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[Environmental] | Advisory

Clean Water Act Jurisdiction Under the Newly Issued Clean Water Rule

More than 40 years after Congress passed the landmark Clean Water Act, the jurisdictional reach of that statute remains a contentious legal and political issue. By prohibiting the discharge of pollutants to "navigable waters" without a permit, the Act expressly limits its protections to "navigable waters." The statute defines "navigable waters" as "waters of the United States," but fails to define that latter term. Congress' omission led to more than three decades of federal rulemaking and Supreme Court litigation, which has yet to clarify this critical jurisdictional issue.

In their latest rulemaking effort, the United States Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers (Corps) released the "Clean Water Rule" on May 27, 2015, offering their most recent interpretation of "waters of the United States." The validity, scope and impact of the Clean Water Rule remain heavily disputed, and the rule is expected to trigger judicial challenges and possibly a legislative response from Congress (including S. 1140 and H.R. 1732). In the meantime, the regulated community must make sense of this complex rulemaking, estimated by some to affect as much as 60 percent of the land in the United States.

The Clean Water Rule will be published in the Federal Register shortly and will take effect 60 days thereafter. The rule sets the jurisdictional scope for all Clean Water Act regulatory programs: Section 404, for filling and dredging; Section 402, establishing NPDES permits for wastewater and stormwater discharges; Section 311, regarding Spill Prevention, Control and Countermeasures requirements for oil storage; Section 303, regarding water quality standards and maximum daily loads; and Section 401, for water quality certifications. Greenberg Traurig has closely followed regulatory, legislative, and judicial developments involving the "waters of the United States" issue to assist our clients with meeting their Clean Water Act obligations. We continue to do so by offering the following analysis of the Clean Water Rule.

Background

Following passage of the Clean Water Act, both USEPA and the Corps issued separate and dissimilar regulations interpreting "waters of the United States." Litigation ultimately forced the Corps to conform their regulations with USEPA's interpretation. The agencies' interpretation of "waters of the United States" remained essentially unchanged from 1986 until two key Supreme Court decisions - *SWANCC* in 2001 and *Rapanos* in 2006. In both these cases, the Supreme Court concluded that the agencies had interpreted "waters of the United States" too broadly. Ironically, in doing so, the Supreme Court created further ambiguity about the meaning of the term and the jurisdictional reach of the Act. The *Rapanos* decision, which lacked a majority opinion, effectively created a two-part jurisdictional test for wetlands and for waterbodies that were not "traditional navigable waters:" (1) does the wetland have a "continuous surface connection" to traditional navigable waters, or is the waterbody "relatively permanent" and connected to a traditional navigable water, or (2) based on a case-by-case determination, does the waterbody or wetland, "alone or in combination with similarly situated" waterbodies or wetlands, have a "significant nexus" to a traditional navigable water?

Responding to these rulings, USEPA and the Corps issued guidance documents in 2003 and in 2007 to clarify the intended reach of the term "waters of the United States" and to provide more predictable regulatory and enforcement decisions. However, under growing pressure to promulgate enforceable regulations, the USEPA and Corps issued a proposed rule in April 2014 and then conducted a lengthy and extensive public comment process.

The resulting Clean Water Rule, modified materially from the proposed rule, specifies seven categories of regulated waters. Six of these categories are jurisdictional by rule and include: (1) traditional navigable waters, (2) interstate waters (including interstate wetlands), (3) territorial seas, (4) impoundments, (5) tributaries, and (6) adjacent waters. The seventh category is a "catchall" that relies on a case-by-case analysis using the significant nexus test articulated by Justice Kennedy in his concurring opinion in *Rapanos*.

The Clean Water Rule includes marked differences from both the proposed April 2014 rule and the earlier 1986 regulations. The "significant nexus" test, articulated by a single justice in the *Rapanos* decision, has now been promulgated as a regulatory test for jurisdiction. The agencies attempted to provide greater certainty to affected parties by limiting when this time-intensive case-by-case analysis must be utilized. However, the price paid for that certainty was the adoption of regulatory definitions for "tributaries" and "adjacent waters," which, as defined, will likely broaden the scope of federal jurisdiction. Conversely, the Clean Water Rule has expanded the categories of natural and man-made features excluded from jurisdiction.

While USEPA and the Corps publicly contend that the Clean Water Rule has not expanded the jurisdictional footprint of the Clean Water Act, the *Economic Analysis of the EPA-Army Clean Water Rule* published along with the rule concludes that more positive jurisdictional determinations will be reached once the Clean Water Rule is implemented.

