

The New Clean Water Rule

What You Need to Know

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What We'll Cover

- **Basis and Rationale for new Clean Water Rule**
- **New Clean Water Rule implementation timeline**
- **What the new Rule does and doesn't do**
- **New definition of Waters of the U.S.**
- **What it means for the Agencies (USACE & EPA)**
- **What it means for you**

Section 404 of the Clean Water Act

- Establishes a program to regulate the discharge of dredged and/or fill material into Waters of the U.S., including jurisdictional wetlands
- Responsibility for administering and enforcing Section 404 is shared between the EPA and USACE
- USACE handles the day-to-day regulatory aspects
- EPA has ultimate authority for jurisdictional determinations (JDs)
- USACE has authority for Waters of the U.S. and wetland determinations

Section 404 of CWA Confusion

- **Protection for many of the nation's streams and wetlands has been complex and time-consuming since Supreme Court decisions in 2001 and 2006**
- ***SWANCC v. USACE (2001)***
 - Court ruled that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for regulatory authority under the CWA.
- ***Rapanos v. United States (2006)***
 - Waters of the U.S. encompasses some waters that are not navigable
 - Justice Kennedy: “Significant Nexus”

Why the New Rule?

- **EPA and USACE have received many requests for a rulemaking to provide clarity from many stakeholders including:**
 - **Congress**
 - **State and Local Governments**
 - **Agricultural Community**
 - **Conservation Groups**
 - **Private Sector**
 - **Public**

Clean Water Rule Timeline

- September 2013: EPA publishes “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”
 - Report was later finalized in Jan. 2015
 - Based on a review of more than 1,200 peer-reviewed publications
- Report provides much of the technical basis for new Rule
 - 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

Clean Water Rule Timeline ctd.

- April 2014: EPA and USACE released a Draft of the Definition of Waters of the U.S.
 - Solicited comments via Public Notice for more than 200 days
 - 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 Clean Water Rule – would be final 60 days after being published in the Federal Register
- The new Clean Water Rule is effective as of....

August 28, 2015

What Does the New Rule Do?

- “Ensures that waters protected under the CWA are more precisely defined, more predictably determined, and easier for businesses and industry to understand”
- Enhance protection for the nation’s aquatic resources
- Increase CWA program predictability and consistency
- Allow agencies to make categorical determinations of jurisdiction, particularly with respect to “other waters”
- Define “significant nexus,” “neighboring,” “tributary,” “floodplain,” and “riparian area”
- Reduce documentation requirements and timeframes to make AJDs by decreasing the number of JDs that require case-specific significant nexus analysis

What Does the New Rule NOT Do?

- **Protect any types of waters that have not historically been covered by the CWA**
- **Regulate most ditches**
- **Apply to groundwater**
- **Eliminate previous exemptions**
- **Interfere with or change private property rights**
- **Cover erosional features such as gullies, rills, and non-wetland swales**

What are Waters of the U.S.? ctd.

33 CFR 328.3(a)

Eight Categories of Jurisdictional Waters

“Mainstay Waters”

- **(1):** All waters which are currently used, or were used in the past, or may be susceptible to use in the future in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide
 - Traditional Navigable Waters (TNWs)
- **(2):** All interstate waters, including interstate wetlands
- **(3):** Territorial Seas

What are Waters of the U.S.? ctd.

33 CFR 328.3(a)

- **(4):** Impoundments of Waters of the U.S.
- **(5):** All tributaries of waters identified in paragraphs (1) through (3) (Mainstay Waters) – more on this later!
- **(6):** All waters adjacent to waters identified in paragraphs (1) through (5) - more on this later!

Waters in (a)(1) through (6) are jurisdictional by rule – no additional analysis is required. Therefore, a case-specific significant nexus determination is not necessary. Covered tributaries and covered adjacent waters have a significant nexus to the Mainstay Waters.

What are Waters of the U.S.? ctd.

33 CFR 328.3(a)

Jurisdictional based on case-specific significant nexus determination:

- **(7):** Five types of waters which have been determined to be “similarly situated” and should be considered in combination in a significant nexus analysis.
 - 1. Prairie Potholes
 - 2. Delmarva and Carolina bays
 - 3. Pocosins
 - 4. Western vernal pools in California
 - Texas coastal prairie wetlands

- **(8):** Waters located within 100-year floodplain of Mainstay Waters and waters located within 4,000 feet of high tide line or ordinary high water mark of (a)(1) through (5). – more on this later!

Tributaries– (a)(5)

- **Previous definition of Waters of the U.S. regulates all tributaries without qualification**
- **For the first time, 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**
 - **Flow must have sufficient volume, frequency, and duration to create physical characteristics**
 - **Bed and Bank**
 - **Ordinary High Water Mark**

Adjacent Waters – (a)(6)

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

“Similarly Situated” Waters – (a)(7)

Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in CA, & TX coastal prairie wetlands

Case-specific significant nexus determination required
– If not jurisdictional under (a)(1) through (a)(6)

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

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 (EPA has final say for jurisdictional status)

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

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. ctd.

Erosional features, including gullies, rills, and other ephemeral features that do not meet tributary definition

Non-wetland swales and lawfully constructed grassed waterways

Puddles

Groundwater

Stormwater control features created in dry land

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

NOT Waters of the U.S. ctd.

Some Ditches

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

Ditches with intermittent flow that are not a relocated 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)

What Does This Mean for the Agencies?

What hasn't changed is that each USACE District operates and behaves differently – different interpretations

Based on direct communication with the USACE, Districts have yet to be provided guidance with respect to new rule implementation

Unclear objectives

How will existing submittals be handled?

What Does This Mean for YOU?

Expect regulatory delays, at least up-front during the initial stages of rule implementation

- Don't expect expeditious responses from USACE PMs

Processing/findings/results/determinations will differ geographically (arid/dry vs. humid/wet)

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 (AJD) 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 recognize that there are pending actions

The Agencies expect “only a small portion” of pending actions will require additional information by the requester

Hot Off The Press!

A federal judge in North Dakota acted late Thursday to block the Clean Water Rule hours before it was due to take effect

Judge Ralph Erickson found that the 13 states suing to block the rule met the conditions necessary for a preliminary injunction

Decision is a major roadblock for the Agencies

The Obama Administration says it will largely enforce the Clean Water Rule as planned, arguing that the decision only applies to the 13 states that requested the injunction.

Alaska

Nebraska

Arizona

New Mexico

Arkansas

Nevada

Colorado

North Dakota

Idaho

South Dakota

Missouri

Wyoming

Montana

Questions ???



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