Waters of U.S Rule Update
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Clean Water Act Jurisdiction

- “Navigable Waters” as defined as “Waters of the United States including the Territorial Seas” 33 U.S.C 1362 (7) and 33 CFR 328.3 (a) (Corps def.), 40 CFR 122.2 (EPA Def.) (Includes wetlands adjacent to “waters.”)

- Corps is primary federal agency for making jurisdictional calls. EPA has final authority over CWA jurisdiction (AG Civilettei 1979 Legal Op.)

- Three Major Supreme Court decisions affecting CWA jurisdiction
  
  (a) U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985) --- CWA jurisdiction over wetlands adjacent to navigable waters

  (b) SWANCC v. Corps, 531 U.S. 159 (2001) – No CWA jurisdiction over isolated intrastate waters based on use by migratory birds. Does not reach Question of jurisdiction over non nav. Tributaries but introduces concept of “significant nexus.”
(c) Rapanos v. United States, 547 U.S. 715 (2006) (Jurisdiction over navigable tributaries at issue)— Plurality opinion (4-4-1) with Scalia test conflicting with Kennedy test in concurrence ---

- **Scalia**—“continuous surface water connection test.” Non-navigable waters only if they exhibit a relatively permanent flow (e.g. river stream or lake) and wetlands if there is a continuous surface water connection to a relatively permanent water body.

- **Kennedy**—“Significant Nexus” Test---“a water or wetland must possess a ‘significant nexus’ to water that are or were navigable in fact” CWA jurisdiction extended to all wetlands that “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as “navigable…. When wetlands effects are speculative or insubstantial, they fall outside zone … encompassing nav.waters.”
Agencies Initial Response

- Corps and EPA decide to issue Guidance initially, not Rule

- 2007 Guidance, as Revised in 2008:

  - Reaffirms “wetlands definition” --- “Areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions.” (33 CFR 328.3 (b)

  - Data From required for SN determination with documented sources to address:

    - Consideration of **Hydrologic Factors** including: Volume, duration and frequency of flow, proximity to the closest TNW, size of watershed, average annual rainfall, average annual winter snow pack
- Consideration of **Ecological Factors**: Ability of the tributary and its adjacent wetlands (if any) to carry pollutants and flood waters to the TNW, ability of the tributary and its adjacent wetlands (if any) to provide aquatic habitat that supports the biota of the TNW, ability for adjacent wetlands to trap and filter pollutants or store flood waters, ability to maintain water quality

> **Excludes** Prior Converted Croplands, waste treatment systems, upland drainage ditches, artificial pools, water filled depressions from upland excavation

> **Swales and Erosional features also excluded** but may be jurisdictional where they: Replace or relocate a water of the U.S., connect a water of the U.S. to another water of the U.S. or provide relatively permanent flow to a water of the U.S.
• Pressure from Congress, state and local offices, industry, environmental NGOs, scientists, builders, local governments and the public to clarify jurisdiction through Rule

• Agencies claimed confusion. EPA admits that “protection for many of the nation’s streams and wetlands has been confusing, complex and time consuming.”

• **March 2014**--- Agencies Issue Proposed rule to clarify jurisdiction and “enhance protections for certain bodies of water.”
Impetus Behind Rule, cont.

- EPA Issues report summarizing more than 1200 peer reviewed published scientific studies noting important rule small streams and wetlands play in health of downstream waters

- Agencies insist they did not intend to protect waters not historically covered by the CWA

- Over 400 meetings held with stakeholders

- Over 12 million public comments received

- Congressional hearings on proposed rule held in early 2015.
EPA and Corps testify at Joint House Senate Hearing on Prop rule– deny intention to expand CWA authority

Vocal opposition from states and regulated community that rule would be a federal power grab

EPA Administrator McCarthy disputes stating that – “Our goal is straightforward… Its’ to respond to requests from stakeholders …to make the process of identifying waters protected under the CWA easier to understand, to make it more predictable and more consistent with the law and peer reviewed science.”
• Agencies claim that rule will increase regulated waters by 2.8 to 4.65% (mostly in “other waters” category).

• Agencies--- est. increased costs to regulated entities by $158.4M to $306.6M with increased benefits of $338.9M to $349.5 M – disputed by Prof Sunding (Cal. Berkley) as underestimating NPDES, 401 WQC and 311 Oil spill program costs.

