EPA's Expanded "Waters of the U.S." Definition: Navigating the Unprecedented Reach and Scope of New Rule

WEDNESDAY, MAY 28, 2014

1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

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Background and Basic Content of the Proposed Rule

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May 28, 2014
OVERVIEW OF PRESENTATION

- Riverside Bayview, SWANCC and Rapanos
- EPA Guidances
- The Proposed Rule
OVERALL HISTORICAL TIMELINE FOR WATERS OF THE UNITED STATES ("WOUS")

- 1972 - The Clean Water Act (CWA) is enacted
- 1974-1977 - Corps issues & revises early CWA jurisdictional rules
- 1977 - Congress amends the CWA
- 1985 - Supreme Court decides *Riverside Bayview Homes*
- 1986 - Corps issues the “migratory bird rule”
- 1987 - Corps publishes “Wetlands Delineation Manual”
- 2001 - Supreme Court decides *SWANCC*
- 2003 - Corps and EPA issue joint memorandum on *SWANCC*
- 2006 - Supreme Court decides *Rapanos*
- 2008 - Corps and EPA issue guidance on CWA jurisdiction after *Rapanos*
- 2011 - Corps and EPA release new draft guidance (never finalized)
- 2013 - EPA releases draft “Connectivity Report”
- 2014 - Corps and EPA release proposed rule for public comment

Red – Jurisdiction Arguably Reduced
Green – Jurisdiction Arguable Expanded
EARLY REGULATORY HISTORY

- 1972 – Congress enacts the Clean Water Act (CWA).

- 1974 – Corps issues first CWA jurisdictional rules.
  - Includes only traditional navigable waters. 33 C.F.R. § 209.120(d)(1) (1974).

  - Includes non-navigable waters, including tributaries and wetlands adjacent to other jurisdictional waters. Id. § 209.120(d)(2) (1976); § 323.2(a) (1978).

- 1977 – Congress amends the CWA.
  - After bi-cameral debate, definition of “navigable waters” is not circumscribed.

- 1982 – Corps further revises CWA jurisdictional rules.
  - Defines “WOUS” substantially the same as today. Id. § 323.2(a) (1983).
RIVERSIDE BAYVIEW HOMES, INC. (1985)
474 U.S. 121

**Facts:**
- **Wetlands abutting traditional navigable waters.**
- 80 acres of marshy land near the shores of Lake St. Clair in Michigan.
- Housing developer begins placing fill in preparation for construction.
- Corps obtains injunction in federal district court.
- Sixth Circuit Court of Appeals reverses:
  - “[B]ecause [the wetlands’] semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters.” 474 U.S. at 125.
RIVERSIDE BAYVIEW HOMES, INC. (1985)  
474 U.S. 121

- **Holding:**
  - Reversed. Corps may require permits for the discharge of fill on developer’s land.
  - “[W]e therefore conclude that a definition of [WOUS] encompassing **all wetlands adjacent to other bodies of water over which the Corps has jurisdiction** is a permissible interpretation of the [CWA].” 474 U.S. at 135.
  - However, this case involved a wetland that “**actually abuts on a navigable waterway.**” *Id.*

- **Rationale:**
  - The term “**navigable**” as used in the CWA is of “**limited import.**” *Id.* at 133.
  - Not unreasonable for the Corps to conclude that adjacent wetlands are “**inseparably bound up**” with WOUS, and thus are themselves jurisdictional waters under the CWA. *Id.* at 134.
  - “**Congress in 1977 acquiesced** in the Corps’ definition of waters as including adjacent wetlands.” *Id.* at 138.
WETLANDS DELINEATION MANUAL (1987)

- Regional Supplements
THE THREE PRONGED TEST

- Hydrophytic Vegetation
- Hydric Soils
- Wetlands Hydrology

- Often used to show that there is a connection between a some other location and a water of the United States when the connection is not apparent;
- Also used to demonstrate that the space between an isolated wetland and a water of the United States is not a nexus do to the lack of any evidence of wetlands characteristic.
Corps recodifies the definition of WOUS at 33 C.F.R. Part 328 (its current location).

