

Water, Water Everywhere?  
EPA and Army Corps  
Publish New Clean Water Rule

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# **WATER, WATER EVERYWHERE?**

## **The New Clean Water Rule**

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# Section 404 of the Clean Water Act (“CWA”)

- The CWA imposes restrictions on discharges of pollutants into the waters of the U.S. (“WOTUS”) unless authorized by a permit.
- **§ 404 says you need a permit before discharging dredge and fill material into navigable waters.**
- Responsibility for administering and enforcing Section 404 is shared between the EPA and USACE: “Cooperative Federalism.”

# LEGAL BACKGROUND

- USACE handles the day-to-day regulatory aspects.
- EPA has ultimate authority for jurisdictional determinations (“JDs”)
- The permits must be issued consistent with guidelines developed by both EPA and the Corps. 33 U.S. Code §§ 1344(a)(b)

# Agency Interpretations

- 40 plus years of agency guidance
- 1986: Agencies used the “migratory bird rule” to assert authority over isolated waters, saying that those waters which are or could be used by migratory birds, which cross state lines, are WOTUS.



# Supreme Court Case Law Tangled

- **U.S. v. Riverside Bayview Homes**
  - Court upheld Corps’ determination that wetlands adjacent to navigable waters were jurisdictional.
- **SWANCC v. USACE (2001)**
  - Court ruled that “isolated” non-navigable intrastate ponds visited by migratory birds was not by itself a sufficient basis for regulatory authority under the CWA.

# Supreme Court Case Law Tangled

- **Rapanos v. United States (2006)**
  - Waters of the U.S. encompasses some waters that are not navigable.
  - Court was divided between supporting the broad reach of the regulations and affirming that the CWA covered only navigable waters.
  - Justice Kennedy was the outlier: A “significant nexus” between an isolated wetland and a traditional navigable water could be enough, but he did not define “significant nexus”.

# BACKGROUND

- Decades of uncertainty over the extent of federal authority over U.S. waters, compounded by penalties of almost \$40,000.00 per day.
- Requests for clarification from industry and everybody else.
- EPA has promoted the rule as “grounded in law and the latest science,” and as an effort to decrease the need for case-specific analysis of waters.



# Jurisdictional Determinations

- To give landowners some help in deciding whether their property is subject to Clean Water Act regulations, the Corps allows them to seek a “jurisdictional determination.”
- A landowner can ask the Corps for the agency’s opinion on whether an area is jurisdictional.
- Judicial review is available, but not in our 5<sup>th</sup> Circuit. Corps’ position had been that only denial of a permit constitutes appealable final agency action.

# HISTORY OF NEW RULE

- January 2015: EPA finalizes “Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”.
  - Based on a review of more than 1,200 peer-reviewed publications

# HISTORY

- Report provided much of the technical basis for new rule.  
Conclusions:
  - Connections of waters range from “highly connected” to “highly isolated”
  - **Tributary streams (perennial, intermittent, and ephemeral) are chemically, physically, and biologically connected to downstream waters.**
  - Floodplain waters are connected to downstream waters
  - **Effects on downstream waters by non-floodplain waters is difficult to assess**

# HISTORY

- April 2014: EPA and USACE jointly released a draft of the definition of Waters of the U.S.
  - More than 1,000,000 comments were submitted
  - “More than 3,000” (!) were considered substantive – most in support
- May 27, 2015: EPA and USACE finalized content of the Clean Water rule – would be final 60 days after being published in the Federal Register

# HISTORY

- By June 30, 2015, over half of the states filed for review in court.
- **The new Clean Water Rule became effective August 28, 2015.**
- 33 Code of Federal Regulations §§ 328.1, et seq.

# What Does the New Rule Purport to Do?

- “Ensures that waters protected under the CWA are more precisely defined, more predictably determined, and easier for businesses and industry to understand”
- **Determines where permits will be needed to dredge and fill wetlands and other waters under § 404**
- AND determines where permits will be required to discharge pollutants to surface waters under § 402 (NPDES)

# What Does the New Rule Purport to Do?

- Allows agencies to make categorical determinations of jurisdiction, particularly with respect to “other waters”
- **Defines “significant nexus,” “neighboring,” “tributary,” “floodplain,” and “riparian area”**
- Reduces documentation requirements and time frames to make approved Jurisdictional Determinations (“JDs”) by reducing the number of JDs that require case-specific significant nexus analysis

# What Do Critics Say?

- Significantly expands the scope of federal agency determination and is unconstitutional, arbitrary, and capricious.
- Will increase costs and regulatory burdens on businesses, landowners, states and local governments by expanding the types of water bodies that require permits.
- Has implications for permitting, facility siting, land use options, required mitigation, and the availability of financing.



