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## Is that Wetland Jurisdictional? A Practical Guide to the New Clean Water Rule

The Clean Water Rule recently issued by EPA and the Army Corps of Engineers defines the scope of federal jurisdiction over wetlands and other “waters of the United States.”<sup>1</sup> It’s effective on August 28, 2015, so you need to understand what it means for you. The new rule – issued, in part, as a result of the regulatory morass created by the U.S. Supreme Court’s decision in *United States v. Rapanos*, 126 S. Ct. 2208 (2006) (“*Rapanos*”) – is intended to make it easier to determine what’s subject to federal jurisdiction and what’s not. Does it? Read on.

This article begins by examining the long and winding road through the courts that got us here. It then describes the basic parameters of the Clean Water Rule and some of the practical difficulties concerning its implementation. Finally, it describes the litigation that has already been filed challenging the rule and looks at what’s to come.

### **Background**

Federal regulation of both tidal and nontidal wetlands takes place under Section 404 of the Clean Water Act. The Act requires that a Section 404 permit be obtained from the Army Corps of Engineers before “dredged or fill material” may be discharged to “navigable waters,” a term that is defined broadly – if not ambiguously – to mean “waters of the United States.” “Waters of the United States” is not defined by the Act, but courts have interpreted the term to include non-navigable waters, including wetlands. Thus, waters do not need to be truly navigable to be regulated – in fact, they don’t even need to be wet.

In general, what qualifies as a wetland turns upon soil conditions (hydric soils), hydrology and whether the area supports hydrophytic (water-loving/tolerant) vegetation. Under the Clean Water Act’s Section 404 program, wetlands are defined as areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for living under saturated soil conditions.<sup>2</sup> The Corps uses its 1987 *Wetland Delineation Manual* along with Regional Supplements to delineate the presence and extent of wetlands and then makes a “jurisdictional determination” that establishes the boundaries between wetlands and uplands.

But simply because something meets the regulatory definition of a wetland doesn’t mean it’s subject to federal jurisdiction. That’s just the starting point of the regulatory analysis.<sup>3</sup>

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<sup>1</sup> 33 CFR Part 328; 80 Fed. Reg. 37054 (June 29, 2015).

<sup>2</sup> 33 CFR § 328.3(b) (Corps rule); 40 CFR § 230.3(t) (EPA rule).

<sup>3</sup> The analysis is different for wetlands in states that have their own wetlands laws. For example, all wetlands in Virginia are subject to regulation under either the Virginia Wetlands Resources Act, Va. Code § 62.1-44.15:20, *et seq.*, or the Virginia Tidal Wetlands Act, Va. Code § 28.2-1300, *et seq.* Thus, even if a wetland in Virginia is not subject to federal jurisdiction, it’s still subject to regulation under Virginia law.

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## Federal Law

As noted above, Section 404 of the Clean Water Act regulates the “discharge of dredged or fill material into the navigable waters.” If only it were that simple. Which wetlands are subject to federal regulation has long been the subject of controversy in the courts. The U.S. Supreme Court upheld the Corps' regulation of wetlands adjacent to open bodies of water in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), but did not express an opinion as to wetlands that are connected to navigable waters but are more removed. The Court finally sought to address that issue in *Rapanos*, but the decision was a nightmare for regulated parties and regulators alike because it didn't set a clear standard.

Under the test set forth in Justice Scalia's plurality opinion, federal jurisdiction applies only if there is a continuous surface connection between a wetland and “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’” Justice Kennedy rejected Justice Scalia's test in his concurrence, and advanced a test that would require the Corps to establish a “significant nexus” between wetlands and navigable waters on a case-by-case basis. Under Justice Kennedy's test, “wetlands possess the requisite nexus, and thus come within the phrase ‘navigable waters,’ if the wetlands, 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.’”