• AFBF data--- 100% of land in Va and 95% of land in Okla within 4000 ft of a trib--- in Pa, 81% of land within 1500 ft and 99% of land within 4000 ft.
Key Dates

• April 21, 2014 – Proposed rule released for public comment

• May 27, 2015 – Pre Publication of final CWA Rule

• June 29, 2015 – Final CWA Rule published in Federal Register (80 F.R. 37054)

• August 28, 2015 – Final Rule Becomes Effective

• February 22, 2015 – Sixth Circuit issues Nationwide Stay of Rule
Agencies Findings

- **EPA Connectivity Study** – Synthesis of more than 1200 scientific publications

  - Study finds that (a) streams, individually and cumulatively exert strong influence on downstream waters (b) all trib. are chemically, physically and biologically connected to downstream waters (c) Isolated waters (e.g. prairie potholes, vernal pools) provide numerous functions benefitting downstream WQ

- **SAB Panel** confirmed study but found that “degree of connectivity is critical ... When considering impact to downstream waters

- **SAB Panel** – “SN is not a scientific term but a legal one…”
• Defines “Waters of the United States” to include 8 categories of jurisdictional waters:

(1) Traditionally Nav. Waters

(2) Interstate waters including interstate wetlands

(3) Territorial seas

(4) Impoundments

(5) All Tribs. of (1)--- (4)

(6) “Adjacent Waters” --- All Jurisdictional  By Rule
(7) Listed Waters requiring case specific S.N Analysis– (prairie potholes, Carolina and Delmarva Bays, pocosins, western vernal pools and Texas coastal prairie wetlands) (all are “similarly situated” in that they function alike and are sufficiently close to function together “)

(8) Other S. N Waters– Non – Adjacent waters located within 100 year flood plain of or within 4000 ft of waters of the U.S.

• Broad Scope of WOTUS Rule Coverage--- (a) 311 oil spill program (401) WQ Certification (c) 402 NPDES program (4) 404 dredged or fill material discharge program
• **Tributary Def. Central to Rule**--- Tributary is any feature that “physical indicators of a bed and banks and ordinary high water mark (OHWM) and is conclusively jurisdictional – even if dry much of year--- man made barriers (such as road or berm) do not cut off trib. Jurisdiction.

• Agencies can now **assert jurisdiction** over many ephemeral and largely dry “landscape features” based on vague and tenuous OHWM test.

• Rule sanctions use of “**desktop analysis** “ (e.g. LIDAR or aerial photography) to assert jurisdiction over such features.
Adjacent Waters

• Agencies can categorically claim jurisdiction over “adjacent waters” defined as “bordering, contiguous or neighboring” to a WOTUS

• “Neighboring” def. sets a bright line distance limits -- Includes (1) all waters within 100 ft of OHWM (2) waters within 100 –year FP and not more than 1500 ft from OHWM of a TNW (3) waters within 1500 ft of the high tide line of a TNW-- All such waters and wetlands categorically jurisdictional

• Even if such waters are outside distance limits and not “adjacent” can still be jurisdictional based on S.N Test if located within 100 yr. FP or within 4000 ft of a WOTUS.
• SN means that a “water including wetlands, either alone or combinations with similarly situated waters in the region, has a significant effect on the chemical, physical or biological integrity of a TNW, interstate water or the territorial seas. “significant effect” means “more than speculative or insubstantial.”

• Rule lists specific functions for S.N. test – (1) sediment trapping (2) nutrient recycling (3) pollutant filtering (4) flood water retention (5) runoff storage (6) flow contribution (7) organic matter export

• Agencies can find any one of these functions has a significant effect.” – vague standard giving broad discretion to agencies.
Exclusions

• **Rule exclusions are narrow**

• “Ditches” excluded unless they excavated in relocated tributaries – could sweep in roadside ditches with little or no connection to WOTUS

• “storm water systems, artificial ponds and water filled depressions created on “dry land”– but no “agreed to def. of dry land.”

• Ground water excluded– but GW connection could still support jurisdiction based on adjacency or SN tests.

• No Grandfathering
New Concepts in Final Rule

- **Final Rule includes new concepts not in proposed rule**
  - including (1) bed bank and OHWM in defining tributary as categorically jurisdictional
  - (2) Adjacency Limits of up to 1500 ft & located within 100 FP
  - (3) Outer “bright line” limit of 4000 ft.
  - (4) Limiting list of functions for SN test.

- **Failure to provide notice and comment on “distance limits”**
  - esp. problematic because of agency position that “if any portion of a feature is within limits of distance thresholds, entire feature is jurisdictional.”
Corps Memos Dispute EPA

- Corps HQ Staff prepared legal and technical memos disputing EPA data, analysis and findings
- “Corps data to EPA has been selectively applied out of context…these documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies and logical inconsistencies.”
- “The 1500 ft. limitation is not supported by science or law and thus is legally vulnerable.”
- “Requests that all references to the Corps in the draft final rule and eco analysis be removed …and reference made to EPA only as author.”
- Cong Committees and EPA in fight over EPA responses to info requests in memos
Final Waters of the U.S. Rule

Sufficient indication of flow?
One stream segment requiring mitigation (dark blue)

Additional wetlands (lime) and numerous stream segments (light blue) also need mitigation
Litigation “Avalanche “