- No substantial changes to the language of the rule.
- Corps “clarifies” in the preamble that WOUS include *any waters used as habitat by migratory birds* which cross state lines.
- Also “clarifies” jurisdiction over isolated waters that are:
  - Used as habitat by birds protected by Migratory Bird Treaties;
  - Used as habitat by endangered species;
  - Used to irrigate crops sold in interstate commerce.
**Facts:**

- **Isolated ponds visited by migratory birds** – approx. 121 observed species.
- Abandoned sand and gravel pit in Northern Illinois; old excavation trenches become permanent and seasonal ponds of varying size (from under 0.1 acre to several acres).
- Corps determines that ponds are jurisdictional, denies permit application.
- District court agrees with Corps.
- Seventh Circuit Court of Appeals affirms:
  - The CWA reaches as many waters as the Constitution allows.
  - The Commerce Clause allows regulation of these waters based on the “cumulative impact doctrine.” 531 U.S. at 166.
**SWANCC (2001)**

531 U.S. 159

- **Holding:**
  - Reversed. Migratory Bird Rule exceeds authority under the CWA.

- **Rationale:**
  - “It was the **significant nexus** between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes.*” 531 U.S. at 167.
  - **Cannot read “navigable” out of the statute.** *Id.* at 172.
  - Evidence of Congressional acquiescence to Corps regulation of isolated waters is less strong than with respect to adjacent wetlands. **No acquiescence to Migratory Bird Rule**, which was announced in 1986. *Id.* at 170-71.
  - The Court reads the CWA to avoid the **significant constitutional questions** raised by the Corps’ broad jurisdictional interpretation. *Id.* at 172-74.
“Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands).”

Field staff should not assert jurisdiction over isolated waters based on any of the factors listed in the Migratory Bird Rule.

Field staff should seek HQ approval prior to asserting jurisdiction over isolated waters based on factors at 33 C.F.R. § 328(a)(3)(i)-(iii).

(i) potential use by interstate or foreign travelers;
(ii) presence of fish or shellfish that could be taken and sold in interstate commerce;
(iii) potential use for industrial purposes by industries in interstate commerce.
Facts (two consolidated cases):

- **Wetlands adjacent to ditches/drains.**

- **Rapanos** – knowingly filled 54 acres of “wetlands” on 3 parcels.
  - One connected to a drain, which flows into a creek, which flows into the Kawkawlin River.
  - One connected to a drain, which flows into the Tittabawassee River.
  - One connected to the Pine River, which flows into Lake Huron.

- **Carabell** – appeals Corps’ permit denial.
  - Wetland separated by an impermeable berm from a ditch, which emptied into another ditch, which drains to a creek, which flows into Lake St. Clair.

In both cases, jurisdiction was upheld by the district court and the Sixth Circuit Court of Appeals.
**RAPANOS (2006)**
547 U.S. 715

- **Holding:**
  - Vacated & remanded for reevaluation under the proper legal standard.

- **Rationales – there are two!**
  - **Plurality** (four Justices) – Jurisdiction only extends to:
    - *Relatively permanent bodies of water* connected to traditional navigable waters (those commonly described as streams, oceans, rivers, and lakes). 547 U.S. at 739.
      - Based on the plain meaning and dictionary definition of the phrase “the waters.”
    - *Wetlands with a continuous surface connection to these waters*, such that it is difficult to determine where the “water” ends and the “wetland” begins. *Id.* at 742.
      - Based on the boundary-drawing problem first noted in *Riverside Bayview Homes*. 
RAPANOS (2006)
547 U.S. 715

Rationales (continued):

Justice Kennedy:

- “[J]urisdiction over wetlands depends upon the existence of a **significant nexus** between the wetlands in question and [traditional] navigable waters.” 547 U.S. at 779.
  - Based on language from *Riverside Bayview Homes* and *SWANCC*.
  - “Wetlands possess the requisite nexus . . . if the wetlands, **either alone or in combination with similarly situated lands in the region**, significantly affect the chemical, physical, and biological integrity of” traditional navigable waters. *Id.* at 779-80.

