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Environmental Issues Impacting Land Use and Development in 2020

Including the New Navigable Waters Protection Rule

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I. SETTING THE STAGE (THE PREAMBLE)

The Clean Water Act (CWA)[1] applies to *navigable waters*, including the territorial seas. The CWA then defines navigable waters as *waters of the United States*.[2] This definition in practice establishes the CWA's jurisdiction. If an activity affects a *water of the United States*, the actor must comply with the CWA. If the activity does not affect a *water of the United States*, the actor need not comply with the CWA. Compliance can be expensive, but even more challenging, it can be time consuming, especially for regulated parties like real estate developers, energy producers, and farmers and ranchers, for whom time is money.

Congress failed to define *waters of the United States* in the CWA. The two regulatory agencies responsible for administering and enforcing the Act, namely the Department of the Army's Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), adopted a series of versions of definitions as explained in detail in Section II below. have now, on three separate occasions, adopted a substantive regulation defining *waters of the United States* as used in the CWA. This paper addresses the most recent definition, published January 23, 2020.

Adding fuel to the fire, the penalty provisions in the CWA are some of the most draconian among the United States' environmental statutes, imposing criminal liability as well as steep civil fines (up to $75,000 per day)[3] on a broad range of ordinary industrial, commercial, and land development activities. The pressure is on regulated parties to not just accurately apply the CWA, but to accurately apply the Corps' and EPA's interpretation of the CWA to their activity.[4] These punitive remedies may also explain why there is such interest in each and every new development, court opinion, and regulation affecting the definition of *waters of the United States*.

In order to make this paper as relevant as possible to an audience that retains consultants and attorneys who are expert in environmental matters, this paper will not delve into an overly detailed technical review of the 2020 Rule. This paper will take a broad perspective and explain what effect this new rule may have for cities, developers, the agriculture sector, and the oil and gas sector.

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[1]Originally the Federal Water Pollution Control Act of 1948, extensively revised in 1977 and now known as the Clean Water Act, codified at 33 U.S.C., Chapter 26, Sections 1251-1387; implemented by 40 C.F.R. Subchapters D, N, and O (Parts 100-140, 401-471, and 501-503). A similar statute, the Rivers and Harbors Act of 1899 (33 U.S.C. 403; Chapter 425, March 3, 1899; 30 Stat. 1151), is beyond the scope of this paper because, although it operates similarly to the CWA by requiring authorization from the Secretary of the Army, acting through the Corps, for the construction of any structure in or over any navigable water of the United States, in Section 10 it defines navigable waters as those waters that are subject to the ebb and flow of the tide and/or are presently being used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

[2]33 U.S.C. § 1362(7)

[3]The original statute set a penalty cap of $25,000 per violation per day. The Federal Civil Penalties Inflation Adjustment Act of 1990, 104Stat. 890, note following 28 U. S. C. §2461, as amended by the Debt Collection Improvement Act of 1996, §3720E, 110 Stat. 1321–373, note following 28 U. S. C. §2461, p. 1315 (Amendment), authorizes the EPA to adjust that maximum penalty for inflation. On the basis of that authority, the agency has raised the cap to $37,500. See 74 Fed. Reg. 626, 627 (2009).

[4]As Justice Alito observed in 2012, "the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for [violating the Act] leaves most property owners with little practical alternative but to dance to the EPA's tune." *Sackett v EPA*, 566 U.S. 120, 132, 132 S.Ct. 1367, 1375, 182 L.Ed.2d 367, 378 (2012) (Sackett).

This paper will make every attempt to avoid addressing political matters to focus on more objective aspects of the 2020 Rule and the CWA. Nothing herein should be construed as the author taking a position that one version of the rule is "right" while another is "wrong." Notwithstanding, the fact remains that these different rules reflect policy decisions made by the President of the United States in his capacity as the Chief Executive.

II. A BRIEF WOTUS RULE HISTORY

A. The CWA

The CWA is a broad, omnibus pollution abatement law containing grant programs, data collection efforts, and permit schemes all for the purpose of restoring and maintaining the chemical, physical, and biological integrity of the United States' waters. The CWA establishes several different compliance programs that regulated parties must follow when activity will affect, or may affect, the quality of waters to which it applies. The following sections of the CWA are of particular interest to land users and land regulators:

- Section 303 Water Quality Standards and Total Maximum Daily Load Programs (TMDL)
- Section 311 Oil Spill Prevention and Response Program
- Section 401 State Water Quality Certification Process
- Section 402 National Pollutant Discharge Elimination System (NPDES) permit program
- Section 404 Dredge and Fill permit program

The Supreme Court of the United States (SCOTUS) seems to have gradually lost its patience with the Corps and EPA over the years. In a 2006 opinion the Court went so far as to state that the Corps and EPA have intentionally kept the definitions in the CWA, including but not limited to waters of the United States, vague as a means to expand and protect their jurisdiction.[5] With regard to Section 404 Dredge and Fill permits, Justice Scalia wrote that, in the permitting process, the "Corps exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'"[6] By 2012, Justice Scalia would characterize the EPA's enforcement tactics as a deliberate effort to "drop the hammer"[7] and rebuke the EPA for arguing that the CWA was "uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."[8]

B. The 1986 Rule

Prior to passage Congress passed the CWA, the SCOTUS had interpreted the phrase "navigable waters of the United States" in the CWA's predecessor statutes, *supra* at footnote 1, to mean interstate waters that are "navigable in fact" or readily susceptible of being rendered so.[9] After passage of the

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[5] *Rapanos v. United States,* 547 U.S. 715, 126 S.Ct. 2208, 721, 165 L.Ed.2d 159 (2006) (Rapanos)

[6] *Id.* He noted that, as of 2002, the average applicant for an individual Section 404 permit spent 788 days and $271,596 in completing the permit process. Also as of 2002, the public and private sectors were spending over $1.7 billion obtaining wetlands permits.

[7] *Sackett,* 566 U.S. at 127, 132 S.Ct. at 1372

[8] *Id.*, 566 U.S. at 130-131, 132 S.Ct. at 1374

[9] *The Daniel Ball,* 10 Wall. 557, 563, 19 L.Ed. 999 (1871); *United States v. Appalachian Elec. Power Co.,* 311 U.S.

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