EPA's Controversial Rule Clarifying CWA Jurisdiction Could Negatively Impact Most Commercial Property Owners

By John Heer and Leslie Wolfe

U.S. EPA and U.S. Army Corps of Engineers recently proposed a far-reaching new rule defining "waters of the United States" under the federal Clean Water Act (CWA). Real estate experts have referred to the new rule as the most sweeping change in a generation to the rules governing CWA jurisdiction.

Anyone who owns commercial property or is thinking of entering into a real estate transaction could be affected. Even if you plan on simply upgrading, expanding or rezoning existing property, your development plans should take into account the potential impacts of the proposed rule.

John Heer

Leslie Wolfe

Government's ever-expanding jurisdiction

The CWA prohibits the discharge of any pollutant by dumping or filling in "navigable waters" without a permit from the Army Corps of Engineers. "Navigable waters" is defined as "waters of the United States." Over time, the Corps and the courts have stretched the meaning of that phrase to include areas bearing very little resemblance to traditional bodies of water, such as man-made ditches and intermittently flowing storm drain systems and culverts, resulting in expensive and time-consuming legal hurdles for landowners and developers.

In 2006, the Supreme Court attempted to rein in the government's expansive regulation of wetlands under the CWA. In *Rapanos v. United States*, 547 U.S. 715, a five-justice majority of the Court found that the Sixth Circuit had applied the wrong standard in reviewing the Corps' decisions that certain wetlands were subject to the CWA. However, the justices could not agree on the correct standard. Four justices in the majority argued for less regulation under the CWA, so that only "relatively permanent, standing or continuously flowing" bodies of water "forming geographic features," such as streams, oceans, rivers and lakes would be covered, but intermittent or ephemeral channels where water flows only periodically would not be. Conversely, the fifth justice in the majority, Justice Kennedy, disagreed. He believed the CWA should be given a broader interpretation using a case-by-case determination as to whether a particular wetland bears a "significant nexus" to traditional navigable waters.

The proposed new rule

In the eight years that followed *Rapanos*, courts have struggled to determine how to apply the Justices' different tests. EPA and the Army Corps have promised repeatedly to issue a new rule that would clarify the standard for identifying jurisdictional waters under the CWA. Unfortunately, the proposed rule issued on March 25 of this year may add to the confusion, rather than eliminate it.

Among other things, the proposed rule adds several categories of waters that may be regulated as jurisdictional, including "tributaries" of traditional navigable waters, wetlands "adjacent" to those tributaries, and other "adjacent" waters. It also contains expansive definitions of certain key terms, such as "tributary," "adjacent" and "neighboring" (used in the definition of "adjacent"). In addition, the proposed rule delineates a category of waters that would be considered jurisdictional based on their relationships to other waters, using the "significant nexus" concept from *Rapanos*. A "significant nexus" would exist when "a water, including wetlands, either along or in combination with other similarly situated waters in the region… significantly affects the chemical, physical, or biological integrity of" a traditional navigable water, interstate water, or the territorial seas.

What is the likely impact?

Although EPA claims the proposed rule simply "clarifies" its existing

jurisdiction without extending its regulatory power to any new types of waters, many legal experts believe that the new rule would broaden federal jurisdiction beyond what Congress originally intended when it created the CWA, such that more properties will be regulated than ever before. Taking the most extreme interpretation, the proposed rule could apply to nearly any water body, no matter how insignificant or remote its connection to traditional jurisdictional waters may seem. Even using a less extreme reading, the proposed rule will mean lengthier and costlier permitting and approval processes for many transactions. With the new definitions, there will likely also be more uncertainty as to what tributaries and adjacent wetlands are subject to regulation. This could lead to project delays due to the need for permits for dredging, filling, discharge or hazardous substances releases that might not previously have been required.

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As a result of these changes, property owners and developers will need to approach any type of development or property changes cautiously, knowing that there could be more delays or hurdles to overcome in the approval process. Consultants and legal counsel should be brought in early in any transactions to help understand all potential issues and adequately prepare to minimize project delays.

It is important to note that the proposed new rule is subject to a public comment period of 90 days from the time it was published in the Federal Register – in other words, until July 21, 2014.

Individuals and companies potentially affected by this rule should consider filing public comments in the administrative record during this time. P

Heer and Wolfe practice in the litigation and environmental law groups of Cleveland-based Walter | Haverfield LLP.