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Environmental ADVISORY ■

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EPA and Army Corps Propose Rulemaking to Redefine "Waters of the United States" under the Clean Water Act

On March 25, 2014, the EPA and the Army Corps of Engineers jointly issued a proposed rulemaking that would redefine the term "waters of the United States" under the Clean Water Act, and, in turn, redefine the scope of the federal agencies' regulatory authority under the Clean Water Act.

The rulemaking seeks to expand and establish greater certainty as to the scope of the federal government's Clean Water Act jurisdiction over intrastate water bodies and wetlands following two Supreme Court cases in 2001 and 2006 that limited the agencies' jurisdiction under prior regulations.

The currently existing 1986 regulations define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas and adjacent wetlands. (33 CFR § 328.3; 40 CFR § 122.2.)

Under the new proposed rule, the agencies define "waters of the United States" to mean "traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands." Waters falling into these categories would be jurisdictional "waters of the United States" by rule—no additional analysis would be required.

In addition, the agencies propose that "other waters" that do not fit in any of the above categories could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, those "other waters" have a "significant nexus" to a traditional navigable water, interstate water or the territorial seas. The agencies have stated that the final rule will offer a definition of "significant nexus" and explain how similarly situated "other waters" in a region should be identified.

The new proposed definition thus appears to seek to broaden the scope of federal jurisdiction in the wake of *Rapanos v. United States*, 547 U.S. 715 (2006), by adding interstate wetlands and all adjacent waters, and significantly broadening the scope of applicable tributary waters to the definition of "waters of the United States." To justify the increased scope of federal jurisdiction, the agencies rely on an assertion that most water bodies and wetlands have an established "nexus"

to traditional navigable waterways—per Justice Kennedy's concurrence in *Rapanos*—under principles of hydrological and hydrogeological connectivity. (See, generally, EPA, September 2013, Connectivity of Streams and Wetlands to Downstream Waters.)

The new proposed definition could thus effectively circumvent recent Supreme Court decisions limiting federal jurisdiction and once again allow EPA to regulate bodies of water, regardless of how small or how tenuously connected to navigable waters. This could greatly expand the regulatory reach of the federal government onto private property. The agencies have requested public comments on topics related to defining "other waters" and criteria for case-by-case determinations. Comments from regulated parties will be necessary to ensure a clear and workable regulation that is not overreaching. Specifically, the agencies have requested comments regarding:

- how to define "other waters";
- alternate approaches to determining whether "other waters" are similarly situated and have a "significant nexus" to a traditional navigable water, interstate water or the territorial seas;
- whether other approaches could better meet the goals of greater predictability and consistency through increased clarity, while simultaneously fulfilling the agencies' responsibility to the Clean Water Act's objectives and policies to protect water quality, public health and the environment;
- whether and how alternate approaches may be more consistent with the best available science and case law;
- scientific and technical data, case law and other information that would further clarify which "other waters" should be considered similarly situated for purposes of a case-specific significant nexus determination;
- the potential for determining waters in identified ecological regions (eco-regions) or hydrologic-landscape regions, and whether classes of other waters can be determined as similarly situated for purposes of evaluating a significant nexus, as well as the basis for determining which eco-regions or hydrologic-landscape regions should be so identified;
- whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction;
- determining which waters should be determined non-jurisdictional;
- how inconclusiveness of the science relates to the use of case-specific determinations; and
- whether the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that, as a class, they do not have such a significant nexus and might not be jurisdictional.

The proposed rulemaking has been submitted for publication in the Federal Register. The comment period in advance of the formulation of the final rule will commence upon publication in the Federal Register and last 90 days thereafter.

If you have any questions, or would like assistance in submitting comments to the agencies, please contact Maureen Gorsen at Maureen.Gorsen@alston.com or Jonathan Wells at Jonathan.Wells@alston.com.

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