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Environmental Law Update

WEB CONFERENCE SERIES

Federal Jurisdiction Over Wetlands and the Proposed Clean Water Act Rule: Are EPA and the Army Corps Navigating New Waters?

Tuesday, May 20, 2014

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Program Speaker

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Thomas K. Maurer
Partner
Foley & Lardner LLP
407.244.3242
tmaurer@foley.com

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Program Speaker

3



Sarah A. Slack
Senior Counsel
Foley & Lardner LLP
608.258.4239
sslack@foley.com



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Program Speaker

4



Catherine M. Basic
Associate
Foley & Lardner LLP
414.297.5865
cbasic@foley.com



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Outline

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- Introduction – Federal Jurisdiction over “Waters of the United States” (i.e., wetlands)
- Case Law Regarding “Waters of the US”
- Agency (EPA / Army Corps) Interpretation
- Proposed Rule



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Introduction



Over-arching Federal Law Affecting Water

- Section 301 of Clean Water Act (CWA) and 1899 Rivers & Harbors Act
 - Prohibits “discharge of any pollutant by any person” except in compliance with Act
- “Discharge of pollutant” is “any addition of any pollutant to navigable waters from a point source”





Regulation of Actions Affecting Wetlands

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- In the wetlands context, CWA prohibits “discharge” of “pollutants” (e.g., dredged or fill material) to “navigable waters”
- Examples
 - Placing fill in wetland
 - Replacement of native materials into wetland (including, potentially, material falling out of backhoe bucket, known as “fallback” or “sidecasting”)
 - Clearing of wetlands
 - Draining wetlands
 - Cutting wetland vegetation



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Clean Water Act – Jurisdiction

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- Jurisdiction is only over “navigable waters”
- CWA defines “navigable waters” as “waters of the United States, including territorial seas”
- United States Environmental Protection Agency (EPA)/United States Army Corps of Engineers (Corps) have identical regulations defining “waters of the United States”
 - 40 C.F.R. § 230.3(s) (EPA); 33 C.F.R. § 328 (Corps)



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“Waters of the United States” means...

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1. All waters currently used, or were used, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide
2. All interstate waters, including interstate wetlands



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“Waters of the United States” means...

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3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - Which are/could be used by interstate or foreign travelers for recreational/other purposes
 - From which fish/shellfish are/could be taken and sold in interstate or foreign commerce
 - Which are/could be used for industrial purposes by industries in interstate commerce



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“Waters of the United States” means...

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4. All impoundments of waters otherwise defined as waters of the United States under this definition
5. Tributaries of waters identified in Nos. 1 through 4
6. The territorial sea
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in Nos. 1 through 6, waste treatment systems including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11[m] which also meet the criteria of this definition) are not waters of the United States



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“Waters of the United States” means...

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- Waters of the United States do not include prior converted cropland
- The determination of an area’s status as prior converted cropland by any other Federal agency, for purposes of the CWA, the final authority regarding CWA jurisdiction remains with the USEPA



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Why Care About Federal Jurisdiction?

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- A water's jurisdictional status can have implications on/for:
 - Permitting of pollution discharges
 - Filling of wetlands and streams
 - Certifications by states that activities such as dam-building or other federally permitted activities do not harm water quality and cleanup of oil spills
 - Drinking water supplies
 - Beneficial uses of water by property owners
 - The health of fish and other wildlife
 - The filtering of pollutants
 - Resilience to flood hazards

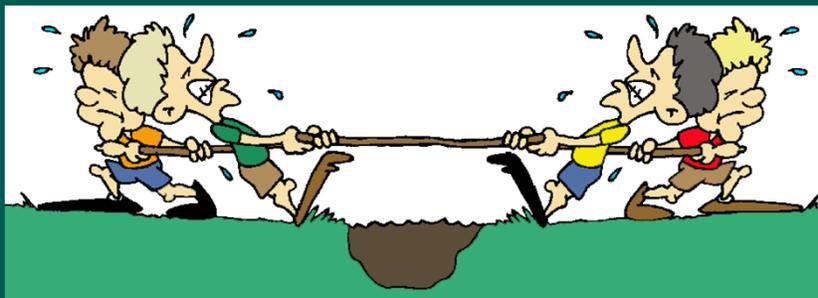


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Navigable Waters / Waters of the US

