

"Beyond Jurisdiction: Wetlands Policy for the Next Generation"

**There is Only One Definition of “Navigable Waters”:
Implications of Clarification Across Clean Water Act Programs**

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There is only one Clean Water Act (CWA) definition of “navigable waters”, which means “the waters of the United States, including the territorial seas.”¹ The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have adopted consistent regulatory definitions of this term.² This essay explores the following question—how will clarification via guidance, policy, or regulation of the definition of “navigable waters” and the “waters of the U.S.”, for the purposes of jurisdiction over wetlands through the CWA’s Section 404 dredge and fill program, impact the scope of other CWA regulatory programs? These programs include the CWA Section 303 water quality standards program (WQS), affecting states, tribes, and EPA; the CWA Section 401 water quality certification program, also affecting states, tribes, and EPA; the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) program, affecting states and EPA; and the CWA Section 311 Oil Spill Prevention Program, affecting EPA, the Department of Interior (DOI), the Department of Homeland Security (DHS), and the Department of Transportation (DOT). EPA’s analysis, for example, of its 2011 proposed jurisdictional guidance³, estimated a “2.7% increment in regulatory actions with increased assertion of CWA jurisdiction” with respect to the CWA 404 program, which “may or may not be representative of the scope of impact for other regulatory applications.”⁴ This essay thus investigates what these regulatory actions would be and what programs they might implicate.

Each time the U.S. Supreme Court has clarified the definition of “navigable waters,” it has done so in the context of the CWA Section 404 wetlands dredge and fill program.⁵ Following these decisions, each time EPA and the Corps has issued clarifying rulemaking and guidance, they have largely done so in the context of the Section 404 program as well.⁶ At those times, due to the controversy and complexity of the wetlands issues at hand, there generally was little discussion of the fact that any clarification to the “navigable waters” also could result in changes to other CWA programs which also rely on the same threshold definition.

¹ 33 USC 1362(7).

² For the Army Corps, see 33 CFR Parts 328, 329.4; for EPA see 40 CFR 122.2.

³ 76 Fed. Reg. 24479 (May 2, 2011)

⁴ Slides presented by EPA/Corps to States and Associations, December 7, 2011.

⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), *Rapanos v. United States*, 547 U.S. 715 (2006).

⁶ See, i.e., “Joint Memorandum” providing clarifying guidance on *SWANCC*, dated January 15, 2003 (68 Fed. Reg. 1991, 1995); “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*,” dated December 2, 2008.

Perhaps to explicitly state what was previously known but not directly addressed, in the Federal Register Notice announcing the availability of the latest CWA jurisdictional guidance in draft, EPA and the Corps explicitly noted that the “guidance will apply to all CWA programs, including section 303 water quality standards, section 311 oil spill prevention and response, section 401 water quality certification, section 402 National Pollutant Discharge Elimination System permits, and section 404 permits for discharges of dredged or fill material.”⁷ And, in the guidance’s introduction, the agencies note that “this draft guidance, like the earlier guidance it replaces, necessarily will apply to decisions concerning whether a waterbody is subject to any of the programs authorized under the CWA. Although *SWANCC* and *Rapanos* specifically involved section 404 of the CWA and discharges of dredged or fill material, the term “waters of the United States” must be interpreted consistently for all CWA provisions that use the term.”⁸

These statements focus attention on what the impacts would in fact be for these other CWA programs, and in comments filed on the draft guidance, a variety of groups asked EPA and the Corps to further analyze the costs and related effects of its choices.⁹ In fact, a letter from nine state regulatory organizations specifically noted that “[t]he proposed guidance anticipates an enlarged scope of regulation, which could increase the states’ costs for Section 401 water quality certification, water quality standards and total maximum daily load (TMDL) development, National Pollutant Discharge Elimination System (NPDES) permitting, or for collaborative state-federal regulatory programs.”¹⁰ The Association of Clean Water Administrators noted in its comment letter that “[t]he potential resource demands are further compounded by the estimated jurisdictional re-expansion (with a post-*SWANCC* universe as the baseline) in some states. Although the guidance places the jurisdictional re-expansion overall at 17%, preliminary estimates in some states forecast much greater numbers. For example, Kansas estimates that application of the Draft Guidance would quadruple the miles of streams within that state that are jurisdictional. Therefore, we request that EPA/Corps further study and explore through a formal rulemaking how the application of the procedures will impact the administration of all CWA programs before making further jurisdictional determinations.”¹¹

A. Section 303 Water Quality Standards

Water quality standards (WQS) are the “heart” of the CWA, as all states must develop, adopt, and implement WQS for their waters. EPA refers to WQS as the “foundation of the water quality-based pollution control program mandated by” the CWA.¹² EPA may review and approve the WQS, which states are to review and update every three years. Under CWA Section 303(c), states designate uses for all waters, generally by developing standards for categories of uses, and then applying those standards across all waters, such

⁷ 76 Fed. Reg. 24479 (May 2, 2011)

⁸ “Draft Guidance on Identifying Waters Protected by the Clean Water Act” at 3.