- Wetlands adjacent to navigable-in-fact waters: may rely on adjacency alone.
- Wetlands adjacent to tributaries: must establish significant nexus.
  - But Corps may craft rules identifying categories of tributaries that are significant enough that their adjacent wetlands are jurisdictional by rule. 547 U.S. at 780-82.
Dissent (four justices):

- Would have upheld jurisdiction over all wetlands at issue, and all other wetlands adjacent to tributaries of waters of the United States.
  - *Riverside Bayview Homes* “squarely controls” this case. 547 U.S. at 792.
  - Deference to Corps interpretation of the CWA.

- Direction to lower court on remand: uphold jurisdiction if either the plurality or Kennedy test is satisfied. *Id.* at 810.
  - Most, but not all, lower courts have agreed with this interpretation.
The agencies will always assert jurisdiction over:

- Traditional navigable waters (TNWs).
- Wetlands adjacent to TNWs.
- Tributaries of TNWs that are relatively permanent (typically flow-year round or have continuous flow at least seasonally – typically three months).
- Wetlands that directly abut such tributaries.

The agencies will assert jurisdiction over the following waters if they have a significant nexus to TNWs:

- Tributaries that are not relatively permanent.
- Wetlands adjacent to such tributaries.
- Wetlands adjacent to, but not directly abutting, relatively permanent tributaries.
The agencies will “generally not” assert jurisdiction over:

- **Swales** or **erosional features** (e.g., gullies, small washes characterized by low volume, **infrequent**, or **short duration** flow).
- **Ditches** excavated in and draining only uplands and that do not **carry relatively permanent flow**.

The Significant Nexus Test:

- “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.”
- “Significant nexus includes consideration of **hydrologic** [i.e., flow] and **ecologic** [i.e., functions] factors.”
More expansive than the 2008 guidance.

Basic framework is similar to the 2008 guidance, with several exceptions, including:

- Provides for application of the significant nexus test to “other waters,” in addition to adjacent wetlands.
  - Lakes, ponds, and other non-wetland waters that are “adjacent” to other jurisdictional waters.
  - Isolated wetlands and waters.
- Treats “interstate waters” (regardless of navigability) the same as TNWs.
- Alters the list of waters that are “generally not” jurisdictional.
  - Qualification of exclusions for ditches and swales.
  - Several other types of artificial insignificant waters are added to the list.
2011 DRAFT GUIDANCE
HTTP://WATER.EPA.GOV/LAWSREGS/GUIDANCE/WETLANDS/UPLOAD/WOUS_GUIDANCE_4-2011.PDF

- **Significant Nexus Analysis:**
  - “Similarly situated” means all waters of the same resource type.
    - (a) tributaries;
    - (b) adjacent wetlands; or
    - (c) proximate other waters.
  - “In the region” means in the watershed of the nearest TNW.

- **Tributaries:**
  - Characterized by a **channel** with defined bed and banks and an **OHWM**.
  - Can be **natural**, **man-altered**, or **man-made**.
  - **Contributes flow**, either directly or indirectly, to a TNW or interstate water.
  - “Relatively permanent” = **seasonal flow** (flow during wet seasons most years).
  - If not relatively permanent, still jurisdictional under significant nexus test if tributary system can transport pollutants to a TNW (**basically all tributaries**).
DRAFT CONNECTIVITY REPORT (SEPT. 2013)
HTTP://OFMPUB.EPA.GOV/EIMS/EIMSCOMM.GETFILE?P_DOWNLOAD_ID=515649

- **Major Conclusions:**

  - **All tributary streams**, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.

