EPA and U.S. Army Corps Seek to Expand Jurisdiction Under the Clean Water Act

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The U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") (jointly, the "Agencies") are in the process of issuing a guidance that would expand the scope of their jurisdiction under the Clean Water Act ("CWA"). At the same time, the U.S. Supreme Court recently issued a decision in *Sackett v. Environmental Protection Agency*[1] that could cause the Agencies' assertions of CWA jurisdiction to be given greater scrutiny because it allows regulated parties to challenge compliance orders issued under the CWA and may provide support for challenging jurisdictional determinations made by the Agencies outside the context of a compliance order.

Expansion of Jurisdictional Waters Under the Clean Water Act

On May 2, 2011, the Corps and EPA issued their "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" ("Draft Guidance"),[2] which purports to describe how the Agencies will identify waters subject to jurisdiction under the Clean Water Act ("CWA") and implement the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[3] and *Rapanos v. United States*,[4] cases that are now eleven and six years old, respectively.

The CWA regulates the discharge of pollutants into "navigable waters," which the statute defines to mean "the waters of the United States."[5] The Draft Guidance expands the scope of waters subject to CWA jurisdiction by expanding the definition of "waters of the United States" to include all ephemeral waters; most agricultural, roadside, and irrigation ditches; and many other non-aquatic land features. Under the Draft Guidance, the Agencies are purporting to regulate, and thus require permits for, all linear features that contain "standing water" regardless of the frequency or the duration of the "flow." Never in the history of the CWA has federal regulation defined ditches and other upland drainage features as "waters of the United States." This broad view of the scope of federal authority would encompass many natural landscape features not readily recognizable as "waters."

Significantly, the Draft Guidance applies to the entire suite of CWA programs—section 303 water quality standards, section 401 water quality certifications, section 311 oil spill prevention control and countermeasures, the section 402 storm water program (including recently-issued pesticide permits and soon-to-be-issued post-construction stormwater regulations), and the section 404 dredge and fill permit program.

The Agencies published the Draft Guidance for public comment and received approximately 230,000 comments from groups representing a wide range of interests, including environmental groups; industry groups from the construction, housing, mining, agriculture, and energy sectors; and state and local officials, represented by organizations such as the National League of Cities and the National Association of Counties. The majority of commenters, industry and environmentalist interests alike, urged the Agencies to undertake a rulemaking to address the definition of "waters of the United States" in the context of the *SWANCC* and *Rapanos* decisions rather than proceed by guidance. Indeed, in *Rapanos*, the Supreme Court itself urged the Agencies to conduct a rulemaking to clarify the scope of their CWA jurisdiction.[6] But the Agencies are proceeding as they have in the past—by issuing yet more guidance. They have not included a "waters of the United States" rulemaking on their respective semiannual regulatory agendas. Instead, the Agencies are poised to issue the guidance without undergoing a rulemaking that complies with the various procedural requirements of Administrative Procedure Act ("APA").

On February 21, 2012, the Agencies sent a revised version of the Draft Guidance to the Office of Management and Budget ("OMB") for review. Although the OMB review process is supposed to be completed within ninety days, EPA has been pushing for a more expeditious review schedule. In any event, whenever the final guidance is issued, it is expected to follow closely the substance of the May Draft Guidance and to be immediately effective. As a result, it is quite possible that, within the next two to three months, EPA and the Corps will begin formally applying the new guidance to jurisdictional determinations for all CWA programs.

Implications of Expanding the Definition of "Waters of the United States"

A determination that an area is a "water of the United States" immediately subjects that area to a number of legally-binding requirements. Enlarging the universe of what is considered jurisdictional under the CWA, and thus what areas are subject to the myriad of programs, permits, and limitations associated with such designation will clearly have a broad and substantial impact on regulated entities and the public. The Agencies' proposed expansion of the federal regulatory footprint of the entire CWA will blur the distinction between regulating water and land use and have significant economic implications across the nation's entire economy.

For example, with more waters regulated by the federal government, more entities will be subject to the CWA permitting programs under sections 402 and 404. CWA section 404 requires a permit for projects and activities that involve the discharge of dredged or fill material into the navigable waters,[7] reaching a broad scope of projects, including pipeline and electric transmission and distribution lines; residential and commercial development; renewable energy projects like wind,

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solar, and biomass; transportation infrastructure, including roads and rail; and agriculture. Under the Draft Guidance, virtually all waters could be jurisdictional under the CWA and, as a result, even more projects and activities would be required to obtain section 404 permits. The section 404 permit process is lengthy and costly, often requiring the use of consultants and lawyers.[8] Failure to obtain permits can result in enforcement actions and potential civil or criminal penalties of up to $37,500 per day.[9] Such an expansion of the CWA's jurisdictional reach will add delays and costs to an already-overburdened Corps regulatory program. It will also erect significant economic barriers to important projects at a time when our country is facing the need for massive infrastructure improvements.

In addition, under section 402 of the CWA, dischargers must obtain a National Pollutant Discharge Elimination System ("NPDES") permit for any point-source discharge into "navigable waters."[10] With the proposed expansion of the scope of navigable waters to include waters such as remote waters and ditches that were not previously governed by the CWA, many more activities will become classified as discharges that are required to have NPDES permits. As the number of NPDES permits that must be issued increases, the cost of issuing, monitoring, and enforcing these permits will fall predominantly on the states, which administer the NPDES program in most cases.

Moreover, broadened CWA jurisdiction may lead to additional third-party litigation in instances in which the Corps or EPA determines that a water body is not jurisdictional. The expanded jurisdiction gives an additional jurisdictional hook to potential litigants and, in many cases, will authorize suits for activities with a tenuous connection to water quality by citizens seeking to delay or disrupt new construction or industrial activities.

