WHITE & CASE

Client**Alert**

Environmental | Litigation

November 2013

US federal agencies to seek expanded Clean Water Act regulatory jurisdiction over aggregate mines and farmlands

The US Environmental Protection Agency ("EPA") and the US Army Corps of Engineers ("Corps") are poised to propose a new rule that would significantly expand their regulatory jurisdiction under the Clean Water Act. While many parties may be affected, this will particularly affect the regulatory status of aggregate, sand and gravel mines, and agricultural lands.

The Clean Water Act prohibits discharges without a permit into the "navigable waters," which are defined in the statute as the "waters of the United States."[1] Discharges into such waters without a Clean Water Act permit, or in violation of the terms of a permit, are subject to government enforcement actions seeking administrative, civil and criminal penalties,[2] and citizen suits seeking injunctive relief.[3]

In the 1980s, the EPA and the Corps promulgated regulations defining "waters of the United States." These regulations took an expansive approach to the scope of the Clean Water Act, and effectively asserted regulatory jurisdiction over most waters and wetlands in the United States. At that time, the agencies identified several categories of waters that were outside of Clean Water Act regulatory jurisdiction, including most active mining lakes (e.g., sand and gravel pits filled with water) and most ditches.[4]

Since those regulations were promulgated, there has been significant litigation over the scope of Clean Water Act regulatory jurisdiction, and the Supreme Court rejected the agencies' assertions of jurisdiction in two cases involving a former gravel mine[5] and wetlands near agricultural ditches.[6] Since that time, the agencies have attempted to define

Miami

Neal McAliley
Partner, Miami
+ 1 305 995 5255
nmcaliley@whitecase.com

Doug Halsey
Partner, Miami
+ 1 305 995 5268
dhalsey@whitecase.com

Angela Daker
Counsel, Miami
+ 1 305 995 5297
adaker@whitecase.com

New York

Richard Horsch
Partner, New York
+ 1 212 819 8866
rhorsch@whitecase.com

Seth Kerschner
Associate, New York
+ 1 212 819 8630
skerschner@whitecase.com

1 33 U.S.C. § 1362(7).

2 33 U.S.C. § 1319.

3 33 U.S.C. § 1365.

4 Corps, "Final Rule for Regulatory Programs of the Corps of Engineers," 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); EPA, "Clean Water Act Section 404 Program Definitions and Permit Exemptions: Section 404 State Program Regulations," 53 Fed. Reg. 20764, 20765 (June 6, 1988).

5 *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (holding that the Corps exceeded its authority in asserting jurisdiction over an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds).

6 *Rapanos v. United States*, 547 U.S. 715 (2006) (holding that the Corps exceeded its authority by asserting regulatory jurisdiction over Michigan wetlands located near ditches and man-made drains that eventually empty into traditionally navigable waters).

Miami
White & Case LLP
Southeast Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, Florida 33131
United States
+ 1 305 371 2700

New York
White & Case LLP
1155 Avenue of the Americas
New York, New York 10036
United States
+ 1 212 819 8200

ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

the scope of Clean Water Act regulatory jurisdiction through a series of guidance documents. In those documents, the agencies reiterated that the exclusions for most active mining lakes and ditches remained in place.[7]

Earlier this year, the EPA and the Corps indicated that they intend to propose a new regulation that would clarify the scope of "waters of the United States." A preliminary draft of the proposed regulation obtained by Bloomberg BNA on November 7, 2013[8] indicates that the agencies intend to expand the scope of areas that they regulate under the Clean Water Act. While this could affect many different interests, the forthcoming proposed regulation would particularly expand the scope of regulation over active mining lakes and farm ditches.