  - **All wetlands and open waters in riparian areas and floodplains** are physically, chemically, and biologically connected with downstream rivers.

  - **Isolated wetlands** – current literature is insufficient to generalize about the connectivity or downstream effects of isolated wetlands.

- EPA Scientific Advisory Board (SAB) panel is reviewing the report.
- Not yet approved by the EPA SAB or Administrator.
Would make the following categories of waters jurisdictional by rule:

- **All “tributaries”** (not just those that are relatively permanent).
- **All waters (including wetlands) “adjacent” to tributaries.**
  
  33 C.F.R. § 328(a)(5) & (6).

- All other waters (with limited exceptions) would be subject to jurisdiction on a case-by-case basis under the significant nexus test. *Id.* § 328(a)(7).

**New definitions:**

- Adjacent;
- Neighboring;
- Riparian area;
- Floodplain;
- Tributary;
- Significant nexus. *Id.* § 328(c).
IS THIS WHAT THE PROPOSAL IS REALLY ABOUT?

See video #1

See video #2

See video #3
PROPOSED RULE (2014)
WWW.GPO.GOV/FDSYS/PKG/FR-2014-04-21/PDF/2014-07142.PDF

- **Codifies exclusions** for some ditches and other artificial waters:
  - Ditches that are excavated *wholly* in uplands, drain only uplands, and have **less than perennial flow**.
  - Ditches that **do not contribute flow**, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas.
  - Artificially irrigated areas that **would revert to upland** should application of irrigation water to that area cease.
  - Artificial lakes or ponds created by **excavating and/or diking dry land and used exclusively for** such purposes as stock watering, irrigation, settling basins, or rice growing.
  - Artificial reflecting pools or swimming pools created by **excavating and/or diking dry land**.
  - **Small ornamental waters** created by excavating and/or diking dry land for **primarily aesthetic reasons**.
  - Water-filled depressions created **incidental to** construction activity.
  - Groundwater, including groundwater drained through subsurface drainage systems.
  - Gullies and rills and non-wetland swales. 33 C.F.R. § 328(b).

- Also, a separate “interpreting rule” exempting discharges associated with specific NRCS conservation practices under 33 U.S.C. § 1344(f)(l)(A).
EPA’s “Waters of the United States” Proposal

James T. Banks
Clean Water Act Jurisdiction

= Waters of the United States

- Section 301 (33 U.S.C. § 1311)
- Section 311 (33 U.S.C. § 1321)
  - Spill prevention/liability
- Section 402 (33 U.S.C. § 1342)
  - Discharge of a pollutant
  - Stormwater
- Section 404 (33 U.S.C. § 1344)
  - Dredged or fill material
“Waters of the United States” Proposal

What’s In

• Jurisdictional By Rule
  – The Big Three
    • Navigable waters, interstate waters, territorial seas
  – Tributaries—newly defined
  – Adjacent waters and wetlands

• Case-by-Case Basis
  – “Other” waters—significant nexus test
“Waters of the United States” Proposal

What’s Out

• Preexisting exemptions
  – E.g., prior converted cropland

• New categories
  – Gullies
  – Rills
  – Non-wetland swales
  – Upland ditches (limited)
What is Changing?

• The Big Three – No Changes

• Changes; Focus for Discussion:
  – Tributaries
  – Adjacent Waters
  – “Other” Waters
1. A “water” with stream-like physical characteristics, i.e. “a bed, banks, and ordinary high water mark,” that “contributes flow,” directly or through “another water,” to:

A. The Big Three;
B. An impoundment of The Big Three; or
C. An impoundment of a “tributary”
Tributary: Ordinary High Water Mark

- 33 C.F.R. § 328.3(e)
  - “Ordinary high water mark” means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
2. A wetland, lake, or pond that “contributes flow,” directly or through “another water,” to The Big Three.
Tributary

- Pond
- Embankment
- Overland Fill and Spill
- Pond
- Creek
- Ephemeral Stream
- River
Tributary Characteristics