Following *Rapanos*, six United States Courts of Appeal addressed the decision. The Fourth, Seventh, Ninth and Eleventh Circuits concluded that the “significant nexus” analysis in Justice Kennedy's concurrence provides the controlling test for determining the jurisdictional boundary of the United States' authority over water bodies and wetlands. In contrast, the First and Fifth Circuits held that the United States could assert jurisdiction either by applying the “significant nexus” test or by meeting the standard adopted by the plurality.<sup>4</sup> EPA and the Corps issued a joint guidance document a year after *Rapanos* was decided indicating how future jurisdictional determinations were to be made.<sup>5</sup> That guidance has now been supplanted by the Clean Water Rule.

## The Clean Water Rule

Once a site is determined to contain wetlands or waters, whether they qualify as “waters of the United States” is determined using the Clean Water Rule. Wetlands and waters that meet the criteria are known as “jurisdictional” waters and are subject to regulatory requirements under the Clean Water Act. Non-jurisdictional waters are not subject to those requirements. (Here's a helpful tip: Whenever the rule uses the broad term “waters,” included within that term are wetlands and streams, not just open waters. Keep that in mind as you read on.)

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<sup>4</sup> See *United States v. Johnson*, 467 F.3d 56 (1<sup>st</sup> Cir. 2006); *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278 (4<sup>th</sup> Cir. 2011) *United States v. Lucas*, 516 F.3d 316 (5<sup>th</sup> Cir. 2008); *United States v. Gerke Construction Co.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9<sup>th</sup> Cir. 2006); *United States v. Robison*, 505 F.3d 1208 (11<sup>th</sup> Cir. 2007).

<sup>5</sup> See 72 Fed. Reg. 31824 (June 8, 2007).

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The rule establishes three categories of regulated waters: (i) those that are jurisdictional, (ii) those that are excluded, and (iii) those that require a case-specific “significant nexus” analysis to determine if they are “waters of the United States.” Let’s take a look at each category.

1. Categories that are jurisdictional. Waters in this category are “waters of the United States” by rule. That means no additional analysis is required – these waters are regulated. Many of these waters are what one would expect to be “waters of the United States.” They include traditionally navigable waters, territorial seas, and interstate waters (meaning such things as rivers, lakes and wetlands that flow across, or form part of, state boundaries). They also include impoundments of water when the water impounded is otherwise identified as “waters of the United States.” But for land use and development purposes, the two most important jurisdictional categories in the rule are “adjacent” waters and “tributaries.” These categories encompass isolated wetlands and wetlands in the vicinity of flowing waters, as well as small creeks, streams, gully and certain ditches – some of which have little to no flowing water. The extent to which these features are regulated has been about as clear as mud ever since *Rapanos*. The Clean Water Rule seeks to clear up that confusion with two new definitions, each of which is discussed below:

i. Adjacent wetlands.

These wetlands border or are near other “waters of the United States.” For example, wetlands separated from other jurisdictional waters by dikes, dunes, berms and ditches can be considered adjacent. The U. S. Supreme Court in *Riverside Bayview Homes* upheld the Corps’ regulation of wetlands adjacent to open bodies of water, but gave no guidance as to wetlands more removed. Moreover, the Corps’ wetland regulations defined the term “adjacent,” but the definition did not include any maximum or minimum distance. Result? Confusion and litigation.

The Clean Water Rule changes things with a bright-line test, which some say is a “land grab.” The rule defines “adjacent” to mean “bordering, contiguous, or *neighboring*” certain jurisdictional waters. The key term here is “neighboring.” The rule defines that term using maximum distances from these waters or features associated with those waters. Thus, “neighboring” waters are:

- all waters (including wetlands) located in whole or in part within 100 feet of the ordinary high water mark of a traditionally navigable water, interstate water, territorial sea, jurisdictional impoundment, or a tributary;
- all waters (including wetlands) located in whole or in part within the 100-year floodplain of a water identified immediately above that are not more than 1,500 feet from the ordinary high watermark of such water; and
- all waters (including wetlands) located in whole or in part within 1,500 feet of the high tide line of a traditionally navigable water, interstate water, or

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territorial sea or within 1,500 feet of the ordinary high water mark of the Great Lakes.<sup>6</sup>

Thus, subject to limited exceptions described below, a wetland that meets the definition of “neighboring” is automatically regulated by the Corps, even if the wetland is not physically adjacent to another jurisdictional water and regardless of whether it can be shown to have a “significant nexus” to that jurisdictional water. And even if the wetland is too far removed to be considered “neighboring,” it might still be deemed jurisdictional under the case-specific evaluations that are described later in this article.

