



EPA / Corps of Engineers “Waters of the U.S.” Regulation Update

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Background

- **Clean Water Act (CWA):**
 - Provides federal jurisdiction over "navigable waters" defined as "the waters of the United States, and the territorial seas."
 - "Navigable waters" appears over 80 times in the CWA.
- **New Rulemaking:**
 - EPA and Corps propose new rule to define the scope of water protected under the Clean Water Act (CWA)
 - Proposed in light of 2001 and 2006 Supreme Court rulings:
 - Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers and Rapanos v. U.S.
 - Rulings interpreted scope of CWA more narrowly
 - BUT, *Rapanos* was 4-4 decision and created uncertainty of how it should be defined
 - Rulings urged agency rulemaking
 - Rules intended to replace existing 2003 and 2008 guidance.
 - Originally proposed in 2011 but controversial because of overreach contentions although intended to lessen confusion over Supreme Court Rulings.
 - Legislation proposed to bar guidance or regulations
 - New regulations released in 2014, published in Federal Register April 21, 2014
 - Federal Register, Vol. 79, No. 76, Page 22188
 - Original public comment deadline July 21, 2014
 - Public comment extended currently until Monday, October 20, 2014.
 - <https://www.federalregister.gov/articles/2014/04/21/2014-07142/definition-of-waters-of-the-united-states-under-the-clean-water-act>

Navigable Waters / Waters of the U.S.

- **The Proposed Rule replaces the definition of "navigable waters" and "waters of the United States" in the regulations for all CWA programs, and in particular sections 311, 401, 402, and 404:**
 - 33 C.F.R. § 328.3: Section 404
 - 40 C.F.R. § 110.1: Oil Discharge Rule
 - 40 C.F.R. § 112.2: Spill Prevention, Control and Countermeasure Plan
 - 40 C.F.R. § 116.3: Designation of hazardous substances
 - 40 C.F.R. § 117.1(i): Notification of discharge of hazardous substances required
 - 40 C.F.R. § 122.2: NPDES permitting and Storm Water
 - 40 C.F.R. § 230.3(s) and (t): Section 404
 - 40 C.F.R. § 232.2: Section 404 exemptions
 - 40 C.F.R. § 300.5: National Contingency Plan for oil discharges
 - 40 C.F.R. § 300, Appendix E to Part 300, 1.5: Structure of plans to respond to oil Discharges
 - 40 C.F.R. § 302.3: Petroleum exclusion
 - 40 C.F.R. § 401.11: Effluent limitations

EPA Stated Purposes For Rulemaking

- Ensure protection of our nation's aquatic resources and make the process of identifying “waters of the United States” less complicated and more efficient.
- Achieve these goals by increasing CWA program transparency, predictability, and consistency.
- More effective and efficient CWA permit evaluations with increased certainty and less litigation.
- Increased clarity regarding the CWA regulatory definition of “waters of the United States” and associated definitions and concepts.

Highlights of the Proposed Rule

- **The proposed rule replaces the prior regulatory definition of "waters of the United States" with the following:**
- 1. all waters currently used, used in the past or that may be susceptible to use in interstate or foreign commerce, including tidal waters (e.g., Mississippi River, Red River, Lake Pontchartrain, or Calcasieu River)
- 2. all interstate waters, including interstate wetlands (e.g., Sabine River)
- 3. the territorial seas (e.g., coastal waters up to three miles)
- 4. all impoundments of waters identified in (1)-(3) above (e.g., Toledo Bend)
- 5. all tributaries of waters identified in (1)-(4) above (definition of tributary subject to changes in proposed rule)
- 6. all waters, including wetlands adjacent to a water identified in (1)-(5) above (definition of adjacent subject to changes in proposed rule)
- 7. on a case-by-case basis, other waters, including wetlands, that alone or in combination with other similarly situated waters in the region, have a significant nexus to a water identified in (1)-(3) above (other waters may include vernal pools, prairie potholes and subject to changes in proposed rule)

Key Measures of Regulation

- **Reducing the documentation requirements and the time currently required for making jurisdictional determinations.** The proposed rule sanctions the use of "desktop" information such as watershed studies, U.S. Geological Survey maps, aerial photography or other remote sensing information.
- **Classifying certain waters as "jurisdictional by rule."** For the first time, the proposed rule defines "tributary" based on some evidence of flow, however indirect, to a traditional navigable water.
- **Expanding the existing "adjacent" definition to now include waters as well as wetlands and for the first time defining "neighboring" "riparian area" and "floodplain" broadly to further clarify adjacency.** Under the proposed rule, waters and wetlands a considerable distance from a tributary may be "adjacent" and therefore jurisdictional if located within a riparian or flood plain area even where separated by a man-made structure like a berm. This could include areas outside FEMA's flood plain maps.