The substance of the rule is discussed in more detail below. At the end of this Advisory is a table prepared by the agencies comparing the provisions of The Clean Water Rule with the existing regulations and the April 2014 proposed rule.

Categorically Jurisdictional Waters

The Clean Water Rule sets forth six categories of waterbodies and wetlands that are deemed jurisdictional:

1. traditional navigable waters,
2. interstate waters,
3. territorial seas,
4. impoundments,
5. tributaries, and
6. waters "adjacent" to any of the foregoing waters.

Waterbodies and wetlands that fall within any of these six categories are *per se* jurisdictional, without the need for further analysis. Therefore, for each of these categories, the controlling issues for the jurisdictional determination will be: (1) does the water meet any of the categorical definitions, and (2) does the water fall within any of the regulatory exclusions?

Traditional Navigable Waters, Interstate Waters, and the Territorial Seas. The Clean Water Rule does not materially change the existing regulations with respect to the first three categories. Waters will be considered "traditional navigable waters" if they have been found to be navigable-in-fact by a federal court; are being used, are susceptible in the future to being used, and have formerly been used for commercial navigation (including commercial recreation such as water ski tournaments, boat rentals, and the like); or are subject to Sections 9 or 10 of the Rivers and Harbors Appropriations Act of 1899. Interstate waters include both wetlands and waterbodies, and neither need to be navigable nor connected to traditional navigable waters or territorial seas in order to be jurisdictional. Territorial seas continue to be defined as the sea within three nautical miles of American shores.

Impoundments. The existing regulations deem impoundments of jurisdictional waters to also be jurisdictional, and the Clean Water Rule retains that approach. Importantly, impoundments of jurisdictional waters will be regulated under the Clean Water Act even if there is no flow below the impoundment. Additionally, impounding non-jurisdictional waters can create a jurisdictional waterbody should the impounded waters become navigable-in-fact.

Tributaries. The definition of "waters of the United States" in the existing regulations did not expressly address "tributaries." Instead, those regulations determined jurisdiction over upstream waters on a case-by-case basis. The Clean Water Rule directly incorporates tributaries into the regulatory definition and focuses on the physical characteristics of the water feature in question (whether water flowing through an area has created a bed, banks, and an ordinary high water mark), and whether the feature contributes flow, either directly or indirectly (e.g., through another water body), to a traditional navigable water, interstate water, or the territorial seas.

Importantly, the frequency, duration, volume, and origin of flow are all irrelevant – ephemeral, intermittent, and perennial streams will all be jurisdictional if they possess the requisite bed, bank, and ordinary high water mark. USEPA and Corps consider the terms "perennial," "intermittent," and "ephemeral" to be commonly used scientific terms and declined to define them further in the rule. The existence of these physical characteristics can be assessed using direct observation, U.S. Geological Survey (USGS) data, stream datasets such as the National Hydrography Dataset, aerial photography, reliable remote sensing information, or other appropriate information. The Clean Water Rule's preamble states that the historical existence of bed, bank, and ordinary high water mark, even if no longer present, may be considered as part of a jurisdictional determination.

Water features that contribute flow through either non-jurisdictional features (such as excluded ditches), or through jurisdictional waters that are not tributaries (such as an adjacent wetland), still will be considered a tributary and classified as waters of the United States under the rule, so long as a bed, bank, and ordinary high water mark exist above the non-jurisdictional feature. In other words, there may be natural breaks in flow (for example, where low gradients cause the stream banks to disappear) or there may be a man-made structure in place (such as dams or culverts), yet the water feature will continue to be considered a tributary if it is part of a tributary system that eventually flows to a traditional navigable water, an interstate water, or the territorial seas.

Adjacent Waters. The existing regulations deemed certain water features jurisdictional if they were "adjacent" to "waters of the United States." The Clean Water Rule substantially builds on the concept of adjacency as a jurisdictional trigger and now defines all waters, not just wetlands, that are adjacent to traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries as "waters of the United States." The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." While the Clean Water Rule considers the first two terms to be "well understood," it does provide a regulatory definition for "neighboring" and relies on three geographic criteria to do so:

1. waters within 100 feet of the ordinary high water mark (even if separated by a berm) of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary;
2. waters within the 100-year floodplain, but not more than 1,500 feet from ordinary high water mark, of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary; or

3. waters within 1,500 feet of the high tide line of a traditional navigable water, interstate water, or territorial sea, and waters within 1,500 feet of the ordinary high water mark of the Great Lakes.

