GODFREY & KAHN S.C.

Environment & Energy Strategies Flash

May 2015

Edward (Ned) B. Witte
414.287.9518
nwitte@gklaw.com

U.S. EPA seeks to clear the air on the definition of waters of the United States

A maxim usually attributed to Mark Twain provides "*Whiskey is for drinking; water is for fighting*." One ongoing fight over water has been whether the United States federal government has the right to control certain private property as "waters of the United States." To many, the assumption of government authority over any land feature based on the presence of water has seemed strained. Landowners have felt deprived of rights over their own property, and have fought back, usually in the courts. This week, the Obama administration promulgated a rule to end the dispute, but opponents are already lawyering up to challenge what they perceive as an overreach by the executive branch. The fight over water will continue.

Where did the Rule come from?

The "Waters of the United States" rule (the Rule), published by the United States Environmental Protection Agency (U.S.EPA) on May 27, 2015 and effective on August 25, 2015, seeks to resolve 15 years of confusion and conflict concerning the scope of the federal government's Clean Water Act (CWA) jurisdiction.

The CWA, originally passed in 1972, authorizes the U.S.EPA to regulate activities affecting "navigable waters", defined in the CWA as "waters of the United States, including the territorial seas." Because Congress passed the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," courts including the Supreme Court have approved U.S.EPA's exercise of jurisdiction over waters beyond those that are "navigable in fact," a term that generally means capable of commercial or recreational navigation. Courts have extended CWA coverage to upstream waters, headwaters and wetlands, and waters that significantly affect the chemical, physical and biological integrity of downstream waters.

However, certain judicial interpretations reflect the different perspectives that caused the uncertainty, ultimately leading U.S.EPA to issue the Rule this week:

- In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Bayview*), a unanimous Supreme Court held that the federal government's jurisdiction extends to "adjacent wetlands" because such wetlands are "inseparably bound up" with the navigable waters to which they are adjacent. This represented a substantial extension of the reach of the federal government's CWA jurisdiction.

- In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court considered whether the reach of the federal CWA extends to "isolated" nonadjacent wetlands which are periodically alighted on by migratory birds. The argument was that the birds themselves or the people who travel across state lines to view and hunt these birds created a notion of interstate commerce to bring such isolated wetlands under federal control. The *SWANCC* Court answered the question in the

negative and identified that there must be a "significant nexus" between the wetland and other navigable waters or other regulated waters of the United States.

• Finally, five years after *SWANCC*, the Supreme Court considered whether the CWA regulation extends to wetlands connected to navigable waters via ditches or man-made drains in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). Justice Kennedy's concurring opinion, which ultimately stands as the takeaway from *Rapanos*, provided that the linchpin of CWA jurisdiction is a "significant nexus" between any water body and a downstream jurisdictional navigable water.

The *Bayview*, *SWANCC* and *Rapanos* decisions left the regulated community with a fairly murky landscape of CWA regulation over waters of the United States. In spite of guidance documents promulgated to resolve some of the confusion, the predominant result was an inefficient process of case-specific analyses of particular waters and wetlands to determine possible jurisdiction, and, therefore, much litigation. The regulated community sought a final rule on waters of the United States that would be easier to understand, more predictable, and more consistent with law and peer reviewed science. The May 27 Rule reflects the U.S.EPA's consideration of over 1 million public comments on the proposed rule.

What waters are covered under the May 27 Rule?

In the Rule, the U.S.EPA breaks down waters of the United States subject to CWA jurisdiction into eight types.

The first four types of waters are "jurisdictional by rule" and always subject to CWA jurisdiction. These four types of waters are (i) **navigable waters**, (ii) **interstate waters**, (iii) **territorial seas**, and (iv) **impoundments** of such jurisdictional waters.

The next category of waters of the United States subject to CWA jurisdiction is "**tributaries**," a class of waters that has spawned much debate and litigation. The Rule provides that tributaries are "waters that are characterized by the presence of physical indicators of flow – bed, banks and ordinary high water mark – and that contribute flow directly or indirectly to a traditional navigable water or the territorial seas." "Ditches" that are constructed in tributaries, are relocated tributaries, or that in certain circumstances drain wetlands, are subject to regulation. However, ditches that flow only after precipitation are excluded from regulation, as are "ephemeral streams" that do not have a bed and banks and ordinary high water mark.

The sixth type of water subject to CWA jurisdiction is **adjacent waters**, the subject of the *Bayview* decision. Adjacent waters, including wetlands, ponds, lakes, oxbows, impoundments and similar water features, have an impact on the chemical, physical or biological integrity of the downstream navigable waters, and therefore meet the significant nexus standard.

The seventh class of waters subject to the Rule is waters that do not fit into the prior six categories but that, alone or in combination, have a significant nexus to other regulated waters of the United States based on **case-specific analyses**.

Finally, certain jurisdictional waters that are within the 100-year floodplain of a traditional navigable water and within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water are subject to the same case-specific significant nexus analysis.

In addition, the Rule also identifies those waters that are **not** waters of the United States, including treatment ponds or lagoons, prior converted cropland, ditches with ephemeral flow, ditches that do not flow into another regulated water, irrigated areas, artificial lakes and ponds, groundwater, and stormwater control features.

What is the significance of the final Rule?

Activities affecting waters of the United States are very often subject to federal and state regulation. For example, at the federal level, the United States Army Corps (Corps) of Engineers considers applications and issues permits under CWA section 404 for proposals to place fill in regulated wetlands. As part of the same permitting process, the Wisconsin DNR considers applications and issues "water quality certification" as the state stamp of approval on Corps - approved 404 permits. Over the last 15 years, however, the breadth of federal and state regulation has pendulumed from expansive jurisdiction (*see Bayview*, and the reach to "adjacent wetlands"), to the absence of jurisdiction (*see SWANCC*, and the elimination of certain bird-frequented isolated wetlands as within the scope of coverage), to intensely fact-specific regulation (*see Rapanos*, which drove the case-by-case analysis of whether a water had a "significant nexus" on the chemical, physical or biological integrity of the downstream navigable waters).

At the very least, the Rule will lay to rest some degree of time-intensive and frequently litigated fact-specific subjective determinations that arose as a result of the ambiguous framework arising out of the three controlling Supreme Court cases and the U.S.EPA's and Corps' efforts to issue clarifying guidance. By its very nature, however, the "significant nexus" standard, which will provide the basis to determine

jurisdiction for several types of waters addressed by the Rule, requires a legal evaluation, and one that is subject to dramatically conflicting points of view. The U.S.EPA's May 27 Rule may go most – or at least part – of the way to clarifying how certain waters fall within the scope of federal jurisdiction, but there are clearly still some unsettled issues that will likely form the basis of future disputes before these questions will be finally answered.

Environment & Energy Strategies Team Members

GREEN BAY OFFICE:

Winston A. Ostrow
wostrow@gklaw.com

MADISON OFFICE:

John L. Clancy
jclancy@gklaw.com

Emily M. Ertel
eertel@gklaw.com

David J. Gilles
dgilles@gklaw.com

Douglas M. Poland
dpoland@gklaw.com

MILWAUKEE OFFICE:

Jessica A. Franklin
jfranklin@gklaw.com

Arthur J. Harrington
aharrington@gklaw.com

Diane M. Marchik
dmarchik@gklaw.com

Brian L. Pierson
bpierson@gklaw.com

Edward (Ned) B. Witte
nwitte@gklaw.com