

Client Alert

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EPA and Army Release Final Rule Expanding Scope of Clean Water Act Jurisdiction

On May 27, 2015, the Environmental Protection Agency and the Department of the Army released a pre-publication version of the final rule defining the scope of waters that will be regulated under the federal Clean Water Act (CWA), also known as the “waters of the U.S.” rule. The rule has implications for any entity regulated under the CWA, including construction, manufacturing, mining, agricultural, and energy development. The rule will become effective 60 days after the date it is published in the *Federal Register*, which is expected soon.

Publication of the rule is expected to trigger legal challenges by a number of states and industry groups. In addition, there are several legislative efforts underway to halt the rule’s implementation, but [environmental groups](#) have already committed to spending several million dollars to lobby against these efforts. It is important that your business review the rule’s provisions and assess how it will impact existing activities, operations and maintenance and future projects. We provide a general summary below of the rule’s major provisions.

Summary of the Rule

The rule creates eight categories of regulated waters. The first four categories, (1) traditional navigable waters (TNW); (2) interstate waters; (3) territorial seas; and (4) impoundments, are jurisdictional by rule. Two categories, (5) tributaries and (6) adjacent waters are jurisdictional by rule where features meet the definition. Two categories, (7) enumerated regional features with a significant nexus; and (8) waters in the 100-year flood plain or within 4,000 feet of a water of the U.S. with a significant nexus, are jurisdictional where the agencies find, after a case-by-case analysis, they have a significant nexus to TNW, interstate waters or territorial seas.

Key New Regulatory Terms

The rule creates new regulatory terms and definitions that will be key to determining jurisdiction:

- A Tributary is newly defined as a water that exhibits a bed, bank and Ordinary High Water Mark (OHWM) and contributes flow, either directly or through another water, to a TNW, interstate water or territorial sea;
- Ditches are now considered jurisdictional where they exhibit tributary characteristics. Certain ditches are excluded from jurisdiction, e.g. ditches with intermittent or ephemeral flow that do not relocate or excavate a tributary, or drain wetlands or ditches that contribute flow to a TNW, interstate water or territorial sea. The burden of proving a ditch is not jurisdictional under one of these narrow exclusions is on landowners and applicants. A ditch may be both a point source and a “water of the U.S.,” which could lead to duplicative and possibly inconsistent regulation under the CWA;
- Adjacent is defined to include waters that are “neighboring” other waters. Neighboring waters now include: all waters located within 100 feet of the OHWM of a TNW, interstate water or

territorial sea; all waters located within the 100-year floodplain and not more than 1,500 feet from the OHWM of such water; and all waters located within 1,500 feet of the high tide line of such waters. The new definition captures features such as ponds, lakes, oxbows and features on industrial sites formerly considered non-jurisdictional. The use of OHWM and 100-year floodplain as factors creates ambiguity and will make it difficult for landowners and regulators to make definitive decisions. The adjacency analysis inserts inconsistency and uncertainty into the process and creates risk for landowners or project proponents who face civil and criminal penalties under the CWA, should they get it wrong.

- Waters not within the distance thresholds of the adjacent waters category can be jurisdictional if they are located within the 100-year floodplain or within 4,000 feet of the OHWM or high tide line of waters of the US *and* are found to have a “significant nexus.” Certain listed regional features (prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands) can also be jurisdictional if they are found to have a significant nexus.
- A significant nexus can be found if any one of the following functions exists: sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a TNW, interstate or territorial sea.

Features Excluded From Jurisdiction

The rule sets forth several exclusions that include:

- waste treatment systems, including ponds or lagoons designed to meet the requirements of the CWA;
- prior converted cropland;
- certain ditches that are not tributaries;
- artificial, constructed lakes and ponds created in dry land, such as cooling ponds, settling ponds, and irrigation ponds;
- artificially irrigated areas that would revert to dry land should watering cease;
- 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;
- erosional features, including gullies, rills, and other ephemeral features that do not exhibit bed, banks and OHWM;
- groundwater, including groundwater drained through subsurface drainage systems;
- stormwater control, wastewater recycling structures, detention and retention basins built for wastewater recycling only where built on dry land; and
- water distribution structures built for wastewater recycling.

Most of the exclusions require that the feature was created in or would revert to “dry land.” Again, the burden will be on the applicant to demonstrate that an exclusion is applicable to features on their land.

The rule establishes that existing approved jurisdictional determinations (JDs) issued under the previous rule remain valid. However, for the most part, pending and future JDs will be subject to the terms of the new rule, upon its effective date.

Our lawyers are available to assist you with understanding how the rule will impact your business.

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