



CARLTON FIELDS

JORDEN BURT

Litigation Issues and the
“Waters of the U.S.” Rule

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Matt Leopold – July 2015

Clean Water Act

- Clean Water Act (“CWA”) prohibits discharge of pollutants into navigable waters of the United States without a National Pollutant Discharge Elimination System (“NPDES”) permit or “Section 404” permit (named for Section 404 of the CWA)
- U.S. Environmental Protection Agency (“EPA”) and Army Corps of Engineer (the “Corps”) have permitting jurisdiction for such discharges
- They have rulemaking authority for WOTUS Definition
- Previous regulations (from 1986) attempted to invoke jurisdiction over broad scope of waters.

Final Rule – What Changed?

- Adjacent Waters Definition
 - Changed definition of “Neighboring”
 - Deleted “Other Waters” Definition
 - More specific exclusions



WOTUS Definition Under the Final Rule

1. Traditional navigable water bodies;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in 1-3 above;
5. All **tributaries** of waters identified in 1-4 above;
6. All waters, including wetlands, **adjacent** to waters identified in 1-5 of this section;
7. Listed regional features that have a significant nexus.
8. Waters in the 100 yr floodplain or w/i 4,000 ft with a significant nexus

Summary

- Tributary = anything with flow (bed, bank and OHWM)
- Adjacent Waters = waters that are “next” to any tributary including all waters in a floodplain, wetlands, riparian area and shallow subsurface connection.
 - Neighboring definitions
- Significant Nexus Waters – Case by Case

Tributaries - Categorical

- Final Rule expands on the 2008 Guidance and automatically find jurisdiction (without requiring a fact-specific significant nexus determination) for a number of additional waters.
- All “tributaries” (not just relatively permanent) of downstream traditional navigable waters, interstate waters, or territorial seas are automatically jurisdictional
 - Includes any water that contributes flow, either directly or through another water, to these more substantial downstream waters
 - Includes tributaries with ephemeral, intermittent, or perennial flows
 - Includes tributaries with man-made and natural breaks so long as a bed and banks and ordinary high water mark exist upstream of the break

Bed, Bank, and OWHM?



Adjacent - Categorical

- All waters “adjacent” to such tributaries (or traditional navigable waters, interstate waters, or territorial seas) are jurisdictional
- Neighboring
 - (i) All waters located within 100 feet of the OHWM of TNWs, territorial seas, interstate waters/wetlands, impoundments, tributaries, ;
 - (ii) All waters located within the 100-year floodplain of the same and not more than 1,500 feet from the OHWM
 - (iii) All waters within 1,500 feet of the high tide line of TNWs, territorial seas, interstate waters/wetlands, or Great Lakes

More Exclusions

- **The Final Rule recognizes existing exemptions and has included more:**
 - Wastewater treatment systems, ponds/lagoons, recycling
 - Prior converted cropland
 - Ditches wholly excavated in uplands, drain only uplands, and have less than perennial flow
 - MS4 Conveyances, created from dry land
 - Artificially irrigated areas
 - Artificial lakes or pond from dry land
 - Artificial reflecting pools or swimming pools
 - Small ornamental waters
 - Water-filled depressions from construction activity
 - Groundwater
 - Gullies and rills and non-wetland swales
 - Puddles



“Significant Nexus” – Case by Case

- Waters that do not qualify as automatically jurisdictional under the Rule could still be found jurisdictional on case-by-case basis if a significant nexus can nevertheless be shown
 - A significant nexus exists when a water, either alone or in combination with other similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or territorial seas
 - For an effect to be “significant,” it must be more than speculative or insubstantial
 - Other waters are “similarly situated” when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their chemical, physical or biological effects

