THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

INFORMATION

- Board of Directors
  Communications and Legislation Committee

8/19/2014 Board Meeting

9-2

Subject

Report on federal rulemaking regarding definition of "waters of the United States" under the Clean Water Act

Executive Summary

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, Agencies) published a proposed rule for public comment in the *Federal Register* on April 21, 2014. The proposed rule defines the jurisdictional scope of waters protected under the federal Clean Water Act (CWA). The stated intent of the proposed rule is to increase the predictability and consistency of the CWA program by clarifying the scope of "waters of the United States" protected under the CWA. The proposed rule creates categories of waters that would be either jurisdictional (i.e., covered under the CWA) or excluded by rule, thereby reducing the current need for case-by-case jurisdictional determinations by the Corps. Waters that are not categorically excluded or are not jurisdictional by rule must pass a "significant nexus" test to determine if the CWA applies.

The most notable effect of this change in jurisdictional scope could be to expand the number and type of features that would be considered "waters of the United States," which would increase the number of CWA permits Metropolitan and other agencies would be required to obtain for operations, maintenance and construction projects. Additional permitting could result in increased time, expense and potential delay. Comments on the proposed rule were originally due on July 21, 2014. EPA extended the comment period until October 20, 2014, however, based on numerous requests for more time due to the complexity of the proposed rule. Metropolitan staff is preparing a comment letter, and is working with the Association of California Water Agencies (ACWA) and other agencies to provide comments.

Description

The federal Water Pollution Control Act Amendments of 1972 established the CWA, passed by Congress in 1972, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Existing regulations pursuant to the CWA define "waters of the United States" to be traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands. The Agencies have jointly published a proposed rule for public comment, defining the jurisdictional scope of waters protected under the CWA.

U.S. Supreme Court Cases

The intent of the proposed rule is to increase the predictability and consistency of the CWA program by clarifying the scope of "waters of the United States" protected under the CWA in light of three U.S. Supreme Court cases: *U.S. v. Riverside Bayview Homes (Riverside)* (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* (2001), and *Rapanos v. United States (Rapanos)* (2006). The Agencies assert that in all three cases, the Court has broadly interpreted congressional intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In *Riverside*, the Court unanimously deferred to the Corps' judgment and upheld the determination that adjacent wetlands are properly included in the regulatory definition of "waters of the United States." In *SWANCC*, although the Court narrowed the Agencies' jurisdiction, holding that non-navigable, intrastate water bodies used as habitat by migratory birds were not jurisdictional, the

Court also articulated the notion that a "significant nexus" between wetlands and "navigable waters" was consistent with Congress' concern for the protection of water quality and aquatic ecosystems. In *Rapanos*, a plurality of the Court found that to establish federal jurisdiction under the CWA, a water body must have a significant nexus to the chemical, physical, and biological integrity of a traditionally navigable water.

Draft Scientific Report

Building on the Court's decisions defining the types of significant nexus necessary to establish jurisdiction, the Agencies studied the scientific basis for such connections. To this end, the Agencies have prepared a draft scientific report examining the current scientific understanding about the physical, chemical, and biological connectivity or isolation of streams and wetlands relative to traditionally defined navigable waters. The draft report is a synthesis of peer-reviewed scientific literature addressing the connectivity of certain types of waters (tributaries, wetlands, adjacent open waters, and various other features such as ditches and waters found in upland areas) to downstream waters in terms of the chemical, physical, and biological integrity of those downstream waters. The draft report concludes that water bodies can affect downstream waters via chemical or biological mechanisms, even if they are not connected hydrologically. Some examples of non-hydrologic effects described in the report include sediment trapping, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat.

Because this conclusion informs the proposed rule, waters not currently considered to be jurisdictional could be included within the scope of regulated waters. Determinations regarding significant nexus would be made on a case-by-case basis (contrary to the Agencies' stated intent in the proposed rule to minimize the number of case-specific determinations), creating the potential for inconsistent regulation in different regions across the country. Metropolitan submitted comments on the draft report during the public comment period. The draft scientific report has not been finalized as of this date.

Proposed Rule

On May 2, 2011, the Agencies released a proposed Draft Guidance on "Identifying Waters Protected by the Clean Water Act" for public comment. In commenting on that Draft Guidance, Metropolitan and many other stakeholders requested that rulemaking precede the issuance and implementation of any guidelines. As a result, the Agencies withdrew the Guidance and began this formal rulemaking process. In light of the Court cases, comments on the Draft Guidance, and the conclusions in the draft scientific report, the proposed rule creates three categories for evaluating jurisdiction under the CWA: (1) waters that are jurisdictional by rule; (2) waters that are excluded by rule; and (3) all other waters.

First, waters that are jurisdictional by rule include: all waters used or susceptible to use in interstate or foreign commerce, all interstate waters, the territorial seas; all impoundments of these waters; all tributaries of these waters; and all waters, including wetlands, adjacent to these waters. For instance, under the proposed rule, all tributaries will be "waters of the United States" by rule and no case-specific jurisdictional determination would be needed.