⁹ July 26, 2011 Letter to Jackson/Darcy from 9 State Organizations on Draft Guidance.

¹⁰ *Id.*

¹¹ July 26, 2011 Letter to Jackson/Darcy from Association of Clean Water Administrators (fka ASIWPCA).

¹² <http://water.epa.gov/scitech/swguidance/standards/index.cfm> (last visited August 25, 2012).

as cold water fishery, primary and/or secondary contact recreation, industrial, and so forth. WQS are made up of the state's "designated uses," water quality criteria or "ambient criteria" – which may be expressed as 1) chemical-specific concentrations; 2) toxicity levels; or 3) narrative statements¹³ -- and an antidegradation policy designed to prevent further adverse water quality impacts.¹⁴

Waterbodies that previously were not jurisdictional could become so with a change to the EPA/Corps definition of waters of the U.S. This means that states would need to develop WQS for these new waterbodies, with limited time, staff, and resources.

An emerging area which also could be driven by a change in the definition of waters of the U.S. is that of wetlands WQS. While not a new idea, as in 1990, EPA issued guidance on developing WQS specifically for wetlands,¹⁵ evolution of such standards has been slow. According to the Association of State Wetland Managers, fifteen states thus far have developed wetland WQS.¹⁶ A wetland WQS may involve a narrative standard for wetlands.¹⁷ A more advanced approach would be that taken by Ohio, which is to have a biologic, or vegetation based WQS, for a wetland. In May 1998, for example, Ohio adopted wetland water quality standards and a wetland antidegradation rule. Ohio's wetland antidegradation rule categorized wetlands into three basic categories based on the wetland's functions, sensitivity to disturbance, rarity, and irreplaceability. There are three functionality categories: 1: minimal wetland function and/or integrity; 2: moderate function and/or integrity; and 3: superior function and/or integrity. To implement the wetland standards, wetlands are assessed on their relative quality. The quality is determined by both the Ohio Rapid Assessment Method¹⁸ and by biocriteria metrics based on vegetation, macroinvertebrates, and amphibians to set wetland biocriteria.¹⁹

The state of Minnesota has a progressive protection approach to prevent further degradation of wetlands. Under the state's Tier II alternatives analysis, a multi-step process is applied. The first step is the alternatives analysis - "an investigation of prudent and feasible alternatives that will avoid or minimize net increases in permitted loading through pollution prevention and/or treatment."²⁰ The investigation focuses on parameters of concern - pollutants or causes of water pollution – selected based on potential for degradation.²¹

¹³ ABA, The Clean Water Act Handbook, pp. 40-44

¹⁴ Cite to Fed. Reg.

¹⁵ <http://www.epa.gov/owow/wetlands/facts/fact24.html> (last visited Aug. 26, 2012).

¹⁶ <http://aswm.org/wetland-programs/water-quality-standards-for-wetlands> (last visited Aug. 26, 2012).

¹⁷ EPA lists "maintain natural hydrologic conditions, including hydroperiod, hydrodynamics, and natural water temperature variations necessary to support vegetation which would be present naturally" as an example of a wetland narrative WQS. <http://www.epa.gov/owow/wetlands/facts/fact24.html> (last visited Aug. 26, 2012).

¹⁸ define

¹⁹ <http://water.epa.gov/type/wetlands/assessment/oh1.cfm>

²⁰ <http://www.pca.state.mn.us/index.php/view-document.html?gid=14024>

²¹ Id.

B. 303(d): TMDLs

Under CWA Section 303(d), states are to develop total maximum daily loads (TMDLs) for waters not meeting their designated uses, known as “impaired waters.” A TMDL is made up of a load allocation to nonpoint sources and a wasteload allocation to point sources. These WLAs are used to set effluent limitations in NPDES permits.²²

With an expanded definition of waters of the U.S., states will have to, following the development of water quality criteria, assess waters to determine if they are impaired. If impaired, the states will then need to develop TMDLs.

Not only will additional waters need to be assessed, but to the extent that more states move into the arena of wetlands WQS, more and more wetlands may be subject to TMDLs. Today, due to limited resources, assessment of wetlands is limited and as such there are limited listings for impairments. Frequently, states start by looking at downstream waters, and use those as a proxy for the water quality of waters higher up in the watershed.

C. 401: State Water Quality Certifications

An applicant for a 402 or 404 permit, as well as several other licenses and permits, must obtain certification from the state in which the discharge originates or will originate that the discharge will comply with all relevant sections of the CWA and any state laws or regulations. According to EPA, the “major Federal licenses and permits subject to Section 401 are Section 402 and 404 permits (in nondelegated States), Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act Section 9 and 10 permits.”²³ And while a state may waive certification, its primary role in making 401 certifications is to ensure that there will be no WQS violations. An expanded definition of “waters of the U.S.” may mean an increase in 402 and 404 applications, and thus an increased number of state 401 certifications.

EPA has put particular focus on the intersection between 401 certifications and wetlands. In fact, in response to the 1988 National Wetlands Policy Forum’s recommendation that states “make more aggressive use of their certification authorities under Section 401 of the CWA to protect their wetlands from chemical and other types of alterations,”²⁴ in 1989, EPA issued guidance to States on applying Section 401 certification to protect wetlands.²⁵

D. 402: National Pollutant Discharge Elimination System

²² ABA, *The Clean Water Act Handbook* at 45.

