

LEGISLATIVE AND REGULATORY UPDATE

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Confined Animal Feeding Operations

In 2003, the Environmental Protection Agency (EPA) required, for the first time, that certain confined animal feeding operations (CAFOs) facilities obtain National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act. In *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2nd Cir. 2005), the Second Circuit Court of Appeals struck down EPA's 2003 CAFO Rule, which required CAFOs to obtain NPDES permits. In response to the *Waterkeeper* decision, on Feb. 10, 2006, EPA extended the deadline for CAFOs to comply with its 2003 CAFO Rule, specifically this extension applied to water pollution permit deadlines.

On July 18, 2007, EPA announced a final rule extending, once again, certain compliance deadlines within the 2003 CAFO Rule. This second extension applies to CAFOs, which already have NPDES permits, and the development and implementation of nutrient management plans (NMPs). An NMP is a plan specifying the amount of manure that can be applied to crops. The NMP is intended to minimize potential nutrient runoff to water bodies. This latest extension of the 2003 CAFO Rule expires on Feb. 27, 2009. While EPA proposed a revised CAFO Rule in 2006, that rule is not yet final and it is unknown how any revised proposed rule will impact this extended deadline.

Clean Water Act Jurisdiction—'Waters of the United States'

On June 19, 2006, the United States Supreme Court (Court) rendered its decision in *United States v. Rapanos*, 126 S. Ct. 2208 (2006). In *Rapanos*, the Court narrowed Clean Water Act (CWA) jurisdiction over certain wetlands by limiting the definition of

"navigable waters." However, two different jurisdictional tests emerged from the *Rapanos* decision. Justice Scalia, joined by Justices Alito and Thomas and Chief Justice Roberts, issued a two-part jurisdiction test. First, a wetland must be adjacent to a relatively permanent, continuous flowing waterbody, which qualifies as "waters of the U.S." in its own right. *Id.* at 2225. Second, the wetland must have "a continuous surface connection" with adjacent jurisdictional water, "so that there is no clear demarcation" between "where the 'water' ends and the 'wetland' begins." *United States v. Rapanos*, 126 S. Ct. 2208, 2226 (2006).

The second jurisdiction test to emerge from the *Rapanos/Carabell* decision was authored by Justice Kennedy. Under Justice Kennedy's jurisdiction test wetlands would be subject to CWA jurisdiction only if a "significant nexus" exists with traditional navigable waters. *United States v. Rapanos*, 126 S. Ct. 2208, 2237 (2006). The *Rapanos* decision and the two different jurisdictional tests derived from that opinion, have prompted both legislative and regulatory action pertaining to CWA jurisdiction.

Legislatively, Congressman James Oberstar and Sen. Russ Feingold responded to the *Rapanos* decisions by introducing legislation intended to clarify the waters protected under the CWA. See H.R. 1356; see also S. 912. Specifically, the Oberstar and Feingold legislation propose broadening the reach of the CWA by removing the word "navigable" from the CWA. Such an amendment to the CWA would expand the federal government's jurisdiction. Opponents of the legislation contend the bills would overextend federal control of privately owned lands placing undue burdens on farmers and ranchers.

However, even before the last Congressional elections, the Oberstar bill had over 200 signatures. Furthermore, Oberstar will be the chair of the House Transportation and Infrastructure Committee, which is one the largest and most influential committees in Congress. The committee has jurisdiction over

aviation, highways, mass transit, railroads, ports and waterways, and pipelines. A key subcommittee of the House Transportation and Infrastructure Committee is the Water Resources and Environment Subcommittee, which has jurisdiction over water conservation, pollution control, infrastructure, and hazardous waste cleanup. This subcommittee is also responsible for reauthorizing the CWA. Obviously, the Oberstar bill, as well as its companion Senate bill should be watched.

EPA and the Army Corps of Engineers (Corps) reacted to the *Rapanos* decision by issuing new guidance on which “waters of the United States” were jurisdictional for purposes of regulation. The guidance, entitled “Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States & Carabell v. United States*” (Guidance) came out on June 5, 2007. Specifically, the Guidance attempts to ensure consistent jurisdictional determinations and permitting actions based upon application of the *Rapanos* opinion. The Guidance clarifies the scope of the CWA jurisdiction, allowing EPA and the Corps to exercise factual case-by-case determination as to whether EPA and the Corps will assert jurisdiction. The Guidance also clarifies those waters over which EPA and the Corps will not assert jurisdiction. Waters, which EPA and the Corps will assert jurisdiction include: (i) traditional navigable waters, (ii) wetlands adjacent to traditional navigable waters, (iii) non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g. typically three months), and (iv) wetlands that directly abut such tributaries. However, EPA and the Corps will make a fact-based determination based on whether there exists a significant nexus to navigable waters over the following waters: (i) non-navigable tributaries that are not relatively permanent, (ii) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (iii) wetlands adjacent to but which do not directly abut a relatively permanent non-navigable tributary. Waters over which EPA and the Corps will not assert jurisdiction include: (i) swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow), and

(ii) ditches, including roadside ditches, excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water. Finally, the agencies will apply the significant nexus standard in the following manner: (i) a significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters; and (ii) significant nexus includes consideration of hydrologic and ecologic factors. While the Guidance is currently effective, EPA is inviting public comments on the Guidance until Dec. 5, 2007.

Country of Origin Labeling

On June 15, 2007, the United States Department of Agriculture (USDA) reopened the comment period for 60 days for the Interim Final Rule (IFR) for mandatory country of origin labeling (COOL) for fish and shellfish covered commodities. The IFR requires designated retailers and their suppliers to notify customers of the country of origin and method of production of specified fish and shellfish products and maintain specific records to verify claims.

Also occurring on June 15, 2007, the USDA reopened the comment period for 60 days for the Proposed Rule (PR) for mandatory COOL for beef, lamb, pork, perishable agricultural commodities, and peanuts. The PR, like the IFR for fish and shellfish, requires designated retailers and their suppliers to notify customers of the country of origin of covered commodities, as well as requires retailers and their suppliers to maintain specific records to verify claims.

2007 Farm Bill

Perhaps the relevant and significant legislative update affecting the agricultural sector is renewal and amendment of the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill). Approximately every five years, the U.S. Congress reauthorizes and amends the Farm Bill. The Farm Bill is omnibus legislation, which sets the federal farm and food policy for the United States. The 2002 Farm Bill expires at the end

of 2007. Therefore, the U.S. Congress is actively engaged in renewal and amendment of the 2002 Farm Bill.

On July 27, 2007, the U.S. House of Representatives passed its version of the Farm, Nutrition, and Bioenergy Act of 2007 (2007 Farm Bill). The house-passed 2007 Farm Bill, as it relates to the agricultural industry, proposes to reauthorize, expand and/or modify existing agricultural programs and create new agricultural programs and initiatives. The bill passed by a vote of 231-191. The Senate must now consider the Farm Bill. For more information on the 2007 Farm Bill go to <http://agriculture.house.gov/inside/2007FarmBill.html>.

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