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U.S EPA/Corps' Proposed Rule Redefining Federal Jurisdiction Under the Clean Water Act

Presented to:

Council of Industrial Boiler Owners
Energy & Environment Meeting
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The Bottom Line...

- “Navigable waters” will essentially mean all waters
- Waters – including ditches and other man-made features – will be regulated even if located miles from the nearest traditional “navigable waters”
- Jurisdiction extends to tributaries... even if intermittent or ephemeral; adjacent waters; geographically isolated waters; or waters that might significantly affect “navigable waters”
- No real breaks for agricultural... exemptions do not exclude ordinary farming that might impact “navigable waters” (e.g., pest and weed control, fertilizer use and other common soil management activities)



WOTUS Timeline

- 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 *United States v. Riverside Bayview Homes*
- 1986 - Corps issues the “migratory bird rule”
- 1987 - Corps publishes “Wetlands Delineation Manual”
- 2001 - Supreme Court decides *SWANCC v. USACE*
- 2003 - Corps and EPA issue joint memorandum on *SWANCC v. USACE*
- 2006 - Supreme Court decides *Rapanos v. United States*
- 2008 - Corps and EPA issue new guidance after *Rapanos v. United States*
- 2011 - Corps and EPA release new draft guidance (never finalized)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



Court Rulings *(or lack thereof)*

The CWA has never clearly defined federal jurisdiction...

- *United States v. Riverside Bayview Homes*, 474US121 (1985) Supreme Court ruled CWA authority over wetlands adjacent to “navigable-in-fact” open waters
- *SWANCC v. USACE*, 531US159 (2001) Supreme Court ruled isolated, non-navigable intrastate waters are not subject to CWA jurisdiction solely on the basis of supporting migratory birds
- *Rapanos v. United States*, 547US715 (2006) Supreme Court was divided in ruling a stream or wetland is subject to the CWA only when there is a “significant nexus” to navigable water, especially for isolated wetlands, ephemeral streams and small water bodies where the connection to navigable water is not obvious





Key terms and concepts important to interpreting federal jurisdiction

- Landscape jurisdiction
- Upland features
- Tributaries
- Adjacent and neighboring waters
- Navigability and navigable waters
- Ditches
- Groundwater

- Connectivity
- Significant nexus
- Similarly situated





Life After *Rapanos*...

2008 EPA/Corps Guidance



Clean Water Act Jurisdiction
Following the U.S. Supreme Court's Decision
in
Rapanos v. United States & Carabell v. United States



This memorandum¹ provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States*² (herein referred to simply as "*Rapanos*") which address the jurisdiction over waters of the United States under the Clean Water Act.³ The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- 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)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

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

The agencies will apply the significant nexus standard as follows:

- 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 and ecologic factors

¹ This guidance incorporates revisions to the EPA/Army Memorandum originally issued on June 6, 2007, after careful consideration of public comments received and based on the agencies' experience in implementing the *Rapanos* decision.

² 126 S. Ct. 2208 (2006).

³ 33 U.S.C. §1251 et seq.

December 02, 2008

Clean Water Act Jurisdiction

- EPA/Corps will always assert jurisdiction over:
 - Traditional navigable waters (TNWs),
 - Wetlands adjacent to TNWs,
 - Tributaries of TNWs that are relatively permanent,
 - Wetlands that directly abut such tributaries.

The Significant Nexus Test

- "... assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary..."
- "... determine if [tributary] significantly affects the chemical, physical and biological integrity of downstream traditional navigable waters."
- "... includes consideration of hydrologic [i.e., flow] and ecologic [i.e., function] factors."



Life After *Rapanos*...

2011 EPA/Corps Guidance



Draft Guidance on Identifying Waters Protected by the Clean Water Act

This draft guidance clarifies how the Environmental Protection Agency (EPA)⁶ and the U.S. Army Corps of Engineers (the Corps)⁷ will identify waters protected by the Federal Water Pollution Control Act Amendments of 1972⁸ (Clean Water Act or CWA or Act) and implement the Supreme Court's decisions concerning the extent of waters covered by the Act (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC)⁹ and *Rapanos v. United States* (Rapanos)).¹⁰ This document clarifies how the EPA and the Corps understand existing requirements of the CWA and the agencies' implementing regulations in light of SWANCC and Rapanos and provides guidance to agency field staff in making determinations about whether waters are protected by the CWA.

