



In Kansas City, EPA Administrator Seeks to Clarify Proposed “Waters of the United States” Regulation

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On July 10, EPA Administrator Gina McCarthy spoke to the Agricultural Business Council of Kansas City in an attempt to ease concerns over the Administration’s proposed rule to clarify the reach of the Clean Water Act (CWA). The proposed rule, issued jointly by EPA and the Army Corps of Engineers, seeks to specify by regulation the scope of the CWA following the 2006 Supreme Court decision in *Rapanos v. United States*. The competing tests for CWA jurisdiction issued by the Court in *Rapanos* have complicated efforts to determine when smaller waters, wetlands, and ephemeral streams are subject to CWA jurisdiction and would require government permits before they can be impacted. In response to mounting criticism of the proposed rule from a number of stakeholders, McCarthy tried to reassure the audience, saying, “We don’t believe that we are expanding jurisdiction.”

Nonetheless, critics of the proposed rule say it *would* expand CWA jurisdiction by including many smaller waters that previously were not regulated. Critics of the proposed rule claim that it is based on flawed scientific and economic analysis and would unlawfully expand the scope of the CWA beyond what Congress intended. Furthermore, they claim that such an expansion would infringe on private property, states’ rights, and constitutional limitations and would create significant obstacles to new development, agriculture, and industrial activity.

The language in the proposed rule seems to validate these fears. The proposed rule states that “tributaries and adjacent waters, each as defined by the proposed rule, have a significant nexus such that they are jurisdictional *by rule*.” (emphasis added). This conclusory language seems to do away with any analysis of the physical, biological, or chemical links under the “significant nexus” test Justice Kennedy articulated in *Rapanos*.

The impact of the proposed rule is already being seen in the courts. Recently filed citizen suits are invoking language from the proposed rule. In *Galveston Baykeeper v. Trendmaker Homes, et al*, filed May 30 in the United States District Court for the Southern District of Texas, environmentalists cite a “significant biological, chemical and physical nexus” between prairie potholes in a housing development and downstream bayous that are jurisdictional waters. This conclusory allegation stems directly from the proposed rule.

In another recently filed suit in the United States District Court for the District of Colorado, *Wildearth Guardians v. Western Sugar Cooperative*, environmentalists are claiming that the groundwater beneath the Fort Morgan, Colorado, sugar beet processing plant constitutes a “significant biological, chemical and physical nexus” to the South Platte River. This argument draws from language in the proposed rule that allows waters to be jurisdictional when they are connected by “shallow subsurface hydrologic connections.”

Opposition to the proposed rule has developed in Congress. In the House and Senate proposals have been launched to strip EPA of authority to develop or enforce the rule as proposed. EPA is concerned enough about the opposition that the Agency has launched a messaging campaign to try to reassure opponents and influence opinion leaders. Administrator McCarthy’s visit to Kansas City was part of that effort.

Real estate owners, developers, and facilities contemplating construction should expect to see the expansive language of the proposed rule used by development opponents, even though the regulation has not been adopted. The same language also may come to be used as guidance by regulators in certain instances. In both situations, we suggest development proponents counter by citing Administrator McCarthy’s statements in Kansas City and elsewhere that EPA does not intend to expand CWA jurisdiction.

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We are continuing to watch developments in this area. EPA and the Corps recently extended the comment deadline on the proposed rule to October 20, 2014. In Kansas City, Ms. McCarthy said that persons who believe the regulation would be overly expansive should submit comments to EPA during the public comment process. We agree.