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Boiling down EPA rule defining waters of U.S.

EPA water rule has potential to be most consequential regulatory issue for ag in decades.

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ON April 21, 2014, the Environmental Protection Agency and the Army Corps of Engineers published a proposed rule on the definition of "waters of the United States" under the Clean Water Act (CWA) to clarify the federal government's jurisdiction over certain waters.

This proposed rule-making is the latest step in a long-running dispute over the jurisdictional reach of CWA, particularly in the aftermath of two U.S. Supreme Court cases from 2001 and 2006, both of which narrowed the jurisdictional scope of the law and inserted considerable uncertainty into the issue of which waters are, and are not, under the jurisdiction of CWA.

Brief history

When Congress passed CWA in 1972, overriding the veto of then-President Richard Nixon, it sought to protect the nation's "navigable waters."

While that term brings to mind free-flowing rivers and other waters that are, indeed, navigable ("fishable and swimmable" is the generally understood interpretation), Congress provided little direction in the law as to what that term actually means and defined it only as "waters of the United States," a term for which no further definition or explanation was given.

Beginning in 1986, EPA and the Corps began using their regulatory authorities to try to define the term "waters of the United States" on their own. By the beginning of the 21st century, the agencies were aggressively enforcing their broad regulatory interpretations of CWA jurisdiction, and the regulated community was becoming increasingly concerned that the agencies were not operating within the scope of CWA.

Two U.S. Supreme Court cases sought to bring a resolution to the issue, with little success. Now, nearly a decade since the second such decision, EPA and the Corps have proposed a rule-making that appears to be nearly as controversial as the long-running disputes that both preceded and supposedly necessitated it.

Court cases

In 2001, in a case known as *Solid Waste Agency of Northern Cook County* (SWANCC) *vs. Army Corps of Engineers*, a municipal waste agency sought to develop a nonhazardous landfill on a roughly 500-acre parcel in the state of Illinois (531 U.S. 159 [2001]). The property had long been used for mineral mining, eventually resulting in the formation of several small and large ponds on the property.

The Corps refused to grant SWANCC a federal CWA fill permit because it claimed that the ponds SWANCC sought to fill were navigable waters.

SWANCC sued in federal court in a case that eventually made its way to the U.S. Supreme Court, which, in a 5-4 decision, sided with the municipal waste agency that CWA jurisdiction could not be based solely on the presence of migratory birds. The broad impact of the decision was that it precluded the Corps from regulating such isolated waters under almost any circumstances.

Five years later, the Supreme Court was given the chance to wade in yet again. In this case, a Michigan developer named John Rapanos had been fighting with the federal government since the late 1980s, when he applied sand to 22 acres of land he owned in order to develop a strip mall.

In *Rapanos vs. United States*, the Corps argued that the property constituted wetlands, while Rapanos argued that his property was located nowhere near navigable waters and refused to apply for a permit (547 U.S. 715 [2006]). The circuit court ruled against the alleged regulated party, and Rapanos then appealed to the U.S. Supreme Court, arguing that the property in question was not subject to CWA jurisdiction.

In its 2006 ruling, the Supreme Court concurred with Rapanos that the Corps had exceeded its statutory authority. However, the court did not issue a clear majority decision and instead issued five opinions attempting to define the scope of "waters of the U.S.," with no agreement on how a "water" should be determined to be navigable.

Writing for the conservative plurality, Justice Anton Scalia said for waters to be jurisdictional, they must be "relatively permanent, standing or flowing bodies of water" and concluded that wetlands are only jurisdictional when they are adjacent to the above-referenced "waters

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of the U.S."

While another justice concurred in the Rapanos judgment, he called for a more deferential case-by-case analysis requiring a "significant nexus" between a jurisdictional water and the water in question. This significant nexus threshold is met when the water in question, "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical and biological integrity of other covered waters more readily understood as 'navigable.'"

The net result from these rulings is this new proposed rule, which comes eight years after the Rapanos decision and is intended to achieve clarity where the Supreme Court rulings failed to do so.

What the rule says

The EPA/Corps proposed rule includes a few key items. It would define jurisdictional waters of the U.S. as "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."

This new definition would expand jurisdictional waters to include tributaries and all adjacent waters to those waters currently under CWA jurisdiction.

Based on a draft report by EPA's Office of Research & Development detailing the connectivity and influences of streams and wetlands on downland waters, the proposed rule would also expand EPA's jurisdiction to many ephemeral waters, meaning those that may have water for only a short time, including some small ponds, ditches and even areas of fields that are wet only when it rains.

The rule also addresses exemptions for agriculture from permits required by certain sections of CWA. One of the more notable of those is the Section 402 National Pollutant Discharge Elimination System (NPDES) permit, which is required for certain uses of crop applications such as pesticides.

Currently, agriculture also is granted certain exemptions from Section 404 permitting requirements, dredge and fill activities, which include "normal farming," silviculture and ranching practices such as plowing, seeding, cultivating and harvesting, among others.

EPA and the Corps collaborated with the U.S. Department of Agriculture to publish an interpretive rule that includes an "additional" 56 conservation practices that would be exempt from the same Section 404 permitting requirements. To be sure, this is not a blanket exemption from regulation under CWA but, rather, from only the specific permitting requirements under Section 404(f)(1)(A) "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

This can be misleading, giving some the sense that an additional 56 agricultural practices are completely exempt, whereas they actually would be exempt only from one particular permit. Further, the exemptions in the interpretive rule apply only to the extent that they are in connection with conservation activities.

