Background on the Clean Water Rule

By Maureen O'Sullivan, Wayne Law ’16, and Great Lakes Environmental Law Center Student Fellow

On June 29, 2015 the EPA and the Army Corps issued 33 CFR 328.3 and 40 CFR 230.3, jointly, as the Clean Water Rule: Definition of “Waters of the United States” which defines the scope of waters protected under the CWA.[1] The Clean Water Rule does not create any regulatory requirements, and serves to clarify the definition of “waters of the United States” consistently with Supreme Court precedent.[2]

Background

The Clean Water Act (CWA) states that any “discharge of a pollutant” by any person is unlawful.[3] The Act defines “discharge of a pollutant” as “any addition of any pollutant to *navigable waters* from any point source.”[4] “Pollutant” includes not only traditional toxic contaminants, but also includes dredged soil, rock, and sand.[5] The CWA does not specifically describe what bodies of water may be considered “navigable” for purposes of enforcement and permitting. The Act instead defines the phrase “navigable waters” very broadly as “the waters of the United States…”[6] Therefore under the language of the CWA, any unpermitted discharge into a U.S. water body is considered a violation of the Act. Determining which bodies of water are considered “waters of the U.S.” for the purposes of the CWA is essential for permitting and enforcement actions.[7]

In 1986 the Army Corps of Engineers issued a rule defining “waters of the United States” for purposes of CWA permitting and enforcement.[8] From 1986-1993, 33 C.F.R. §328.3 defined “waters of the United States” as:

(1) All waters which are currently used, or 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;
(2) All interstate waters *including wetlands*;
(3) All other waters such as lakes, rivers, 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:

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[1] 80 Fed. Reg. 37054.
[2] *Id.*
[3] 33 U.S.C. §1311(a).
[4] 33 U.S.C. §1362(12)
[5] 33 U.S.C. §1362(6).
[6] 33 U.S.C. §1362(7)
[7] *See* 33 U.S.C. §1319(b) and (c) (civil and criminal enforcement actions for violations of the CWA) and 33 U.S.C. §§1311(a); 1372(a)(1); 1344(a)(1) and 1362(7) (combined, requiring a permit to discharge a pollutant, including dredged and fill material, into waters of the U.S.).
[8] 51 Fed. Reg. 41250 (Nov. 13, 1986); 33 C.F.R. 328.3

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
(6) The territorial seas;
(7) Wetlands *adjacent* to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are **not** waters of the United States.[9]

In 1993, this definition was amended to include an exclusion for converted cropland, stating that those waterbodies are not included in the definition of "waters of the United States."[10]

In addition to defining "waters of the United States," 33 CFR §328.3 also defined the terms "wetlands," "adjacent," "high tide line," "ordinary high water mark," and "tidal waters." "Wetlands" were defined by the Army Corps of Engineers in 1986 as:

> …those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[11]

The Army Corps went on to define "adjacent" as "bordering, contiguous, or neighboring. 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 wetlands."[12]

The Agency's definition of "waters of the United States" is critical for operation of the National Pollution Discharge Elimination System (NDPES) permit program, the section 404 permit program for discharge or dredged or fill material, and the section 311 oil spill prevention and response programs. 80 Fed. Reg. 37054. All wetland permitting (section 404) is performed by the Army Corps of Engineers,[13] and all NPDES permitting is performed by the EPA, or a State Environmental Agency with delegated authority to

[9] 33 CFR §328.3(a) (1987 Archived Version).
[10] 33 CFR §328.3(a)(8) (1994 Archived Version).
[11] 33 CFR §328.3(b) (1987 and 1994 Archived Versions).
[12] 33 CFR §328.3(c) (1987 and 1994 Archived Versions).
[13] With the exception of section 404 wetland permitting in Michigan and New Jersey, which have been delegated authority to permit wetland dredging or filling in their respective states. (CITE)

do so. The scope of the definition of "waters of the United States" directly affects the number of waterbodies the EPA and the Army Corps of Engineers are able to permit and protect.

