

EPA and USACE Finalize Waters of the US Rule

Greg Munson, Esq.

Last year, EPA and the USACE published a draft rule defining waters of the United States. The agencies finalized the rule on May 27, 2015 and it will take effect on August 28, 2015. This paper will summarize the new rule and conclude with some commentary about the new rule and the process used to finalize it.

Summary

The Federal Clean Water Act applies to all navigable waters, which are defined as all Waters of the United States.¹ The Clean Water Act includes permitting requirements for discharges into surface waters, identifying and cleaning up polluted (i.e. impaired) waters, and is the basis for the jurisdiction of the USACE's wetlands permitting program, which also includes an evaluation under the Endangered Species Act. Many people know these programs by their acronyms and similar jargon: NPDES permits, TMDLs, BMAPs, and 404 permits are all based on the definition of Waters of the U.S.

The U.S. Supreme Court attempted to define what constitutes a Water of the U.S. in court cases as recently as 2006, but these cases created lingering uncertainty. The new rule attempts to fill the voids. The rule relies on a complicated series of cross-references and internal definitions. For the sake of simplicity, this summary omits most of this confusion and other details. Reading the full rule is necessary to understand the rule as it may apply to a particular situation.

It's easiest to understand the rule as a series of steps:

Step One

The rule identifies a group of waters that most people would readily accept as Waters of the U.S. These are waters that can be used in interstate commerce, including interstate waters and wetland, those subject to the ebb and flow of the tide, and territorial seas ("Interstate Commerce Waters"). Interstate Commerce Waters are the foundation for the rest of the rule's coverage.

Step Two

All "tributaries" to Interstate Commerce Waters are defined to be Waters of the U.S. ("Tributaries"). Tributaries are defined as waters that contribute flow, directly or through another water, to Interstate Commerce Waters and is characterized by a bed, bank and ordinary high water mark,² and can be man-made or natural in origin. They can also include man-made or natural breaks, so long as a bed, bank and ordinary high water mark can be found upstream of the

¹ States operating programs approved under the Clean Water Act (e.g. Florida) sometimes apply their own broader definition of waters of the state for the purpose of operating their approved program. In such states, the actual impact of the new rule will depend on the existing definition of waters of the state, although generally speaking, USACE permitting will apply the waters of the U.S. rule even in such states.

² "Ordinary high water mark" is defined in the rule as the line on the shore established by fluctuations as indicated by a number of factors included in the definition.

break. Similarly, a tributary doesn't lose its covered status if it contributes flows through a non-covered water. It also includes ditches not excluded in Step Five.³

Step Three

All waters "adjacent" to Interstate Commerce Waters or Tributaries are defined to be Waters of the U.S. Adjacent waters are defined to include:

- All wetlands within or abutting the Ordinary High Water Mark of an Interstate Commerce Water or Tributary;
- All waters connecting Interstate Commerce Waters or Tributaries to other Interstate Commerce Waters or Tributaries;
- All waters within 100 feet of Interstate Commerce Waters or Tributaries
- All waters within the 100-year floodplain of Interstate Commerce Waters and Tributaries if not more than 1,500 feet from the Ordinary High Water Mark of such water
- All waters within 1,500 feet of the high tide line of an Interstate Commerce Water
- Any water used for agricultural purposes is not adjacent

Any water covered in Steps One through Three are Waters of the U.S. under the new rule. Step Four covers only waters meeting a "significant nexus" test.

Step Four

There are two types of waters to which the significant nexus test is applied. First, the rule identifies a series of specific types of wetland that are considered Waters of the U.S. if they have a significant nexus to an Interstate Commerce Water. Some examples include Pocosins, Carolina Bays, and Texas Coastal Prairie Wetlands.

Second, all waters within the 100-year floodplain of an Interstate Commerce Water or within 4,000 feet of a high tide mark or Ordinary High Water Mark are covered if the water has a significant nexus to an Interstate Commerce Water. Also, once part of such a water is covered as a result of the significant nexus test, the entire water becomes a covered water.

A significant nexus exists when a water "significantly affects" (i.e., more than "speculatively or insubstantially") the biological, chemical, or physical integrity of an Interstate Commerce Water based on any of nine functions. Waters within the same watershed that perform certain the same functions and are close enough to each other to function together are grouped together for purposes of determining whether they significantly affect another water. The nine included functions are broad, and include things such as trapping sediment, trapping or transporting pollutants, contributing flow, and export of organics.

Step Five

The rule contains a number of specific exclusions, including prior converted crop lands, erosional features that don't form tributaries, puddles, stormwater control features and a series of wastewater exclusions. The list is specific and lengthy and needs to be consulted to determine the application to a specific situation. Among the exclusions are ditches with ephemeral flow, ditches with intermittent flow that don't drain wetlands or ditches that don't contribute flow into

³ The rule also makes the impoundment of any water defined as a Water of the U.S. as a Water of the U.S.

an Interstate Commerce Water. This exclusion and the definition of a tributary in the rule will mean that most ditches with perennial flow are covered.

Commentary

A striking aspect of the new rule is the significant number of changes from the draft rule published in 2014. Regulated entities can reasonably complain that the impact and operation of the new rule is sufficiently different from the draft rule that the agencies should have opened the new rule for additional commentary.

The new rule is significantly more complicated than the draft rule. In some cases, this complexity may bring some helpful clarity but in other cases it will just add confusion. Examples of potential ambiguities exist in the rule and continued scrutiny and application is almost certain to reveal more.

The new rule appears to work a significant expansion of the Clean Water Act compared to the direction of the Supreme Court in their previous decisions. Although the clarification of waters that are “adjacent” is a significant improvement over the draft rule, the significant nexus test’s application to all waters within the 100-year flood plain of an Interstate Commerce Water reaches quite far, particularly in flat states that have large flood plains. It would also seem including waters that trap pollutants or transport pollutants as those with a significant nexus would encompass most imaginable scenarios. Similarly, including ditches as tributaries also appear to sweep up a number of waters. The exact reach of the rule is not clear, however, and this simply reinforces the point that the agencies should have accepted another round of comments before finalizing the rule.

The author, Greg Munson, is the former General Counsel and Deputy Secretary for Water Policy at the Florida Department of Environmental Protection. He is now a shareholder practicing environmental law at the Gunster law firm, and working in Tallahassee, Florida.