DEFINING WATERS OF THE UNITED STATES: ECONOMIC BURDEN ATTACHING TO REAL PROPERTY

Earlier this year, the EPA, in conjunction with the Army Corps of Engineers, adopted a new definition of Waters of the United States ("WOTUS"). This rule has been the subject of heated controversy, with multiple states taking the issue to the courts. The new rule is projected to raise costs on businesses. In addition to costs generally, the regulatory burden is expected to increase. If the concerns over the new definition of WOTUS are founded, it could entail a host of new considerations for businesses small and large when it comes to real estate and land matters.

The term “wetlands” commonly conjures up visions of pristine mountain streams, dense swamps or coastal tide-zones. These are not the areas in question under the EPA’s Clean Water Rule latest definition of WOTUS. For the purposes of this Perspective, I will recognize a distinction between traditional wetlands and regulatory wetlands encompassed by the latest EPA rule. Traditional wetlands are already covered by previous regulations and are not impacted by the new definition. Under this new definition of WOTUS, many intermittently wet areas, including ditches, may be considered regulated wetlands. The expansive scope of this rule becomes clear when considered in light of buffer zones, which are created under the heading of “Adjacent Waters” and can extend up to 1,000 feet in both directions in the case of ditches that are classified as tributaries. In short, this new definition of WOTUS would subject large amounts of the American geography (potentially...

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6. Id.
7. Id.
any place within 1,000 feet of drainage ditches) to EPA regulation and permitting requirements.\textsuperscript{8}

Now, the reader may be wondering what does WOTUS have to do with anything business related? The answer is simple: businesses require buildings. For example, restaurants shops and office buildings are inherently tied to more specific locations. Even online corporations like Google and Amazon still maintain offices and require locations to store products and house servers. What happens if most new buildings are subjected to EPA regulation? Compliance is expensive, thus the cost of doing business may increase.

At some point, practically every piece of land drains into a ditch. Previous agency actions regarding drainage ditches, such as \textit{U.S. v. Deaton}, have determined that changing the way water flows into a ditch requires a federal permit.\textsuperscript{9} Even further, the court in \textit{Deaton} held that a §404 permit was required to complete the project despite the fact that no additional water or material was added to the site.\textsuperscript{10} If the modest land project in \textit{Deaton} required a permit, then it is possible that any project involving concrete or an increase in water run-off and drainage will require a permit. If the final rule remains in place as written, it may dramatically impact the real estate decisions of companies. The final rule is currently subject to a preliminary injunction pending challenges by multiple states.\textsuperscript{11}

Thus, all arguments presented here are subject to the outcome of that pending litigation. Going forward, no significant land modifications regarding wetlands can be conducted in the covered zone without the approval of the Federal Government.\textsuperscript{12} This federal approval is not without costs:

\begin{itemize}
\item [1] To the extent costs would be incurred, the majority of such costs would result from permitting costs and mitigation expenses incurred by entities seeking CWA 404 permits. These indirect costs may include wetlands mitigation, stream mitigation, and project re-design and relocation expenses. In addition, to the extent the guidance is followed, there would be program management, training, and
\end{itemize}

\begin{thebibliography}
\item \textsuperscript{8} \textit{Id.}
\item \textsuperscript{9} \textit{U.S. v. Deaton}, 332 F.3d 698, 702–03 (4th Cir. 2003).
\item \textsuperscript{10} \textit{Id}. at 703 (classifying the existing dirt as “fill material” requiring a §404 Permit).
\end{thebibliography}
associated environmental compliance costs to government associated with administering the CWA.\(^{13}\)

This creates a multi-faceted impact.\(^{14}\) The first is uncertainty; when a company considers purchasing a piece of property it must determine whether the development will be subject to Federal Wetlands Permitting.\(^{15}\) Unlike building permits, which companies can reasonably expect to get approved, there is no similar surety that the EPA will approve any development projects whatsoever.\(^{16}\) Thus, companies must bear the risk that any property they purchase may be deemed a protected wilderness, which would effectively prevent any project development. Second, even if a company already owns property, the building process may become increasingly more expensive than it originally projected in order to comply with agency requirements.\(^{17}\)

This could have three significant impacts on businesses nationwide. First, the economic value of currently developable land may be negatively impacted if it becomes subject to EPA regulation.\(^{18}\) If the land is not usable, it may have reduced marketability and value. The far-reaching implications of reduced land values are self-evident. On the contrary, land that is already developed, or is not subject to EPA regulations, may increase in value.\(^{19}\) Second, if costs for new projects rise, it is logical to expect that fewer projects will be initiated or completed. This has the potential to shift the focus of companies across the

