

Client Alert

September 2013

Proposed Rule on CWA Jurisdiction Sent to OMB for Review and Draft Scientific Report on Connectivity of Water Released by EPA for Public Comment

The US Environmental Protection Agency (EPA) announced yesterday that it and the US Army Corps of Engineers (Corps) have sent a draft proposed rule to clarify federal Clean Water Act (CWA) jurisdiction over waters of the United States to the Office of Management and Budget (OMB) for interagency review.¹ EPA indicated to certain stakeholders and congressional staff that it intends to withdraw its 2011 draft guidance on CWA jurisdiction. However, no statement withdrawing the guidance was included in Tuesday's EPA announcement.

EPA's announcement on the draft proposed rule was made in conjunction with EPA's release of a draft scientific report on the "connectivity" of water, "Connectivity of Streams and Wetlands to Downstream Waters," that the agency states will inform the upcoming CWA rulemaking. EPA is soliciting public comments on the draft scientific report through October 31, 2013.

The draft proposed rule "is limited to clarifying current uncertainty concerning the jurisdiction of the Clean Water Act that has arisen as an outgrowth of recent Supreme Court decisions. . . ." EPA says the proposed rule will provide "greater clarity on which waters are not subject to CWA jurisdiction and greater certainty on which activities do not require CWA permits." Although EPA's announcement does not provide many details regarding the contents of the proposed rule submitted to OMB, which is not likely to be publicly released, EPA does state that the rule does not propose changes to existing regulatory exemptions and exclusions, such as exclusions for prior converted croplands and waste treatment systems. EPA's announcement also lists several additional exclusions that it says are included in the draft proposed rule.

OMB normally is required to complete its interagency review within 90 days, but "the review period may be extended by the head of the rulemaking agency, and the OMB Director may extend the review period on a one-time basis for no more than 30 days." If OMB finds problems with the proposed rule, it may return the rule to the agencies for further agency effort before the rule may be published. The proposed rule will be issued only after OMB approves the rule for publication, at which time the proposed rule would be published in the Federal Register and the public comment period would begin.

The draft connectivity report is expected to provide scientific justification for the administration's interpretation of when isolated wetlands and other marginal waters are subject to CWA jurisdiction under *Rapanos v. United States*. EPA states that public comments received on the draft scientific report will be considered by the Scientific Advisory Board (SAB) panel's independent peer review of the report scheduled for December 2013. According to EPA, any final regulatory action related to CWA jurisdiction "will be based on the final version of this scientific assessment."

¹ EPA Announcement of Release of Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft) for Public Review and Comment (Sept. 17, 2013), <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345>.

How Hunton & Williams LLP Can Help

Hunton & Williams LLP has an extensive water and natural resources practice and regularly counsels and represents clients in all facets of CWA regulation. Hunton & Williams was named “Law Firm of the Year: Water Law Practice” in the 2013 edition of *U.S. News – Best Lawyers®* and received a Tier 1 national ranking as a “Best Law Firm: Environmental Law.” These accolades follow the practice’s recent designation as a *Law360* “Environmental Group of the Year” for the third consecutive year (2010–2012).

The firm has a comprehensive, national practice involving the Clean Water Act, with significant experience in NPDES permitting under Section 402, water quality under Section 303, Section 404 permits for discharges of dredged or fill material, water supply concerns and water rights negotiations, as well as Oil Pollution Act of 1990, National Environmental Policy Act and Endangered Species Act issues that often arise in connection with Clean Water Act permits and litigation. We represent individual businesses, water districts, and trade associations across numerous industries subject to CWA regulation in permitting, rulemaking, litigation and enforcement actions.

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