This draft guidance document is intended to describe for agency field staff the agencies' current understandings; it is not a rule, and hence it is not binding and lacks the force of law. Once finalized, this guidance will supersede existing guidance to field staff issued in 2003 and 2008 on the scope of "waters of the United States" (also "waters of the U.S.") subject to CWA programs.¹¹ Although guidance does not have the force of law, it is frequently used by Federal agencies to explain and clarify their understandings of existing requirements. In this case, the agencies believe that field staff across the country will benefit from new guidance that is informed by lessons learned since 2008 and that reflects the agencies' understandings with respect to CWA jurisdiction, consistent with Supreme Court decisions and existing agency regulations. Each jurisdictional determination, however, will be made on a case-by-case basis considering the facts and circumstances of the case and consistent with applicable statutes, regulations, and case law.

After receiving and taking account of public comments on this document, EPA and the Corps expect to finalize it and to undertake rulemaking consistent with the Administrative Procedure Act. This process is expected to start with a proposed rule, to clarify further via regulation the extent of Clean Water Act jurisdiction, consistent with the Court's decisions. EPA and the Corps decided to begin this process with draft, nonbinding guidance in order to clarify their existing understandings while also considering and receiving the benefit of public comments.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and this guidance will help the agencies implement specific provisions of the Act to achieve this objective.¹² The CWA has a number of programs designed to protect and restore the Nation's waters. Together, these programs provide effective protection from pollution for waterbodies across the country, including waters that

⁶ To increase clarity of this document, endnotes that primarily provide citations will be indicated with Arabic numerals, and footnotes that provide additional substantive information will be indicated with Roman numerals.

⁷ EPA Regions will use this guidance to oversee and implement programs under the Clean Water Act, including those under sections 303, 311, 401, 402 and 404, 33 U.S.C. §§ 1313, 1321, 1341, 1342 and 1344. (See endnote 1 for an explanation of the relevant history of the Clean Water Act.)

⁸ Corps Districts will utilize this guidance to implement Clean Water Act section 404, 33 U.S.C. § 1344.

⁹ Specifically, this memorandum supersedes the "Joint Memorandum" providing clarifying guidance on SWANCC, dated January 15, 2003 (68 Fed. Reg. 1991, 1995), and "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," dated December 2, 2008.

"Similarly situated"

- Determined in the absence of site-specific information...
- A means to evaluate waters using information obtained for a water from a different location...

Tributaries

- Characterized by a channel with defined bed and banks and high-water mark...
- Natural, man-altered or man-made...
- Contributes flow either directly or indirectly, to a TNW or interstate water...

"Relatively permanent"

- Seasonal flow during wet seasons most years...
- If not relatively permanent, still jurisdictional under significant nexus test if tributary system is capable of transporting pollutants to a TNW...



Life After *Rapanos*...

2014 CWA Proposed Rule



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Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency

40 CFR Parts 110, 112, 116, et al.
Definition of "Waters of the United States" Under the Clean Water Act;
Proposed Rule



2014 Proposed Rule on CWA Jurisdiction

WHAT THE RULE DOES

- Reduces confusion about Clean Water Act protection
- Clarifies types of waters covered under Clean Water Act
- Saves businesses time and money
- Provides more benefits to public than costs
- Helps states to protect their waters

WHAT THE RULE DOES NOT DO

- Does not protect any new types of waters
- Does not broaden coverage of the Clean Water Act
- Does not regulate groundwater
- Does not expand jurisdiction over ditches

STREAMS AND WETLANDS MATTER

- Streams and wetlands benefit communities
- Streams and wetlands are economic drivers
- Upstream waters impact downstream waters
- Streams provide drinking water for 1 in 3 people