Implications of *Sackett v. EPA* Decision for CWA Jurisdictional Determinations

On March 21, 2012, the U.S. Supreme Court issued a unanimous decision in *Sackett v. Environmental Protection Agency*,[11] finding that an administrative compliance order issued by EPA under the CWA was final agency action reviewable under the APA and that the CWA does not preclude pre-enforcement review of the compliance order. This decision has important implications for the Agencies' CWA jurisdictional determinations because it allows groups to challenge an agency assertion of jurisdiction in a compliance order issued under the CWA in federal court. The decision may also open the door for groups seeking judicial review of CWA jurisdictional determinations made outside the context of the compliance order.

After the Sacketts began earth-moving work on a plot of land in Priest Lake, Idaho, EPA claimed that the property was a jurisdictional wetland subject to CWA permitting requirements and that the landowners were in violation of the CWA after they placed fill material into the wetlands. The compliance order prevented further construction on the land and required the Sacketts to restore the wetlands. The Sacketts filed suit, seeking a hearing to contest the EPA compliance order. Both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed their request.[12]

In an opinion written by Justice Scalia, the Supreme Court reversed and held that the compliance order was final agency action subject to APA review and that the CWA does not preclude that review. The Court found that the compliance order was final agency action under the APA because it placed legal obligations on the Sacketts to restore their property, it was not subject to further agency review and therefore marked the "consummation" of the agency's decisionmaking process, and the Sacketts had no other adequate remedy in court. The Court noted that judicial review in CWA enforcement cases typically occurs when EPA brings a civil action. Because the Sacketts cannot initiate the process, they were essentially forced to "wait for the agency to drop the hammer," all the while accruing potential civil penalties. Moreover, the Court found that nothing in the CWA expressly precludes judicial review under the APA and that there is no suggestion that Congress sought to overcome the APA's presumption of judicial review or exclude compliance order recipients from CWA's review scheme. The Court further stated that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." Justice Ginsburg noted, in a concurring opinion, that the Sacketts "may immediately litigate their jurisdictional challenge in federal court."

Although the Court did not reach the merits of EPA's underlying assertion of CWA jurisdiction in the compliance order, it noted that the Sacketts' suit over the compliance order flows from an underlying dispute over the scope of "waters of the United States" subject to CWA jurisdiction. Justice Scalia referenced the Court's previous decisions in *United States v. Riverside Bayview Homes, Inc.*, *SWANCC*, and *Rapanos*, and noted that interested parties like the Sacketts lack clear guidance on the limits of the reach of the CWA. Similarly, in a concurring opinion, Justice Alito noted that the Court's decision provided *some* relief for property owners like the Sacketts because they have the right to challenge EPA's jurisdictional determinations under the EPA, but that solving the underlying problem of agency overreach requires Congress or the Agencies to provide a reasonably clear definition of "waters of the United States" subject to jurisdiction under the CWA. Justice Alito specifically called out the Agencies' reliance on informal guidance and noted that the Agencies' most recent Draft Guidance is "far from providing clarity and predictability" and instead relies on case-by-case determinations.

Prior to the *Sackett* decision, as Chief Justice Roberts noted during the *Sackett* oral arguments, when EPA made a jurisdictional determination that an area is a "water of the United States" subject to the permitting requirements of the CWA, the lack of pre-enforcement review essentially meant that the Agencies were "never going to be put to the test."[13] Because of this decision, the Agencies' overbroad assertions of CWA jurisdiction, such as those anticipated by the Draft Guidance, may be given greater scrutiny. Under *Sackett*, property owners subject to an assertion of CWA jurisdiction in a CWA compliance order may challenge that order in federal court prior to the Agencies issuing an enforcement action. Moreover, the *Sackett* decision also provides useful support for groups seeking to challenge CWA jurisdictional determinations

made by the Agencies outside the context of a compliance order. With the Agencies' attempts to expand the scope of CWA jurisdiction through guidance, the ability to bring pre-enforcement challenges to CWA jurisdictional determinations in federal court will be of paramount importance for regulated parties.

Endnotes

1 566 U.S. __ (2012).

2 76 Fed. Reg. 24,479 (May 2, 2011).

3 531 U.S. 159 (2001).

4 547 U.S. 715 (2006). The Office of Management and Budget began reviewing a revised version of the guidance on February 21, 2012. This version, which was leaked to the public on March 7, 2012, contains few changes from the Draft Guidance. It is unlikely that the Agencies' final version of the guidance will differ substantively from the 2011 Draft Guidance discussed in this article.

5 33 U.S.C. § 1251, 1344, 1362 (7).

6 *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (stating that the agencies could have potentially avoided "another defeat" if they had completed the rulemaking they began following *SWANCC*); *id.* at 782 (Kennedy, J., concurring) (providing that the agencies must make case-by-case determinations "[a]bsent more specific regulations"); *id.* at 812 (Breyer, J., dissenting) (calling on the Corps to "write new regulations, and speedily so").

7 33 U.S.C. § 1344.

8 One study found that obtaining a "nationwide" general permit under section 404 took, on average, 313 days at a cost of $28,915, and obtaining an individual permit took, on average, 788 days at a cost of $271,000. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources. J. 59, 73-82 (Winter 2002). And these were simply processing costs. They did not include the costs of land, mitigation, delay, and development opportunities foregone, which can be extreme.

9 33 U.S.C. § 1319.

10 33 U.S.C. § 1342(a).

11 566 U.S. __ (2012).

12 *See* Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010).

13 Transcript of Oral Argument at 52, Sackett v. EPA, No. 10-1062 (Jan. 9, 2012).