



## Environment, Land Use & Natural Resources ADVISORY ■

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### Interpreting “Waters of the United States”

***By Paul Beard and Damien Schiff***

On May 26, 2015, the heads of the Army Corps of Engineers and the Environmental Protection Agency signed a new rule interpreting the jurisdictional scope of the Clean Water Act, the first time the agencies have promulgated such regulations in a generation. The new rule significantly expands the agencies’ authority under the Act, and for that reason likely will be challenged.

#### **Who Will Be Affected by the New Rule?**

The rule will have far-reaching impacts. It potentially implicates *anyone* with land that has a wet feature on it. And the Act’s permit requirements are triggered when a landowner decides to discharge a “pollutant” into a wet feature that is jurisdictional, which the new rule very broadly defines.

#### **Overview**

The Clean Water Act makes unlawful the unpermitted discharge of a pollutant into “navigable waters,” which the Act defines simply as the “waters of the United States.” Shortly after the Act’s 1972 passage, regulations were promulgated interpreting those waters to mean waters that are navigable-in-fact. An environmentalist lawsuit successfully challenged that interpretation as too narrow. Thereafter, the agencies promulgated regulations that have until now remained largely unchanged. Under these regulations, waters of the United States (WOTUS) included, in addition to navigable-in-fact waters, all tributaries of such waters, all wetlands adjacent to such waters and tributaries, and certain waters, the use or degradation of which could affect interstate commerce.

The U.S. Supreme Court has had three occasions to interpret the scope of this assertion of Clean Water Act authority. In *United States v. Riverside Bayview Homes*, the Court upheld the assertion of jurisdiction over wetlands adjacent to navigable-in-fact waters. In *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, the Court rejected the agencies’ assertion of authority over ponded gravel mining pits that had no connection to navigable waters other than that they provided habitat for migratory birds. Finally, in *Rapanos v. United States*, the Court (in a fractured opinion) refused to accept the agencies’ “hydrological connection” theory, whereby Clean Water Act jurisdiction would attach to any water or wetland from which water *could* flow and ultimately reach a navigable-in-fact water. Although rejecting that theory, the Court could not produce a single rationale explaining

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the rejection. A four-justice plurality led by Justice Antonin Scalia argued that the Act cannot extend to ephemeral streams or ditches and cannot cover wetlands that are clearly separated from neighboring jurisdictional waters. Justice Anthony Kennedy, concurring in the judgment and writing only for himself, concluded that Justice Scalia's approach was both too narrow and too broad. For him, the appropriate test should be whether the water or wetland bears a "significant nexus" to a traditional navigable water, i.e., significantly affects the chemical, physical *and* biological integrity of that downstream water.

## **The New WOTUS Rule**

The new rule differs from prior rules in three main respects. First, it significantly expands the scope of the agencies' jurisdiction under the Act. Second, it adds a number of categorical exclusions to jurisdiction that purport to demonstrate the agencies' restraint, but in reality concern waters—like swimming pools and some ditches—that no reasonable interpretation of the Act would designate as jurisdictional. Third, it adds a number of definitions to existing and new terms, many of which are found nowhere in the statute but rather only in prior judicial opinions.

### ***The rule's expansion of jurisdiction***

The new rule expands the Act's scope with respect to "tributary," "adjacency" and "other waters" jurisdiction.

1. Tributary jurisdiction. Prior to the new rule, a non-navigable stream was jurisdictional only following a site-specific analysis of the tributaries' physical and hydrological characteristics. In contrast, under the new rule, every tributary is jurisdictional regardless of the particular effects that the tributary has on any traditional navigable water.
2. Adjacency jurisdiction. Prior to the new rule, adjacency could justify jurisdiction only over certain classes of wetlands. In contrast, under the new rule, adjacency can provide jurisdiction for *any* water, not just for wetlands.
3. "Other waters" jurisdiction. Prior to the new rule, jurisdiction could be asserted over those waters otherwise not subject to jurisdiction if the use or degradation of those waters could affect interstate commerce. In contrast, the new rule eliminates entirely the commerce connection. Instead, for certain classes of regional wetlands, jurisdiction is based on whether those wetlands have a significant nexus to the nearest traditional navigable water. For other non-adjacent waters, jurisdiction is based on a combination of geographic closeness (depending on the circumstances, being within a 100-year flood plain or 4,000 feet of a jurisdictional water) and a site-specific significant nexus analysis.

