



Legal Alert

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EPA Issues Prepublication of Final Rule On Definition of “Waters of the United States”

Michelle De Blasi
mdeblasi@gblaw.com
602-256-4419
www.gblaw.com

After receiving over 1 million comments on its rule proposed on April 21, 2014, the EPA has issued a prepublication version of its much-anticipated final rule defining “waters of the United States.” The rule determines the jurisdiction of EPA and the Army Corps of Engineers under the Clean Water Act over certain types of waterways and tributaries.

EPA claims that the final rule is an improvement over the proposed rule by “providing more bright line boundaries and simplifying definitions that identify waters that are protected under the CWA, all for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities.” Despite EPA’s repeated assurances that the new definition does not expand its jurisdiction, few stakeholders are satisfied that EPA’s “scope of jurisdiction is actually narrower than that under the existing regulation” as claimed by EPA in its almost 200 page preamble to the rule.

The most significant implications of the rule relate to the potential expansion of the definition of “waters of the US” itself, particularly with respect to which waters have a “significant nexus” to traditional navigable waters, interstate waters, or territorial seas. Although still somewhat controversial, EPA claims that its basis for redefining “waters of the US” is supported by its peer-reviewed science reported in the “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” published in January 2015.

As defined in the final rule, certain types of waters – traditional navigable waters, interstate waters, territorial seas, tributaries, and adjacent waters – are jurisdictional by rule. Therefore, no analysis is needed to determine whether such waters are regulated. Additional categories, such as neighboring waters and similarly situated waters in certain categories, are subject to a case-by-case significant nexus determination. EPA states that waters that are otherwise jurisdictional under the rule cannot be considered in combination with a case specific significant nexus

determination. Finally, there are exclusions from jurisdiction, including certain ditches and other features that have been the subject of considerable controversy with the agricultural industry. Many organizations are still analyzing the rule to confirm that such exclusions have actually been included to avoid overreaching by the government.

A broad range of stakeholders provided comments on the proposed rule, including states, counties, municipalities, real estate developers, energy companies, farmers, miners, environmental organizations, academics and other federal agencies, among others. The concern by many impacted stakeholders over the expansion of jurisdiction is due to the rule's far reaching implications on other programs, including NPDES discharges, stormwater regulation, and water quality standards. For many stakeholders, broader jurisdiction could mean increased areas where permitting and mitigation is required, including additional triggers for "Federal action" in programs such as the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and Section 401 water quality certification, and the potential for third party citizen suits. All of these impacts could mean additional delay and cost for development of projects. Many state and local governments are also concerned an expanded definition could affect comprehensive land use plans, watershed and stormwater plans, and floodplain regulations.

Since the prepublication of the rule was just issued on May 27, 2015, it will be some time before the actual implications of the rule are realized as it begins to be implemented. The rule will become effective 60 days after its official publication in the Federal Register. Gammage and Burnham will continue to monitor the interpretation of the rule and provide guidance to its clients to assess its implementation once it becomes effective.