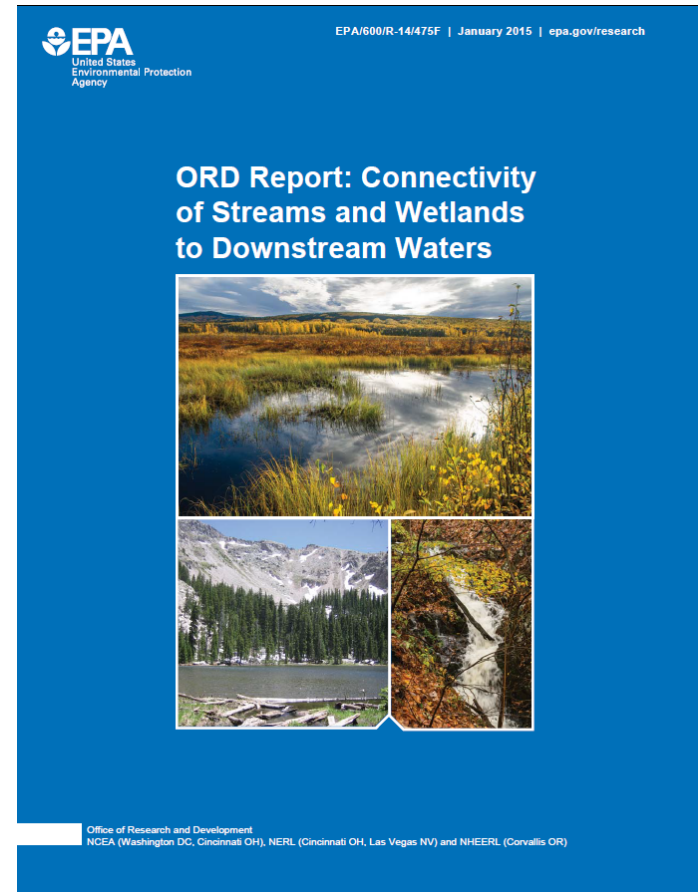


CLEAN WATER RULE

WESTCAS Annual Conference – June 18, 2015

Clean Water Rule

- ❑ May 27, 2015
- ❑ Science report
- ❑ Narrower in scope
- ❑ Increased positive JD's
- ❑ Increased costs
- ❑ Increased benefits



Why a new definition

- Supreme Court Cases
 - ▣ Riverside Bayview Homes, 1985
 - ▣ Solid Waste Agency of Northern Cook County, 2001
 - ▣ Rapanos, 2006
- 2008 Post Rapanos Guidance
 - ▣ Increased number of case-by-case Jurisdictional Determinations by corps staff
 - ▣ Failed to achieve it's intended purpose
- 2011 Proposed WOTUS Guidance

Clean Water Rule

- How it differs from existing guidance
 - ▣ 2008 Post Rapanos Guidance addressed 404 only
 - ▣ Clean Water Rule addresses all CWA Programs
 - Water quality standards
 - Oil pollution prevention and response
 - Discharge permitting
 - Spill reporting
 - ▣ Both tests from Rapanos valid
 - Continuous surface connection
 - Significant nexus standard

What waters are jurisdictional?

- ❑ Traditional Navigable Waters
- ❑ Interstate Waters
- ❑ Territorial Seas
- ❑ Impoundments of any big 3 waters
- ❑ Tributaries
- ❑ Adjacent Waters
- ❑ Similarly situated waters
- ❑ Case-specific waters

Tributary defined

- Tributaries include any water with a bed and bank and evidence of an Ordinary High Water Mark (OHWM)
- Tributaries include ephemeral, intermittent, or year-round flowing streams
- Tributaries include natural, man-altered, or man-made waters
- Ditches are Tributaries if they meet the definition and are not exempt

Neighboring defined

- Adjacent waters defined as bordering, contiguous, or **neighboring** to other waters of the U.S.
 - Neighboring is defined as:
 - Within 100 feet of OHWM of a big three water, jurisdictional impoundment, or Tributary
 - Within the 100-year floodplain and within 1,500 feet of OHWM of a big three water, jurisdictional impoundment, or Tributary
 - Within 1,500 feet of the High Tide Line (new definition) of a Traditional Navigable Water or Territorial Sea, or within 1,500 feet of OHWM of the Great Lakes

Similarly situated & case-specific waters

- Five subcategories of waters that are similarly situated
 - ▣ Prairie potholes
 - ▣ Carolina Bays and Delmarva Bays
 - ▣ Pocosins
 - ▣ Western Vernal Pools in California
 - ▣ Texas Coastal Prairie Wetlands
- Case-specific waters
 - ▣ All waters within the 100-year floodplain of a big three water & waters within 4,000 feet of the OHWM or high tide line of a big three water, jurisdictional impoundment, or Tributary



Categorical exclusions

- ❑ Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds
- ❑ Artificial reflecting pools or swimming pools created in dry land
- ❑ Small ornamental waters created in dry land
- ❑ 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
- ❑ Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land
- ❑ Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling
- ❑ Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- ❑ Puddles
- ❑ Groundwater, including groundwater drained through subsurface drainage systems

Ditch exclusion

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
- Ditches with intermittent flow that are not a relocated tributary or excavated in a tributary, or drain wetlands.
- Ditches that do not contribute flow, either directly or through other water, to traditional navigable waters, interstate waters, or the territorial seas.





Potential challenges

- Undefined terms
 - ▣ Dry land
 - ▣ 100-year floodplain
- Definition of Tributary
 - ▣ As proposed, “...presence of a bed and banks and ordinary high water mark...”
 - ▣ In final rule, “...presence of “physical indicators” of a bed and banks and ordinary high water mark...”
- Isolated basins
- Similarly situated waters, i.e., prairie potholes
- Expansion of SWANCC & Rapanos

Significant nexus standard

In light of Rapanos and SWANCC, the “significant nexus” standard for CWA jurisdiction that Justice Kennedy’s opinion applied to adjacent wetlands also can reasonably be applied to other waters such as ponds, lakes, and non-adjacent wetlands that may have a significant nexus to a traditional navigable water, an interstate water, or the territorial seas.

-Technical Support Document, pg. 377

Adjacent wetlands to adjacent waters







...[W]hile the language of the specific adjacency provision in the final rule may have changed from wetlands to waters, that does not represent an expansion of jurisdiction as a whole in comparison to the existing regulation, since adjacent non-wetland waters would have been subject to jurisdiction under the “other waters” provision.

-Final Rule, pg. 118

Next steps

- Federal Register publication
- Response to comments document
- National Advisory Council for Environmental Policy and Technology (NACEPT)
 - ▣ Assumable Waters Subcommittee
 - 80 Fed Reg., 131539 (March 16, 2015)
 - ▣ Committee Selection June 15, 2015
- Litigation?

WESTCAS comments on proposed rule

-  Abandon groundwater connectivity to establish CWA jurisdiction
-  Exclude all stormwater and groundwater recharge basins from proposed definition of waters of the U.S.
-  Exclude all non-tidal roadside, stormwater and agricultural ditches from the proposed definition of tributary
-  Exclude all isolated impoundments and upland tributaries connected to them from the proposed definition of WOTUS
-  Retain the use of RGL No. 07-02 and all existing agency jurisdictional determinations
-  Eliminate the use of Eco-regions to establish jurisdiction over “other” waters