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Oil and Water: Proposed Redefinition of Waters of the U.S. Has Significant Implications for Domestic Operations

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The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) have announced a new Nov. 14, 2014, deadline to submit comments to its much-debated redefinition of the term, "Waters of the United States," which drives the scope of federal jurisdiction in numerous areas.[1] The extension, several related legal and regulatory developments since this proposed rule was published in April, and now the results of the election make this an opportune time to reassess the impact this redefinition will have on oil and gas operations and activities, during a period of extraordinary domestic growth.

The Clean Water Act (CWA), enacted in 1972, grants broad authority to EPA and the ACOE to exercise regulatory jurisdiction over the navigable waters of the United States, which the CWA defines simply as "waters of the United States." EPA and the ACOE have implemented this authority, which defines the scope and extent of their power, in many subsequent rulemakings. The latest proposal was prompted largely in response to the Supreme Court's 2006 decision in *Rapanos v. United States*[2], which EPA and others have criticized for muddying an already complex area of the law. EPA and the ACOE have proposed to change and replace the present definition of "waters of the United States" that governs the scope and application of several sets of regulations—12 in all—that these agencies have promulgated since the CWA was enacted, and all 12 regulations affect the operations of the oil and gas industry. Hence, these new rules, if adopted as proposed, will have a significant impact on the operations of the oil and gas industry, which is engaged, on a daily basis, in the exploration, development, production, transportation, refining, distribution and marketing of petroleum and petroleum products throughout the

[1] See 79 FR 61590 (October 14, 2014). The prior deadline was October 20, 2014.

[2] 547 U. S. 715 (2006)

nation.[3] For many of these activities, industry must secure state and federal permits under the CWA and its state-law counterparts. For example, EPA implements and oversees the CWA Section 402 permitting program (stormwater and NPDES pollution discharges); the CWA Section 311 oil and hazardous substance spill prohibition, prevention, and control program; the CWA Section 303 Water Quality Standards program; the CWA Section 401 state water quality certification program; and the oversight of the ACOE's CWA Section 404 dredge and fill program. In addition, the ACOE is authorized to administer and enforce the CWA Section 404 dredge and fill permitting program, which is fundamental to most oil and gas production and pipeline operations. Moreover, activities regulated by these programs often are also regulated under the Endangered Species Act (ESA) and are therefore subject to the citizen suit provisions of the CWA and the ESA, which allow and even encourage enforcement by non-governmental parties.

The agencies interpret the term "waters" broadly to encompass not just the water itself but also the physical or geographic area where the water or water feature is located.[4] Thus, the proposed redefinition of "waters of the U.S." also establishes the geographic and physical boundaries in which oil and gas operations and activities will be subject to regulation under the Clean Water Act. By expanding the reach of the term, the agencies will effectively expand the scope of all twelve rules if the proposal is finalized in its current form.

Since the redefinition of Waters of the United States was proposed in April 2014, the federal courts have issued several rulings that are significant for all of industry today and that will take on particular significance for companies whose operations could impact waters not previously thought to be subject to CWA jurisdiction. These rulings address the scope of oil spill liability under the CWA and the Oil Pollution Act, and those actions or inactions that constitute "gross negligence" for purposes of assessing civil liability for spills of oil into navigable waters. Other courts have recently reviewed and limited the "permit shield" defense in connection with the issuance and management of National Pollutant Discharge Elimination System (NPDES) permits by state agencies under CWA Section 402, and reaffirmed EPA's authority to exercise strong oversight over the development of state water quality standards and their use in permitting determinations. In an important new case, EPA's broad statutory oversight powers over dredge and fill permits issued by ACOE was confirmed by the D.C. Circuit Court of Appeals, while other courts have resisted the argument that an ACOE jurisdictional determination that a body of water is subject to federal regulation can itself be subject to a pre-enforcement challenge in federal court—in the wake of the Supreme Court's decision in *Sackett v. EPA*.[5] Finally, a federal court has recently ruled that the federal statute of limitations defense is available to nullify certain CWA citizen suit and enforcement actions, but even here the courts have discretion to withhold full relief when a government CWA enforcement action is being challenged.[6]

[3] It should be noted here that these proposed changes to the regulatory definition of "waters of the United States" will have no effect on the current regulatory scheme that applies to hydraulic fracturing operations.