The rule provides that the entire adjacent water will be deemed jurisdictional as long as any portion of that water is located within the applicable distance threshold. Under the rule, for example, an entire 100-acre wetland complex will be deemed jurisdictional if just 50 square feet of those wetlands are within 1,500 feet of a jurisdictional ephemeral stream.

"Adjacency" is not limited to waters located laterally to traditional navigable waters, interstate waters, the territorial seas, impoundments, or tributaries. Waters that connect segments of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries, or that are located at the head of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries, may be determined to be adjacent and jurisdictional. For example, a pond that is the source of water to an intermittent stream and that borders that tributary at its uppermost reach is jurisdictional as an adjacent water.

"Significant Nexus" Waters

The other principal jurisdictional hook under the Clean Water Rule is the "significant nexus" test. As adopted in the rule, waters are jurisdictional if an agency determines, after a case-by-case analysis, that those waters have a "significant nexus" to traditional navigable waters, interstate waters, or territorial seas. All waterbodies and wetlands will be subject to the significant nexus test if they are located within (1) the 100-year floodplain, or (2) within 4,000 feet of the high tide line, or ordinary high water mark, of traditional navigable waters, interstate waters, or territorial seas. As in the case of adjacent waters, only a portion of a wetlands or waterbody must be within one of these geographic limits to trigger the significant nexus test, which, if met, would subject the entire wetland or waterbody to jurisdiction.

There are two key components to the significant nexus test: does the waterbody or wetland (1) alone or in combination with other similarly situated waters in the region (2) significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or territorial seas? For certain waters (prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie pools), the Clean Water Rule presumes that these waters are "similarly situated" to other waterbodies of the same type in the same watershed that drain to the nearest traditional navigable water, interstate water, or territorial sea. In other words, these waters are presumed to meet the first prong of the significant nexus test, but must still undergo the case-by-case analysis for the second prong. For all other waters located within the geographic limits, a case-by-case analysis must be conducted for both prongs of the significant nexus test.

Regarding the second prong, the Clean Water Rule mandates demonstration of something more than a speculative or insubstantial impact to the integrity of traditional navigable waters, interstate waters, or territorial seas. To evaluate impacts to the chemical, physical, or biological integrity of jurisdictional waters, the rule identifies the following functions as relevant: sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering or transport, retention and attenuation of flood waters, runoff storage, contribution of flow, export of organic matter or food resources, and provision of aquatic habitat for species located in traditional navigable waters, interstate waters, or territorial seas.

Conversely, there is no need to establish a surface or shallow subsurface hydrologic connection to satisfy the significant nexus test. In some situations, the absence of a hydrologic connection may support a significant nexus test; for instance, if the remote waterbody traps sediments or floodwaters and prevents them from reaching a traditional navigable water, interstate water, or territorial sea.

The Clean Water Rule's articulation of the significant nexus test fails to resolve some of the major issues that currently face affected parties. First, waterbodies and wetlands located thousands of feet from a traditional navigable water, interstate water, or territorial sea could be subject to jurisdiction, even in the absence of a physical connection. Jurisdiction could potentially be established by a connection as tenuous as amphibians moving between an interstate wetlands used for feeding and a vernal pool 4,000 feet away used by that same species for breeding. Second, the substantial nexus test may require affected parties may incur substantial time and cost to generate a sufficient factual and technical record to satisfy the regulatory agencies. Third, applicants looking to challenge jurisdictional determinations

based on the significant nexus test will find the deck stacked in favor of the agencies. Courts have deferred, and can be expected to continue deferring, to the Corps when its significant nexus determinations are challenged.[1]

Excluded Waters

The Clean Water Rule also expressly excludes certain waters and other features from jurisdiction. These exclusions include:

1. waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act;
2. prior converted cropland;
3. three types of ditches ((i) ditches with ephemeral flow that are not a tributary or excavated in a tributary, (ii) ditches with intermittent flow that are not a relocated tributary or excavated in a tributary, or do not drain wetlands, or (iii) ditches that do not flow, either directly or through another water, into a traditional navigable water, interstate water, or territorial sea);
4. artificial, constructed lakes and ponds created in "dry land," such as cooling ponds, settling ponds, and irrigation ponds;
5. artificially irrigated areas that would revert to "dry land" should watering cease;
6. 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;
7. erosional features, including gullies, rills, and other ephemeral features that do not exhibit bed, banks, and ordinary high water mark;
8. groundwater, including groundwater drained through subsurface drainage systems; and
9. stormwater control, wastewater recycling structures, detention and retention basins built for wastewater recycling only where constructed on "dry land."

