
The rule is set to take effect on August 28, 2015. Now is a good time to consider whether the final rule impacts your operations.

Upon expiration of an NPDES permit or request for a new Section 404 permit, applicants may want to consider whether to pursue a new jurisdictional determination for discharges to storm water retention ponds, cooling lakes, or drainage ditches previously considered “waters of the United States.” While a water body may be excluded from federal jurisdiction, state requirements may still apply and an NPDES permit may still be needed for discharges to a downstream jurisdictional water body. Nonetheless, a new jurisdictional determination could change where permit limits apply, and how to collect data and calculate compliance.

Please contact Schiff Hardin with any questions about your permit or planned construction project.

Background

According to EPA, the Clean Water Rule was an effort to make permitting easier and bring regulations up to date with U.S. Supreme Court opinions. According to EPA, the rule codifies the way Supreme Court decisions have interpreted the definition of “waters of the United States” over the past 30 years. The rule also codifies some important exclusions that may limit the scope of federal jurisdiction in some circumstances.

The CWA gives EPA and the Corps jurisdiction to regulate all “navigable waters,” which the law defines only as all “waters of the United States.” The federal regulatory scope is thus limited by what constitutes the “waters of the United States.” If your property contains or your project affects “waters of the United States,” then authorization, approval, or permitting may be required pursuant to federal programs including Section 311 (oil spill program), Section 401 (water quality certification), Section 402 (NPDES discharge program), and Section 404 (dredged or fill material discharge permit program). A determination that an activity triggers regulatory jurisdiction can add significant time and expense to the project.

The Clean Water Rule impacts a number of parties that are subject to CWA jurisdiction including real estate developers, NPDES permit holders, and those required to prepare and maintain Spill Prevention, Control and Countermeasure (SPCC) plans. You may want to revisit your current operations and permits to determine whether to seek any new jurisdictional determinations in light of the new definition. The following paragraphs briefly review the categories of jurisdictional waters EPA discusses in the rule Preamble then focuses in more depth on the newly clarified exclusions from the definition.

Jurisdictional Waters

The Clean Water Rule establishes eight categories of jurisdictional waters, six of which are per se covered by CWA and two of which may be subject to the CWA after a case-specific significant nexus analysis.
Per Se Categories:

1. Traditional navigable waters;
2. Interstate waters;
3. The territorial seas;
4. Impoundments of jurisdictional waters;
5. Tributaries;
6. Waters adjacent to traditional navigable waters, interstate waters, or the territorial seas; Such adjacent waters include:
   a. Waters separated from a tributary by a barrier such as a "constructed, dike or barrier, natural river berms, beach dunes and the like."
   b. Waters located within the 100-year floodplain and not more than 1,500 feet from the ordinary high water mark of the tributary.
   c. Waters for which any portion is within 1,500 feet from the high tide line of a traditionally navigable water, interstate water or the territorial sea or within 1,500 feet of the ordinary high water mark of the Great Lakes.

The first four categories have previously been identified as jurisdictional waters under the CWA rules. “Tributaries” and “adjacent waters” were not defined in the previous rules, but were often categorized as jurisdictional waters on a case-by-case basis under the standards set out by the Supreme Court. The new definition eliminates the need for case-by-case determinations for many features that fall within these two categories.

Categories Subject to Case-Specific Analysis

The final two categories remain subject to case-specific analysis to determine whether they are jurisdictional:

7. Listed “significant nexus” waters.
   a. The rule lists five categories of waters that are subject to a case-specific “significant nexus” analysis unless they are considered adjacent waters and would then be categorically jurisdictional. These include prairie potholes, Carolina and Delmarva Bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. In determining whether a water has a “significant nexus” because it “significantly affects” a traditional navigable water, interstate water, or territorial sea, a water may be considered alone or in combination with other “similarly situated” waters in the region. Waters covered must have a “chemical connection” to a downstream water that falls in one of the first three categories.

