Regulation Review

Regulation Review: EPA's Definition of "Water"

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Recently, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Army Corps) released their proposed rule to define "Waters of the United States" under the Clean Water Act (CWA). The proposal is a result of a series of Supreme Court cases ordering the agencies to

clarify their original definitions of certain bodies of water. The rule includes a complicated framework and imposes $166 million in annual costs to state and local governments, and private entities. The unofficial, pre-publication version of the rulemaking is 370 pages.

The cases that forced EPA to adjust its rulemaking approach include: *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency v. U.S. Army Corps of Engineers (SWANCC)*. The first ruling established EPA's broad ability to categorize certain bodies of water as "Waters of the United States" under the CWA. The next two rulings narrowed that scope in specific ways. EPA has proposed this rulemaking in order to update its current CWA regulations so that they are within this narrower framework.

The primary adjustment the agencies make in this proposal is to substitute a broad, standard definition of bodies of water, "such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," with a more case-based definition framework. The main crux of this case-based system, under *Rapanos*, is determining whether such bodies reach a "significant nexus" with other navigable bodies traditionally covered by the CWA.

The term, "significant nexus," is from Justice Kennedy's concurring opinion in *Rapanos*. The phrase appears 268 times in the proposal. The rule's preamble even notes: "'Significant nexus' is not itself a scientific term." The regulatory text defines it as:

> *The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.*

Determining something is significant because it is "more than speculative or insubstantial" is a tremendously vacuous test with a light burden of proof. Furthermore, the inclusion of "chemical, physical, or biological integrity" presents the agencies with a variety of factors they can apply, regardless of how relevant such factors might be to a particular locale. The agencies do recognize this issue's ambiguity, however, as they look to

“continue to solicit additional science (peer-reviewed whenever possible) that could lead to greater clarity, certainty, and predictability of which waters are and are not within the jurisdiction of the CWA.”

Why does this matter? Because stakeholders in both the private sector and local governments now face new costs in preparing for a federal determination about certain bodies of water. As the Economic Impact Analysis points out, the majority of the costs ($166 million out of $231 million total) are imposed on state and local governments adjusting their permitting policies, and private stakeholders. Given the uncertain nature of the significant nexus determination, a property owner’s mitigation measures may all be for naught.

Although stakeholders can thank the Supreme Court for narrowing the scope of “Water of the United States,” this proposal still has many issues to address. The sheer variety of the bodies of water covered and technicality of analysis will, as the rule states, “require significant public involvement and engagement.” One should expect its final form to be even more extensive in order to illuminate some of the determination principles. Interested parties have 90 days from the rulemaking’s official publication, to submit comments.