Key Measures of Regulation (cont.)

- **Allowing for a generalized scientific study to provide the basis of "significance nexus" for all classes of waters.** The proposed rule defines **"significant nexus"** as existing when **"a water, including wetlands either alone or in combination with similarly situated waters in the region (defined as the watershed), significantly affects the chemical, physical or biological integrity of water identified in (1)-(3) above."** It cites to a scientific literature review conducted by the agency, the **"connectivity study"** to show that the nexus is more than insubstantial.
- **Drawing on scientific literature to support the principle that other waters in a watershed need to be considered in the "aggregate."** The proposed rule directs the agencies to aggregate (e.g., combine together) **"similarly situated"** tributaries, their adjacent wetlands and **"other waters"** within a watershed that discharge into a **"single point"** of entry to a traditionally navigable water as meeting the **"significant nexus"** test. **Streamlining the basis for jurisdiction by eliminating the "commerce clause" test for "other waters" and substituting significant nexus test.** The proposed rule eliminates the existing regulatory provision that defines waters of the United States as including other waters on the basis of interstate or foreign commerce, and instead requires a significant nexus determination.

Key Measures of Regulation (cont.)

- **Finding that "other waters,"** such as isolated vernal pools, prairie potholes and pocosins, may be jurisdictional subject to case specific significant nexus evaluation assessing these waters in combination with similarly situated waters and wetlands in the same region. The proposed rule provides that such waters are "similarly situated" when they "perform similar functions and are located sufficiently close together or sufficiently close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical and biological integrity" of a waters identified in category (1)-(3) above. Under this definition, agency reviewers will have great discretion in identifying certain waters, such isolated ponds and wetlands, and evaluating them together within a large "landscape unit."
- **Expanding the scope of the term "traditional navigable waters."** Under the proposed rule, the definition of traditional navigable water now includes any water body that can support waterborne recreational use, broadly interpreting "susceptible for use" in transporting commerce.

Key Measures of Regulation (cont.)

- **Tributary definition:**
 - Water body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to waters in 1-4.
 - A water **does not lose its tributary status if there are man-made breaks** (such as bridges, culverts, pipes, dams, [levees, floodwalls]) so long as bed and bank can be identified upstream of the break.
 - A wetland, pond, or lake can be a tributary, even if it lacks an OHWM and bed and bank, provided it contributes flow to 1-3.
 - **A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).**

Exclusions in the Proposed Rule

- The proposed rule contains a number of exclusions, including existing exclusions such as **waste treatment systems, prior converted cropland, artificially irrigated areas, artificial lakes and ponds, reflecting pools, small ornamental bodies of water and water-filled depressions incidental to construction activity, water-filled depressions excavated on dry land for the purposes of obtaining sand and gravel**, additional exclusions such as **groundwater, gullies, rills, non-wetland swales, and certain (very limited) ditches**, as well as additional protections for **ranching and agriculture**. Notwithstanding the "exclusions," the proposed rule appears to indicate that even exempt water bodies could be determined to be jurisdictional; however, in such a case, the proposed rule would continue to preclude application of CWA permitting requirements to the excluded water bodies. Despite this assurance, the list of exempted discharges do not appear to reach all exempt water bodies.