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Defining “waters of the United States” has been a tug of war between the courts and agencies



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Case Law Regarding “Waters of the US”



United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (9-0)

- *Bayview* determined federal jurisdiction extends to waters and wetlands “adjacent to” navigable waters, even though adjacent wetlands may be geographically and hydrologically isolated from the waters
- **Rule:** wetlands adjacent to traditional navigable waters are covered by the CWA; wetland need not be navigable to be regulated
- As a result of *Bayview*, Corps promulgated regulations and guidance concerning jurisdiction over “isolated wetlands” – 51 Fed. Reg. 41206 (1986)





Migratory Bird Rule

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- Corps interpreted element of federal jurisdiction, which extends to “waters, including wetlands, the use, degradation, or destruction of which could affect interstate commerce”
- Corps used interstate commerce link to promulgate guidance to assert jurisdiction over “isolated waters”
- Corps determined in 1986 that federal jurisdiction extended to isolated wetlands visited by migratory birds (i.e., interstate travelers) and hunters and bird watchers who traveled to see (or shoot at) them



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SWANCC

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- In 2000, after several courts split as to validity of migratory bird rule, SWANCC case came before Supreme Court – *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps of Engineers* (2001)
 - Factually, SWANCC sought to use former sand and gravel mining site in northern Illinois for landfill
 - Corps denied SWANCC’s individual permit application, asserting jurisdiction over isolated wetlands on property on basis of migratory birds triggering Commerce Clause

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SWANCC – Migratory Bird Rule Doesn't Fly

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- Supreme Court rejected “migratory bird” rule
- *SWANCC* court focused more on Corps exceeding its authority in promulgating migratory bird rule than constitutional extent of authority over isolated wetlands via the Commerce Clause



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End of Migratory Bird Rule

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- *SWANCC* court rolled back part of *Bayview*, demanding there be some nexus to navigable waters, above and beyond speculative Commerce Clause link based on interstate birds
- *SWANCC* court extended greater deference to states to effectively regulate wetlands
- For federal jurisdiction to extend to isolated, intrastate wetlands, *SWANCC* court demanded wetland be “adjacent to” some navigable water



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Rapanos v. United States

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- Rapanos planned to sell 175-acre plot near Traverse City, MI to developers, after clearing property
 - Wetlands connected via 100 year old man-made drain through two other non-navigable tributaries to Kawkawlin River (navigable)
 - Rapanos property “between 11 and 20 miles from nearest navigable in fact river”



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Rapanos v. United States – Background

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- Rapanos’ attorney consults with MDNR, who advises Rapanos that wetlands are on-site
- Rapanos’ consultant identifies up to 60 acres of wetlands
- Rapanos instructs consultant to destroy report
- Rapanos starts clearing and filling wetlands



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***Rapanos v. United States* – Background**

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- MDNR and U.S. EPA bring action on basis of migratory bird rule **and** adjacency and obtain judgment of \$185,000 and 3 years probation – but after appeals and SWANCC decision, court finds no jurisdiction because wetlands were not “directly adjacent to navigable waters”
- Sixth Circuit reverses, arguing any contamination that affects drain could ultimately affect navigable waters (11 to 20 miles away)



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Carabell v. United States

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- Carabell sought to deposit fill material in wetland one mile from Lake St. Clair (Michigan)
- 4-foot wide berm separated wetland from man-made drainage ditch that flowed through tributaries to Lake St. Clair
- Sixth Circuit concluded wetland was connected to tributary system “one way or the other” and upheld Corps jurisdiction and denial of permit to Carabell



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U.S. Supreme Court – *Rapanos/Carabell* Decisions (6/19/06)

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- Issue = whether CWA covers wetlands that do not contain, and are not adjacent to, waters that are not navigable in fact
- Supreme Court split 4-1-4
- Justices issued five separate opinions (with no one opinion being a majority) – 126 S. Ct. 2208 (2006)
- Judgments vacated and cases remanded