In 2006, the Supreme Court decided *Raponos v. United States*, which narrowed the scope of waterbodies that may be considered "waters of the United States" for purposes of CWA applicability.[14] As a result of the *Rapanos* decision, the EPA and the Army Corps of Engineers issued the "Clean Water Rule," which offers a definition of "waters of the United States" that is consistent with the CWA, Supreme Court precedent, and scientific developments.[15]

The Clean Water Rule amends the previous definitional rule regarding "waters of the United States," and narrows the scope of federal jurisdiction under the CWA.[16] Under the Clean Water Rule, fewer waters will qualify as "waters of the United States" for purposes of CWA permitting and enforcement.[17] The language of the rule now provides regulators with greater clarity as to which waters fall under federal jurisdiction, and therefore there will be less case-specific jurisdictional determinations made by Agency officials.[18]

<u>Clean Water Rule</u>

The Clean Water Rule clarifies the definition of "waters of the United States" through the imposition of additional qualifiers for certain types of water bodies. Under this new definition, there are four main avenues through which a water may fall under federal jurisdiction: (1) waters that impact interstate commerce, cross state boundaries, and the territorial seas (the "navigable waters"); (2) tributaries of "navigable" waters; (3) water bodies that are adjacent to the "navigable" waters; and (4) waters with a significant nexus to any "navigable" water body, or tributary of such. In addition to creating more detailed requirements for designating a body of water a "water of the United States," the Clean Water Rule also enumerates specific waters that are *not* "waters of the United States," "even where they otherwise meet the terms of [the rule]."[19]

"Navigable" Waters. As the preceding rule also stated, all waters used, or previously used, for interstate commerce, all interstate waters and wetlands[20], the territorial seas, and all impoundments "otherwise identified as waters of the United States under this section," are expressly included in the definition of "waters of the United States."[21] These waters

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[14] *Rapanos v. United States,* 547 U.S. 715 (2006).
[15] 80 Fed. Reg. 37054.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 33 CFR §328.3(b).
[20] "Wetlands" is defined in the Clean Water Rule as, "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 prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR 328.3(c)(4).
[21] 33 CFR 328.3(a)(1)-(4).

also include "all waters which are subject to the ebb and flow of the tide."[22] If a body of water is used for interstate commerce, or crosses state or national borders, then it is "navigable" in the traditional sense of the word, and it is a "water of the United States" and subject to federal jurisdiction under the CWA.

Tributaries. Any tributaries of the "navigable" water bodies will also be considered "waters of the United States" under the Clean Water Rule, as long as they also meet the rule's additional, specific qualifications for tributaries.[23] The Rule creates these new qualifications for tributaries by specifically defining the terms "tributary and tributaries," which was not included in the previous definitional rule.[24] The Clean Water Rule defines tributaries as:

> …a water that contributes flow, either directly or through another water (including an impoundment…), to a water identified in paragraphs (a)(1) through (3) [(the *"navigable" waters*)] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark.[25]

The physical indicators identified in the definition were included because of their ability to demonstrate the sufficiency of the water body's volume, frequency and duration of flow in order to qualify as a tributary.

The Clean Water Rule's "tributary" definition also includes some more specific examples of what types of water bodies qualify as tributary and therefore a "water of the United States": "A tributary can be natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches."[26] A tributary which contains one or more "constructed breaks" (i.e., bridges, culvers, pipes, or dams), or "natural breaks" (i.e., wetlands, debris piles, boulder fields, or underground streams), may still fall under federal jurisdiction so long as the physical indicators (bed, banks and ordinary high water mark) can be identified *upstream* of the break.[27] As long as the tributary connects to a "navigable" water, contains the requisite physical indicators to demonstrate flow requirements are met, and those physical indicators are present upstream from any breaks, the tributary is a "water of the United States" and falls under federal CWA jurisdiction. Even if the tributary contributes flow through non-jurisdictional waters, as long as it also flows through a "navigable" water, its status as a "water of the United States" is not in jeopardy.