- Eleven Cases filed in Federal District Courts
- Eleven Cases in eight Federal Courts of Appeals
- Seventy One Plaintiffs and Petitioners including:
  > 31 States
  > Industry and business groups (Chamber, utilities, NFIB, Water)
  > environmental groups
- Major Fight over Jurisdiction (District Courts or Courts of Appeals?)
- Fight centers around unclear language of CWA Sec 509 Judicial Review--- Is WOTUS an “other limitation” or “permit”?
Legal Challenges

• Claims by States, Industry and Business groups allege:

  > Federalism/Tenth amendment--Usurps States Primary Responsibilities for management, protection of intrastate waters and lands (e.g. “Tributary def. would allow regulation of ponds, ephemeral streams and even dry channels”)

  > Commerce Clause and Due Process--- Rule gives agencies “virtually limitless power over non-navigable waters”

  > APA— Rule is “arbitrary and capricious, and not supported by law, scientific and economic evidence”

  > Process --- Rule Issued without adequate notice and opportunity for public comment( e.g. 1500 ft. and 4000 ft. “limits” )

  > Harms— Undue Burdens on individuals, businesses and states. Imposes immediate and high costs on States ( WQS, permitting etc.)

  > Relief--- Declare Rule unlawful, vacate and set side rule, enjoin agencies from using rule and remand to agencies
• SE SW Assoc., Fla League of Cities v. EPA (N.D. Fla 11/30/15) (SW exclusion vague. “For the first time, rule requires permits for discharges into municipal SW systems…with permitted downstream outfalls”)

• Regulated Industries Suit (NSSGA, AFBF, API, ARTBA, NAHB) (S. Dist. Of Texas)

• Murray Energy Corp. (ND of W.Va)

• Environmental Groups Challenge-- Puget Soundkeeper Alliance & Sierra Club v. McCarthy (WD Wash.)—claims rule violates:
  - CWA by Excluding all waste treatment systems and limiting availability of case specific SN determinations
  - APA by limiting “Trib.” def. to OHWM and “bed and banks.”
Litigation, cont.

- **Aug 27, 2015** --- D.N.D.--- Judge Erickson issues P.I. --- ( "The breadth of the trib. Def. allows for regulation of any area that has a trace amount of Water.") North Dakota v. McCarthy

- ND Injunction only applicable to 13 states suing there.

- **On July 27, 2015** MDL Panel consolidates Appellate Petitions in Sixth Cir.

- **October 9, 2015, 6th Cir.** In Murray Energy v. EPA issues nationwide stay of Rule but defers jurisdictional issue ("It is far from clear that distance limits are harmonious with [Rapanos]")

- **On Oct. 13, 2015** – MDL Panel declines to consolidate all D . Ct cases. “centralization under sec. 1407 is inappropriate.”

- **On February 22, 2016** – Sixth Cir. In 2-1 ruling holds that jurisdiction is only in Cts of Appeals while still conceding that rule is “definitional only.”
Eleventh Circuit Considering appeal of Ga Fed. Ct that it lacked jurisdiction & that Sixth Circuit's ruling conflicts with Eleventh Circuit Case law that jurisdiction is only in District Courts. – State of Georgia v. McCarthy---- Argument set for July 8, 2016– Could lead to Cir. split and possible S Ct Review

May 24, 2016– N.D. Ct dissolves P.I and stays case pending 6th Cir. ruling

June 14, 2016– Sixth Circuit Issues Merits Briefing Schedule—
> Contents of Ad. Record– All briefing completed by 7/29/2016
> Merits Briefing– All Briefing completed by 2/17/17
> Oral Argument --- Scheduled as soon as practicable after briefing
Legislative Responses

• Numerous Cong. oversight hearings critical of Rule

• House and Senate have each passed bills requiring withdrawal of rule and ordering new process. Pres. Obama pledged to veto

• Appropriations rider blocking rule implementation recently approved by Senate Apropos. Committee– Unlikely to make into law

• GAO Report (12/14/15) finding that EPA’s “social media’ campaign violated several federal laws– Cong. Oversight Committees investigating and claiming that EPA is “stonewalling.”
Hawkes v. U.S. (S.Ct. 5/31/16)

- Unanimous Supreme Ct. rules that JD Recipients can file pre-enforcement suits challenging JD record.

- Court Extends 2012 Sackett Ruling to JDs finding that JD meets “finality” test.

- Justice Kennedy comments Relevant to WOTUS. He comments that
  - “CWA reach is notorious unclear.”
  - “Act continues to Raise troubling questions regarding Government’s power to cast doubt on the full use and enjoyment of private property.”

- Comments suggest that he may have concerns over broad sweep of WOTUS rule should it reach the Court.
The Future of WOTUS?

• While Stay is in effect, Corps will continue to use 2007/08 guidance. Web site set up with Corps/EPA JD info to improve transparency (Corps/EPA Memo 11/16/15)

• Litigation Outcome Uncertain

• Congressional Action Uncertain

• The Election --- New Congress and President Could be Decisive