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Scalia, Roberts, Thomas and Alito²⁸ Write Plurality Opinion

- “Navigable waters” means “relatively permanent bodies of water”
 - “... at a bare minimum, [wetlands require] the ordinary presence of water”
- Applied a two-part test
 - A finding that there is a “... relatively permanent standing or flowing body of water connected to traditional interstate navigable waters”
 - Each wetland has a “... continuous surface connection to bodies that are ‘waters of the United States’ in their own right” – making it difficult to determine where “water” ends and “wetland” begins



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Scalia, Roberts, Thomas and Alito²⁹ Write Plurality Opinion

- “Relatively permanent”
 - Excludes intermittent and ephemeral streams
 - But does not necessarily exclude:
 - Streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought
 - Seasonal rivers that contain continuous flow during some months of the year but no flow during dry months

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Kennedy Writes Separate Opinion³⁰ Concurring With Plurality

- Defers heavily to SWANCC – significant nexus
- Corps correctly interprets CWA to apply to impermanent streams
- “Nexus” exists “if the wetlands ... significantly affect the chemical, physical and biological integrity of other covered waters more readily understood as ‘navigable’”
- Nexus is case-by-case determination
- More expansive interpretation of jurisdiction

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Stevens, Souter, Ginsberg and Breyer File Dissenting Opinion

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- Courts must defer to Corps as to what “wetland” is and what “adjacent” means
- To do otherwise is to disregard the Court’s decision in *Riverside*
- Would have affirmed decisions in both cases



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Rapanos Rules

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- Supports finding CWA coverage for a wetland when either:
 - There is a significant nexus between the wetland and navigable waters in the traditional sense (Kennedy significant nexus test); or
 - A relatively permanent body is connected to traditional interstate navigable waters, and the wetland has a continuous surface connection with that water (Scalia plurality test)

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Post Rapanos

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- Which approach = controlling test?
- Eight years after *Rapanos* decided, answer is not entirely clear
- Post-*Rapanos* case law demonstrates that there is a split between the circuits again.



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Circuits Split Again

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Circuit	Kennedy "Significant Nexus" Test	Plurality / Scalia 2-Part Test
1st	U.S. v. Johnson (2006) U.S. v. Agosto-Vega (2010)	U.S. v. Johnson (2006) U.S. v. Agosto-Vega (2010)
2nd	Not directly addressed in recent appellate decisions; but probably both standards would be adopted in future	
3rd	U.S. v. Donovan (2011)	U.S. v. Donovan (2011)
4th	Precon Development Corp. (2011); Deerfield Plantation (2012)	
5th	U.S. v. Lucas (2008)	U.S. v. Lucas (2008)
6th	U.S. v. Cundiff (2007)	U.S. v. Cundiff (2007)
7th	U.S. v. Gerke Excavating (2006)	
8th	U.S. v. Bailey (2009)	U.S. v. Bailey (2009)
9th	N. Cal. River Watch v. Heraldsburg (2007)	
10th	TBD	
11th	U.S. v. Robinson/McWane (2007)	

Note: This chart does not contain all appellate decisions re federal jurisdictional wetlands; however it is representative of each circuit's position



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EPA & Corps' Interpretation of “Waters of the US” Guidance Documents



2008 CWA Jurisdiction Guidance

- Joint guidance issued by U.S. EPA and Corps
- Described jurisdiction based on both *Rapanos* standards (Scalia and Kennedy)





2008 CWA Guidance

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- EPA/Corps **will** assert jurisdiction over the following waters:
 - Traditional navigable waters
 - Wetlands adjacent to traditional navigable waters
 - Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (at least 3 months)
 - Wetlands that directly abut such tributaries



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2008 CWA Guidance

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- Jurisdiction over the following waters based on a fact-specific analysis to determine whether waters have a significant nexus with a traditional navigable water:
 - Non-navigable tributaries that are not “relatively permanent”
 - Wetlands adjacent to non-navigable tributaries that are not relatively permanent
 - Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary



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2008 CWA Guidance

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- Will **not** assert jurisdiction over:
 - Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
 - Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry relatively permanent flow of water



