WATER OF THE UNITED STATES
RULEMAKING
DISCLAIMER

This presentation does not represent, and should not be construed to represent, any formal or informal EPA determination, policy or regulation. This presentation may not be relied on to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. Technical considerations are provided for discussion purposes only, and diagrams are provided for illustration purposes only.
WATERS OF THE UNITED STATES
CURRENT CWA DEFINITION - 40 CFR 230.3(S) (1993)

- Use in past, present, or future for interstate or foreign commerce
- Tidal waters
- Waters used for navigation
- Any other waters that could affect interstate commerce
- All tributaries (including wetlands) to these waters
- All wetlands adjacent to the above waters
Two key Supreme Court Decisions altered CWA jurisdiction:

1) S.W.A.N.C.C. (2000) – eliminated jurisdiction over most isolated waters (those without surface tributary connections)
   • But many of these waters contribute benefits to watersheds and can be highly valuable habitats, such as vernal pools (amphibians) and prairie potholes (migratory waterfowl).
   • Court invalidated the use of the Migratory Bird Act as an interstate commerce nexus.
2) **Rapanos** (2006) – eliminated jurisdiction over waters/wetlands without a “significant nexus” to traditionally navigable waters. Such a nexus exists where the wetland or waterbody, either by itself or in combination with other similar sites, significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway.

• The 5-4 “decision” had 5 opinions, none of which garnered a majority, so the controlling opinion is open to debate.
LEGAL BACKGROUND

• 2 tests –
  Scalia: “relatively permanent standing or continuously flowing bodies of water” connected to TNWs; wetlands with a “continuous surface connection” to relatively permanent bodies of water.
  Kennedy: waters sharing a “significant nexus” that are or were navigable in fact or that could reasonably be made so.

• Created confusion and uncertainty over the exact definition of waters of the United States. Greatly complicated the process for jurisdictional determinations. Under guidance implemented in response to Rapanos, ACOE must determine on a case-by-case basis whether every water or wetland has a “significant nexus”.


ROUTINE JURISDICTION DETERMINATIONS
NO LONGER SIMPLE

What was a 1-page letter…

…is now a process requiring an 8 page form (based on a 60-page guidebook with accompanying appendices) with multiple checkboxes, narrative statements, references, and interagency coordination…
ARE THESE WATERS OF THE US?
YOU MAKE THE CALL...

New York Harbor      woodland stream      vernal pool

Always       Probably       It’s complicated
but no, not a WOTUS
WATERS OF THE UNITED STATES RULEMAKING

• Need to clarify protection under the CWA for streams and wetlands that form the foundation of the nation’s water resources and are vital to public health, the environment, and the economy.
• Need to reduce coats and minimize delays in the permit process and increase efficiency in determining coverage of the CWA.
• EPA and the Corps of Engineers received requests for rulemaking from members of Congress, state and local officials, industry, agriculture, environmental groups, and the public.
Streams that flow for only part of the year comprise 59% of the nation’s stream miles; they are the “workhorses of the watershed.”
TO PROTECT SOME GEOGRAPHICALLY ISOLATED WETLANDS AND WATERS

“20% of remaining wetland acreage” - USFWS

Legend

- Wisconsin Glaciation Southern Limit
- Areas of Interest
- Midcontinental Prairie-Steppe
- Atlantic-Gulf Coastal Plain
- Semi-Desert and Desert
- Other U.S.

Vernal Pools
Prairie Potholes
Great Basin
Sandhills
Rainwater Basin
Great Lakes Alvars
Delmarva Potholes
Pocosins-Carolina Bays
Puerto Rico Karst n.t.s.

Carolina Bays
Playas
To Protect Drinking Water Sources

More than 117 million Americans are dependent on seasonal or headwater streams for drinking water.
The proposed rule takes into consideration a draft science report titled: *Connectivity of Streams and Wetlands to Downstream Waters*, which provides a scientific framework for clarifying CWA jurisdiction, including a description of the factors that influence connectivity and the mechanisms by which connected waters affect downstream waters.

The proposed rule is limited to clarifying current uncertainty concerning the jurisdiction of the Clean Water Act that has arisen as an outgrowth of recent Supreme Court decisions. EPA and the Corps are focusing on protection of the network of smaller waters that feed into larger ones, to keep downstream water safe from upstream pollutants.