From the standpoint of agricultural stakeholders, however, these activities — things like brush management, fencing, wetland restoration and enhancement, hedgerow planting, land clearing, prescribed grazing and pruning trees and shrubs — were already exempt.

From the perspective of farmers, the USDA Natural Resources Conservation Service (NRCS) technical standards for these practices, with which they would have to comply in order to be exempt, are already very prescriptive, so the additional exemptions in the interpretive rule provide little of the regulatory relief EPA and the Corps claim to be granting here.

These are some of the key reasons for the resistance agricultural stakeholders have shown toward the proposed rule since its issuance.

Key concerns of ag

EPA and the Corps estimate that only an additional 2.7% of U.S. waters will be covered by their proposed rule versus the current baseline.

Reading through the rule, it would seem that EPA and the Corps went to extra lengths to appease agricultural stakeholders. After all, the agencies published the interpretive rule, a memorandum of understanding with USDA and even an agriculture-specific fact sheet along with the proposed rule.

The fact is, though, that agricultural stakeholders are simply not "buying it." Groups such as the American Farm Bureau Federation (AFBF), the largest trade organization representing farmers of all types, and CropLife America, the trade association representing manufacturers of crop protection products like pesticides, came out strongly opposed to the proposed rule immediately after its release. Since that time, AFBF has even set up a website — DitchTheRule.fb.org — dedicated to opposing the rule.

Expanding the reach of CWA to consider jurisdictional tributaries and ephemeral waters, waters that are neighboring or adjacent to jurisdictional waters and the dubious category of "other waters," all of which EPA and the Corps suggest would be jurisdictional, is extremely worrisome to agriculture.

While EPA claims to be providing ample exemptions for agriculture, the reality is that these are only from dredge and fill activities, not pesticide application activities. If as many additional "waters" are considered jurisdictional, as agricultural stakeholders suspect, then the additional burden of getting permits for certain activities, especially pesticide application, "on, near or around" these waters will be a significant added burden to many agricultural operations.

In addition, the expanded jurisdictional waters will affect total maximum daily load requirements and will also require states to develop standards for many additional miles of intermittent streams and acres of land where ephemeral waters, tributaries and the like exist.

After a strong push from key agricultural organizations, the agencies issued a 90-day extension of the rule's comment period, from July 21 to Oct. 20, 2014. This gives stakeholders additional time to formulate a response and submit public comments.

Clearly, AFBF is pushing for EPA to scrap the rule altogether. CropLife America, in its press release following publication of the proposed rule, called for passage of H.R. 935, the Reducing Regulatory Burdens Act of 2013, which would amend the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) and CWA to eliminate the duplicative requirement of obtaining NPDES permits for the use of pesticides that are already approved for use under FIFRA.

A group of stakeholder organizations called the Waters Advocacy Coalition — which includes AFBF, CropLife America and groups such as The Fertilizer Institute, the National Association of State Departments of Agriculture and the National Council of Farmer Cooperatives — has voiced similar objections and will doubtless be a leader in outlining the objections of the broader agricultural community.

The coalition even sent a letter to the White House in February outlining its objections to the methodology and economic analysis used to develop the rule, which was in the draft stage at the time, in addition to suggesting that the rule should be informed by a peer-reviewed connectivity report, the latter of which was not finalized prior to the rule's publication.

The House Agriculture Committee recently held a hearing to examine the interpretive rule, with a representative from NRCS as a witness. Committee members across party lines, including current ranking member and former chairman Collin Peterson (D., Minn.), were critical of the interpretive rule, calling it "ambiguous" and suggesting

that it could turn NRCS into more of a regulatory agency as opposed to an agency intended to work with farmers on conservation.

Also, Sen. John Barrasso (R., Wyo.) led a bloc of 29 other Republican senators in introducing the Protecting Water & Property Rights Act of 2014, a bill that would prevent EPA and the Corps from finalizing their waters of the U.S. proposed rule. The legislation sends a strong message of opposition to the rule, although it is unlikely to garner a hearing in the Senate Environment & Public Works Committee.

Legislators could attempt to attach the bill to a "must-pass" appropriations bill, but the likelihood of success is uncertain, if not nil.

Conclusion

Just how far CWA jurisdiction reaches has been a matter of serious dispute for decades. While Congress, federal agencies and federal courts have all made attempts to clarify and add certainty to the issue, the underlying dispute over the proper role and reach of federal power under CWA have made it increasingly difficult to bring certainty to this matter.

Agricultural producers and their industry groups have ample reason to be concerned with this proposed rule, but this should also be viewed as an opportunity to produce a final rule that is as minimally harmful as possible.

While regulatory uncertainty is a bad thing, clarification does nothing if the end product is a bad proposal that will not work for agriculture. As such, in the coming weeks and months, EPA will no doubt be hearing from a broad range of stakeholders that seek to influence the proposal and, in some cases, derail it altogether.

Industry should be mindful that, given the lack of major regulatory action out of the EPA Water Office in recent years (this proposal is undoubtedly its most significant) and the importance being placed on this matter within the Administration and its allies, it is extremely unlikely that the Administration will walk away from the proposal.

As such, it is exceedingly important that agricultural stakeholders pay close attention to what the proposal would do, what impacts it would have on their operations and what EPA and the Corps need to do to make it more amenable to the needs of agricultural stakeholders.

This has the potential to be the most consequential regulatory issue for agriculture in decades, and the level of engagement and outreach from affected parties could help make the difference between a regulation that is clear and achievable for the industry and one that is confusing, unachievable and serves only to further alienate farmers and the agricultural community from the federal government and regulatory agencies. ■