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2008 CWA Guidance

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- Will apply significant nexus standard as follows:
 - Assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream navigable waters
 - Consideration of hydrologic and ecologic factors

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Draft Guidance Issued in 2011

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- EPA and Corps claimed that it clarified how to identify CWA protected waters
- EPA: “Previous guidance did not make full use of the authority provided by CWA ... as interpreted by the Court”
- EPA/Corps claimed the guidance would have increased jurisdiction, but not to extent SCOTUS described in *SWANCC/Rapanos*
- Sought to improve predictability and consistency CWA application



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Criticism to 2011 Guidance

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- Extremely controversial
- According to Environmental News Service
 - “... guidance document, knows no bounds, as the agency sees nearly every body of water in the United States, no matter how significant, as potentially falling within its reach” – Senator Inhofe
 - “Sen. Gibbs and 168 other House Republicans and Democrats wrote to EPA and the Army Corps to express their concerns that the agencies are circumventing the proper regulatory process in order to push through this expansion of federal jurisdiction”
- Agencies received thousands of public comments
- Withdrawn September 2013



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“Waters of the United States” Proposed Rule



Proposed “Waters of the US” Rule

- March 25, 2014 – EPA/Corps proposed rule (published in Federal Register on April 21, 2014)
- Purpose = make the process of identifying “waters of the United States” less complicated and efficient
- Seeks to increase transparency, predictability, and consistency for all parties (regulators, stakeholders)
- According to EPA administrators, the rule would not change existing exemptions and exclusions (i.e., those that apply to agricultural sector)
- Public comment open for 90 days (ends July 21, 2014)





Proposed Rule – 40 C.F.R. 328

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- Section 328 (a) defines “waters of the United States” for all CWA sections as:
 - (1) (SAME) All waters currently used, were used in the past, or may be susceptible to use in interstate commerce, including all waters subject to the ebb and flow of the tide (e.g., Mississippi River)
 - (2) (SAME) All interstate waters, including interstate wetlands
 - (3) (SAME) The territorial seas
 - (4) (SAME) All impoundments of waters in paragraphs (a)(1)-(3)

...



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Proposed Rule – 40 C.F.R. 328

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- Section 328 (a) cont'd:
 - (5) All tributaries of waters identified in paragraphs (a)(1)-(4)
 - More inclusive than current rules because “tributary” is newly and broadly defined in Proposed Rule
 - (6) All waters, including wetlands, adjacent to water identified in paragraphs (a)(1)–(5)
 - By including all adjacent waters, instead of only adjacent wetlands, the proposed rule is more inclusive than current rule
 - These waters are jurisdictional because they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas



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Proposed Rule – 40 C.F.R. 328

- Section 328 (a) cont'd:
 - (7) On a case-specific basis, **other waters**, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas. (REVISED)
 - The proposed rule omits non-exclusive list of “other waters”
 - Deletes language requiring that an “other water” be one “the use, degradation or destruction of which could affect interstate commerce”
 - Instead proposed rule requires it to meet significant nexus standard (considered a substantial change)



Proposed Rule – Other Highlights

- Encourages use of “desktop” information, including watershed studies, USGS maps, aerial photographs, etc.
- “Jurisdictional by rule” waters
 - E.g., “Tributary” – some evidence of flow to traditional navigable waters (“TNW”), even if broken flow associated with road/barriers, if ordinary high water mark (“OHWM”) or bed/banks are present, the rule classifies that it has a significant nexus and is a tributary. This includes natural and man-made waters such as canals and ditches, unless excluded specifically (§328(c)(5))
- “Adjacent” definition (§328(c)(1))
 - This definition has been enlarged such that waters and wetlands a considerable distance from a tributary could be considered “adjacent” if located within a floodplain area, even if separated by a man-made structure





Proposed Rule – Other Highlights

- “Significant Nexus” – defined in the Proposed Rule as “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 waters identified in 1-3 on previous slide (§328(c)(7))
- “Aggregate” Approach – directs agencies to aggregate (i.e., combine) “similarly situated” waters such as tributaries, wetlands and other waters within a watershed that discharges to a TNW as meeting the “significant nexus” test (§328(a)(7))