8. Other “significant nexus” waters.
   a. Non-adjacent waters, such as wetlands, ponds, impoundments, or certain non-exempt waters in which normal farming, ranching, and silvicultural activities occur, that are located within the 100-year floodplain of or within 4,000 feet of the high tide line of waters listed in (1)-(5) are also subject to a case-specific “significant nexus” analysis. Again, the analysis evaluates the “chemical connectivity” to a traditional navigable water, interstate water, or the territorial seas.

The Clean Water Rule attempts to provide for the first time bright line boundaries to determine which water bodies may be subject to a case-by-case analysis. However, the new definition also appears to capture more features within the definition of “tributary” extending coverage to those that have physical signs of flowing water, even if they do not flow all year. The “significant nexus” analysis itself remains difficult to apply in practice and could require substantial time and cost to generate a factual and technical record to satisfy the regulatory agencies.
Excluded Waters

The Clean Water Rule expressly excludes certain features from jurisdiction including ditches, storm water retention basins, and long-held exemptions for agriculture. 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. Features including 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; and erosional features, including gullies, rills, and other ephemeral features that do not exhibit bed, banks, and ordinary high water mark;
5. Groundwater, including groundwater drained through subsurface drainage systems; and
6. Storm water 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 on “dry land.” Unfortunately, the Clean Water Rule does not specifically define “dry land.” The rule Preamble, however, confirms that impoundments of jurisdictional waters are covered. Impoundments (such as ponds behind a dam or diversion dike) are jurisdictional because, according to EPA, an impoundment of a “water of the United States” remains a “water of the United States,” even where there is no longer flow below the impoundment.

Therefore, truly artificial water bodies created by excavating and/or diking dry land including farm and stock watering ponds, irrigation ponds, settling basins, log cleaning ponds, cooling ponds, storm water retention basins or fields flooded for rice growing are excluded from the rule. The rule Preamble clearly states that while there was discretion before to make jurisdictional decisions on a case-by-case basis about artificial water bodies, these ponds are now categorically excluded from jurisdiction. Lastly, the exclusion applies to ditches not constructed in streams and that flow only when it rains.

Challenges to the Rule

Immediately upon becoming final, a number of groups have challenged the rule. The future of the rule is unknown and the Schiff Hardin Environmental Group is watching the outcome of pending litigation.

There are currently 10 pending lawsuits in eight district courts. The suits generally claim the Clean Water Rule violates the U.S. Constitution and EPA exceeded its authority under the CWA and the Administrative Procedure Act (APA) in promulgating the rule.

For example:

- Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming joined the New Mexico Environment Department and its state

- The State of Oklahoma challenged the rule in early July asking the court to declare the final rule arbitrary and capricious, along with separate declarations that the rule is unconstitutional and void under the Administrative Procedure Act and that the agencies overstepped their authority under the CWA. U.S. Chamber of Commerce later joined the Oklahoma suit. *State of Oklahoma, Chamber of Commerce of the United States of America, et al. v. U.S. Environmental Protection Agency et al.*, No. 4:15-cv-00381, 00386 (N.D. Oklahoma).

- Murray Energy filed a complaint in West Virginia federal court making APA and Constitutional claims about the rule and stating the final rule would cause the company irreparable economic harm. *Murray Energy Corp. v. U.S. Environmental Protection Agency et al*, No. 1:15-cv-00110 (N.D. West Virginia).

On July 24, 2015, the Government Accountability Office backed EPA, finding that EPA had complied with the requirements prior to finalizing the rulemaking.

On July 27, 2015, the U.S. Attorney General’s office asked the U.S. Judicial Panel on Multidistrict Litigation to consolidate the various suits arguing that if they are allowed to proceed independently, they could result in inconsistent pretrial decisions.

Please contact any member of the Schiff Hardin Environmental Group with questions about the Clean Water Rule, pending challenges, or how the final rule impacts your operations.

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