

**30th Annual Ohio Environment,
Energy and Resources Law
Seminar**

**“Defining Waters of the US” or
“Re-defining”?**

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EPA/ Army Corp jointly issued **Proposed Rule** defining “Waters of the US” or WOTUS 79 Fed Reg 22188 (April 21, 2014)

Proposed Rule a response to US Supreme Court decisions which resulted in limitation on jurisdiction of certain streams and wetlands

- *Solid Waste Authority of Northern Cook County v. Army Corps of Engineers*, 531 US 159 (2001)
- *Rapanos v. US*, 547 US 715 (2006)

Following *Rapanos*, Agencies employed “Significant Nexus” test to evaluate CWA jurisdiction

- Waterway evaluated to determine whether it impacts “chemical, physical and biological integrity” of a navigable water
- Derived from concurrent opinion of Justice Kennedy

Agencies *Post- Rapanos* application resulted in uncertainty

- No uniform application due to case-by-case determinations
- Varying determinations
- Conflicting court opinions
- Vacated agency guidance

Agencies have said that **Proposed Rule** is:

- To interpret and apply the “Significant Nexus” test- focused on science based connection
- Provide more certainty on what constitutes a WOTUS
- Make process for identification of WOTUS “clearer, simpler and faster”
 - Defines by rule those waters that are jurisdictional without further analysis
- “Not expanding coverage”/ Merely clarifying existing jurisdiction
- “The proposed rule does **not add protection to any new types of waters that have not historically been covered by the CWA, nor does the rule in any way limit current regulatory or statutory exemptions or exclusions.** Simply put, if an activity was exempted or excluded before this proposal, it will remain exempted or excluded. If you didn’t need a permit for a type of activity before, you won’t need one now.” *EPA/Corp, Question and Answers-Waters of the US Proposal*

EPA/ Corp Proposed Rule

Existing Rule	Proposed Rule
All traditional navigable waters	(1) No change
All interstate waters	(2) No change
The territorial seas	(3) No change
Tributaries of WOTUS	(5) Broader definition of tributary—includes waters characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow, either direct or through another water to a WOTUS. Flow can be perennial, intermittent or ephemeral. A tributary can be natural, man-altered or man-made and includes waters such as canals and ditches.
All impoundments of waters otherwise defined as WOTUS	(4) No change (except with respect to the expansion of tributaries as detailed above.)
All wetlands adjacent to jurisdictional tributary	(6) All waters (not just wetlands) that are “adjacent” to jurisdictional waters (including tributaries) are jurisdictional. Addition of definition of “adjacent” and “neighboring” waters .
All other waters that have effect on interstate commerce	(7) On a case-by-case basis, “other waters” if they alone or in combination with other similarly situated waters located in the same region have a “significant nexus” to navigable waters.

Proposed Rule adds significant new definitions:

- **“Tributary”***
 - Has a defined bed, bank and ordinary high water mark or is a wetland, lake or pond that:
 - Contributes flow, either directly or through another water, to a jurisdictional water
 - Can have perennial, intermittent or ephemeral flow
 - Can be natural, man-altered or man-made
 - Includes waters such as “canals and ditches”
- **“Adjacent”**
 - “Boarding, contiguous or neighboring”
 - “Neighboring” includes waters located within the riparian area or floodplain or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection
 - “Riparian area” is an area bordering a water where surface or subsurface hydrology directly influence the ecological processes/ Transitional areas between aquatic and terrestrial ecosystems
 - “Floodplain” means an area bordering inland or coastal waters that is inundated during periods of moderate to high water flows.

- **“Significant Nexus”** is defined as a water, including wetlands, either alone or in combination with other similarly situated waters in the region, that significantly affects the chemical, physical, or biological integrity of a navigable water.
- Other waters are “similarly situated” when they perform similar functions and are located sufficiently close together or sufficiently close to a WOTUS so they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical or biological integrity of a water.