[4] What the agencies mean by "water" or "waters" is itself very instructive:

> The agencies use the term "water" and "waters" in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble. *The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole, including associated chemical, physical, and biological features. See* 79 FR 22188, at 22191, Footnote 3 (emphasis added).

[5] The *Sackett* case is reported at 132 S.Ct. 1367 (2012).

[6] These cases are: *In Re Oil Spill by the Oil Rig Deepwater Horizon*, 2014 WL 4375933 (U.S. District Court of the Eastern District of Louisiana, September 4, 2014—the gross negligence ruling); *Southern Appalachian Mountain Stewards v. A & G Coal Company*, 758 F. 3d 560 (CA 4, 2014) and *Alaska Community Action on Toxics v. Aurora Energy Services*, 765 F. 3d 1169 (CA 9, 2014)--the permit shield cases; *El Dorado Chemical Company v. EPA*, 763 F. 3d 950 (CA 8, 2014)--EPA's oversight of state water quality standards; *Mingo Logan v. EPA*, 714 F. 3d 608 (CADC, 2013) and 2014 WL 4828883 (DDC, September 30, 2014)--EPA's oversight of Corps of Engineers 404 permitting; *Belle Company LLC, et al. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (CA 5, 2014)—challenging the Corps' 404 jurisdictional determination; *U.S. v. Mlaskoch*, 2014 WL

Moreover, the proposed redefinition of "waters of the U.S." aims to address one of the agencies' biggest concerns with the existing definition under *Rapanos*—that of administrative efficiency. They argue that, because of the *Rapanos* decision and other judicial rulings, the agencies are compelled to expend considerable time and effort in determining, on a case-by-case basis, whether they even have jurisdiction to assert their regulatory authority. The broad redefinition of "waters of the U.S." would designate broad categories of water as subject to federal jurisdiction by rule, thus eliminating the case-by-case jurisdictional determination for activities within areas encompassed by those waters. This change will considerably reduce that administrative burden on the agencies—but arguably increase the regulatory burden on the regulated community. The jurisdictional by rule categories are:

1. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;

2. All interstate waters, including interstate wetlands;

3. The territorial seas;

4. All impoundments of waters identified in paragraphs (1) through (3) and (5) of this section;

5. All tributaries of waters identified in paragraphs (1) through (4) of this section; and

6. All waters, including wetlands, adjacent to a water identified in paragraphs (1) through (5) of this section;

The proposal also deems the following categories *not* to be "waters of the U.S.":

1. Waste treatment systems designed to meet CWA requirements;

2. Prior converted cropland;

3. Ditches excavated and draining only in uplands that have less than perennial flow;

4. Ditches that do not contribute flow to a water identified in paragraphs (1) through (4) above;

5. Artificially irrigated areas that would revert to upland should irrigation cease;

6. Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for purposes as stock watering, irrigation, settling basins or rice growing;

7. Artificial reflecting or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

8. Water-filled depressions created incidental to construction activity;

9. Groundwater, including groundwater drained through subsurface drainage systems; and

1281523 (U.S. District Court for Minnesota, March 31, 2014)—placing limits on the use of a statute of limitations defense in a government CWA enforcement action.

10. Gullies, rills and non-wetland swales.

Further, under the proposed redefinition, waters that do not meet the "waters by rule" designation may nevertheless be subject to regulation as waters of the U.S. on a case-specific basis. "Other waters," including wetlands, may be determined to be within federal jurisdiction provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a "significant nexus" to a water listed in as jurisdictional by rule paragraphs (1) through (3) above.

