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EPA Issues Draft Guidance on Clean Water Act Jurisdiction

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Special to the Legal

On April 27, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers released a draft guidance defining the jurisdictional reach of the Clean Water Act. The guidance advises field staff for these agencies to include as waters protected by the act not only traditional navigable waters and their adjacent wetlands, but also certain wetlands, tributaries and other waters that are controversial candidates for federal regulation. As a consequence, the draft guidance, which is open for public comment until July 1, is likely to engender considerable debate.

In various provisions of the act, Congress sought to control the discharge of pollutants and dredged or fill material into navigable waters. As the guidance recognized, substantive requirements of the act, including prohibitions on discharges, application of permitting and other programs, and issuance of state water quality certifications pertain to navigable waters. Consequently, how “navigable waters” are defined determines which waters are protected by the act.

The act provides that “the term ‘navigable waters’ means the waters



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of the United States, including the territorial seas.” As interpreted by the implementing administrative agencies and the courts, this definition does not restrict “navigable waters” to only waters that are in fact navigable. Instead, the U.S. Supreme Court and federal agencies have developed various criteria for determining when a water and associated land features constitute “waters of the United States.”

SUPREME COURT PRECEDENT

In its decision in 1985 in *U.S. v. Riverside Bayview Homes*, the U.S. Supreme Court affirmed that the phrase “waters of the United States” covers both traditional navigable waters and also wetlands that abut them. The court concluded that the connection between the navigable waters and immediately adjacent wetlands are so close that the corps has the

discretion to classify these wetlands as part of the navigable waters. In contrast, when the corps relied on the presence of migratory birds to impose permitting requirements on fill material placed in a gravel pit or in ponds isolated from navigable waters, the Supreme Court in 2001 held that the corps exceeded its authority under the act. (See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.)

Although *Riverside Bayview Homes* established that wetlands adjacent to traditional navigable waters are waters of the United States, and *SWANCC* held that isolated, intrastate wetlands are not waters of the United States, uncertainty remained as to where the statutory line should be drawn. In 2006, in *Rapanos v. United States*, the Supreme Court examined the validity of the corps’ determination that waters of the United States include wetlands adjacent to non-navigable tributaries. This question produced several opinions that are now referenced in the draft guidance. The plurality opinion of Justice Antonin Scalia, joined by three other justices, concluded that the term “navigable waters” confers jurisdiction only over “relatively permanent, standing or flowing bodies of water,” and

wetlands and other waters that have a continuous surface connection to these jurisdictional waters.

In a concurring opinion, Justice Anthony Kennedy rejected the plurality's continuous surface connection requirement, and instead focused on the act's purpose of restoring the chemical, physical and biological integrity of navigable waters. Kennedy would apply the act to (1) wetlands such as those in *Riverside Bayview Homes* that are adjacent to navigable-in-fact waters and (2) wetlands adjacent to non-navigable tributaries with a significant nexus to navigable-in-fact waters. A significant nexus exists if the wetlands alone or in combination with similarly situated lands in the region significantly affect the integrity of navigable waters. Kennedy further stated that once an adequate nexus is established for a particular wetland, it may be permissible to assume that other wetlands in the region are covered by the act. A dissenting opinion written by Justice John Paul Stevens and joined by three other justices would defer to the corps' decision that the act covers wetlands adjacent to tributaries of non-navigable waters.

THE GUIDANCE'S EXPANSIVE APPROACH

In light of this background, the guidance asserts that waters that satisfy either the plurality standard set forth by Scalia or the standard enunciated in Kennedy's concurrence constitute waters of the United States for jurisdictional purposes. Although this principle conforms to existing guidance, the guidance establishes new criteria for applying these standards that would broaden the act's coverage. This expansive approach serves the environmental goal of bringing

more waters within the act's protection, but also increases regulatory costs and burdens.

The first category of waters that the guidance seeks to protect is traditional navigable waters. These are waters that are "susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Traditional navigable waters include those waters subject to Sections 9 or 10 of the Rivers and Harbors Act, those waters determined to be navigable-in-fact under federal law by a federal court, and those waters that have been used, are currently being used, or are susceptible to being used in the future to transport interstate or foreign commerce. Although this category of traditional navigable waters would not at first blush appear controversial, the guidance states that commercial water borne recreational activities such as canoe trips are sufficient to characterize a waterbody as a navigable water. Consequently, commercial navigation is very broadly construed.

