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Update on the EPA and Corps Unlawful Attempts to Expand Their Clean Water Act Jurisdiction Without Following Proper Rulemaking Procedures

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As those in the construction industry are well aware, builders must obtain dredge and fill permits under Section 404 of the Clean Water Act (CWA) if their construction project will result in the discharge of dredged or fill material into a "water of the United States." The definition of the "waters of the United States" is a highly contentious issue, and, for decades, industry and environmentalists alike have urged the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (jointly, the Agencies) to conduct a rulemaking to clarify which waters are subject to CWA jurisdiction. But the Agencies have steadfastly refused to heed that call, instead adopting guidance after guidance unlawfully expanding their own jurisdiction.

Attempts by the Agencies to expand their CWA jurisdiction through guidance have been rejected by the U.S. Supreme Court on two occasions. First, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Court rejected the Agencies' attempt to assert CWA jurisdiction over an isolated sand and gravel pit that did not actually abut a navigable waterway. 531 U.S. 159, 174 (2001). Then, in *Rapanos v. United States*, the Court rejected the Agencies' assertion of CWA jurisdiction over any non-navigable water that has "any hydrological connection" to navigable waters. 547 U.S. 715, 734, 784 (2006). In *Rapanos*, the Court itself urged the Agencies to conduct a rulemaking to clarify the scope of their CWA jurisdiction.

But the Agencies proceeded as they had in the past — by issuing yet more guidance. In May 2011, the Agencies released a "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" (Draft Guidance). Rather than provide an appropriate and clear definition of "waters of the United States," the Draft Guidance is, instead, complicated legalese that is very difficult to understand let alone implement in the field. Although the *Rapanos* plurality lambasted the Agencies for regulating ditches, drains, and desert washes far removed from navigable streams, under the Draft Guidance, essentially all ditches and ephemeral features would be regulated. Similarly, in *Rapanos*, Justice Kennedy rejected the Corps's previous standard for tributaries that relied on possession of an ordinary high water mark (OHWM) as overbroad, but the Draft Guidance provides a standard for tributaries that again relies on OHWM. In addition, the Draft Guidance's assertion of jurisdiction over certain isolated waters is inconsistent with the SWANCC Court's holding that isolated ponds that did not actually abut a navigable waterway were not jurisdictional under the CWA.

Although the Agencies have not confirmed whether they intend to finalize the Draft Guidance, they have announced that they plan to propose and take comment on a rule in January 2012 to address the scope of CWA jurisdiction. But the Agencies claim that, in promulgating any such rule, they are not required to comply with mandatory statutory and regulatory requirements, such as the Small Business Enforcement Fairness Act (SBREFA) and the Regulatory Flexibility Act (RFA). Among other things, these laws require the Agencies to take a number of important steps to ensure they adopt the least burdensome alternative for small business. EPA mistakenly claims that certain informal outreach it has conducted by meeting with select representatives from various trade organizations and environmental groups is "indistinguishable" from the process required by SBREFA and the RFA. However, EPA has not satisfied these laws' requirements because, among other things, it excluded several legitimate small business interests that requested to be included in the meeting and failed to show that it is considering any alternatives other than the Draft Guidance that would be less burdensome to small business interests.

Rather than proceed with undue haste with a rulemaking that simply mirrors the opaque Draft Guidance, many groups, including the National Association of Home Builders, have recommended that the Agencies begin this process with an advanced notice of proposed rulemaking requesting broad input on how the Agencies' current CWA jurisdictional regulations should be clarified and the scope of any proposed rulemaking. Although it is unclear exactly how the Agencies will proceed, it is likely that the general public will have a relatively short window to provide comments. Therefore, it is important for builders to think about how the scope of CWA jurisdiction affects the construction industry and how your experience in the field can be incorporated into comments that demonstrate the specific areas of CWA jurisdiction that require clarification. ■

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