

# The Clean Water Rule: Definition of Waters of the US

(because who doesn't want clean water?)

OR

Row, Row, Row Your Boat While You Still Can

# Final WOTUS Rule

- \* Issued by the U.S. EPA and the Army Corps of Engineers on May 27, 2015
- \* Defines the scope of waters protected under the Clean Water Act
  - \* “...in light of the statute, Supreme Court decisions...and the agencies’ experience and technical expertise...”
  - \* “...will ensure protection for the nation’s public health and aquatic resources...”

# Final Rule Amends....

- \* 33 CFR Part 328: Definition of Waters of the United States
- \* 40 CFR Part 110: Discharge of Oil
- \* 40 CFR Part 112: Oil Pollution Prevention
- \* 40 CFR Part 116: Designation of Hazardous Substance
- \* 40 CFR Part 117: Determination of RQs for Hazardous Substances
- \* 40 CFR Part 122: EPA Administered Permit Programs: NPDES

# Final Rule Amends...

- \* 40 CFR Part 230: Section 404(b)(1) Dredge or Fill Materials
- \* 40 CFR Part 232: Section 404 Exemptions
- \* 40 CFR Part 300, Appendix E: Oil Spill Response
- \* 40 CFR Part 302: Designation, RQ, and Notifications
- \* 40 CFR Part 401: General Provisions

# Changes from 2014 Proposed Rule

- \* Removed wetlands and other waters lacking bed/bank and ordinary high water mark from definition of tributary
- \* Revises the definition of adjacent for “neighboring” by establishing distances
- \* Eliminates the “other waters” category by clarifying the jurisdiction over isolated waters
- \* Allow for case-specific analysis of certain waters
- \* Refines exclusions and adds features that weren’t previously excluded
- \* Redefines the definition of excluded “ditches”

# What the Clean Water Rule Does Not Do, According to the Preamble

- \* Does not establish any regulatory requirements
  - \* **Definitional rule** that clarifies the scope of “waters of the United States”
  - \* The same definition is added to each of the 11 Parts amended
  - \* “...protect “waters of the United States” from pollution and destruction
- \* Scope of jurisdiction is narrower than under the existing rule
  - \* Qualifiers on existing categories
  - \* Provides clarity regarding jurisdiction

# What the Rule Does, According to the Preamble

- \* Interprets the Clean Water Act to cover those waters that require protection
  - \* Restore and maintain the chemical, physical, **OR** biological integrity of traditional navigable waters, interstate waters, and territorial seas
    - \* the OR becomes important...
- \* Supports the on-going use of general permits to streamline permitting for projects that “...offer significant social benefits, such as renewable energy development”

# What are Waters of the US?

- \* Three basic categories
  - \* Waters that are jurisdictional in all instances
  - \* Waters that are excluded from jurisdiction
  - \* Narrow category of waters subject to case-specific analysis
- \* Preamble highlights eight categories of jurisdictional waters:
  - \* Traditional Navigable Waters
  - \* Interstate Waters
  - \* Territorial Seas
  - \* Impoundments of jurisdictional waters
  - \* Tributaries
  - \* Adjacent Waters

# Tributaries

- \* Waters characterized by the presence of physical indicators of flow – beds and banks and ordinary high water marks (OHWM)
  - \* EXCEPT this also includes ditches to the extent that they are constructed in tributaries, or are relocated tributaries, or in certain circumstances drain wetlands, or ***that science clearly demonstrates are functioning as a tributary.***
  - \* But ditches that flow only after precipitation are excluded
- \* Erosional features, gullies, rills, and ephemeral streams that do not have a bed and bank and ordinary high water mark are excluded

# Adjacent Waters

- \* Bordering, contiguous, or ***neighboring***, included waters separated from other WOTUS by constructed dikes or barriers, natural river berms, beach dunes and the like
- \* Waters that connect segments of, or are at the head of, a stream or river are “adjacent” to that stream or river
- \* Includes wetlands, ponds, lakes, oxbows, impoundments, and similar water features