²³ <http://www.epa.gov/owow/wetlands/facts/fact24.html> (last visited Aug. 26, 2012).

²⁴ Cite.

²⁵ Cite.

Another area that jurisdictional changes can impact is the CWA 402 NPDES program. Under NPDES, permits must be obtained for “the discharge of any pollutant, or combination of pollutants.”²⁶ An NPDES permit requires compliance with all CWA requirements applicable to the permitted discharge, including WQS. Permits control pollutants using technology-based effluent limitations, water-quality-based effluent limitations, TMDL derived limitations, and compliance via monitoring and reporting requirements, standard conditions, and special conditions necessary to assure achievement of the WQS for the waterbody.²⁷

Jurisdictional changes are unlikely to affect the number of permits that will be issued for the discharge of waste material or industrial wastewater. It is more than likely that any entity responsible for such wastes at present is located on a waterbody long acknowledged as jurisdictional and as such will already be covered by an NPDES permit. Where changes are more likely to occur is in the area of land-based activities that cause run-off into jurisdictional waters, such as stormwater or municipal separate storm sewer systems. This potentially large universe of activities could be required to obtain permits for discharge to “waters of the U.S.” for the first time. In the area of construction and development, a project proponent first must obtain a 404 permit (generally from the Corps) for the activities impacting wetlands, and then a 402 permit (in most cases from the state) for the continuing discharge. Consolidated animal feeding operations in newly jurisdictional waters would require general permits. Pesticide application would likewise would require a 402 general permit. Given the current scope of jurisdictional waters, newly jurisdictional waters are likely to be largely rural, and controlling discharges to these waters would fall under an existing permitting scheme and not require state or federal development of new permits.

E. 311: Oil Spill Program

The CWA 311 Oil Spill Program²⁸ was added to the statute after the Exxon Valdez spill to establish oil “spill prevention requirements, spill reporting obligations, and spill response planning requirements.”²⁹ Section 311 jurisdiction is over “accidental releases and spills of oil and hazardous substances to waters of the United States.” EPA’s regulations at 40 CFR 112.1 provide that the oil spill requirements apply to any “owner or operator of a non-transportation-related onshore or offshore facility” that is engaged in a variety of oil and oil product related activities which could due to location could “reasonably be expected to discharge oil in quantities that may be harmful . . . into or upon the navigable waters of the United States.” And, exceptions apply only to facilities that due to location “could not reasonably be expected to have a discharge as described” due “the geographical and location aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.)” Under the regulations at 40 CFR 112.3, covered owners/operators must prepare a Spill Prevention, Control, and Countermeasure (SPCC) plan. As such, any change to the definition of waters of the

²⁶ CWA § 402(a)(1).

²⁷ ABA, Clean Water Act Handbook at 33.

²⁸ <http://www.epa.gov/region1/enforcement/oilspills/> (last visited Aug. 26, 2012).

²⁹ ABA, The Clean Water Act Handbook at 137.

U.S. also could trigger additional requirements for facilities and operations in newly jurisdictional waters. Given the relative subjectiveness of the need to prepare a SPCC plan, EPA regions conduct inspections to assess compliance and coverage. States generally do not have a role in SPCC plans.

F. 106 and 319: Funding Programs

Of course, a change in the “waters of the U.S.” definition will have an impact on the funding available for states/interstates, territories, the District of Columbia, and tribes, to carry out and implement the aforementioned CWA programs. Under CWA Section 106, EPA is authorized to provide grants to these governmental entities to carry out permitting functions, WQS and TMDL development, enforcement and compliance, monitoring, training, and public information.³⁰

Under the CWA Section 319 Nonpoint Source Management Program, EPA provides grants to states, territories, and tribes for nonpoint source control efforts “including technical assistance, financial assistance, education, training, technology transfer, demonstration projects and monitoring to assess the success of specific nonpoint source implementation projects.”³¹ 319 grant dollars are focused on impaired waters (under 303(d), and the statute itself refers extensively to the identification of “navigable waters,” the categories of nonpoint sources of pollution which are adversely impacting “navigable waters”, and programs for controlling nonpoint pollution to such “navigable waters.”³²

Thus, any change to the definition of waters of the U.S., and the scope of such waters, will result in further stretching of limited resources under these two key state/interstate and tribal funding programs.

G. Next Steps

This essay serves as a reminder that the CWA has to be viewed in a holistic manner. Although there is much focus on the implications of the definition of “waters of the U.S.” for the purposes of CWA Section 404 jurisdiction, it is important to keep in mind that any such change will reverberate throughout the law and have impact on other statutory programs.

³⁰ http://water.epa.gov/grants_funding/cwf/pollutioncontrol.cfm (last visited Aug. 26, 2012).

³¹ http://www.epa.gov/owow_keep/NPS/cwact.html (last visited Aug. 26, 2012).

³² CWA Section 319.