# Exploration and Production

- Could change the way oil and gas operators locate, design, construct and maintain oil and natural gas production facilities.
- Applies everywhere, regardless of the surface ownership.

# Exploration and Production

- Applies to every well pad, access route, pipeline right-of-way, and ancillary production facility.
- More sites likely to be seen as categorically jurisdictional by the Corps and EPA.
- Project scheduling, timing, and cost will be affected by the need to determine whether a permit is required.

# What Does The New Rule **NOT** Do?

According to EPA:

- Does not protect waters that were not covered by the CWA prior to the rule
- Does not regulate most ditches
- Does not apply to groundwater
- Does not eliminate previous exemptions

# What Does The New Rule **NOT** Do?

According to EPA:

- Does not cover erosional features such as gullies, rills, and non-wetland swales.

My advice:

- **START YOUR ANALYSIS WITH THE EXCLUSIONS!**

# NOT Waters of the U.S.

Existing exclusions remain (farming, ranching, silviculture)

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA

Prior converted cropland

Artificially irrigated areas that would revert back to dry land should water application cease

# NOT Waters of the U.S.

Artificial, constructed lakes and ponds created in dry land (stock ponds, irrigation ponds, etc.)

Artificial reflecting pools or swimming pools created in dry land

Small ornamental waters created in dry land

Water-filled depressions created in dry land incidental to mining or construction activity

# NOT Waters of the U.S.

Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of “tributary”

Non-wetland swales and lawfully constructed grassed waterways

Puddles

Groundwater

Stormwater control features created on dry land

Wastewater recycling structures constructed in dry land (detention/retention basins, percolation ponds)

# NOT Waters of the U.S.

## Some Ditches

Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary

Ditches with intermittent flow that are not a relocated tributary or excavated in a tributary, or drain wetlands

Ditches that do not flow, either directly or through another water, into a Mainstay Water (a)(1) through (3)



# 3 BASIC CATEGORIES

Waters are put into 3 basic categories by the rule:

- (1) Waters that are jurisdictional in all instances
- (2) A narrow category subject to case-specific analysis to determine whether they are jurisdictional
- (3) Waters excluded from jurisdiction

# Waters that are Jurisdictional in All Instances

- Traditional navigable waters (“TNWs”)
- Interstate waters
- The territorial seas
- Impoundments
- Tributaries, as further defined in the rule
- Adjacent waters, as further defined in the rule

# Waters Subject to Case-Specific Significant Nexus Analysis

Analysis required for:

- The following waters are similarly situated and are to be combined, for the purposes of the significant nexus analysis, in the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea:

# Waters Subject to Case-Specific Significant Nexus Analysis

- Prairie potholes (upper Midwest)
- Carolina bays and Delmarva bays (along Atlantic coastal plain)
- Pocosins (central Atlantic coastal plain)
- Western vernal pools (California)
- Texas coastal prairie wetlands (Gulf Coast)

# Learn New Words!

- What's a Delmarva Bay?
- What's a pocosin?
- What's a vernal pool?

# More Waters Subject to Case-Specific Significant Nexus Analysis

All waters located within the 100-year flood plain of a TNW, interstate water, territorial sea, or impoundment of a jurisdictional water or a tributary.

# Rule's Definition of "Waters of the United States" at 33 CFR § 328.3(a)

Rule says there eight types of waters:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce ("TNWs")
- (2) Interstate waters, including interstate wetlands
- (3) Territorial seas

Those three are "**Mainstay Waters**"

# Rule's Definition of "Waters of the United States"

- (4) Impoundments of Waters of the U.S.
- (5) All tributaries of waters identified in (1) – (3) above
- (6) All waters adjacent to waters identified in paragraphs (1) – (5) above



# So, What's a Tributary?

- Previous definition of Waters of the U.S. regulated all tributaries without qualification
- Finally, in this rule, the agencies have provided a definition of “Tributaries”
  - A water must flow directly or through another water to a Mainstay Water [(a)(1) through (3)]
    - Perennial, intermittent, or ephemeral
  - AND**
  - Flow must have sufficient volume, frequency, and duration to create physical characteristics
    - Bed and Bank
    - Ordinary High Water Mark

# So, What's “Adjacent” Mean?

- **Bordering**
- **Contiguous**
- **Neighboring**
- Including waters separated from other waters of the U.S. by constructed dikes or barriers, natural river berms, beach dunes, and the like

# Rule's Definition of "Waters of the United States"

- Remember, the waters listed above are jurisdictional by rule: No significant nexus determination required.
- The identified tributaries and adjacent waters are considered as having a significant nexus to the 3 Mainstay Waters.