Additionally, the agencies also propose to define a number of regulatory terms that will be used both in determining the geographic extent of those waters deemed jurisdictional by rule and to assist in determining whether waters that are not jurisdictional by rule would nevertheless be jurisdictional on a case-by-case basis because they have a "significant nexus" to a "traditional navigable water, interstate water or the territorial seas." In addition to defining "significant nexus," the proposal will for the first time define "tributary," "neighboring," "riparian area" and "floodplain." While the proposal uses existing definitions of "adjacent" and "wetlands," the importance of those terms would also increase significantly under the proposal.

An appreciation of the impact of these changes follows from these considerations. Although EPA and the Corps maintain the proposed rule does not expand the agencies' jurisdiction, that position is belied by a careful comparison of the proposed rule to current rules. For example, the geographic extent of jurisdiction will increase significantly simply by applying the definitions of "tributary" and "adjacent" in the context of the new rules. As proposed by the agencies, "tributaries" will reach farther upstream than is true under the existing practice, extending well past the current traditional limits—i.e., a break in the physical presence of an "ordinary high water mark" (OHWM). So long as an OHWM can be identified somewhere upgradient of the current limit, the area will be considered a jurisdictional tributary under the proposed rules.[7]

Further, under current regulations, the term "adjacent" is only applied to demarcate the jurisdictional boundary for "wetlands." In contrast, under the proposal, all "waters" (not only wetlands) adjacent to the waters deemed jurisdictional by rule would *also* be jurisdictional by rule. For example, the lateral extent of tributaries would, in many cases, not be bounded laterally by the OHWM because waters "adjacent" to the tributary also would be jurisdictional. Moreover, "adjacent" waters would not have to be adjacent as the term is commonly understood (bordering or contiguous) but would also include "neighboring" waters. As defined, neighboring waters would extend all the way to the edge of the tributary's "floodplain," which often extends well beyond a tributary's OHWM, the current lateral jurisdictional limit. Even waters that are connected to a jurisdictional tributary solely by groundwater (which itself is not regulated under the federal CWA or the proposed rule), would be considered "adjacent waters" under this proposal.

Our focus on the impact of these proposals to oil and gas operations concentrates in three provisions of the Clean Water Act as they have been enforced and interpreted by the agencies and the courts.

[7] Ironically, EPA and the Corps are under pressure from some members of the scientific panel to eliminate even this limitation on the geographic extent of tributaries. Further, ACOE recent "technical" guidance on the Ordinary High Water Mark reflects that traditional limits identifying the OHWM are in flux. See, e.g., "Western Mountains, Valleys, and Coast: A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States" (Mersel and Lichvar 2014); "Arid West: A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States" (Lichvar and McColley 2008). In any case, these developments weaken the assurances by the agencies that that the Ordinary High Water Mark provisions in the proposed definition of tributary even as proposed will remain a real limit on jurisdiction.

I. Section 311.

A. *The Statute*. Section 311 of the CWA, as amended by the Oil Pollution Act of 1990, states that it is the policy of the United States "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States." This flat prohibition was somewhat ameliorated by later amendments to the law, and it now focuses on unpermitted discharges to navigable waters. Accordingly, provisions of Section 311 address the duty to prevent oil spills, and to develop effective oil spill prevention and response plans and timely oil spill reporting requirements. EPA and the Coast Guard are charged with responsibility for non-transportation-related spills, and the Department of Transportation is focused on transportation-related spills from railroads and pipelines.

B. *The Regulations*. 40 CFR Part 110 is EPA's basic "Oil Spill Rule," and it is supplemented by the spill reporting and reportable quantity rules set forth at 40 CFR Parts 116 and 117. 40 CFR Part 112 is EPA's "SPCC" rule, first issued in 1973 and substantially revised in 2002. It establishes SPCC Plan requirements for non-transportation-related facilities handling regulated quantities of "oil" if those facilities, due to their location, could "reasonably" be expected to discharge oil in harmful quantities into "navigable waters." Owners and operators of regulated facilities are required to comply with the recently revised and expanded SPCC rule, and they are subject to routine EPA inspections and enforcement. The conduct of these inspections is governed by an impressively comprehensive EPA "SPCC Guidance" for EPA Regional Inspectors, and the courts have liberally interpreted SPCC oil spill liability in such cases as *Pepperell Associates v. EPA*, 246 F. 3d 15 (CA 1, 2001) and *In Re Deepwater Horizon*, 753 F. 3d 570 (CA 5, 2014).

