



ASSOCIATION OF CLEAN WATER ADMINISTRATORS

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To: ACWA Membership
From: ACWA National Office
Date: June 10, 2014
Re: Waters of the U.S. Rule Proposal

The following memorandum provides a brief overview of key elements within the proposed rulemaking, *Definition of “Waters of the United States” Under the Clean Water Act*, published in the Federal Register April 21, 2014.¹ This summary is meant to assist ACWA’s Membership in their review of the proposed rule as they prepare comments and provide feedback for the Association to consider including in ACWA’s comments. On June 9, 2014, EPA indicated its intention to grant a 90-day extension for accepting formal comments. The new comment deadline is October 20, 2014. ACWA is currently facilitating EPA/state co-regulator calls through late June, and plans further membership outreach to inform the development of Association comments.

Background

The *SWANCC* (2001) and *Rapanos* (2006) U.S. Supreme Court decisions² have resulted in considerable confusion over what waters are jurisdictional under the Clean Water Act (CWA), and therefore increased allocation of federal and state resources to determining this on a case-by-case basis. The *Waters of the U.S.* rule proposal is intended to provide clarity to regulators and the regulated community regarding what waterbodies are jurisdictional and what discharges are subject to permitting requirements.³

Unchanged Categories of Jurisdictional Waters⁴

Waters in the following categories are already considered jurisdictional by existing regulations⁵ and would continue to be jurisdictional “waters of the United States” under the proposed rule:

¹ 79 Fed. Reg. 22188, 22274 (April 14, 2014); Docket No. EPA-HQ-OW- 2011-0880 FRL-9901-47-OW available at <https://federalregister.gov/a/2014-07142>.

² In *SWANCC*, the Court decided that the use of waters by migratory birds is not a sufficient basis for federal jurisdiction under the CWA. In *Rapanos*, a splintered decision provided 1) ‘relative permanance’ with a connection to traditional navigable waters, and 2) ‘significant nexus’ to navigable waters as bases for determining whether a water is protected under the CWA. These two decisions have resulted in considerable confusion over what waters are jurisdictional, and therefore increased allocation of federal and state resources to determining this on a case-by-case basis.

³ The scientific underpinning for the rulemaking is provided in a report by EPA’s Office of Research and Development (*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*) that synthesizes the peer-reviewed scientific literature pertaining to biological, chemical, and hydrologic connectivity of waters and the effects that small streams, wetlands, and open waters have on larger downstream waters such as rivers, lakes, estuaries, and oceans.

⁴ See 79 Fed. Reg. 22188-89.

- 1) **Traditional navigable waters.**
- 2) **Interstate waters**, including interstate wetlands.
- 3) **The territorial seas.**
- 4) **Impoundments** of traditional navigable waters, interstate waters (including interstate wetlands), and tributaries, as defined, of such waters.
- 5) **Tributaries** of a traditional navigable water, interstate water, the territorial seas or impoundment.

Altered Categories of Jurisdictional Waters

- 6) **Adjacent waters**⁶ - *all waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary.*
 - This category replaces and expands upon the previous category of “adjacent wetlands,” and largely accounts for the projected 3% increase in jurisdiction put forth in the EPA/Corps March, 2014 report, *Economic Analysis of Proposed Revised Definition of Waters of the United States*.
- 7) **Other waters**⁷ – waterbodies not covered by the first six categories waters and that may or may not share a “significant nexus” to navigable waters.
 - These waters would only be regulated *if a case-by-case analysis determines that they — alone or in combination with other similarly situated waters located in the same region — share a significant nexus to a downstream traditional navigable water, interstate water or territorial sea.* (See below for new definition of significant nexus.)
 - This category replaces the previous category that included as jurisdictional *all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or which are used or could be used for industrial purposes by industries in interstate commerce.*⁸

Unchanged Definitions⁹

- 8) **Traditional navigable waters** - *all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.*
- 9) **Adjacent** - *bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”* (However, see below for new definition of neighboring.)
- 10) **Wetlands** - *those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a*

⁵ 33 CFR § 328.3; 40 CFR § 122.2.

⁶ See 79 Fed. Reg. 22193.

⁷ See 79 Fed. Reg. 22189.

⁸ 33 CFR § 328.3(a)(3); 40 CFR § 122.2

⁹ *Id.*; See also 79 Fed. Reg. 22189.

prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

New Definitions

- 1) **Tributary**¹⁰ - *a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section (1 through 4 in the Unchanged Categories section above). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section. (See Waters Automatically Excluded below.)*
- 2) **Neighboring**¹¹ - *waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.*
- 3) **Riparian area**¹² - *an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.*
- 4) **Floodplain**¹³ - *an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.*
- 5) **Significant Nexus**¹⁴ - *this term indicates that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, 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 effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.*

¹⁰ See 79 Fed. Reg. 22199.

¹¹ See 79 Fed. Reg. 22207.

¹² See 79 Fed. Reg. 22199.

¹³ *Id.*

¹⁴ *Id.*

Waters Automatically Excluded from the Definition of “Waters of the U.S.”¹⁵

- 1) *Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.*
- 2) *Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.*
- 3) *Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.*
 - *Previous EPA/Corps guidance on CWA jurisdiction after *Rapanos* only exempted ditches that are excavated wholly in uplands, drain only uplands, and do not carry a relatively permanent flow of water. This left intermittent/seasonal ditches in uplands protected.*
- 4) *Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.*
- 5) *The following features:*
 - (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;*
 - (ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;*
 - (iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land;*
 - (iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;*
 - (v) water-filled depressions created incidental to construction activity;*
 - (vi) groundwater, including groundwater drained through subsurface drainage systems; and*
 - (vii) gullies and rills and non-wetland swales.*

¹⁵ *Id.*