# Rule's Definition of "Waters of the United States"

(7) Prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands that have been determined on a case-specific basis to have a significant nexus to a TNW, interstate water, or territorial sea

# Rule's Definition of "Waters of the United States"

(8) All waters located within the 100-year flood plain of a mainstay water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a TNW, interstate water or territorial sea, impoundment or tributary, that are determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water or territorial sea.

# WOTUS, continued

For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain or within 4,000 feet. Waters identified in category (8) are not to be combined with adjacent waters when performing a significant nexus test. If waters are identified in this category (8) are also adjacent waters, then they are considered adjacent waters

# Adjacent Waters – (a)(6)

- Waters adjacent to (a)(1) through (5) are waters of the U.S.
- Entire water is adjacent if any portion is

# “Neighboring”

- All waters located in whole or in part within 100 feet of the ordinary high water mark of (a)(1) through (5).
- All waters within the 100-year floodplain of (a)(1) through (5) located in whole or in part within 1,500 feet of the ordinary high water mark.
- All waters in whole or in part within 1,500 feet of high tide line of TNW or territorial seas, and all waters located within 1,500 feet of the ordinary high water mark of the Great Lakes.



# Significant Nexus

- A water, including wetlands, which, 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 (a)(1) through (3).
- For an effect to be significant, it must be more than speculative or insubstantial.

# Functions Considered for Significant Nexus

These affect the integrity of Main Stay Waters:

- Sediment trapping
- Nutrient recycling
- Pollutant trapping
- Transformation, filtering, and transport
- Retention and attenuation of flood waters

# Significant Nexus

- Runoff storage
- Contribution of flow
- Export of organic matter
- Export of food resources
- Provision of life-cycle dependent aquatic habitat (foraging, breeding, etc.)

# “Similarly Situated” Waters – (a)(7)

- Prairie potholes, Carolina and Delmarva bays, pocosions, western vernal pools in CA, and TX coastal prairie wetlands
- Case-specific significant nexus determination required
  - If not jurisdictional under (a)(1) through (a)(6)

# “Similarly Situated” Waters – (a)(7)

- These waters must be assessed in combination with all waters of the same subcategory in the region identified “point of entry watershed”
- These waters shall not be combined with waters which are otherwise jurisdictional

# 100-Year Floodplain and 4,000-Foot Distance – (a)(8)

- Waters within 100-year floodplain of Mainstay Waters (but beyond 1,500 feet of ordinary high water mark)
- Waters within 4,000 feet of high tide line or ordinary high water mark of (a)(1) through (5)

# 100-Year Floodplain and 4,000-Foot Distance – (a)(8)

- Case-specific significant nexus determination required
- Entire water will be evaluated if only a portion is in either location mentioned above.

# What Does This Mean for the Agencies?

- USACE District offices may have different interpretations
- Districts need guidance from headquarters or EPA with respect to new rule implementation
- How will existing submittals be handled?



# What Does This Mean for YOU?

- Expect delays
- Processing and results will differ depending upon geography (**arid vs. humid**)
- Look for agencies' JDs on websites
- My advice: Get an experienced wetlands consultant (**“Professional Wetlands Scientist”**)

# What Does This Mean for YOU?

- Potential for waters and wetlands which were previously not jurisdictional to be considered jurisdictional, and vice versa
- Additional documentation and negotiation
- USACE will not reopen an approved Jurisdictional Determination (“JD”) unless requested by the requester or new information warrants revision

# What Does This Mean for **YOU**?

- Typically, agencies' actions are governed by the rule in effect at the time of issuance of a JD or permit authorization, not by the date of a permit application or JD request.
- The agencies expect “only a small portion” of pending actions will require additional information by the requester.

# Legal Status of Rule

- On October 9, 2015, the U.S. Court of Appeals issued an opinion staying the Clean Water Act nationwide.
- States said rule's definitions expanded the agencies' jurisdiction and would alter the balance of federal collaboration.

# Legal Status of Rule

- Court said it may not have jurisdiction but would issue stay pending that determination in a few weeks.
- Court also said that petitioner states have demonstrated a substantial possibility of success on the merits.

# Legal Status of Rule

- Respondents (EPA and Corps) failed to “identify anything . . . that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered.”

# Legal Status of Rule

- Thus, the public had no notice and opportunity to comment, which is required.
- Record “is devoid of specific scientific support for the distance limitations . . .” !

# Legal Status of Rule

- EPA had requested consolidation by the Judicial Panel on Multi-district Litigation in the Sixth Circuit. **Sorry now?**
- Decision is a major roadblock for the agencies.



# LEGISLATION

- Bills have been introduced to alter effect of rule.
- Some bills would require EPA and the Corps to consult with state and local officials on CWA jurisdiction issues.

# FOOTNOTE

The content of this PowerPoint was current as of October 9, 2015, but there may have been subsequent developments.

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