- Can be natural, man-altered, or man-made
- Can be discontinuous
- Flow can be perennial, intermittent, or ephemeral
Tributary: Departure from the 2011 Draft Guidance

Added Part 2 – Wetland, lake, or pond

Need not be “relatively permanent” flow
Tributary Characteristics

Adjacent Waters

- Waters “adjacent” to:
  1. The Big Three
  2. Impoundments of The Big Three
  3. Tributaries
- EPA’s examples: Ponds & oxbow lakes
Adjacent Waters: Definitions and Terms

Adjacent = Bordering, contiguous, or “neighboring”

- “Neighboring”
  - “Within the riparian area or floodplain” of (1)-(3); or
  - With a shallow subsurface connection or confined surface connection to (1)-(3)

- How far does the riparian area extend landward? “Reasonable proximity”

- “Floodplain” – An area bordering inland or coastal waters that . . . is inundated during periods of moderate to high water flows”
  - How high is “high water flow”? 100-yr. flood? 500-yr. flood?
Adjacent Waters

- Pond
- Embankment
- Creek
- Ephemeral Stream
- River
- Pond
Adjacent Waters: Take Away

• Substantial expansion of “waters of the United States”
  – Formerly, just adjacent wetlands
  – Very broad definition of neighboring
  – Open-ended use of “riparian area” and “floodplain”
“Other Waters” Under the Current Rule – Effects on Interstate or Foreign Commerce

40 C.F.R. § 122.2:

(c) All other waters such as intra-state lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;
Other Waters Under the Proposed Rule – Is there any limit?

- Case-specific basis
- Waters that “alone, or in combination with other similarly situated waters . . . in the same region, have a significant nexus to” The Big Three
- “Waters”?
  - Possibly mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, vernal pools
Other Waters: Definitions & Terms

• “Same Region” – The watershed that drains to the nearest of The Big Three

• “In Combination With” – Anyone’s guess

• “Similarly Situated” – Perform similar functions located sufficiently close together to be “evaluated as a single landscape unit” with regard to their effects on The Big Three

• “Significant Nexus” – Significantly affects the chemical, physical, or biological integrity of The Big Three
  – Must be “more than speculative or insubstantial”
  – Effects can be due to isolation
Other Waters in the Real World
Other Waters: Take Away

A Few of the Many Issues:

1. "Waters"?
2. What are effects on "biological integrity"?
3. Is any, relatively minor, non-speculative effect considered "significant"?
4. "In combination with" tributaries and adjacent waters?
5. Case-by-case. What process? Establish through citizen suit?
Exclusions

A. Waste treatment systems designed to meet CWA requirements
B. Prior converted cropland
C. Ditches excavated in uplands with less than perennial flow
D. Ditches that do not contribute flow to:
   1. The Big Three
   2. Impoundments of The Big Three
   3. Impoundments of tributaries
Exclusions

E. Features:

- Artificial ponds & pools
- Irrigated “areas”
- Water-filled depressions created “incidental to” construction activity
- Groundwater
- Gullies, rills, and non-wetland swales
Big Picture

• Expansion of Jurisdiction?
  – Ignores SWANCC: “other waters,” and perhaps even “adjacent waters” can be physically isolated intrastate waters
  – Ignores Scalia in *Rapanos*: “tributaries” can be infrequent trickles
  – Exaggerates Kennedy in *Rapanos*: “significant nexus” was suggested for wetlands adjacent (and hydrologically connected) to tributaries; now applies to all “other waters”
EPA’s House of Cards

“OTHER WATERS” WITH SIGNIFICANT NEXUS

Bordering, Contiguous

Neighboring

Adjacent Waters

Streams that contribute some flow

Tributaries

Ponds, etc. that contribute flow

The Big Three

Navigable

Interstate

Sea
Contact

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Looking Ahead: Practical Implications and Potential Challenges

