
EUCI Webinar
August 26, 2015
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Kaplan Kirsch & Rockwell
Objectives of this Webinar

• Address key provisions

• Identify changes from prior CWA regulation

• Address potential impacts of Rule.
How did we get to the new rule?

- CWA’s “Navigable Waters” are “waters of the United States”
- *Rapanos v. United States*—did the Corps go too far?
- *Rapanos* tests—1) significant nexus, and 2) the plurality
- Corps’ *Rapanos* Guidance resulted in project-specific analysis
- EPA: “confusing, inconsistent, time consuming, and expensive”
Key Aspects of the Rule

• Jointly developed by EPA and Corps

• Codified Corps’ practice

• Rule is intended to provide clarity and predictability

• 8 categories of “waters of the United States”
<table>
<thead>
<tr>
<th>CATEGORY OF WATERS</th>
<th>TYPE OF JURISDICTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Waters that have been, are, or could be used in interstate commerce</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>2. Interstate waters</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>3. Territorial seas</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>4. Impoundments of waters of the U.S.</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>5. Tributaries</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>6. Waters adjacent to waters 1–5 above</td>
<td>Always jurisdictional</td>
</tr>
<tr>
<td>7. Prairie potholes, Carolina bays, pocosins, western vernal pools, and Texas</td>
<td>Case specific</td>
</tr>
<tr>
<td>coastal prairie wetlands if they have a significant nexus to waters 1, 2, or 3</td>
<td></td>
</tr>
<tr>
<td>8. Waters located within 100-year floodplain of waters 1, 2, or 3 and all waters</td>
<td>Case specific</td>
</tr>
<tr>
<td>within 4,000-feet of waters 1–5 where they have a significant nexus to waters 1,</td>
<td></td>
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<tr>
<td>2, or 3</td>
<td></td>
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</tbody>
</table>
(1) Traditional Navigable Waters

Waters that have been, are, or could be used in interstate commerce

(2) Interstate Waters
(3) Territorial Seas

(4) Impoundments of waters of the U.S.
(5) Tributaries

First time term is defined:

1) Have a bed and banks and ordinary high water mark (OMHW), and

2) contribute flow to a TNW, interstate water, or sea.
(6) Adjacent Waters

All waters adjacent to waters 1–5 above are jurisdictional

Changes “adjacent wetlands” “adjacent waters”

Bordering, contiguous, or neighboring
New definition for “neighboring”

Within 1,500 feet of:
1. TNW
2. Interstate water
3. Territorial seas
4. Impoundment
5. Tributary

Within 100 feet of:
1. TNW
2. Interstate water
3. Territorial seas
4. Impoundment
5. Tributary

Within 100-year floodplain of:
1. TNW
2. Interstate water
3. Territorial seas
4. Impoundment
5. Tributary

Within 1,500 feet of:
1. TNW
2. Interstate water
3. Territorial seas
4. Impoundment
5. Tributary

Jurisdictional

Not Adjacent

Not Adjacent

1,500 feet

100 feet

YES

NO

YES

NO

NO
Other Waters

• Rule no longer includes other waters that could affect interstate or foreign commerce

• Potential impact in western U.S.

• “Other waters” is now covered in two new categories
(7) Case Specific Waters

- Prairie potholes, Carolina bays, pocosins, western vernal pools, Texas coastal prairie wetlands

- Corps will look at similar waters in watershed and will perform a significant nexus test for all of those waters.
Definition of significant nexus

Waters, either alone or in combination with other similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a TNWs, interstate waters, or territorial seas.
(8) Other waters with significant nexus

Within 100-year floodplain of:
1. TNW
2. Interstate water, or
3. Territorial sea

Within 4,000 feet of:
1. TNW
2. Interstate water
3. Territorial sea
4. Impoundment, or
5. Tributary

Significant nexus to:
1. TNW
2. Interstate water, or
3. Territorial sea

Jurisdictional

Non-Jurisdictional
Rule establishes Exceptions

- Waste treatment systems designed to meet the CWA
- Prior converted cropland
- Ditches
- Artificial lakes and ponds constructed in “dry lands”
- Erosional features such as gullies, swales, and other ephemeral features
- Puddles
- Groundwater
- Stormwater control features constructed in dry land
- Wastewater recycling structures and detention/retention basins built for wastewater recycling
Potential Changes in Treatment of Specific Waters...

*Wetlands* definition did not change in new Rule
Ditches

1. Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary

2. Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands

3. Ditches that do not flow, either directly or through another water, into a TNW, interstate water, or territorial sea
Ditch or Tributary?
Stormwater Ponds

Excludes “stormwater control features constructed to convey, treat, or store stormwater that are created in dry land”
Groundwater

For the first time, groundwater is excluded by regulation from WOTUS
Exclusion of Erosional Features

Explicit exclusion of erosional features generally reflects the agencies’ current practice.
## Immediate Effect of the Rule

<table>
<thead>
<tr>
<th>STATUS OF JD APPLICATION</th>
<th>OLD OR NEW RULE?</th>
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</thead>
<tbody>
<tr>
<td>JDs existing before the effective date</td>
<td>Old Rule</td>
</tr>
<tr>
<td>Preliminary JDs issued before effective date</td>
<td>Old Rule</td>
</tr>
<tr>
<td>JDs associated with complete Section 404 pre-construction notifications under NWPs</td>
<td>Old Rule if PCNs are pending on or before publication date of June 29th</td>
</tr>
<tr>
<td>Stand alone JDs completed after effective date</td>
<td>New Rule</td>
</tr>
</tbody>
</table>
New Considerations in Obtaining Permits

• Potential savings of time and money

• Determining measurable distances becomes more important

• Aerial imaging

• Emphasis on beds, banks, and OHWM
Potential winners and losers...
Potential Impact of Litigation

• Pending preliminary injunctions seeking to stay Rule’s implementation

• Lawsuits place new applicants in uncertain situation as to what Rule will apply

• Any final legal decision will not be issued for at least a year, and potentially longer
Questions?

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