- **Proposed Rule** also defines those waters that are **NOT** WOTUS:
 - Waste treatment systems designed to meet CWA requirements
 - Prior converted croplands
 - Ditches that are excavated wholly in uplands, drain only uplands and have less than perennial flow.
 - Ditches that do not contribute flow, either directly or through another water, to a jurisdictional water
 - Features such as:
 - Artificially irrigated areas
 - Artificial lakes or ponds created by excavating dry land
 - Artificial reflecting pools or swimming pools created by excavating dry land.
 - Small ornamental waters created by excavating dry land
 - Water-filled depressions created incidental to construction activity,
 - Groundwater and
 - Gullies and rills and non-wetland swales.

Examples:

Water	WOTUS under Proposed Rule?
Waters adjacent to a tributary	Yes.
Waters in floodplain or riparian area	Yes. By definition would now be WOTUS.
Wetland adjacent to waters, but not in the riparian area or floodplain.	Site specific analysis. If connected via shallow subsurface hydrologic connection to waters: Yes. If not, No. Unless “other water” under “Significant Nexus” test.
Ephemeral stream contributing flow to WOTUS.	Yes. By definition would now be jurisdictional as a tributary.
Impounded ephemeral stream.	Yes. Ephemeral stream would be WOTUS.
Ditch that contributes flow to WOTUS.	Yes.
Ditch in uplands not draining to another water	No.
Ditch in uplands that drains to another water	Yes.
Wastewater treatment lagoon	No. Exempt.

Definition for All CWA Sections:

- Also applies to 305(WQS), 311 (oil spill prevention), 401 (State water quality), 402 (NPDES permits) as well as 404
- Agencies focus (and cost considerations) only on 404

Definitional Vagueness:

- Vague terms left undefined
- Inconsistent or discretionary application

Permitting impacts:

- Expansion of jurisdiction leads to expanded permitting burden for development/ construction—increased costs, increased mitigation costs, and longer wait times for permits
 - Some studies say over a year or more and in excess of \$200K for individual permit/ Nationwide permit: still over a year and \$30K
- Uncertainty associated with permitting means more site specific analysis will be required/ Goal of less litigation, unlikely
- Concern that could lead to NPDES permitting requirements under 402 as well.

State-by-State impacts:

- State authority and jurisdiction?
- Depends on how broadly State is currently asserting jurisdiction within its boundaries
- Most Western and Midwestern States do not regulate waters more broadly than CWA— These states will see the most significant changes.
- Ohio's jurisdiction is broader than CWA- Waters of the State include "groundwater".

- SAB commented on **Proposed Rule** in October 2014. Suggests that EPA did not go far enough.
- SAB criticizes the limited exceptions under the Proposed Rule
- SAB also recommended:
 - Dropping “ordinary high water mark” from definition of tributary which may be absent in some ephemeral streams
 - Defining “adjacent” based upon connection not only geographic proximity
 - Determining “other waters” on case-by-case basis not only geographic proximity
 - Expand definition to include groundwater
 - Clarify definition of “significant nexus” as a legal term

Controversial Across the Board:

- Over 1M Comments Received (Comment Deadline Nov. 14, 2014)

Environmental groups: Supportive but not far-enough

- Generally supportive of science based connection approach
- Believe wetlands should be defined as tributaries
- Believe impoundments of “adjacent waters” or “other waters” should also be jurisdictional
- Concerned with “large” number of categorical exclusions, including exclusion of groundwater
- Object to use of “waste treatment” exclusion for mining and coal operations

Business/Development: Power grab and over reach by Agencies

- Unauthorized by CWA/Supreme Court precedent
- Broad definition of “tributary” to include ephemeral streams and ditches will lead to significant expansion of jurisdiction
- “Regional” aggregation will be used to circumvent Supreme Court limitations on jurisdiction over isolated wetlands
- Exemptions are too narrow or “virtually useless” given broadness of new definitions/ More uncertain given undefined terms
- Agencies fail to account for real world costs associated with expansion in jurisdiction
- Also fail to address grandfathering: those waters that would now be subject to rule but were deemed not-jurisdictional previously
- Could make development/ certain business nearly impossible.

