BEATTY & WOZNIAK, P.C.
Energy in the Law

Client Alert

AN EXPLANATION OF THE NEW PROPOSED REGULATIONS DEFINING WATERS OF THE UNITED STATES

Recently, the United States Environmental Protection Agency and the United States Army Corps of Engineers jointly released for publication in the Federal Register a proposed rule concerning Clean Water Act jurisdiction. http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act. As detailed below, this proposed rule has potential significant ramifications for the oil and gas industry. The proposed rule has not yet been published in the *Federal Register*. Public comments on the proposal will be due 90 days from the date that it is officially published.

At bottom, the proposed rule would define the scope of waters protected under numerous provisions of the Clean Water Act. On the whole, the proposal significantly expands the scope of waters that the agencies explicitly view as waters of the United States (many of these waters currently are often the subject of case-specific jurisdictional decisions under current regulations). This proposal is of particular importance to the oil and gas and other energy industries because the definition of waters of the United States will bear on whether operators will face expanded Spill Prevention, Control and Countermeasures requirements, spill reporting obligations, construction permitting requirements, and effluent discharge monitoring and reporting requirements.

The issue of what constitutes a "water of the United States" has been heavily litigated for many years, including a 2006 case before the U.S. Supreme Court, Rapanos v. United States. The Rapanos decision did not provide clear guidance, however, and the issue has subsequently been litigated extensively in the federal courts. The proposed rule draws heavily on the concurring

opinion of Justice Kennedy in Rapanos, where he posited that waters or wetlands not obviously navigable had to have a "significant nexus" with traditionally navigable waters to be jurisdictional.

The proposed rule establishes seven broad categories of waters that the agencies view as jurisdictional. But, the real effect of the rule lies in the layered definitions found within the proposal, all of which are premised on the notion that they present a significant nexus with otherwise navigable waters or their tributaries.

The proposed rule would define waters of the United States as the following (including some provisions that reflect existing law):

1. Waters currently used, or used in the past, or susceptible to interstate or foreign commerce;
2. Interstate waters, including interstate wetlands;
3. The territorial seas;
4. Many impoundments of waters;
5. All tributaries of waters listed in the four categories above (the definition of tributary is new);
6. All waters adjacent to one of the waters in the five categories above (another major change, and the word "adjacent is key)); and
7. On a case-specific basis, any other waters (including wetlands), individually or in combination with other similarly situated waters, that have a significant nexus to one of the waters in the first three categories listed above.

The terms underlined above are key to understanding the scope of the proposal.

The word tributary is the place to start. The agencies in the past have generally treated tributaries of traditionally navigable waters as jurisdictional, though there has been a debate about how far upstream jurisdiction extends. In this proposal the agencies would adopt a *per se* rule that tributaries – including headwaters streams that may be ephemeral or intermittent – have a significant nexus to existing jurisdictional waters and are therefore jurisdictional. This would be the case even if the tributary does not contribute to flow in one of the first four specific categories listed above, so long as the water is part of a tributary system that drains to one of those four categories of waters. In practical terms, a tributary has a definable bed and banks, and a discernible high water mark. Though, a tributary could also be a wetland.

Next, look to the word "adjacent," used in the fifth specific category of jurisdictional waters listed above. First, note that the proposal refers to adjacent waters, not just wetlands. Second, note that the proposal would define "adjacent" to include "neighboring," a new concept. Under the latter term, both waters found within the riparian area or floodplain of any of the first five categories of waters above (so, including tributaries), or waters that have a shallow subsurface hydrologic connection or confined surface hydrologic connection to a traditionally navigable water or tributary would be deemed jurisdictional. The agencies acknowledge some of these terms create uncertainty and call for professional judgment, and as such they seek alternatives for providing greater clarity or certainty in responsive comments.

The last remaining category -- the "other waters" of category seven, above – introduces additional uncertainty into the equation. Think of it as the "catch-all" provision: it seeks to capture a wide variety of potentially jurisdictional waters within its ambit. In essence, it suggests that on a case-specific basis, the agency could find that a water, taken on its own or in combination with other similar waters in the watershed that drains to a traditionally navigable water, is jurisdictional. The potential scope of this category, especially given the wide range of situations where "other waters" might become an issue, should be a key area of comment for companies operating in the western United States.

This case-by-case "other waters" determination will be based on the regulatory agency's determination of whether the "other water" has a "significant nexus" to a *per se* jurisdictional water. Again, the basis for the determination that some waters, such as tributaries, are *per se* jurisdictional is that those waters are presumed by the agency under the proposed rule to have a "significant nexus" to jurisdictional waters such as a traditionally-navigable river, or the territorial seas.

When the agencies look at "other waters" that may be jurisdictional, they will apply the same "significant nexus" analysis on a case-by-case basis. Under the proposal, a water will be deemed to have a "significant nexus" if:

> the water, including wetlands, either alone or in combination with other similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a water identified in categories 1-3, above.

Further, the proposed rule explains that functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling,

pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. Additionally, for an effect to be significant, it must be more than speculative or insubstantial. Finally, and importantly, a hydrologic connection is not necessary to establish a significant nexus.

There are innumerable situations where the proposed jurisdictional boundaries of waters of the United States will become important for energy companies. Under the proposed rule, many prairie potholes in North Dakota would continue to occupy a gray zone within which EPA's case-specific approach in assessing "significant nexus" will create uncertainty. Any company operating at mid- or high elevations, where many sites will be located adjacent to or neighboring ephemeral or intermittent streams may find itself negotiating within the broadened framework of waters of the US. Even companies operating in arid regions in the western United States in the vicinity of gullies that are dry most of the time—but which occasionally flow to a jurisdictional water—could find themselves caught within the outer boundaries of waters of the United States and subject to additional federal oversight from the Army Corps of Engineers and the EPA.

The initial period for public comment was set at 90 days from the date of publication in the Federal Register. However, the agencies also stated they would not finalize the jurisdictional rule until EPA's Science Advisory Board completes its review of a "connectivity" study that forms the basis of much of the proposed rule and EPA publishes the final study. http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345#Download. There may be broad support for extending the comment period until at least the connectivity study has been published in final form. Regardless, this proposal is certain to inspire Congressional interest and oversight as well as extensive comment.

Beatty & Wozniak attorneys will follow this process closely and are available to provide assistance on this matter. Please do not hesitate to contact Jim Martin or David Scott for additional information.