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[22] 33 CFR 328.3(a)(1).
[23] 33 CFR 328.3(a)(5).
[24] *See* 33 CFR 328.3(c)(3) and the 1997 Archived Version.
[25] "Ordinary High Water Mark" is defined in the Clean Water Rule as, "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR 328.3(c)(6).
[26] 33 CFR §328.3(c)(3).
[27] *Id.*

Adjacent Waters. All bodies of water that are adjacent to any "navigable" water or tributary may be considered a "water of the United States" for purposes of CWA jurisdiction under the Clean Water Rule. 33 CFR 328.3(a)(6). These adjacent waters can include: "wetlands, ponds, lakes, oxbows, impoundments, and similar waters."[28]

In order to be considered "adjacent" to a "water of the United States" the water body in question must (1) border, (2) contiguously connect to, or (3) neighbor an "navigable" water or tributary. 33 CFR 328.3(c)(1). This definition includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes…[etc.]."[29] In order to be considered "adjacent," the waterbody does *not* need to laterally border, connect or neighbor a water of the United States. Waters that connect segments of "navigable" waters or tributaries, or those that are located at the head of "navigable" waters or tributaries are considered "adjacent waters," as long as they are bordering, contiguous, or neighboring such water. However, the rule expressly excludes "waters being used for established normal farming, ranching and silviculture activities" from federal jurisdiction by expressly stating that they "are not adjacent."[30]

The Clean Water Rule does not further define "border" or "contiguous" for purposes of adjacency determinations, however, it does further define "neighboring" in fairly narrow terms.[31] A water may be "neighboring" an "navigable" water or a tributary, and therefore qualify as an "adjacent water" subject to federal jurisdiction if any of the following qualifications are met: (1) any portion of the water is located within 100 feet of the "ordinary high water mark" of any "water of the United States;" (2) any portion of the water is located within the 100-year floodplain of a "water of the United States," and is not more than 1,500 feet from the "ordinary high mark of such water; and (3) any portion of the water is located within 1,500 feet of the "high tide line"[32] of a "water of the United States," or within 1,500 feet of the "ordinary high water mark" of the Great Lakes.[33] If any portion of a water body fits any of the aforementioned descriptions, the *entire water* is considered "neighboring" a "water of the United States," and falls under federal jurisdiction as an "adjacent water."

"Other" Waters - Significant Nexus Test. The final way in which a water body may fall under federal CWA jurisdiction is if that water has a "significant nexus" to a "water of

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 33 CFR 328.3(c)(2).
[32] "High Tide Line" Clean Water Rule Definition: "…the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm." 33 CFR 328.3(c)(7).
[33] 33 CFR 328.3(c)(2).

the United States." The Clean Water Rule defines "significant nexus" as: "…a water, including wetlands, either alone or in combination with other *similarly situated* waters in the region[34], *significantly affects the chemical, physical, or biological integrity of* a ["navigable" water (excluding impoundments)]."[35] "Similarly situated waters" are those which "function alike and are sufficiently close to function together in affecting downstream waters."[36] When performing a significant nexus analysis, it is imperative that you first identify the waters in question, combining all those similarly situated waters for jurisdictional determination.

In order to show the water body "significantly affects" a navigable water (e.g., a water used for interstate commerce, and those waters that cross state or national borders), the effect "must be more than speculative or insubstantial."[37] The Agency will focus on the following aquatic functions of the water in question, as they relate to the affected navigable body of water, when determining whether or not it is significantly affected: "(1) sediment trapping; (2) nutrient recycling; (3) pollutant trapping, transformation, filtering, and transport; (4) retention and attenuation of flood waters; (5) runoff storage; (6) contribution of flow; (7) export of organic matter; (8) export of food resources; and (9) provision of life cycle dependent on aquatic habitat… for species located in a ["navigable" water]."[38] A significant nexus is present when any one of the individual aquatic functions, or any combination of those functions, performed by the water (alone or combined with similarly situated waters), "contributes significantly to the chemical, physical, or biological integrity of the nearest ["navigable"] water."[39]