A revised definition of "waters of the U.S." is very likely to complicate the compliance responsibilities imposed by the SPCC program in that a determination that a particular body of water is located such that a spill of oil may reasonably be anticipated to enter navigable waters could be second-guessed by enforcement authorities. In short, more facility owners could find that SPCC requirements apply more broadly to their facilities than under the current definition of this important term, and it should be noted that the SPCC inspections are an important component of EPA's enforcement program.

The U.S. Department of Transportation oil spill rules are located at 49 CFR Parts 130 and 194. Both rules were developed to address oil spills and threatened oil spills into navigable waters which, because of their location, could reasonably be expected to cause substantial adverse effects to the environment. The Part 130 rules apply to the transportation of oil by motor vehicles and rolling stock, and the Part 194 rules apply to the operations of oil pipelines. The Department of Transportation has announced that it intends to review the application of the Part 130 rules to railroads carrying large quantities of crude oil. A redefinition of waters of the United States could complicate compliance responsibilities under these DOT rules.

The Coast Guard rules, which are not immediately affected by these proposed rules, are located at 33 CFR Part 153.

II. Section 402.

A. *The Statute*. Section 402 of the CWA authorizes the NPDES discharge-permitting program for both individual point sources and stormwater discharges. Permits must be obtained from EPA or, more typically, a delegated state environmental permitting authority. Compliance with a NPDES permit

ordinarily provides the permittee with a "permit shield" against both government enforcement and CWA citizen suit actions. In the past, courts have held that the permit shield applies to pollutants not listed in the applicant's notification of permit coverage where the pollutant in question was reasonably contemplated to be present by the permit agency. However, the courts have recently narrowed the scope of this defense in such recent cases as *Southern Appalachian Mountain Stewards v. A & G Coal Company*, and *Alaska Community Action on Toxics v. Aurora Energy Services*.[8]

B. The CWA is generally limited to regulating discharges into surface waters, and not groundwater. However the agencies' discussion of the proposed revision of waters of the U.S. indicates they may be open to some consideration of CWA regulation of groundwater, at least in regard to the geographic reach of the regulation. Such a change could dramatically expand the reach of the NPDES permit program.

C. *The Rules*. 40 CFR Section 122.2's definition of "waters of the US" would be revised as described above, and this definition also applies to the separate stormwater permitting rules of 40 CFR Section 122.26. While most stormwater permitting is the result of the application of an EPA General Permitting approach, individual stormwater permitting takes place from time to time. In any case, it should be noted that the stormwater permitting rules require the applicant to provide the name of the "receiving water," and a revised definition of waters of the U.S. could complicate the administration of this rule.

III. Section 404.

A. *The Statute*. CWA Section 404, which is largely implemented by the ACOE and enforced by ACOE and EPA, requires permits for the discharge of dredged or fill material into "waters of the U.S." The scope of the ACOE's permitting and enforcement authority is governed and limited by the meaning of this term. As the Supreme Court noted in *SWANCC v. U.S. Army Corps of Engineers*[9] , the Corps has consistently taken a very expansive view of its 404 jurisdictional authority, particularly with respect to wetlands. Under Section 404(c), EPA has been granted considerable oversight over the ACOE's exercise of its dredge and fill permitting authority. The recent decisions in the *Mingo Logan* cases by the D.C. Circuit and the U.S. District Court for the District of Columbia have resulted in a broad interpretation of EPA's oversight authority.[10] Consequently, to the extent that an oil and gas applicant has received a 404 permit, there is always the possibility that the EPA may, at any time after the permit is issued, effectively veto the permit if the agency is concerned about potentially adverse consequences to the environment.