There are two other things to know about “adjacent” waters. First, the *entire water* is considered “adjacent” if *any portion* of it is within these defined boundaries. Second, the definition excludes those waters in which established normal farming, forestry and ranching activities occur. Thus, wetlands and farm ponds in which normal farming activities occur (e.g., seeding, harvesting, planting, etc.) are not jurisdictional by rule, but will continue to be subject to a case-specific permitting review. (In most instances these activities are exempt from having to obtain a 404 permit.)<sup>7</sup>

## ii. Tributaries.

How big does a stream have to be before it’s a jurisdictional water? How much volume, frequency and duration of flow must it have? Must it have stream banks? The Corps’ previous regulations didn’t answer those questions because they didn’t define “tributary.” Perhaps worse, the previous definition of “waters of the United States” regulated all tributaries without qualification even though it was unclear what tributaries were!

The Clean Water Rule has a lengthy definition of “tributary.” Suffice it to say that a tributary is a water “that contributes flow, either directly or through” to a traditionally navigable water, interstate water or territorial sea *and* “that is characterized by the physical indicators of a bed and banks and an ordinary high water mark.”<sup>8</sup> The requirements that a tributary have a bed and banks and an ordinary high water mark should be familiar to most field scientists. These criteria have been used for years under the former rule to delineate the limits of jurisdiction, although their use was not explicitly authorized.

A tributary can be natural or man-made, and it includes such things as rivers, streams, canals and ditches not otherwise excluded under the rule (see below). It doesn’t lose its status as a tributary if it flows through a man-made break (e.g., culvert, dam) or a natural break (e.g., wetland, boulder field) as long as a bed and banks and an ordinary high water mark exist upstream of the break. Also, if it flows through a non-jurisdictional water at some point, it still retains its status as a tributary as long as its flow eventually reaches one of the waters described above.

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<sup>6</sup> 33 CFR § 328.3(c)(2).

<sup>7</sup> See 33 U.S.C. § 1344 (f)).

<sup>8</sup> 33 CFR § 328.3(c)(3).

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2. Categories that are excluded. The rule excludes the following from federal regulation:

- i. waste treatment systems, including treatment ponds and lagoons designed to meet requirements of the Clean Water Act;
- ii. prior converted cropland;
- iii. artificial, constructed lakes and ponds created in dry land, including settling basins, irrigation ponds and cooling ponds, as well as artificially irrigated land that would revert to dry land should application of water cease;
- iv. water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated to obtain gravel, sand or fill;
- v. groundwater, including groundwater drained through subsurface drainage systems;
- vi. stormwater control features used to convey, treat or store stormwater that are created in dry land;
- vii. wastewater recycling structures constructed in dry land; and
- viii. certain ditches.<sup>9</sup>

Ditches that have certain characteristics are perhaps the most important category of excluded waters for land development purposes. Excluded ditches are:

- Ditches with ephemeral flow – meaning they have flow for brief periods usually following rainfall – provided the ditches are not a relocated tributary or are not excavated in a tributary;
- Ditches with intermittent flow – meaning they usually flow during the wet season, but not the dry season – provided the ditches are not a relocated tributary, are not excavated in a tributary, or do not drain wetlands; and
- Ditches that do not flow, either directly or indirectly, into a traditionally navigable water, an interstate water, or a territorial sea.<sup>10</sup>

Ditches that do not qualify as excluded are regulated *if* they otherwise meet the definition of “tributary.”<sup>11</sup>

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<sup>9</sup> 33 CFR § 328.3 (b)(1)-(7).

<sup>10</sup> 33 CFR § 328.3(b)(3).

<sup>11</sup> 80 Fed. Reg. at 37078.