### ***The rule's categorical exclusions***

Unlike the prior rule, which provided few exclusions, the new rule sets forth nearly two dozen exceptions. These include ditches excavated in uplands, artificial ponds and lakes, swimming pools, puddles, stormwater and wastewater facilities, and groundwater. It is unlikely that any of these features would have been considered jurisdictional under the Act even without these explicit exclusions. Thus, their inclusion in the new rule is a tacit acknowledgement from the agencies that the new rule standing alone would be broad enough to cover such relatively insignificant waters.

### ***The rule's new definitions***

Under the old regulations, very few significant terms were defined. The new rule, however, defines both some old terms as well as new terms. For example, the rule defines for the first time the old term "tributary." A tributary is defined as any conveyance of water that has a bed, bank and an ordinary high water mark. The definition is particularly significant given the rule's categorical assertion of jurisdiction over tributaries, regardless of the individual volume of flow.

Moreover, the new rule defines “significant nexus,” a term used in passing in *SWANCC* and discussed extensively in Justice Kennedy’s *Rapanos* concurrence. Notably, the agencies define the phrase in the disjunctive (chemical, physical or biological) as opposed to Justice Kennedy’s conjunctive usage (chemical, physical *and* biological). The agencies also set forth nine wetland functions that they will use to help determine whether a significant nexus exists. The way in which significant nexus has been defined appears to authorize the agencies to conclude that such a nexus exists so long as *any* of the nine functions is present; in other words, the analysis does not appear to require any further qualitative analysis of the role of that function or functions in connection to a traditional navigable water—i.e., whether the nexus is “significant.” Finally, the rule defines “neighboring” waters (a type of adjacency) as including all waters where, depending on the circumstances, any part of the water is within 100 to 1,500 feet of the ordinary high water mark of the adjacent water. That capacious definition is significant because of the rule’s dramatic expansion of adjacency jurisdiction, combined with its categorical assertion of jurisdiction over all adjacent waters and tributaries.

## Analyzing Whether a Water Is Jurisdictional

Whether water on property is jurisdictional can be difficult to assess. To help, we have created cheat sheets that can simplify the analysis involved in determining the legal status of particular waters. As always, the advice of counsel is essential in making a final determination.

First determine whether the water [qualifies for an exclusion](#). If no exclusion applies, consider whether the water is [categorically jurisdictional](#). If the water is a traditionally navigable water, interstate water, territorial sea, impoundment, tributary or “adjacent” water, then the agencies have jurisdiction over that water.

The most contentious area of jurisdiction concerns intrastate wetlands and similar features. [This diagram](#) offers a simple, step-by-step analysis of whether such a water is jurisdictional. When in doubt, one can always seek a jurisdictional determination from the Army Corps of Engineers.

## Impact

The new rule changes the scope of the Clean Water Act in many ways. Most of the new rule’s changes have the effect of expanding the Act’s scope. It is therefore difficult to reconcile much of the rule with the Supreme Court’s repeated admonition that Congress did not intend to regulate all waters under the Act.

In particular, the Court has emphasized the Act’s use of the phrase “navigable waters” and concluded that a broad interpretation of the Act would deprive “navigable” of any significance. Hence, it is no answer (as the agencies would pretend) that the rule is based on “science,” because such considerations are generally irrelevant to statutory interpretation. Moreover, because the rule focuses principally on interpreting the meaning of “significant nexus,” a phrase found in judicial opinions interpreting the Act but not in the Act itself, it would be unusual for a court to defer to the agencies’ interpretation of that term. It is therefore likely that the new rule will be challenged on the grounds that it exceeds the agencies’ statutory (and possibly constitutional) authority to regulate the nation’s waters.

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