# “Neighboring” for Purposes of Adjacent

- \* Waters located in whole or in part within 100’ or the ordinary high water mark of a jurisdictional water
- \* Waters located in whole or in part in the 100-year floodplain and that are within 1,500’ of the ordinary high water mark
- \* Waters locate in whole or in part within 1,500’ of the high tide line of traditional navigable water or the territorial seas and within 1,500’ of the ordinary high water mark of the Great Lakes

# But You Said 8

“The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, **either alone or in combination with** similarly situated waters **in the region**. Justice Kennedy acknowledged the agencies could establish more specific regulations or establish a significant nexus on a case-by-case basis, and for these waters the agencies will continue to assess significant nexus on a case-specific basis.”

# The *Significant Nexus*

- \* Waters are WOTUS if they significantly alter the chemical, physical or biological integrity of jurisdictional waters
- \* Made on a water individually, but determination can be made **in combination with other waters where waters function together** (i.e., alone or in combination)
- \* Waters in a **region** may be considered

# What is “the Region”?

- \* The ‘single point of entry watershed’ is a “reasonable and technically appropriate scale”
- \* A single point of entry watershed is the DRAINAGE BASIN
- \* Movement of water from the watershed to the coastal waters, rivers, and lakes shapes the development and function of these systems
- \* ... the watershed is a reasonable and technically appropriate way to identify the scope of waters “that together” may have an effect on the chemical, physical, or biological integrity of the jurisdictional water

# Case Specific Significant Nexus (Part 1 of 2)

- \* Five specific types of waters are jurisdictional based on the science behind the significant nexus:
  - \* Prairie potholes
  - \* Carolina and Delmarva bays
  - \* Pocosins
  - \* Western vernal pools in California
  - \* Texas coastal wetlands

# Pocosins

...because you were afraid to ask

- \* “Swamp on a hill”
- \* Found in Virginia to northern Florida, but mainly in NC
- \* No standing water in these peat-accumulating wetlands
- \* Shallow water table that leaves the soil saturated for much of the year
- \* Topographically the high areas on the regional landscape, and as such, the source of water for downstream waters

# Case Specific Significant Nexus (Part 2 of 2)

- \* Waters within the 100-year floodplain of a jurisdictional water and waters within 4,000' of the high tide line or the ordinary high water mark of jurisdictional waters are subject to case-specific significant nexus determinations
  - \* Waters function “alike” and are sufficiently close to function together

# *Functions for Significant Nexus*

- \* Sediment trapping
- \* Nutrient recycling
- \* Pollutant trapping, transformation, filtering and transport
- \* Retention and attenuation of floodwaters
- \* Runoff storage
- \* Contribution of flow
- \* Export of organic matter
- \* Export of food resources
- \* Provision of life-cycle dependent aquatic habitat

# And Finally, the Exemptions

- \* Waste treatment systems, including treatment ponds or lagoons designed to meet the Clean Water Act
- \* Prior converted cropland
- \* Ditches:
  - \* With ephemeral flow not a relocated tributary or excavated in a tributary
  - \* With intermittent flow that are not a relocated tributary or excavated in a tributary, or that drain wetlands
  - \* That do not flow either directly or indirectly into a navigable water, interstate water, or territorial sea
- \* Artificial features (constructed ponds, rice paddies, cooling ponds, swimming pools, ornamental waters, pits for sand and gravel)
- \* Erosional features
- \* Puddles

# When does WOTUS matter?

- \* Effective 60 days after publication in the *Federal Register*
- \* Agencies will not reopen existing approved jurisdictional determinations unless requested by the applicant **OR** unless new information warrants revision of the determination before the expiration
- \* Requests for jurisdictional determination prior to the effective date will be made consistent with the existing rule
- \* Requesters seeking jurisdictional determinations after the rule is published should expect this rule will prevail (i.e., the agencies do not anticipate making any determinations between publication date and effective date)

# Discussion