Several of these exclusions are premised on the fact that the water or landscape feature was created or constructed in "dry land." Unfortunately, the Clean Water Rule does not define that term, adding potential uncertainty for those seeking to rely on those exclusions.

Points to Consider

Acknowledging the complexity of the Clean Water Rule, the USEPA and the Corps intend to issue guidance to assist the regulated community with implementing the rule. Pending further regulatory clarification, the following are some of the more notable areas of potential confusion and uncertainty created by the rule:

1. Erosional features like gullies are excluded, but ephemeral streams that occasionally exhibit a bed, bank, and ordinary high water mark are jurisdictional. It may prove very difficult in practice to distinguish between erosional features and ephemeral streams, particularly in the western states.
2. Quarry ponds or stormwater detention basins are excluded even if they discharge into a jurisdictional water. However, jurisdictional waters that flow into non-jurisdictional waters remain jurisdictional. This would mean that surface flows into those ponds or basins that channelize sufficiently to develop a bed, bank, and ordinary high water mark may be deemed tributaries of downstream jurisdictional waters, and thereby also become jurisdictional.
3. The Clean Water Rule may become a useful tool for environmental advocacy groups seeking to file citizen suits. As a promulgated and enforceable regulation, with a broad geographic reach that can trigger a case-by-case significant nexus analysis, the rule could encourage citizen suit litigation asserting Clean Water Act jurisdiction over waters far removed from traditional navigable waters, interstate waters, or territorial seas.
4. The issue of determining "similarly situated" waters, which is the first prong of the significant nexus test, raises a number of concerns. According to the rule's preamble, if one jurisdictional determination concludes that all waters in a particular watershed are "similarly situated," that determination will be binding on all subsequent jurisdictional determinations. How would an applicant know whether previous jurisdictional determinations in the same watershed

made a "similarly situated" finding, other than by asking the Corps to provide all jurisdictional determinations for that watershed? A watershed advocacy group could pre-emptively file a jurisdictional determination requesting a "similarly situated" finding for all waters in a watershed, and bind all property owners in that watershed with that finding without their knowledge.

5. The agencies acknowledge that "significant nexus," though in part based on "peer-reviewed analysis of published peer-reviewed scientific literature summarizing the current scientific understanding of the connectivity of and mechanisms by which streams and wetlands, singly or in combination, affect the chemical, physical, and biological integrity of downstream waters," is not purely scientific. The rule specifically authorizes the agencies also to rely on their "technical expertise and practical experience in implementing the Clean Water Act during a period of over 40 years." That adds another layer of agency discretion, and therefore uncertainty, to the "scientific" determination of significant nexus.
6. The agencies will rely on the FEMA Flood Insurance Rate Maps (FIRM) to establish 100-year floodplain boundaries, which will be relevant to jurisdictional determinations involving adjacent waters and "significant nexus" waters. FEMA periodically revises floodplain boundaries and re-publishes these maps.. Future FIRM map revisions could trigger the Corps to re-open earlier jurisdictional determinations and/or bring new areas within the Act's jurisdictional reach.
7. The Clean Water Rule's preamble states that approved jurisdictional determinations are valid for five years, implying that those determinations will be unaffected by the rule. However, in spite of this apparent grandfathering provision, two potential exceptions are set forth in the preamble: (1) if new information warrants revision of the determination before the expiration period; or, (2) if requested by the applicant. In either of these circumstances, an agency may revisit a prior determination, and in doing so, apply the potentially broad jurisdictional scope of the Clean Water Rule. Do these exceptions present a threat to those who have already obtained, and are currently relying on, jurisdictional determinations? Would the agencies' discretion permit them to review and revisit a determination if presented with "new information" by an environmental advocacy group?
8. There is the additional unsettled question of whether jurisdictional determinations are considered final agency actions ripe for judicial review under the Administrative Procedures Act. Currently, there is a split in federal Circuit Courts of Appeal on that question, suggesting the Supreme Court may have to weigh in on this important issue.[2] In the meantime, applicants should recognize that jurisdictional determinations made under the Clean Water Rule may not be reviewable until the permitting process is completed or an enforcement action has been initiated, which will further increase the cost, delay, and risk faced by affected parties.

What's Next?