14 See U.S. ENVTL. PROT. AGENCY, supra note 1, at 3 (explaining any economic impact is indirect and merely estimates with benefits that offset costs).
15 See U.S. ENVTL. PROT. AGENCY, supra note 12, at 10 (describing the uncertainty and cost as “within an order of magnitude” of other levels of uncertainty for permitting applicants).
16 See Floodplain Management and Protection of Wetlands, 78 Fed. Reg. 68,719 (Nov. 15, 2013) (to be codified at 24 C.F.R. pt. 50, 55, & 58) (determining whether to approve a 404 Permit Application by evaluating whether: (1) steps have ben taken to avoid wetland impacts, (2) potential impacts on wetlands are minimized, and (3) compensation has been provided for any remaining unavoidable impacts); see also U.S. ARMY CORPS. OF ENG’RS, U.S. ARMY CORPS OF ENGINEERS PERMITTING PROCESS INFORMATION 4-9 (2009) (discussing the criteria for permit denial).
17 See U.S. ENVTL. PROT. AGENCY, POTENTIAL INDIRECT ECONOMIC IMPACTS AND BENEFITS ASSOCIATED WITH GUIDANCE CLARIFYING THE SCOPE OF CLEAN WATER ACT JURISDICTION 5 (2011) (describing the resulting permitting costs and mitigation expenses incurred by entities seeking CWA 404-permits).
19 Id.
nation. To avoid compliance costs, businesses may choose to improve existing buildings rather than gamble on developing a new site subject to an EPA veto. Third, there will likely be an increased nexus of interaction between the federal government and businesses of every size. As the federal government gains power under the Clean Water Act, the §404 permit may function as a quasi-zoning permit process, which may have reaching implications down the line.

The new wetlands definition is so broad that wetlands compliance may need to become an inherent part of any real estate decision for businesses across the nation. This will impact the way companies do business by changing the calculus of what constitutes a sound investment. Currently, new land and buildings are oftentimes the best investments, but subject to this definition, there may be a shift towards maintenance and renovation of previously existing properties.

Having considered the potential impact the new regulation could have on businesses, there are also agency-side issues to be evaluated. It is worth noting that the EPA’s claims of economic non-impact and minimal impact are potentially biased. The EPA openly acknowledges it is trying to circumvent the Supreme Court’s decision in *Rapanos v. United States*. Specifically, the EPA is trying to pick up Justice Kennedy’s vote. This is significant because *Rapanos* dealt negatively with cases such as *Deaton*. It appears that the EPA’s thinly veiled goal is to re-expand its jurisdiction to include areas such as ditches. The agency’s claimed clarification of the process seems a bit disingenuous, given the legal history and the recently exposed interagency conflict between the EPA and the Army Corps of Engineers.

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23 See id. at 757.

24 See id. at 727.

It is difficult to predict how a shift from new construction towards renovation measures would impact business decisions across the nation, but one thing is clear. There is a fundamental nexus between business and land. By changing how businesses approach real property, the EPA is on some level changing all businesses. One of the big questions in the pending litigation is whether or not the EPA acted in an arbitrary and capricious manner. Additionally, recently revealed memos from the Army Corps of Engineers will make it even more difficult for the EPA to prevail in this case.

If the courts do not find in favor of the EPA, the EPA will likely promulgate a nearly identical rule that does not have the same pitfalls and will require a determination on the merits of the rule. It appears that the primary issue on the merits in this case is federalism. If this rule is sustained, virtually all waters will fall under federal purview, which will encroach on areas traditionally governed by the states. In my opinion, this rule must be held as overly broad if even a semblance of federalism is to remain in the area of waters of the United States.

BLAKE MEADOWS

26 Karen Bennet & John Henson, Redefining “Waters of the United States”: Is EPA Undermining Cooperative Federalism?, FEDERALIST SOCIETY (May 5, 2015), https://www.fed-soc.org/library/doclib/20150505_WOTUS.pdf (citing the North Carolina Department of Environment and Natural Resources: “the rule has significant implications for federalism, affects the State’s traditional authority to regulate land and water use, impacts the federal-state framework under the Act, and is unlawful under the Act and the Constitution”).

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