B. *The Rules*. The ACOE's CWA 404 permitting authority is implemented through the rules set forth at 40 CFR Parts 230 and 232 and analogous portions of Title 33 of the CFR, particularly 33 CFR Part 323-332. The proposed re-definition of waters of the U.S. would amend these regulations, which explicate CWA Section 404(b)(1)'s Guidelines for the necessary specification of disposal sites in a 404 permit. 40 CFR Part 232 and 33 CFR Part 323 provide the regulatory definitions for the 404 program. If the new rules increase the geographical areas of ACOE jurisdiction and expand the

[8] In *Southern Appalachian*, the courts conducted an exacting review of the claimed "permit shield" defense, holding that the NPDES permit application was deficient, making the permittee potentially liable for the unpermitted discharge of selenium. The *Alaska Community* decision rejected a claim that having a Stormwater General Permit excused a non-stormwater-related discharge, making the permit shield defense unavailable.

[9] The SWANCC decision is reported at 531 U.S. 159 (2001).

[10] See *Mingo Logan v. EPA*, above.

extent of water bodies that must be considered in the 404 program, then the permitting process and the burden of the regulations themselves are also likely to become more onerous for both the applicant and the ACOE personnel. The new proposed definition of a "tributary" is important here, too. A tributary has in practice been defined by the existence of bed and banks and high water marks, but the agencies are considering minimizing the role of such key components in determining the extent of waters deemed jurisdictional by rule and in making significant nexus determinations for other waters. Moreover, as discussed above, "other waters" can be aggregated under the proposed rule to include all "similarly situated" waters in a watershed under a significant nexus determination.

The Corps can authorize discharges by means of individual permits, nationwide permits and even regional permits developed by local Corps districts. In all cases, the ACOE must take into consideration NEPA and historic preservation requirements, the application of the Endangered Species Act, and the application of the ACOE's mitigation rules in appropriate circumstances. The ACOE's authority is, of course, triggered by discharges into *navigable waters* or *waters of the U.S*. In many cases under the current regulations, the Corps will make a jurisdictional determination that a particular body of water is or is not a water of the U.S. Some 404 applicants have made the argument that the ACOE's jurisdictional determination is itself subject to judicial review. To date, however, this argument has not been successful in the courts.[11] Nationwide ACOE permits, which have played an increasingly prominent role in the construction and permitting of interstate oil and natural gas pipelines, are frequently challenged.[12] Consequently, applicants and the Corps must conduct a careful review of the application of the conditions that a nationwide permit must follow. These considerations may include formal consultation under ESA Section 7 and insofar as any threatened or endangered species are living in the proposed route of a pipeline, and the need to provide appropriate mitigation to ensure that any adverse effects attending the issuance of a permit are minimized and mitigated.[13]

In summary, the pending redefinition of the term Waters of the U.S. will, if adopted as proposed, have a substantial impact on U.S. oil and gas operations. Existing SPCC plans may need to be revised, new stormwater and other NPDES permit coverage may need to be sought, and more 404 permits will be required for regulated activities in waters newly captured by the revised definition. With the expansion of federal jurisdiction and regulation, oil and gas activities will be subject to greater enforcement scrutiny both by government agencies and citizens, and the costs of compliance will surely increase. Accordingly, the regulated community should take advantage of the extended comment period to provide the industry perspectives and essential data needed to influence the agencies' decision and, we suggest, lessen the significant regulatory impact this proposal will otherwise have on their operations and businesses.

[11] See *Belle Company, LLC v. U.S. Army Corps of Engineers*, cited above.

[12] See *Defenders of Wildlife v. Jewell*, 2014 WL 4829089 (DDC, September 30, 2014), which holds that state habitat conservation plans adequately protected the dunes sagebrush lizard, which is found in many oil production areas.

[13] See *Sierra Club v. U.S. Army Corps of Engineers*, 2014 WL 4066256 (DDC, August 18, 2014), which reviews and rejects environmental challenges to an interstate pipeline that had been granted ACOE nationwide 404 permits.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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