Kathryn Kusske Floyd
EPA’s Claims

- The Proposed Rule does NOT:
  - Broaden historical CWA coverage
  - Regulate groundwater
  - Regulate land use
  - Protect new types of water
  - Expand regulation of ditches
  - Remove existing statutory/regulatory exemptions
EPA’s Connectivity Report

- Suggests a gradient of connection between categories of “other waters” and large rivers and other large waters downstream
- Can’t protect larger water bodies without protecting the streams and tributaries that feed them
- Currently being reviewed by EPA’s Science Advisory Board
EPA: Benefits of the Proposed Rule

- Environmental Benefits
  - reduced flooding
  - filtering pollution
  - wildlife habitat
  - supporting hunting and fishing
  - recharging groundwater

- Increased certainty and efficiency
Congressional Research Service View

- Proposed Rule will expand CWA jurisdiction
- Language of the rule is more inclusive than current Guidelines (e.g., not just wetlands adjacent to a traditionally navigable water are jurisdictional, all waters)
- Contrast with EPA, which claims that just 3 percent more waters will be subject to CWA
May 1 Letter from 231 Members

- Aggressively expands federal authority under the CWA, bypassing Congress
- Creates unnecessary ambiguity (heavily relying on undefined or vague concepts such as “riparian areas,” “landscape unit,” “floodplain”)
- Leads to confusion in the areas of extensive state regulation of point sources
- Incomplete scientific and economic analysis
Direct Costs of the Proposed Rule

- Delay in acquiring 404 permit
  - Administrative burdens for applicants
  - Confusion caused by transitioning to new rule with new requirements
  - Case-by-case jurisdictional determinations

- Some Corps districts may already be applying the proposed rule, to avoid disagreements with EPA
Risks Created by Proposed Rule

- Additional compensatory mitigation
- Confusion between current guidance and proposed rule
- Jurisdictional determinations through citizen suits
- Expiring, unused permits may be subject to proposed rule
Ripple Effects

- Increasing Corps CWA jurisdiction will also increase applicability of other federal environmental laws (e.g., NEPA, NHPA, ESA)
- Broadening definition of jurisdictional waters will make it more difficult to qualify for nationwide permits
- More jurisdictional waters could mean more enforcement actions against accidental discharges and spills
Timing Questions

- Will the comment period be extended?
- Is EPA willing to finalize prior to Science Advisory Board review of Connectivity Study?
- What effect will mid-term elections have?
Potential Legal Challenges

- Prima facie challenge
  - Rule is arguably inconsistent with Supreme Court precedent (SWANCC, Rapanos)
  - Rule renders statutory term “navigable waters” meaningless
  - How much deference is due to EPA’s interpretation of the CWA?
Potential Legal Challenges

- As-applied challenge
  - “Significant nexus” test will eventually be applied in “real-life” circumstances
  - Application will give meaning to vague terms like “similarly situated wetlands” and “single landscape unit”
  - As-applied challenges allow courts to apply common sense meaning of “waters” and “wetlands” to specific situations
Crystal Ball

- Never trust a crystal ball (or the US Supreme Court)
  - Judges are individuals, and you never know which one you’re going to get
  - The Supreme Court has recently narrowed the scope of the CWA, but key members of the Court could be gone by the time this case is there
  - Rapanos is a divided decision that may not be reliable precedent
Prima Facie v. As-Applied

- The ambiguity in the rule gives EPA “wiggle room” in a prima facie challenge
- EPA can take better advantage of judicial deference in a prima facie challenge
- Once the rule is applied in an unreasonable manner, EPA has to defend a specific decision
- Deference still applies, but the context matters
Next Steps

- Comments on the proposed rule (July 21)
  - Various industry groups are commenting
  - Focus on practical implications and legal flaws
  - Must comment to have standing to sue

- Communication with Corps districts
  - Consider whether Corps is already applying proposed rule
  - Identify any expansions of jurisdiction

- Contact members of Congress
Thank You

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