Jurisdiction will also be asserted over interstate waters. Under EPA and corps regulations, these waters include rivers, lakes and other waters that flow across or form a part of state boundaries. Coverage of interstate waters is not dependent upon a finding that the waters are navigable in fact. Perhaps anticipating opposition to a category of navigable waters that does not require findings of navigability, an attachment to the guidance extensively discusses the legislative history of the act, Supreme Court precedent and agency discretion supporting coverage of interstate waters.

In addition, the guidance brings all waters satisfying the *Rapanos* plurality test within the act's coverage.

Consequently, a non-navigable tributary with a continuous surface connection to a downstream traditional navigable water containing a seasonal or other relatively permanent flow is subject to the act. Similarly, jurisdiction exists over a wetland that abuts and has a continuous surface connection to a relatively permanent, non-navigable tributary that is connected to a downstream navigable water. The physical connection makes finding a significant nexus unnecessary. Assessing whether the requisite seasonal flow exists requires an examination of the length and timing of flows in the watershed.

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The guidance also implements the standard that Kennedy set forth in *Rapanos* by asserting jurisdiction over those waters with a significant nexus to traditional navigable waters or interstate waters. Waters have the requisite significant nexus if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity of traditional navigable waters or interstate waters. To determine whether waters are "similarly situated," the guidance counsels agency field staff to first classify the water to be evaluated as a tributary, adjacent wetland or other water. All waters within each of these respective categories constitute "similarly

situated” waters. Establishing the “region” at issue involves defining the geographic limits of the watershed in which the waterbody being evaluated is located. The watershed consists of the area draining to the nearest navigable water or interstate water through a single point of entry.

Finally, field staff must determine whether the water they are evaluating, in combination with other similarly situated waters in the watershed, has a significant nexus to the nearest traditional navigable water or interstate water. Under the guidance, the nexus element is dependent on the function of the water being evaluated. The guidance notes that wetlands or other waters may provide ecological services such as sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, run-off storage and provision of aquatic habitat. For example, wetlands may protect traditional navigable waters by preventing flood waters or pollutants from reaching navigable waters. Where as in these examples the effectiveness of a wetland’s ecological services do not depend on a hydrologic connection between the wetland and the tributary or traditional navigable waters, jurisdiction over the wetland may exist absent a hydrologic connection.

Once a significant nexus has been found between the water at issue and a traditional navigable water, the guidance allows the presumption that other similarly situated waters in the watershed also have a significant nexus. The effect of all similarly situated waters should be evaluated in the aggregate.

Based on its broad reading of Kennedy’s significant nexus test, the guidance provides details on how to

apply the test to tributaries, wetlands and other waters.

For example, the guidance states that a tributary has a significant nexus if it exhibits physical indicators of flow such as a bed and bank and an ordinary high water mark, and can transport pollutants, floodwaters or other materials to a traditional navigable water or interstate water. The guidance suggests that the collective flows through all such tributaries in a watershed will transport pollutants or other materials downstream in amounts that would significantly affect the chemical, physical or biological integrity of the receiving traditional navigable water.

Similarly, even in the absence of a physical connection, adjacent wetlands or other waters such as ponds may be covered under the significant nexus test if they alone or in combination with similarly situated waters have a demonstrable ecological effect on the chemical, physical or biological integrity of traditional navigable or interstate waters that is more than speculative or insubstantial. A wetland is considered to be adjacent if it is bordering, contiguous or neighboring.

POTENTIAL CHALLENGES TO THE GUIDANCE

Many aspects of the guidance are likely to provoke comment on the draft guidance and challenges to any final guidance and any subsequently promulgated rules. For example, the guidance provisions extending the act’s coverage to isolated waters and wetlands that have a significant nexus to a traditional navigable water pose risks of added cost and delay to development projects. If a wetland located at considerable distance from a tributary or traditional navigable water is found to provide flood control or other

ecological benefits to the waterbody, it may be classified as waters of the United States, even in the absence of a hydrologic connection. In such event, the developer may be obligated to secure a permit from the corps to fill the wetland.

In addition, once a wetland within a watershed is classified as waters of the United States, other wetlands within the same watershed may be deemed “similarly situated.” These wetlands may be presumed covered by the act without the need for a field assessment, even if their contribution to flood protection is minor. As a result, a developer seeking to fill these minor intrastate wetlands may also need to obtain a permit from the corps. This potential blanket classification of all wetlands within a watershed as subject to the act is likely to provoke considerable opposition.

In sum, the guidance constitutes a commendable effort to protect water quality through application of the act’s provisions to waters with an ecological connection to traditional navigable waters. In certain respects, however, the guidance may expand the act’s jurisdiction beyond permissible limits. The Supreme Court will no doubt again be asked to review the bounds of the authority of the EPA and the corps to reach most intrastate waters. •