New Tool - Challenges to JD's

- 9th Circuit in Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, held that a Jurisdictional Determination (JD) is not “final agency action” under the APA because the determination does not fix a legal right or obligation. 5th Circuit followed the lead of the 9th Circuit in Belle Co.,LLC v. U.S. Army Corps of Eng'rs (5th Cir. 2014)
- But this could be inconsistent with Sackett v. EPA (2012), where the Court held a determination on jurisdiction issued through a compliance order is subject to judicial review under the APA.
- Hawkes Co. v. U.S. Army Corps of Eng'rs (8th Cir. 2015) - split from the other circuits and said 1) JD's are the consummation of the agency's decisionmaking process, and 2) JD's determine rights or obligations from which legal consequences flow.
- JD's affect property values, permitting is expensive and uncertain, risk enforcement?
 - average applicant “spends 788 days and \$271,596 in completing the process.”
- Current JD's grandfathered under the Final Rule

JD Challenges Interaction with WOTUS

- **“Significant Nexus” JD’s Challengeable**
Categorical waters like Tributaries and Adjacent Waters more difficult to challenge
- **Connectivity Report**
 - “Connectivity of Streams and Wetlands to Downstream Waters:
 - Draft synthesis of 1,000+ scientific reports currently under review by EPA’s Science Advisory Board – relied on heavily by EPA and the Corps in developing the Proposed Rule
 - Conclusion of the Report:
 - Essentially all tributary streams, including perennial, intermittent, and ephemeral streams are physically, chemically, and biologically connected (i.e., have a significant nexus) to downstream waters
 - Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically connected with downstream waters

Law Suits Filed by States

- Who has Filed? 4 lawsuits by 27 States
 - North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, and Wyoming; and New Mexico
 - Texas, Louisiana, and Mississippi
 - Ohio and Michigan
 - Georgia, West Virginia, Alabama, Florida, Kansas, Kentucky, South Carolina, Utah, and Wisconsin
- What do they claim?
- Will the Lawsuits Prevail?



4 Arguments Made by States

1. The Rule usurps state authority violating the Constitution
 - Land use regulations is a traditional state power
 - Increases costs to states to implement water quality, TMDLs, and CWA 401 Certification
2. The rule violates the Rapanos “Significant Nexus” Test
 - Categorical jurisdiction for adjacent and tributaries are not applying significant nexus.
 - Violations Kennedy’s OHWM guidance;
 - Violates Kennedy's focus on chemical, physical AND biological
3. The Rule violates the Commerce Clause
4. The Updated Rule violates federal APA “logical outgrowth” test

U.S. v. Riverside Bayview

- In U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), Supreme Court addressed the Corps' CWA jurisdiction over “adjacent wetlands”
- Held that the Corps had jurisdiction and could require Section 404 permits for such waters
- Held that agency's definition of “waters of the United States” including “adjacent wetlands” was not unreasonable due to hydrologic cycles of water and frequent difficulties in defining where water bodies ended.

SWANCC v. U.S. Army Corps

- In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (“SWANCC”), Supreme Court addressed the Corps’ assertion of CWA jurisdiction of “isolated waters” based on the fact that they could be used by migratory birds that cross state lines (known as the “migratory bird rule”)
- The Corps argued that SWANCC was required to obtain a permit for discharges into an intra-state water based on commerce clause arguments
- Supreme Court rejected these arguments and held that the Corps had no jurisdiction based on migratory birds
- After confusion among the circuits over implications of Riverside Bayview and SWANCC, Supreme Court again addressed CWA jurisdiction in Rapanos v. United States, 547 U.S. 715 (2006)

Rapanos v. U.S.

- No majority opinion: Supreme Court was split 4-1-4 with Justice Kennedy issuing an individual “concurring” opinion
- Justice Kennedy opined that in order for a water to be regulated under the CWA, it “must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” A “significant nexus” exists if the wetlands significantly affected the “chemical, physical, and biological integrity” of traditionally navigable waters. But not speculative or insubstantial
- In the plurality opinion, Justice Scalia and 3 other justices more narrowly defined CWA jurisdiction limiting it to 1) “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to 2) “wetlands with a continuous surface connection to” bodies of water that are already “waters of the United States” in their own right.

IS THE SWANCC SITE NOW JURISDICTIONAL?

