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Agriculture and Natural Resources

B-5 Waters of the United States

United States Supreme Court decisions in 2001 and 2006, along with subsequent guidance issued by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), failed to resolve confusion over the definition of “waters of the United States,” a key term in determining whether water is subject to the federal Clean Water Act (CWA). Whether specific waters are within the jurisdiction of the CWA is significant because those waters are subject to stringent water quality and pollution control requirements.

In 2011, the EPA and the Corps issued a joint draft guidance based on the agencies’ interpretation of the CWA, implementing regulations, and relevant case law. Congress, industry organizations, environmental groups, states, and the public made requests to the agencies to forgo the guidance and pursue rulemaking to further clarify the requirements of the CWA consistent with the Supreme Court decisions.

In September 2013, the EPA and the Corps announced they jointly submitted a draft rule to the Office of Management and Budget (OMB) that attempts to define “waters of the United States” and the application of federal law.

History of the Clean Water Act and Waters of the United States

The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), governs pollution of the nation’s surface waters. It was originally enacted in 1948 and completely revised in 1972. In the 1972 legislation, a declaration was made to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The goals presented in the legislation were to achieve zero discharge of pollutants by 1985 and obtain water quality that was both “fishable and swimmable” by mid-1983. Even though the deadlines have passed, the efforts to attain those goals remain.

In 1987, multiple amendments were made to the CWA that turned the focus to nonpoint source pollution (storm water runoff from farm lands, forests, construction sites, and urban areas) and away from point source pollution (wastes discharged from discrete sources such as pipes and outfall). States were directed to develop and implement nonpoint pollution management programs. Under this direction, qualified states have the authority to issue discharge permits to industries and municipalities and

to enforce permits. Kansas is one of the states authorized to administer this permit program.

The CWA is carried out by both federal and state governmental agencies. The federal government sets the agenda and standards for pollution abatement, and states carry out day-to-day implementation and enforcement.

Jurisdiction is a point of uncertainty and contention when state and federal governments are required to enforce the CWA. The CWA defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source”. Under the CWA, the term “navigable waters” means “the waters of the United States, including the territorial seas.” A federal regulation expands the definition of “traditional navigable waters” as “waters subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 CFR § 328.3(a)(1).

United State Supreme Court Cases

Two United States Supreme Court cases address the issue of jurisdiction as it pertains to navigable waters.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)

The Supreme Court held that the Corps exceeded its authority in asserting CWA jurisdiction over isolated intrastate, non-navigable waters based on their use as a habitat for migratory birds. The *Solid Waste Agency of Northern Cook County* ruling eliminated CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is:

- The actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations;
- Any of the factors listed in the Migratory Bird Rule, such as use of the water as

habitat for federally protected endangered or threatened species; or

- Use of the water to irrigate crops sold in interstate commerce.

Rapanos v. United States, 547 U.S. 715 (2006)

The *Rapanos* case addressed whether a wetland or tributary is a water of the United States. The Justices issued five separate opinions with no single opinion commanding a majority of the Court; therefore, the EPA and the Corps issued a memorandum to provide clarification of the findings shared by a majority of Justices as it relates to jurisdiction. The findings of *Rapanos* are as follows:

The CWA has jurisdiction over the following waters:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, where the tributaries typically flow year-round or have continuous flow at least seasonally; and
- Wetlands that directly abut such tributaries.

The CWA has jurisdiction over the following waters if a fact-specific analysis determines they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent;
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

The CWA does not have jurisdiction over the following features:

- Swales or erosional features; and

- Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The significant nexus analysis should be applied as follows:

- Assessment of the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of the downstream traditional navigable waters; and
- Consideration of hydrologic and ecologic factors.

Current Status

No further action was taken on the 2011 draft guidance that was released and submitted to the OMB for review.

In September 2013, the agencies submitted a joint proposed rule to the OMB for interagency review. After the OMB reviews the proposed rule it will be released for public comment. Also in September 2013, the EPA released for public comment a draft scientific report, *Connectivity of Streams*

and Wetlands to Downstream Waters: A Review of Synthesis of the Scientific Evidence. The report made the following:

- Streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters;
- Wetlands in floodplains of streams and rivers and riparian areas are integrated with streams and rivers, and strongly influence downstream waters by affecting the flow of water, trapping and reducing nonpoint source pollution, and exchanging biological species; and

There was insufficient information to generalize about the wetlands and open waters located outside of riparian areas and floodplains and their connectivity to downstream waters.

In September 2013, EPA leadership, in its official blog, stated the final version of the report will serve as a basis for a joint EPA and Army Corps of Engineers rulemaking aimed at clarifying the jurisdiction of the CWA. The blog also explained the proposed joint rule will provide greater consistency, certainty, and predictability nationwide by providing clarity for determining where the CWA applies and where it does not.

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