The Navigable Waters Protection Rule Updates
Learn more about the ramifications of 22250 Federal Register published April 21, 2020 and EPA policy updates

Background Context

The first Waters of the U.S. (WOTUS) Rule that was consistent between USACE and USEPA was developed in 1993. There were minor changes to the rule in attempts to clarify, but how the Rule was applied remained relatively consistent until after the Rapanos case at the U.S. Supreme Court.

The manner in which the U.S. Supreme Court decision on the Rapanos v United States case was handed down continues to complicate this rule making. There was no majority decision in the case, but there was a plurality decision (Scalia plurality) and a concurring decision (Kennedy). This second decision was viewed as more consistent with other court decisions and provided a stronger basis for regulatory rulemaking and guidance. The Kennedy decision became the basis for future guidance. The case, as it applies to the various rules, created a “significant nexus” test for whether a wetland or stream was jurisdictional, spoke to adjacency of wetlands and streams, and incorporated limited subsurface connections as a part of maintaining jurisdictional review.

The agencies issued 2008 Guidance which explained the applicability of the Rapanos decision to the 1993 Rule. This combined rule and guidance is often referred to as the “Pre-2015 Rule”.

In early 2015, the USEPA issued a report titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”. The report summarized the known connections that occur between streams, wetlands, and groundwater. However, many questioned whether the report was a stepping-stone towards increasing the footprint of jurisdictional review based on science that was not supported in legal cases to that point.

The question was answered by the issuance of the 2015 Rule defining waters of the U.S. A stated intent of the rule was to provide greater clarity. However, it introduced as much confusion as it tried to clarify. Many felt the 2015 Rule strengthened or extended jurisdictional authority into some ephemeral streams, as well as potentially extended jurisdictional authority based solely on groundwater connections “uphill” from a wetland without specificity on where the line would need to be drawn. This called into question as to how the significant nexus requirement from the Kennedy decision was being applied.
As a result, two significant court challenges were made to the 2015 Rule. A North Dakota federal court rendered an injunction to the rule in favor of 13 states, and in another slightly later case, the remaining 37 states, territories, and protectorates obtained an injunction on the rule. In early 2018, the 37-state injunction was lifted, but the 13-state injunction remained, resulting in a mixed bag of 2015 Rule applicability that remained until the “2019 Rule” repealed the 2015 Rule in December 2019. The 2019 Rule will be superceded by the Navigable Waters Protection Rule, which takes effect June 22, 2020.

Navigable Waters Protection Rule (NWPR)

The text of the NWPR refers multiple times to incorporating “federalism,” the application of the Executive Order 13778 (titled Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule), and alters the Rapanos decision from using the Kennedy concurring decision to the Scalia plurality decision. A few outcomes of the NWPR, based on the key terms used in the rule and its own analysis include:

A. TYPICAL YEAR: While used previously, it was undefined. This rule adds a definition which is “precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.” On first reading, this seems consistent with a general understanding, but without field testing, it’s hard to say if this has an impact to jurisdictionality.

B. PERENNIAL, INTERMITTENT, AND EPHEMERAL:

Ephemeral streams are generally exempted under this rule, although it does seem to allow for ephemeral streams making a jurisdictional connection between upstream and downstream features. This is a substantive change in that, under all previous rules, some (albeit limited) ephemeral streams could be jurisdictional under the proper conditions.

C. BREAKS:

In the NWPR, breaks (culverts, pipes, bridges, etc. that do not maintain a surface water connection) in ephemeral stream will typically sever jurisdiction. This may be inconsistent with earlier rules and in its own discussion on ephemeral streams, as noted above. For example, if a stream meets jurisdictional requirements upstream and downstream of a pipe, the pipe is assumed to have replaced a jurisdictional section stream and therefore maintains the jurisdictional connection, irrespective of stream flow.

D. TERRITORIAL SEAS AND TRADITIONAL NAVIGABLE WATERS:

No substantive change here other than to classify Territorial Seas under the heading Jurisdictional Waters. Previously, they had separate headings in text of the published regulation.

E. INTERSTATE WATERS:

Like Territorial Seas, above, they classify Interstate Waters as Jurisdictional Waters rather than under a separate heading. Refer to Outcomes, below.

F. TRIBUTARIES:

No substantive change here.

G. DITCHES:

The 2019 Rule appears to treat ditches in similar manner as earlier rules. In the past, if a ditch had been created where a jurisdictional stream was located (effectively channelizing the stream), then the ditch was jurisdictional. It was then in the field survey evaluation that one would examine if the ditch served as the main drainage for an area and if there were jurisdictional features upstream. The 2019 Rule appears, however, to reduce that aspect. Field testing will best determine if there is an actual change.

H. LAKES AND PONDS, AND IMPOUNDMENTS OF JURISDICTIONAL WATERS:

Similar to the NWPR’s treatment of ditches, the rule does not provide clarity in the treatment of lakes and ponds and impoundments of jurisdictional waters and it does not appear to alter what was jurisdictional prior to this rule.

I. ADJACENT WETLANDS:

The NWPR exempts wetlands protected by levees and dikes that do not have a “significant hydrologic connection” such as a culvert, gate, valve, etc. allowing water to connect to a jurisdictional stream or river. Irrespective of the analysis provided in the rule, this appears contrary to the United States v Riverview Bayside federal court decision that many districts use to take jurisdiction on adjacent wetlands.
J. WATERS AND FEATURES THAT ARE NOT WATERS OF THE UNITED STATES:  As noted above, ephemeral streams and those adjacent wetlands not directly connected to a jurisdictional water, are exempted. Additionally, the NWPR does not effectively define what constitutes a prior converted cropland and, in fact, it could reduce clarity.

Outcomes

The NWPR names the Navigable Waters grouping and then a Jurisdictional Waters subset, which includes Waters of the United States. Waters of the U.S. include:

- Territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide (e.g., traditionally navigable waters);
- Tributaries;
- Lakes and ponds, and impoundments of jurisdictional waters; and
- Adjacent wetlands.

The NWPR also includes a Non-jurisdictional Waters subset. These are not Waters of the United States. Non-jurisdictional Waters include:

- Waters or water features that are not included in Jurisdictional Waters;
- Groundwater, including groundwater drained through subsurface drainage systems;
- Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;
- Diffuse stormwater runoff and directional sheet flow over upland;
- Ditches that are not waters defined as jurisdictional (above), and those portions of ditches constructed in waters that do not satisfy the conditions of adjacent wetlands;
- Prior converted cropland;
- Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
- Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in Non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of a more detailed definition in the text;
- Water-filled depressions constructed or excavated in upland or in Non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in Non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- Stormwater control features constructed or excavated in upland or in Non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;
- Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in Non-jurisdictional waters; and
- Waste treatment systems.

Final Thoughts

1. While these changes apply to most states, it is not likely to be a change to those states that have state-level CWA Section 404 authority, such as Michigan and New Jersey, as well as those states that may have their own, more restrictive regulations.

2. There will likely be numerous court cases filed in relation to the 2019 Rule, and it will likely be enjoined. In fact, at least one court case has already been filed. This process could delay implementation for years and could potentially lead to denial of the rule.