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3. Case-specific categories. Watch out! Simply because a water is not *expressly stated* to be jurisdictional doesn't mean it's not jurisdictional. The rule *requires* case-specific "significant nexus" determinations when two categories of waters are at issue. That means sometimes the waters in these categories are jurisdictional and sometimes they're not, depending on the results of the significant nexus determination.<sup>12</sup> What's a significant nexus determination? It's a determination designed to find out whether the water being evaluated has a significant effect (more than just speculative or insubstantial) on the chemical, physical or biological integrity of a traditionally navigable water, interstate water or territorial sea. If it does, the water is jurisdictional. The preamble to the rule goes into great detail about how the determination is to be made.<sup>13</sup>

The difference between the two case-specific categories turns on the rule's bright line distinction between waters that *are* "similarly situated" and those that *may* be "similarly situated." The preamble to the rule spends lots of ink parsing this term, but suffice it to say that it means waters found in the same watershed that function alike and are sufficiently close in proximity to function together in affecting the water quality of the nearest traditionally navigable water, interstate water or territorial sea.<sup>14</sup>

So now let's get to the two categories. Hold onto your hats, because this is the most confusing part of the rule.

i. Waters that *are* similarly situated.

There are five subcategories of waters in certain areas of the country that have been determined by rule to be "similarly situated." On the East Coast, for example, two such subcategories exist: Carolina and Delmarva bays (a type of ponded depressional wetland) and pocosins (a type of evergreen shrub and tree-dominated wetland). When a significant nexus determination is performed, these subcategories of waters are to be evaluated with other waters within their same subcategory. Thus, if more than one pocosin is within the area under review, then all pocosins in that area are to be reviewed together, provided they are in the same single point of entry watershed.<sup>15</sup> Note, however, that if one of these features is jurisdictional for some other reason – for example, it sits on a state border and so is an interstate water or it meets the definition of "adjacent" – then it is automatically regulated, and a case-specific determination is not performed for that particular water.<sup>16</sup>

ii. Waters that *may* be similarly situated.

Any water that is (i) within the 100-year floodplain of any traditionally navigable water, interstate water or territorial sea *or* (ii) within 4,000 feet of the high tide line or ordinary high water mark of those waters, of any jurisdictional impoundment, or of a tributary is subject to a case-specific review for whether it has a "significant nexus" to a traditionally navigable water,

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<sup>12</sup> The basis for this aspect of the rule is Justice Kennedy's test in *Rapanos*.

<sup>13</sup> See 80 Fed. Reg. at 37091-96.

<sup>14</sup> *Id.* at 37065.

<sup>15</sup> *Id.* at 37087.

<sup>16</sup> *Id.*

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interstate water or territorial sea. If the case-specific review determines the water has a significant nexus to a traditionally navigable water, interstate water or territorial sea, then the water is jurisdictional and subject to regulation.<sup>17</sup> But there's one more consideration to take into account.

If (i) there is more than one water to be evaluated within the distance thresholds mentioned above, and (ii) those waters are in the same point of entry watershed, then before the significant nexus determination is made, it must first be determined whether any of the waters are "similarly situated." That means a field scientist has to determine whether some or all of the waters can reasonably be expected to function together in their effect on downstream traditionally navigable waters, interstate waters or the territorial seas. Waters that function together means, in general, that the waters are "within a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.)."<sup>18</sup> If the waters are similarly situated, they are evaluated as a group during the significant nexus determination; if not, they are evaluated individually. Again, the preamble to the rule goes into detail as to how that's to be done.<sup>19</sup>

There are two other important things to know about this category. First, as with the other case-specific category noted above, if any water to be evaluated under this category is jurisdictional for some other reason – for example, it meets the definition of "adjacent" – then no case-specific review of that water is necessary because the water is automatically regulated. Second, if *any portion* of a water lies within the distance thresholds described at the beginning of this discussion, then *all* of that water is subject to the significant nexus determination.<sup>20</sup> That means waters beyond the case-specific distance thresholds could be jurisdictional.

This is a quick overview of the rule. The preamble to the rule contains myriad nuances that you and your consultant will need to review and consider.

