Waters of the United States Are Not What You'd Expect

The U.S. Environmental Protection Agency and Army Corps of Engineers' new rule defining "waters of the United States" covered by the Clean Water Act ("CWA") provides a good example of what can happen when a simple term gets manipulated over time by regulatory agencies and the courts.

For some context, the CWA applies only to "waters of the United States." You would think this would mean waters that flow through multiple states. If the water is in only one state or is only on your property, it would more accurately be referred to as a "water of California" or "Joe's water." But under this new regulation, that little pond on Joe's property could be a water of the United States.

The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Army Corps")—the agencies charged with administering the CWA—have been wrestling for decades with the Supreme Court over what constitutes a "water of the United States."

In 1975, the EPA and Army Corps issued a rule including all navigable waters and their tributaries as waters of the United States, as well as non-navigable intrastate waters that could affect interstate commerce. In 1986, the Corps tried to expand its jurisdiction under the CWA further by asserting that wetlands adjacent to navigable waters and tributaries, as well as certain waters used as habitat for migratory birds, constitute waters of the United States.

In 2001 and 2006, the Supreme Court handed down two important decisions opining on the agencies' jurisdiction. *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), is noteworthy because the court struck down the assertion of jurisdiction over waters used as habitat for migratory birds, finding that Congress did not authorize the agencies to regulate non-navigable, isolated, intrastate waters, such as seasonal ponds. In *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of the court found that only relatively permanent, standing or continuously flowing bodies of water, and secondary waters with a continuous surface connection to such waters, qualify as waters of the United States. In a concurring opinion, Justice Kennedy explained that the CWA applies only to waters that are navigable in fact or could reasonably be made so, and waters with a significant nexus to such waters.

Purporting to follow the Supreme Court's direction, the EPA and Army Corps issued a new regulation defining waters of the United States. 80 Fed. Reg. 124 (June 29, 2015). Under this new regulation, waters subject to the CWA now include waters adjacent to, bordering, within 100 feet of, and within the 100-year flood plain of traditional waters (generally interstate waters and wetlands, territorial seas, and waters used or susceptible to use for interstate commerce), as well as waters within 1,500 feet of the high tide line of traditional waters. These waters are per se subject to the CWA.

The new rule also includes waters partially located within the 100-year floodplain of a traditional water and waters partially included within 4,000 feet of the high tide line or ordinary high water mark of a traditional water when such waters have a significant nexus to a traditional water.

410 17th Street, Suite 2200
Denver, Colorado 80202

What does the new CWA regulation mean to anyone trying to run a business, a farm, develop land, or do any number of things with real property? A few examples are provided below to illustrate some of the interpretive challenges that may arise following issuance of the rule.[1]

- A farmer needs to build a new dirt road across his or her property that will span a small creek located solely on the property and is dry half the year. Some natural features indicate that the creek may be within the 100-year floodplain of a stream located about a mile away that eventually flows across state lines. Unfortunately, the farmer may now need a permit to build his or her road across the creek bed. There is no requirement to find a significant nexus to a traditional water; the little creek may be a water of the United States.
- A developer purchased property to build a 500-home residential development. Again, there is a small creek running along the edge of the property. The creek is about 3,500 feet from the historic high water mark of a tributary that contributes to a river hundreds of miles away. The EPA finds that the creek, in connection with other nearby creeks in the area, could affect the chemical integrity of the river the tributary feeds. Most likely, the developer is now going to need a CWA permit to develop on or near that creek. The developer will also need to understand the dizzying kaleidoscope of local, state and federal discharge permitting requirements and restrictions to which it will be subject.
- An industrial operation sits adjacent to a small pond. The operation has never been concerned with CWA discharge requirements because the pond has no direct connection to any flowing water; however, the western tip of the pond is located within 100 feet of a manmade canal on an adjacent property that delivers water to an interstate waterway. There is a large barrier built atop a high berm along the property line, which would effectively prevent the pond from ever connecting to the canal. Even so, under the new definition of waters of the United States, the pond may now be subject to the CWA.
- State and local agencies charged with managing aspects of the CWA will now have substantially increased costs for monitoring, reporting and permitting programs. Agencies will need to quickly get a handle on the new regulation in order to bring those now subject to the act into compliance.

The revised definition of waters of the United States is likely to have wide-ranging effects on landowners, developers, and public agencies, among others. Within days of the EPA and Army Corps issuing the new CWA regulation, 25 states, and one mining company, filed lawsuits challenging it. At the time this article went to publication, the U.S. Court of Appeals for the Sixth Circuit was chosen to hear 12 consolidated petitions for review filed in seven separate federal district courts.

As evidenced by the illustrative examples provided above, property owners and developers who own property within the vicinity of any body of water, whether or not the water is continuously flowing, can no longer take comfort in the fact that your property does not connect directly to a traditional water of the United States. It is important that each situation be evaluated individually to determine whether the water is now a “water of the United States” subject to additional requirements.

410 17th Street, Suite 2200
Denver, Colorado 80202

[1] The examples provided are meant to be illustrative only and do not constitute an opinion on whether a water would be classified as a water of the United States. Whether a water is subject to the CWA is a fact-specific inquiry that must be evaluated on a case-by-case basis.

Ronda L. Sandquist
Shareholder
rsandquist@bhfs.com
Denver
303.223.1191

Dylan K. Johnson
Associate
djohnson@bhfs.com
Santa Barbara
805.882.1413

Christine A. Jochim
Associate
cjochim@bhfs.com
Denver
303.223.1163