Active mining lakes

In the 1980s, the agencies stated that the phrase "waters of the United States" generally did not include "[w]aterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States."[9] In the proposed new rule, the agencies would retain the exclusion for "water-filled depressions created incidental to construction activity," but would eliminate the exclusion for "pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." Even if such active mining lakes lack a surface-water connection to traditionally navigable waters, or tributaries to such traditionally navigable waters, the proposed new rule would treat them as regulated "adjacent" waters if they have a "shallow subsurface hydrologic connection to such a jurisdictional water."[10]

Under the proposed new regulation, discharges into active mining lakes would need a Clean Water Act permit. While a Clean Water Act permit to excavate aggregate from a jurisdictional wetland presumably would allow many discharges back into the active mining lake, there may be other discharges into the lake that are not directly related to the excavation.[11] This would bring a new level of detailed regulatory scrutiny and control over ongoing aggregate mining operations that have been exempted from Clean Water Act jurisdiction for decades.

Agricultural ditches

In the 1980s, the EPA and the Corps indicated that "[n]on-tidal drainage and irrigation ditches excavated on dry land" were excluded from the definition of "waters of the United States."[12] While over time the agencies have asserted increasing jurisdiction over such ditches, they have never completely abandoned this exclusion. The preliminary draft new regulation, however, would place most ditches presumptively within the scope of "waters of the United States." The new regulation would regulate "tributaries" of the traditionally navigable waters, and would define tributaries in a way that includes most ditches: "The term tributary means a waterbody physically characterized by the presence of a bed and banks and ordinary high water mark, and which contributes flow, either directly or through other waterbodies, to [an otherwise regulated water]." There are two narrow exclusions for certain ditches, specifically, "[d]itches that are excavated wholly in uplands, drain only uplands or non-jurisdictional waters, and have no more than ephemeral flow," and "[d]itches that do not contribute flow, either directly or through other waterbodies, to [an otherwise regulated] water." Many agricultural ditches would not meet these exclusions because they typically connect to offsite streams or canals, and "[e]phemeral flow means that the flow in the ditch occurs only during, or for a short duration after, precipitation events because it does not intersect groundwater."[13]

The practical effect of these proposed changes would be that agricultural ditches would be far more regulated than they are under current rules. Since ditches typically are located throughout farmlands, this would expose large tracts of land to potential Clean Water Act regulation. Farmers will be more reliant on the agricultural activity exclusions set forth in Section 404(f) of the Clean Water Act[14] and the exclusion for "prior converted croplands" from the definition of "waters of the United States,"[15] which would be carried over from the existing regulations.

---

7 *See, e.g.*, "Draft Guidance on Identifying Waters Protected by the Clean Water Act" 20 (April 2011), available at http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf.

8 Amena H. Saiyid, "EPA, Corps Propose to Assert Jurisdiction Over Tributaries Affecting Navigable Waters," Bloomberg BNA (Nov. 7, 2013), citing draft proposed rule, available at http://op.bna.com/itr.nsf/id/rran-9d8qx7/$File/WOTUS%20scan.pdf.

9 *See* footnote 1.

10 *See* footnote 8 above, at pages 277-79.

11 *See e.g.., Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (quarry lake used for the discharge of water from sewage treatment plant).

12 *See* footnote 1.

13 *See* footnote 8 above, at pages 277-79.

14 33 U.S.C. § 1344(f). The Clean Water Act exempts certain listed activities from the need for a permit, even if they involve discharges into the "waters of the United States." These exemptions primarily benefit agricultural and silvicultural activities.

15 *See, e.g.*, 33 CFR § 328.3(a)(8); *see also New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F.Supp.2d 1272 (S.D. Fla. 2010) (vacating Corps amendment to "prior converted cropland" rule promulgated in violation of Administrative Procedure Act).

The agencies have not yet formally proposed the new regulation, and whether it is adopted, changed in scope or survives legal challenges remains to be seen. However, for many businesses, especially in the gravel mining and agricultural sectors, these proposed changes would significantly affect the regulatory status of their operations. Once the proposed rule is officially released, there will be a limited period to submit comments, and those affected by the rule should begin to consider whether they may wish to participate in the rulemaking process.

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.
NY1113/ENV/A/09009_3