## **Implementation of the Rule**

Under existing Corps regulations and guidance, approved jurisdictional determinations ("JDs") are generally valid for five years and will not be re-opened unless the applicant requests it or unless new information warrants re-opening the JD before its expiration. The good news is that this is not changing under the provisions of the new rule. Thus, for those who already have a JD in hand, or who have relied on a preliminary JD, the determination of what's regulated and what's not won't change unless the applicant requests that the determination be made using the new rule.<sup>21</sup>

But for all others, implementing the rule will be easier said than done and will, no doubt, result in confusion, inconsistencies and myriad guidance and Q&A documents from EPA and the

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<sup>17</sup> 33 CFR § 328.3(a)(8).

<sup>18</sup> 80 Fed. Reg. at 37092.

<sup>19</sup> *Id.* at 37092-95.

<sup>20</sup> *Id.* at 37087.

<sup>21</sup> *Id.* at 37073-74. If, for example, a ditch that the Corps previously decided was jurisdictional is now clearly excluded under the new rule, it might make sense to obtain a new JD.

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Corps. For example, the Corps has acknowledged that “single point of entry watersheds can be a challenge to delineate.” It also said that the identification of “similarly situated” waters “may be challenging to do remotely” and that “using remote tools [and] aerial photos may not be accurate as to the actual waters.”<sup>22</sup>

As to the exclusions, the rule does not say how one gets the “all clear.” Is the Corps to make an “official” determination that waters are excluded? If so, how far back in history must one go in making that determination, and who bears the burden of proof that an area or activity is, in fact, excluded? For example, when there is little historical information available, how do you prove that a depression was incidental to mining or construction or that stormwater control features were constructed on what was then dry land?

Bottom line: This isn’t going to be easy; some things will be “figured out” on the fly.

## Litigation

Pardon the pun, but the floodgates were opened the minute the rule was published in the Federal Register. Critics contend the rule’s distance-based metrics for determining the extent of jurisdictional waters were written in a way to expand jurisdiction, not simply to help define it. They say the rule means it’s now possible to extend jurisdiction to just about any water anywhere.

At least 70 parties have filed 14 petitions for review of the rule in U.S. Courts of Appeal. Twenty-seven states filed cases within days of the rule’s issuance seeking to block the rule. The U.S. Chamber of Commerce, National Federation of Independent Businesses, American Farm Bureau, and other business groups also filed suit. On the other side of the coin, a number of environmental organizations filed suit contending the rule impermissibly weakens federal jurisdiction. The House has already passed a bill to block the rule, and the Senate is now considering such a bill.

Major issues to be litigated include:

- Whether science and the law support the rule’s assertion that *all* waters within 1,500 feet of the ordinary high water mark of certain jurisdictional waters do, in fact, have a “significant nexus” to that water.
- Whether requiring a case-specific determination for all waters within 4,000 feet (as opposed to some other distance) of the ordinary high water mark or high tide line of certain jurisdictional waters is supported by science and the law.
- Whether science and the law support designating as “tributaries” *all* natural surface features that *ever* contribute *any* water to jurisdictional waters if such features have a bed, bank and ordinary high water mark. (Ditches that have ephemeral flow are excluded, but not natural features, such as dry washes commonly found in the Southwest.)

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<sup>22</sup> May 15, 2015 memorandum by Jennifer Moyer, Chief of Regulatory Programs.

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- Whether the determination that *all* the isolated waters in the five subcategories that require a case-specific determination are, in fact, “similarly situated” and do, in fact, have a “significant nexus” to other jurisdictional waters.

## **Conclusion**

Confusion has been the watchword for years with wetlands and streams, and that’s not going away with the Clean Water Rule. Try as they might, the courts and the regulators have not made life any easier for real estate developers and other owners seeking to make use of their land. That means you should assume any development activities in or adjacent to surface waters or wetlands are regulated under the Clean Water Act. Only after a legal and ecological review should you conclude otherwise. Also, don’t forget to consider whether the state in which your project will be performed has its own wetland laws. Something could be excluded under the rule and still be subject to state regulation.

Finally, with all the litigation pending, it’s a safe bet that some aspect of the Clean Water Rule will be changed. Those who don’t like surprises must stay abreast of future developments.

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