Second, the proposed rule expressly excludes certain facilities and features over which the Agencies have generally not asserted CWA jurisdiction in the past. These exclusions include waste treatment systems, groundwater, prior converted cropland, certain ditches in uplands, and artificially irrigated areas that would revert to upland should the irrigation cease, gullies and rills, non-wetland swales, and water-filled depressions created incidental to construction. In addition, the proposed rule would not affect longstanding exemptions in the CWA for farming, silviculture, ranching, and other related activities.

Third, waters that are not jurisdictional by rule or categorically excluded, termed "other waters," would be jurisdictional upon a case-specific determination that they have a significant nexus with navigable waters as defined by the proposed rule. As discussed above, a water has a significant nexus if it significantly affects the chemical, physical, or biological integrity of downstream navigable waters. This category has the potential to expand existing federal jurisdiction to include some areas that are not currently considered to be jurisdictional, which could increase the number of CWA permits and associated mitigation required for maintenance and construction projects.

Recent Federal Legislative Actions

Members of Congress have taken a number of actions to prevent the proposed rule from moving forward. Republicans in both the House and Senate introduced amendments or riders to a series of fiscal year 2015 appropriations bills that would deny funding to the Agencies for implementing the proposed rule. A bill was recently introduced in the House (H.R. 5078), entitled "Waters of the United States Regulatory Overreach Protection Act of 2014" (Sutherland R-Florida) to prevent the Administration from implementing the proposed rule as a matter of Congressional directive. The House of Representatives has also held hearings before the House Transportation and Infrastructure Committee, the House Natural Resources Committee and the House Science and Technology Committee with witnesses representing EPA and the Army Corps regarding the rule.

Potential Impacts on Metropolitan

Metropolitan must obtain CWA permits for operations and maintenance activities and for capital projects where the activities involve dredge or fill within "waters of the United States." Metropolitan often incurs significant obligations to mitigate any unavoidable impacts to jurisdictional waters, including the on-site restoration of affected waters or the off-site purchase of equivalent habitat types.

The jurisdictional scope of "waters of the United States" under the CWA also affects the permits Metropolitan must obtain from the state pursuant to the Porter-Cologne Water Quality Control Act, administered by the State Water Resources Control Board, because the state administers federal CWA programs that rely on this definition of jurisdiction. State permits include National Pollutant Discharge Elimination Systems (NPDES) permits for the application of copper sulfate at Lake Skinner, Lake Mathews, and Diamond Valley Lake, and permits for dewatering during pipeline shutdown operations.

Member agencies have also expressed concern that the new rule may impact water conservation efforts. For example, the proposed rule might be interpreted to cover some recycled water storage facilities that were not previously included in the existing definition of "waters of the U.S.," requiring member agencies to obtain permits for those storage facilities.

Given limited federal and state resources, obtaining these permits can take a long time and delay proposed projects. Metropolitan is already encountering significant delay in moving its critical maintenance activities forward when such activities need a federal CWA permit. For example, the Santa Ana River Bridge Seismic Retrofit and Routine Maintenance Project has been delayed by a year due to the Corps' inaction on Metropolitan's permit application. Metropolitan also has concerns about the status of the Colorado River Aqueduct under the proposed rule along with Metropolitan's other facilities. Permitting delays could also impede Metropolitan's ability to support conservation and local supply development efforts of member agencies when CWA permits are required. Metropolitan's incentive programs often require that applicants obtain permits for their projects in a timely way in order to take advantage of funding opportunities.

Metropolitan has adopted policy principles that balance protection of waters of the United States with support of regulatory reforms that streamline permitting processes. Metropolitan routinely designs its projects and activities to avoid water quality impacts whenever practicable and compensates for any unavoidable impacts through mitigation. Over the last two decades, Metropolitan has opposed legislation that expands the regulatory burden related to CWA permitting where the benefits to water quality do not outweigh or justify the burden. Furthermore, in accordance with Metropolitan's wetlands policy principle, Metropolitan has sought exemptions from wetlands permitting for its operations, maintenance, and construction activities and for artificially created wetlands, such as groundwater recharge spreading areas constructed on uplands.

Next Steps

Metropolitan will continue to work closely with ACWA and other water industry association groups, such as National Water Resources Association (NWRA), on comments to the proposed rule. Metropolitan will be preparing comments that (1) seek to eliminate ambiguity in the rule on what constitutes waters of the United States; and (2) seek to provide clear exclusions for water delivery facilities and infrastructure, including groundwater basins.

Staff will keep the Board informed as this issue progresses.

Policy

Policy Principle on Wetlands, M.I. 40503, dated October 12, 1993.

Policy Principle on Permit Streamlining, M.I. 40196, dated April 13, 1993; January 10, 2000 - staff revision: grammatical correction.

8/6/2014
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