Agricultural Interests: Expansion Will Adversely Impact Industry

- Overbroad expansion of jurisdiction circumvents Supreme Court limitations
 - Nexus standard not consistent with opinion/ includes all waters (including tributaries)
 - Regional approach allows improper aggregation to get at isolated waters
 - Regulation of agricultural ditches as tributaries has broad implications for crop land use and development
 - Disregards state laws
- Expansion will have significant and costly repercussions on industry and will threaten ability to utilize land for food production or raising animals
- EPA's estimated 3% increase in jurisdictional waters underestimates expansion/ Would instead reestablish it at *pre-SWANCC* case levels or even more expansively
- Expansion of jurisdictional waters undercuts existing agricultural exemption
- Expands third party citizen suit risks for agriculture—implications for US consumers

Note: In January 2015, at Congressional direction, Agencies were forced to withdraw an interpretative rule under the CWA which would only exempt 56 listed farming practices from permitting requirements if conducted near streams or wetlands

Public Entities: Fails to Expressly Exclude Stormwater Systems or Account for Costs/Impacts That Expansion of Jurisdiction Will Impose

Municipal/ Storm water Utilities:

- No express exemption of MS4 stormwater and green infrastructure- may result in significant permitting burdens and discourage use of green infrastructure
- Given expanded definition, WTT and line expansions or upgrades will be impacted and permitting obligations expanded if constructed through WOTUS—higher burden.
- Would require water quality standards for stormwater and drainage ditches and lead to permitting and TMDL implications

County Associations:

- Expansion of jurisdiction over ditches and ephemeral streams will lead to uncertainty and more costs for County utilities
- Vital infrastructure repairs will be delayed due to cost and length of permitting process at a risk to public safety.
- Inhibit use of sediment control practices

Drinking Water Utilities:

- Impacts to siting and construction of instream reservoirs
- Expansion of jurisdictional waters could also impact reservoir expansion and management activities.

Current Developments on **Proposed Rule**

- **April 6-** EPA/ Corp sent **Proposed Rule** to OMB
- **April 6-** Agencies state that **Proposed Rule** will be changed based upon over 1 million comments received
 - Better define how protected waters are “significant” to downstream waters
 - Define tributaries more clearly to avoid confusion and ambiguity—bright lines
 - Clarify that adjacent waters such as wetlands next to protected waterways will be subject to protection too
 - Addressing concerns that “other waters” is too broad and undefined/ specify what is important to protect.
 - Limit jurisdiction to ditches that function as tributaries and carry pollution downstream- eliminate reference to “upland ditches”
 - Preserve CWA exclusions and exemptions, particularly agricultural land exemption
 - Maintain status of waters with MS4s—did not intend to change how those waters are treated.
- **Final rule could be published in the next few weeks**

- **Waters of US Regulatory Overreach Protection Act of 2015--HR 594 (Introduced 1/28/2015)**
 - Would prohibit Corp and EPA from adopting the Proposed Rule or related guidance
 - Would require withdraw of interpretive rule, “Notice of Availability Regarding Exemption from Permitting Under Section 404(f)(1)(A) of the CWA to Certain Agricultural Conservation Practices” (April 21, 2014)
 - Would require Corp and EPA to consult with State and local officials to develop regulatory proposal on WOTUS
 - Long list of co-sponsors recently added
- **Regulatory Integrity Protection Act of 2015—HR 1732 (Introduced 4/13/2015)**
 - Would prohibit Corp and EPA from adopting the Proposed Rule
 - Would require agencies to consult with State and local officials and interested stakeholders on development of new definition
 - Report on consultations to Congress
 - Voted out of House Transportation and Infrastructure on 4/15/2015
 - 49 Co-sponsors

- Senate version expected.
- House appropriators included language in the FY 2016 Energy and Water Appropriations bill preventing USACE from using federal funds to implement proposed rule.