Officials from both USEPA and the Corps have indicated that, on the effective date, local agency administrators will review all pending applications and requests (including jurisdictional determination requests) for which materials have already been submitted, and if they determine that the record includes sufficient information to make a decision as of the effective date,[3] that application or request will be issued under the existing regulations. All other applications and requests will be issued, and evaluated, pursuant to the Clean Water Rule.

Given its new, broad definitions, and the attendant expanded scope of federal jurisdiction over previously local waters, litigation challenging the Clean Water Rule, brought on behalf of states and industry groups, is very likely. These challenges may focus on: the definitions of "tributary" and "adjacent waters," the scope of which could include small, ephemeral, and intermittent streams miles upstream from the nearest traditional navigable water; the concept of ordinary high water mark (which underpins the definition of "tributary"); and isolated waters, otherwise beyond the existing regulation's jurisdictional purview, which are deemed to fall within the Clean Water Rule's jurisdiction because they lie within a specific distance (e.g., 4,000 feet) of a traditional navigable water's ordinary high water mark. Lurking in the background is the larger question of whether the rule runs afoul of the Constitution's Commerce Clause.

In addition, several bills (including S. 1140 and H.R. 1732) are pending in Congress seeking to derail the Clean Water Rule. Whether these bills can pass in both chambers, and survive a potential White House veto, is far from certain. Whatever their fate, these bills reveal that the Clean Water Rule remains both a controversial political issue and a complex rule that will present significant challenges to the regulated community.

Table from USEPA Fact Sheet

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Did not define tributary.	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Included all other waters - the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Caroline & Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches groundwater, gullies, rills, and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

[1] *See, e.g.* , *Precon Dev. Corp. v. Army Corps of Eng'rs* , No. 13-2499, ___ F.3d ___, 2015 WL 1020693 (4th Cir. Mar. 10, 2015) (deferring to Corps' determination that wetlands located seven miles upstream from navigable water were jurisdictional).
[2] *See, e.g.* , *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs* , 782 F.3d 994 (8th Cir. 2015) (approved jurisdictional determination reviewable); *Belle Co. LLC v. U.S. Army Corps of Eng'rs* , 761 F.3d 383 (5th Cir. 2014) (jurisdictional determinations can only be challenged if and when a subsequent § 404 permit to is denied).
[3]The question appears to be whether a decision can be made, not whether a decision must be made as of the effective date.

This *GT Client Advisory* was prepared by **H. Hamilton Hackney III**, **Kerri L. Barsh**, **Michael G. Cooke**, **Hayley E. Neal**, **and John V. Chibbaro**. Questions about this information can be directed to:

- H. Hamilton Hackney III | +1 617.310.6090 | hackneyha@gtlaw.com
- Kerri L. Barsh | +1. 305.579.0772 | barshk@gtlaw.com
- Michael G. Cooke | +1 813.318.5728 | cookem@gtlaw.com
- Hayley E. Neal | +1 303.685.7451 | nealha@gtlaw.com
- John V. Chibbaro | +1 305.579.0568 | chibbaroj@gtlaw.com

Albany
+1 518.689.1400

Amsterdam
+ 31 (0) 20 301 7300

Atlanta
+1 678.553.2100

Austin
+1 512.320.7200

Boca Raton
+1 561.955.7600

Boston
+1 617.310.6000

Chicago
+1 312.456.8400

Dallas
+1 214.665.3600

Delaware
+1 302.661.7000

Denver
+1 303.572.6500

Fort Lauderdale
+1 954.765.0500

Houston
+1 713.374.3500

Las Vegas
+1 702.792.3773

London*
+44 (0) 203 349 8700

Los Angeles
+1 310.586.7700

Mexico City+
+52 (1) 55 5029.0000

Miami
+1 305.579.0500

New Jersey
+1 973.360.7900

New York
+1 212.801.9200

Northern Virginia
+1 703.749.1300

Orange County
+1 949.732.6500

Orlando
+1 407.420.1000

Philadelphia
+1 215.988.7800

Phoenix
+1 602.445.8000

Sacramento
+1 916.442.1111

San Francisco
+1 415.655.1300

Seoul∞
+82 (0) 2 369 1000

Shanghai
+86 (21) 6391 6633

Silicon Valley
+1 650.328.8500

Tallahassee
+1 850.222.6891

Tampa
+1 813.318.5700

Tel Aviv^
+972 (0) 3 636 6000

Tokyo¤
+81 (0)3 3216 7211

Warsaw~
+48 22 690 6100

Washington, D.C.
+1 202.331.3100

Westchester County
+1 914.286.2900

West Palm Beach
+1 561.650.7900