

THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: JUNE 10, 2014

Service

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Waters of the U.S. – A New Definition

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have issued a proposed rule intended to clarify the scope of “waters of the U.S.” protected under the Clean Water Act (CWA) and for which Section 404 permitting by the Corps will apply.

Comments are due by July 21, 2014, and can be submitted online, by mail or hand delivery.

The CWA and associated regulations are intended to be the means to restore and maintain the chemical, physical and biological integrity of the nation’s waters. A challenging issue is what is meant by the “nation’s waters” (a.k.a., navigable waters, waters of the U.S.).

If you’re in the business of levees and flood protection, it’s likely you’ve encountered the complex regulatory framework stemming from the Federal Water Pollution Control Act of 1948, which became commonly known as the Clean Water Act after its significant broadening in 1972. Since then, there have been additional amendments, other legislation and court cases that have sought to clarify the jurisdictional reach of the CWA and those agencies responsible for its administration and implementation. Most recently, the U.S. Supreme Court visited this issue in the *Rapanos* case; however, that decision did not produce a majority opinion on the definition of “navigable waters.”

The proposed rule, according to the Corps and EPA, will improve efficiency by increasing program predictability and consistency through clarification on what is protected under the CWA. While the proposed rule clearly preserves the agriculture exception and provides a listing of categories of waters to be included, it also presents the potential for confusion by now including “other waters.” The determination of whether these “other waters” would be covered is to be made on a case-by-case basis considering whether there is a “significant nexus” to traditional navigable or interstate waters, or the territorial seas.

It remains to be seen whether individual, case-by-case determination of what falls under "other waters" is predictable or efficient. For levee owners or operators seeking to make improvements to their systems, or even to perform operation and maintenance, the proposed rule could require a lengthy determination on whether Section 404 of the CWA applies, that may then need to be followed by application for the actual 404 permit. Comments are specifically being requested on the use of the terms "other waters" and "significant nexus," and whether the use of these terms will better meet the goals of providing greater predictability and consistency, while also meeting the objectives of protecting water quality, public health and the environment.

Contact Us

If you would like to learn more, or if your levee or drainage district would like to prepare and submit comments, we can help. Please contact David Human at 314.480.1710 or Karin Jacoby at 816.983.8304.