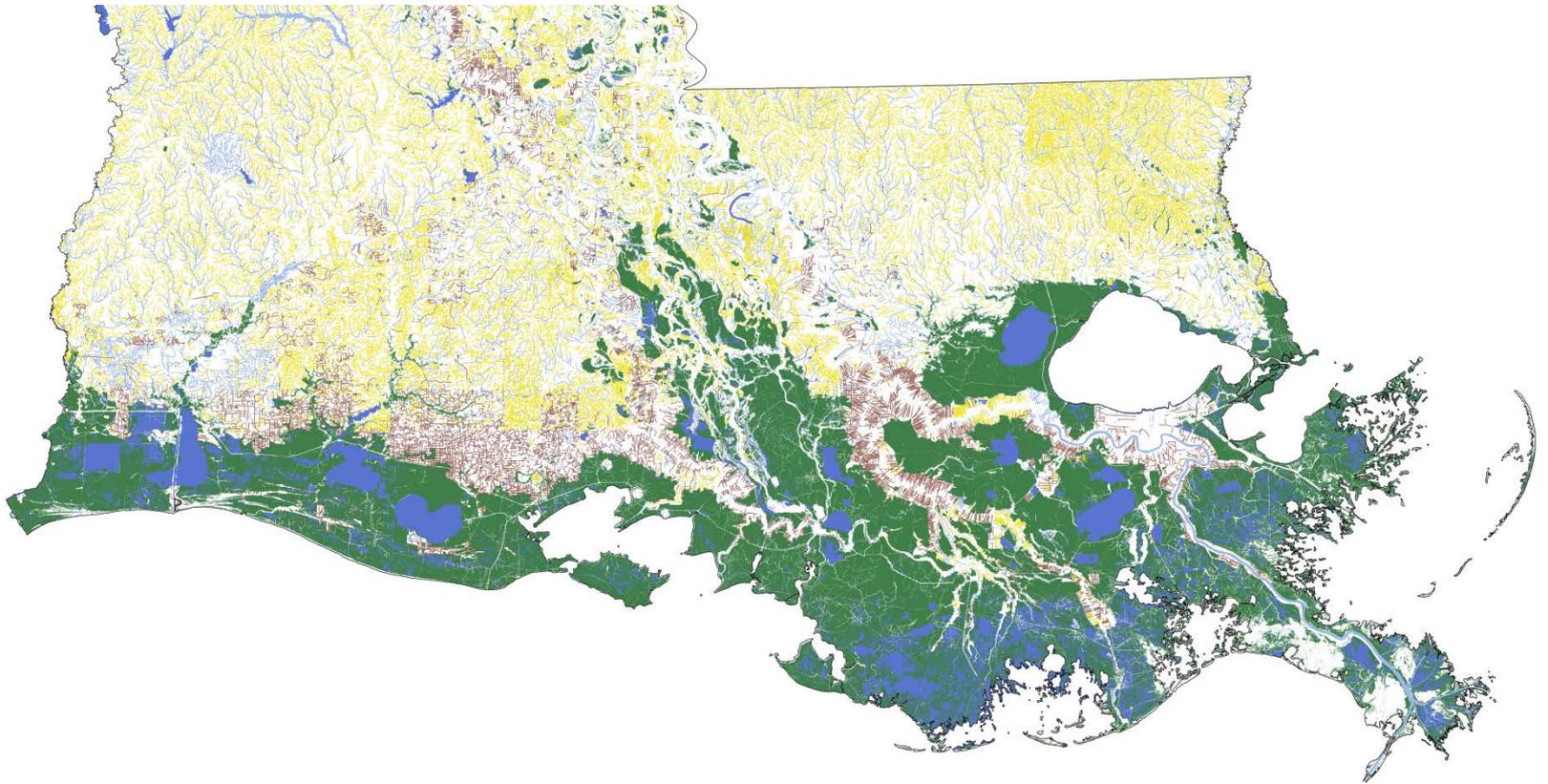
Exclusions (cont.)

- **Key exclusions that are considered to be controversial include:**
- **Ditches.** The proposed rule excludes two types of ditches: (1) those excavated wholly in uplands, drain only uplands and have less than perennial flow; and (2) ditches that do not contribute flow either directly or indirectly to a navigable or interstate water. However, the proposed rule states that a non jurisdictional ditch may be a point source, and also states that a wetland may be considered "neighboring" and thus "adjacent" if the ditch connects the wetland to a tributary. Further, the second category appears to act more like an exception that could sweep in even ditches in the first category, if they ultimately drain to a navigable water.
- **Agriculture.** The proposed rule preserves the CWA agricultural exemptions and proposes to provide further protections for agriculture by developing an interpretative rule with the Department of Agriculture to ensure that established conservation practices that protect water quality will not be subject to the CWA Section 404 permitting program.
- **Groundwater.** Under the exclusions discussion, the proposed rule reiterates the agencies' long-held position excluding groundwater, including drainage through subsurface systems. However, elsewhere in the proposed rule, a shallow subsurface connection could establish "adjacency" jurisdiction. The proposed rule does not distinguish between groundwater and shallow subsurface waters.