<u>Significant Nexus & Geographic Boundaries</u>: If a significant nexus is found between a "navigable" water (not including impoundments) and a water body that would not otherwise be considered a "water of the United States" that water body *may* fall under federal jurisdiction for purposes of the CWA, as long as it meets the Clean Water Rule's additional requirements. In order to be considered a "water of the United States," the waterbody with a significant nexus must be located within one of the following geographic boundaries: (1) waters located within the 100-year floodplain of a "navigable water" (excluding impoundments); (2) waters located within 4,000 feet of the "high tide line" or "ordinary high water mark" of a "navigable" water or tributary (including impoundments).[40]

For any water found to have a "significant nexus," the entire water is considered a "water of the United States," even if only a portion is located within these geographical boundaries. However, when performing the significant nexus analysis, any waters

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[34] "The term 'in the region' means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section, [("navigable" waters, excluding impoundments)]." 33 CFR 328.3(c)(5).
[35] 33 CFR 328.3(c)(5).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] 33 CFR 328.3(c)(5).
[40] 33 CFR 328.3(a)(8).

identified under this section (33 CFR 328.3(a)(8)), cannot be combined with waters identified as "adjacent." If a water identified in this section is also found to be an "adjacent water," adjacency trumps significant nexus and that water falls under federal jurisdiction due to its "adjacent water" designation.[41]

Significant Nexus & Specific Types of Waters: If the Agency finds that any of the following bodies of water have a significant nexus to a "navigable water," those bodies of water will be considered "waters of the United States" and fall under federal jurisdiction: (1) prairie potholes, (2) Carolina bays and Delmarva bays, (3) Pocosins, (4) Western vernal pools, and (5) Texas coastal prairie wetlands.[42] When performing the "significant nexus test" for any one of the five aforementioned types of bodies of water, all of those water bodies located within the watershed that drains to the nearest "navigable water" must be combined as they are "similarly situated" waters."[43] However, these five specifically listed types of water bodies cannot be combined with any waters found to be "adjacent waters."[44] If any of these types of water bodies are found to be "adjacent waters," then they are "waters of the United States" due to their adjacency "and no case-specific significant nexus analysis is required."[45]

Exclusions. The Clean Water Rule's enumerated exclusions to federal jurisdiction constitutes a major addition to the definition of "waters of the United States" from the preceding rule. The rule states that even those waters which may fall under federal jurisdiction through their status as an impoundment, tributary, adjacent water, or significant nexus, are not considered "waters of the United States" in certain circumstances.[46] The Rule excludes water treatment systems, prior converted cropland (this exclusion was also present in the previous rule), certain ditches with specific characteristics, groundwater, stormwater, and a number of wastewater recycling structures.[47]

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[41] *Id.*
[42] Definitions: (1) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest. (2)Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain. (3) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain. (4) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers. (5)Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf
Coast. 33 CFR 328.3(a)(7).
[43] 33 CFR 328.3(a)(7).
[44] *Id.*
[45] *Id.*
[46] 33 CFR 328.3(b).
[47] 33 CFR 328.3(b)(1)-(3) and (5)-(7); The Clean Water Rule also excludes seven "features" from federal jurisdiction: (i)Artificially irrigated areas that would revert to dry land should application of water to that area cease; (ii)Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (iii) Artificial reflecting pools or swimming pools created in dry land; (iv)Small ornamental waters

Future Impacts of the Clean Water Rule

The Clean Water Rule has been designed to adequately protect precious watersheds and natural resources, but also to "provide the clarity and certainty businesses and industry need about which waters are protected by the [CWA]," according to a statement made by President Barack Obama following the issuance of the final rule.[48] This increased clarity for industry will allow businesses to better plan their facility's operations with full awareness as to which water bodies surrounding their facility are subject to federal jurisdiction. However, it will also allow regulators to more easily find civil or criminal liability for those businesses or individuals that knowingly threaten protected waters.[49]

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created in dry land; (iv) Small ornamental waters created in dry land; (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and (vii) Puddles. 33 CFR 328.3(b)(4).

[48] Jenny Hopkinson, *Barack Obama's Water War,* Politico (May 28, 2015) http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319.html.

[49] *Id.*