BENEFITS FOR AGRICULTURE

- Input from agriculture community shaped the proposal
- Exemptions and exclusions are preserved
- Over 50 conservation practices exempt from permitting
- Notice or permit not needed for certain NRCS practices



Key Documents Supporting Proposed Rule

April 2011

“Potential Indirect Economic Impacts and Benefits Associated with Guidance Clarifying the Scope of the Clean Water Act”

Sept. 2013

“Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”

March 2014

“Economic Analysis of Proposed Revised Definition of Waters of the United States”

“US Environmental Protection Agency and US Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)”

“NRCS Conservation Practice Standards Exempt from Permitting Under Clean Water Act Section 404(f)(1)(A)”



“Connectivity of Streams and Wetlands to Downstream Waters: Review and Synthesis of the Scientific Evidence”

Science foundation failed to...

1. Establish a "bright line" definition of significant nexus
2. Provide technically defensible definition of “connectivity”
3. Distinguish significance of size, permanence, land use or function
4. Recognize or address scientific uncertainties
5. Identify, measure, and monitor the functions and features that characterize the biological, chemical, hydrologic and physical connections
6. Provide a quantitative basis for determining at what point “connectivity” in a stream or wetland landscape becomes significant and contributes to the chemical, biological, hydrological and physical functions of downstream “waters of the US”
7. Acknowledge that quantitative connections between the abiotic and biotic compartments have not fully matured technically in the scientific literature for several US regions, particularly the Gulf Coast and Arid West regions



“Economic Analysis of Proposed Revised Definition of Waters of the United States”

Numerous uncertainties...

1. Economic impact to due increased area of waters of the US
2. Economic impact from potential operational costs
3. Cost implications related to potentially new land holdings
4. Cost implications related to estimates of compensatory mitigation for lands impacted by jurisdictional boundary changes
5. Cost implications related to the potential loss of current and future business activity in a newly created jurisdiction
6. Costs due to additional environmental and regulatory screening, wetland and waters delineation studies and permit acquisition
7. Costs due to permitting delays (from additional agency review)
8. Costs due to additional wastewater treatment needs
9. Costs due to changes in land management approaches (i.e., pesticide application, water resource protection, infrastructure maintenance, fish and wildlife protection, historical structure designations, safety structures, public access, etc.)
10. Costs due to additional insurance requirements



“US Environmental Protection Agency and US Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)”

For the Farming Community, relax...

- Rule continues existing statutory and regulatory exemptions from Section 404 permitting requirements for farming, silviculture and ranching practices where activities are part of an ongoing farming, ranching or forestry operation
- 53 additional agricultural exemptions
 - Consistent with Natural Resources Conservation Service (NRCS) conservation practice standards
- Guidance only, and does not have the force of law
- Exemptions do not apply if there is a change of land use
 - Activities leading to high quality water features are likely to be fall under CWA regulated

But...

- Exemptions are not an exclusion from federal CWA jurisdiction
 - Unclear who inspects and enforces compliance with NRCS guidelines



Errr.... What About Ditches?

- The proposed rule, if adopted, will specifically define **ditches** as jurisdictional tributaries under all CWA programs:
 - Roadside ditches
 - Irrigation ditches
 - Storm water ditches
- Other man-made conveyances that drain or connect would also likely qualify as tributaries.





The Bottom Line...the Proposed Rule is far from Perfect

Broader in Scope

- EPA/Corps claim no jurisdiction over any new types of waters
- ***The proposed rule provides essentially no limit to CWA federal jurisdiction***

Inconsistent with the Courts

- EPA/Corps claim consistency with *SWANCC* and *Rapanos*
- ***The Supreme Court made clear there is a limit to federal jurisdiction***

Poor Economic Assessment

- EPA/Corps claim business will benefit from greater efficiencies
- ***The agencies economic analysis is flawed***

Inadequate Science

- EPA/Corps point to strong science foundation, well accepted by the scientific community
- ***The science review is limited, incomplete and not widely endorsed***

Fails to Provide Clarity

- EPA/Corps claim credit for relief from long-standing regulatory uncertainties
- ***Key concepts remain unclear, undefined, or subject to agency discretion***



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