The proposed rule does not change existing regulatory exemptions and exclusions, including those that apply to the agricultural sector.
How did we get to this point? Isn’t it obvious that upstream waters affect downstream waters?
• How best to define **significant nexus**?

• ORD Report, titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*

  • Purpose is to **summarize the current scientific understanding** of broadly applicable ecological relationships that affect the condition or function of downstream aquatic ecosystems (over 1,000 pieces of scientific literature).
  • Focus of the Report is on small or temporary non-tidal streams, wetlands, and open waters.
  • Findings from this Report will help inform EPA and the U.S. Army Corps of Engineers in their continuing policy work and efforts to clarify what waters are covered by the Clean Water Act.
  • The proposed rule will not be finalized until the final version of the Report is complete.
Major Draft Conclusions:

1. Streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters.

2. Wetlands and open waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) are integrated with streams and rivers.

3. There is insufficient information to generalize about wetlands and open waters located outside of riparian areas and floodplains and their connectivity to downstream waters (because of their inherent variability; some are important, some are not).
PROPOSED WOTUS RULE

Creates three categories of waters:

1. Waters that are clearly jurisdictional by statute/case law: TNWs (that is, susceptible to navigation), interstate waters, territorial seas, impoundments (all included in CWA); and certain types of water bodies that are categorically jurisdictional based on a scientific finding of significant nexus to TNWs:
   - Tributaries of waters set forth above now automatically jurisdictional, whether or not they are permanent and free-flowing.
   - Waters including wetlands adjacent (bordering, contiguous, neighboring) to tributaries are also categorically included as waters of the US.
PROPOSED WOTUS RULE

(2) “other waters” including wetlands, that on a case-by-case basis, the ACOE determines have a significant nexus, either alone, or in combination with other similarly situated waters, including wetlands, located in the same region, to TNWs, interstate waters, or territorial seas.

(3) Those waters that are clearly not WOTUS: certain ditches, artificial lakes and ponds, upland construction depressions, prior converted croplands, waste treatment systems, and groundwater.

• Will be applicable to all CWA programs.
• Does not expand jurisdiction, but will instead reconcile the regulations with the Rapanos court reading of CWA jurisdiction (“relatively permanent/continuous surface connection” and “significant nexus” tests)(elimination of many categories from the definition of WOTUS).
WHAT IS THE BOTTOM LINE?

• Nationally, estimated that the rule will restore protection to 20 million acres of wetlands and more than half of our nation’s streams.
• Most seasonal and rain-dependent streams are protected.
• Wetlands near rivers and streams are protected.
• Other waters may have uncertain connections with downstream waters and protection will be determined through a case-specific analysis of whether the connection is significant.
• Draft rule requests comments on options for protecting similarly situated waters in certain geographic areas or adding to the categories of waters protected without case-specific analysis.
• Does not protect any new types of waters that have not historically been covered under the CWA.
• Does not cover groundwater.
• Does not expand jurisdiction over ditches and proposes to exclude certain ephemeral and intermittent ditches.
• Does not remove any exemption currently in the statute or regulations.
• **Current Status:**
  – EPA and the U.S. Army Corps of Engineers published the proposed rule defining the scope of waters of the United States (WOTUS) in the Federal Register on April 21, 2014. The proposed rule is intended to provide greater consistency, certainty, and predictability nationwide by providing clarity in determining where the CWA applies. The agencies took into account over 4 years of dialogue and 415,000 comments.

• **When:**
• Under the CWA, discharges of dredged or fill material from “normal farming, silviculture and ranching activities” do not need permits under Sec. 404 of the Act.

• The proposed rule preserves CWA exemptions and exclusions for agriculture and clarifies that certain agricultural practices are “normal” and thus do not require a permit.

• EPA and ACOE coordinated with USDA to develop an “interpretive rule” for agricultural activities; this rule was issued on March 25, 2014, and is effective immediately.

• Ensures that 56 specific conservation practices that protect or improve water quality will not be subject to CWA Sec. 404 permitting.

• Pursuant to a March 25 MOU, the Agencies have agreed to work together to implement the exemptions and periodically identify, review, and update conservation practice standards and activities that would qualify under the exemption.