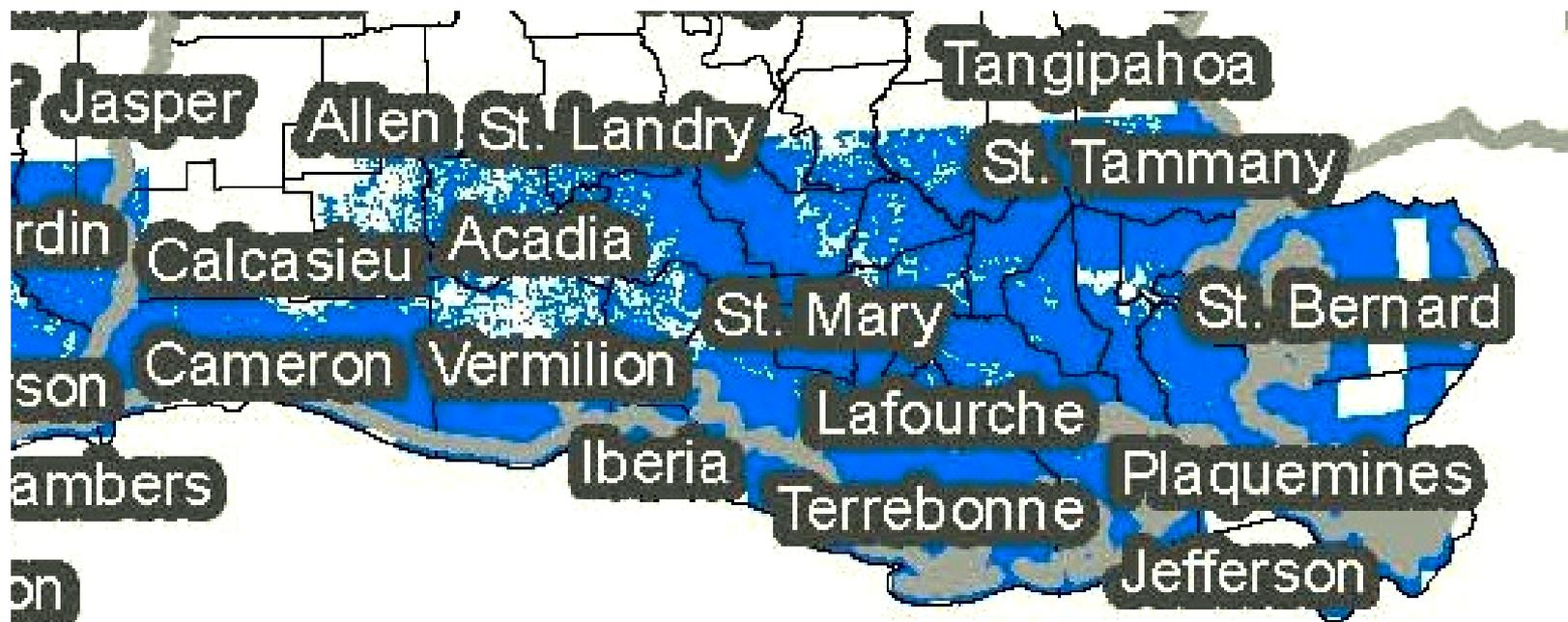
EPA Surface Water Features Map

source: U.S. House Committee on Science, Space, and Technology

<http://science.house.gov/epa-maps-state-2013#overlay-context>



EPA Wetlands Inventory Map



Why It Matters to be WOTUS

- **Defines federal jurisdiction**
- **Type of permit and Degree of Regulation**
 - General or individual permit
 - Numeric water quality standards or best management practices
- **“Federal action” triggers** NEPA, ESA, 401 water quality certification, other Clean Water Act programs
- **Enforcement/likelihood for potential illegal discharges**
 - Are you complying with your permit – meeting water quality standards, discharge limits? At what point is that required?
 - Civil and criminal penalties for violations
- **Third-party citizen suits**
 - Intent and flexibility don't matter
 - Where there's gray, there's a lawyer

Pending Legislation

- **HR 5078: Waters of the U.S. Regulatory Overreach Protection Act**
 - Passed U.S. House of Representatives
 - September 9, 2014 by 262-152 bipartisan vote
 - Prohibits the EPA and the Army Corps of Engineers from finalizing and enforcing a proposed rule that would redefine “waters of the United States” under the Clean Water Act, or using the rule as a basis for future administrative actions. Basis that it is the authority of Congress, not the administration, to change the scope of the Clean Water Act
- **U.S. Senate Bills:**
 - S. 2496, the Protecting Water and Property Rights Act
 - S. 1006, the Preserve the Waters of the United States Act
 - S. 890, Defense of Environment and Property Act

Other Sources of Information

- EPA Website on Waters of the United States:
 - <http://www2.epa.gov/uswaters>
- National Association of Counties:
 - Provides good chart of comparison of current regulations and proposed regulations and potential impact for county/parish administrators
 - <http://www.naco.org/legislation/Documents/Waters-of-the-US-County-Analysis.pdf>
- American Water Works Association
 - Report: “Understanding the Proposed Definition of Waters of the United States”
 - <http://www.awwa.org/Portals/0/files/legreg/documents/WOTUS%20Report%20-%20Final.pdf>
- AWMI Analysis Maps
- Provides Stream, Floodplain and Wetlands maps from USGS, U.S. Fish and Wildlife and FEMA Sources to give approximate idea of potential scope of regulations
 - <http://geosyntec-can.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=9952781243db4c069d0556d04d7d8339>
- Congressional Research Service:
 - CRS Report No. R43455: EPA and the Army Corps’ Proposed Rule to Define “Waters of the United States”
 - www.crs.gov



QUESTIONS

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