

Seeking clearer waters? EPA aims to clarify federal jurisdiction in the new "Waters of the United States" rule

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On May 27, 2015, the US Environmental Protection Agency and the Army Corps of Engineers¹ jointly released a final rule, "Clean Water Rule: Definition of 'Waters of the United States'" (the Rule). The Rule, which becomes effective 60 days after publication in the Federal Register, clarifies the scope of waters that are subject to permitting and regulations under the Clean Water Act (CWA).

The scope of EPA's definition of "Waters of the United States" has long been controversial and confusing, and has been the subject of past regulations, Supreme Court rulings and agency guidance. EPA has stated that the Rule responds to and incorporates input from stakeholders and critics, by, among other things, creating more precise definitions and objective measurements, especially with regard to tributaries and adjacent waters. Critics contend that prior versions and the final version of the Rule assert jurisdiction over wetlands and waterways that Congress never meant to regulate. Litigation challenging the Rule is highly likely as are further efforts in Congress to block the Rule.

Here are the basics. The Rule identifies the regulatory treatment of eight types of waters. The first four of these are straightforward and generally uncontroversial.

1. **Navigable waters:** All subject to regulation.
2. **Interstate waters:** All subject to regulation.
3. **Territorial seas:** All subject to regulation.
4. **Impoundments of jurisdictional waters:** All subject to regulation.
5. **Tributaries to traditionally navigable waters:** Tributaries to traditional navigable waters (categories 1-3 above) are subject to regulation. The Rule provides a new definition of tributaries. To be a tributary, and categorically subject to regulation, the stream must have beds, banks and an ordinary high water mark. Wetlands and open waters without such features will be evaluated for adjacency (see category 6 below). Specifically excluded from regulation are ditches that flow only during or after precipitation events.
6. **Adjacent wetlands and waters:** The Rule maintains jurisdiction over adjacent waters, including wetlands, ponds, lakes, oxbows and impoundments, that border, are contiguous to, or neighbor traditional navigable waters, even if separated from those waters. For the first time, "neighboring" is defined by actual measurement: waters located in whole or in part: a) within 100 feet of the ordinary high water mark of a traditional navigable water, impoundment or tributary; b) in the 100-year floodplain and within 1,500 feet of the ordinary high water mark of such waters (floodplain waters); or c) within 1,500 feet of the high tide line of traditional navigable waters or within 1,500 feet of the ordinary high water mark of the Great Lakes. Waters that do not meet these limits but that may have a "significant nexus" to traditional navigable waters are subject to a case-specific analysis.
7. **Isolated or "other" waters:** Jurisdiction over these waters is to be determined on a case-by-case basis according to whether a significant nexus exists with a traditional navigable water (categories 1-3 above), either alone or in combination with "similarly situated" waters in the region that function together to impact the downstream waters. The Rule identifies five types of waters in specific regions that are considered "similarly situated" and should be analyzed as a group in the watershed that drains to the nearest relevant traditional navigable waters. These are:

prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands.

8. **Waters in flood plain or near high tide line/ordinary high water mark:** Waters located within the 100-year floodplain of a water within any of categories 1-3 above, or within 4,000 feet of the high tide line or ordinary high water mark of a water within any of categories 1-5 above are also to be evaluated on a case-by-case basis and are jurisdictional only if there is a "significant nexus" to a water within category 1-3 above.

Exclusions: The Rule maintains, clarifies and in some cases finally codifies prior exclusions from regulatory coverage, such as prior converted cropland, waste treatment systems, groundwater, shallow subsurface flows or tile drains. The Rule does not regulate ditches that are not located in or do not drain wetlands, are not part of a relocated tributary, and lack flow except during and after precipitation events. Also excluded are normal farming, silviculture and ranching practices (e.g., planting, harvesting, moving livestock, dry land irrigation), erosional features, storm water control features, pits or depressions excavated for upland mining or construction, and artificial lakes, waters and cooling ponds constructed entirely in dry land.

EPA states that its purpose in promulgating the Rule is not to expand CWA jurisdiction but to ensure "that waters protected under the Clean Water Act are more precisely defined and predictably determined, making permitting less costly, easier, and faster for business and industry." While that outcome may be subject to debate, the Rule does provide new definitions and other provisions that help clarify which waters are jurisdictional and reduces the number of case-specific jurisdictional determinations that permitting agencies must undertake. It is important to note that the Rule only pertains to federal jurisdiction; some water bodies that do not meet the federal test may still be regulated under state or local laws.

The Rule could affect a wide variety of companies and businesses engaged in land development or industrial activities. Those whose property contains wetlands, ponds, intermittent (non-continuously flowing) streams or other features that would not commonly be considered navigable or adjacent to navigable waters should give close attention to the Rule prior to conducting any activity that could result in a discharge of fill material or other pollutants.

1. Although it is a joint rule, this summary will refer chiefly to EPA for simplicity.

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