

THE NEW ERA OF EXECUTIVE ACTION

PROTECTING THE WATERS OF THE UNITED STATES

August 25, 2015

Background

Clean water is not only essential to human health and biodiversity, but it is an important component of many American businesses (agriculture and tourism, for example).

The Clean Water Act (1972) authorizes the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) to prevent the pollution of the nation's waterways, specifically waters with a "significant nexus" to "navigable waters." It accomplishes this through a strict permitting process.

Under the Clean Water Act, all discharges (such as wastewater from an industrial plant) into regulated waterways are considered illegal unless a specific permit has been issued by the EPA or the USACE (under section 404).

In recent years, however, there has been some controversy over the definition of "significant nexus" to "navigable waters." In 2006, the Supreme Court, in *Rapanos v. United States*, split over whether to mandate a more restrictive definition of "navigable waters." Since then, there have been numerous calls for the EPA to clarify what its regulations are meant to cover.

Action

On May 27, 2015, the EPA, in conjunction with the USACE, issued The Clean Water Rule: Definition of Waters of the United States (Final). The new rule ensures that "waters protected under the Clean Water Act are more precisely defined and predictably determined."

What It Does

The rule clarifies what the EPA and USACE consider part of the system of navigable waterways for the purposes of permitting. Tributaries of navigable waterways "must show physical features of flowing water—a bed, bank, and

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ordinary high water mark” in order to fall under the relevant regulations. The rule also allows “nearby” waters to be covered, provided they are located within a specific, measurable distance: from a minimum of one hundred feet and within the one-hundred-year floodplain to a maximum of 1,500 feet of the ordinary high watermark.

The definition of “isolated” or “other” waters had, before this rule, been defined as “all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.” As this was criticized for being overly broad, the EPA and USACE have provided a more specific definition. The Clean Water Act now specifically covers:

- prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they have a significant nexus (that is, when they are likely to impact traditional navigable waterways); and
- waters with a significant nexus within the one-hundred-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.

Status

The rule was published in the Federal Register on June 29, 2015, and went into effect on August 28, 2015.

Impact

The impact of the new rule is too soon to reliably gauge, but the Obama administration has said that it will improve the quality of drinking water for 117 million Americans. The rule will apply to about 60 percent of the country’s bodies of water. However, its impact will also be affected by the outcomes of several suits that states have brought against it. The full implementation of the rule, then, is not yet assured.

Response

Columbia University’s Steven Cohen welcomed the new regulation, not only because the clarification will help protect the integrity of U.S. waterways, but because it will also remove a significant source of regulatory uncertainty for U.S. businesses. The pro-conservation group WaterKeeper Alliance took the opposite position, arguing that the rule was “weak” since it effectively narrows the criteria for saying that a body of water is under federal jurisdiction and since it maintains long-standing exemptions for certain agricultural businesses.

Business groups such as the American Farm Bureau Federation were not convinced by the EPA’s assurances that this rule clarification would not create a new regulatory burden; the group’s president also criticized the EPA for mounting an aggressive advocacy campaign during the comment period.

The rule was also criticized as regulatory overreach by congressional Republicans, who passed legislation through the Senate Environment and Public Works Committee to overturn it. That bill is now headed to the Senate floor, where it needs sixty votes to pass. Before the rule was finalized in May, the House passed a similar measure attempting to block the EPA from creating the rule.