Proposed Rule – 40 C.F.R 328(b)

- Under Section 328(b), the following are not “waters of the United States”:
 1. (SAME) Wastewater treatment systems designed to meet CWA requirements
 2. (SAME) Prior converted cropland
 3. (NEW) Ditches that are wholly excavated in uplands, drain only uplands, and have less than perennial flow
 4. (NEW) Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of jurisdictional water





Proposed Rule – 40 C.F.R. 328(b) cont'd

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5. (NEW) The following features are excluded:

- Artificially irrigated areas that would revert to upland if application of water or irrigation ceased
- Artificial lakes or ponds created by excavating and/or diking dry land used for stock water, irrigation, rice growing or settling basins
- Small ornamental waters
- Water-filled depressions created incidental to construction activity
- Groundwater, including water drained through subsurface drainage systems
- Gullies, rills, and non-wetland swales



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Presentation Break

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CLE Code Announcement



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EPA: Certain CWA Exemptions for Agricultural Sector Remain Intact

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- Agricultural storm water discharges
- Return flows from irrigated agriculture
- Normal farming, silvicultural, and ranching activities
- Upland soil and water conservation practices
- Construction or maintenance of farm or stock ponds or irrigation ditches
- Maintenance of drainage ditches, etc...



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Interpretive Rule Issued Simultaneously

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- EPA, Corps and U.S. Department of Agriculture developed an interpretive rule regarding applicability of “normal farming” exclusion under CWA Section 404(f)(1)(A)
- Ensures that 53 specific conservation practices that protect or improve water quality will not be subject to Section 404 dredged or fill permitting requirements
- Will work together to implement exemptions and practice standards
- Effective immediately



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Proposed Rule Relies Upon the “Connectivity Study” (Science Report)

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- Proposed Rule relies on an EPA **draft** science report, *Connectivity of Streams and Wetlands to Downstream Waters*, released on the same day
- Any final regulatory action on rulemaking will be based on the final version of this scientific assessment
- According to EPA, the report “presents a review and synthesis of more than 1,000 pieces of relevant peer reviewed scientific literature.”
- The draft report is currently under peer review and public comment



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Draft “Connectivity Study”

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- Would allow agencies to determine on a case-by-case basis whether geographically isolated wetlands and certain other waters in the uplands have a significant nexus to the chemical, physical and biological integrity of downstream waters (and thus, be considered jurisdictional)
- Concludes streams, regardless of their size or frequency of flow, are connected to and have important effects on downstream waters.
- Wetlands in floodplains of streams and rivers and riparian areas are integrated with streams and rivers, and strongly influence downstream waters by affecting water flow, trapping / reducing nonpoint source pollution, and exchanging biological species
- Found insufficient information to generalize about wetlands located outside riparian areas and floodplains and their connectivity to downstream waters



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Proposed Rule Support/Criticism

- While enviro groups (Sierra Club, American Rivers, NRDC) support the rulemaking action, the proposed rule (and draft science report) faces opposition
- American Farm Bureau Federation:
 - “It is difficult ... to see any federal jurisdictional limit here except for what they call out as exemptions.”
 - Tramples state authority to regulate state waters
- It expands CWA jurisdiction by broadly defining tributaries and adjacent waters
- Supporters of proposed rule argue opponents using endless delay-tactics to prevent progress



Proposed Rule Criticism

- EPA and Corps understated costs and overstated benefits of draft CWA rule
- Relied on incomplete data, flawed methodology, outdated studies to conclude that acreage covered by CWA Section 404 permits would increase 2.7% due to rule
- EPA underestimated the likely number of development projects, used data from recession years, failed to account for inflation, etc.
- Under proposed rule, greatest costs would be incurred by developers, mining companies, landowners and other permit applicants





Congressional Opposition

- May 1, 2014 letter to EPA
- Signed by 231 Representatives (including 19 Democrats)
- Argues proposed rule contradicts U.S. Supreme Court decisions
- “Creates more confusion”
- “Relies on undefined or vague concepts” (e.g., “riparian areas,” “floodplain”) “... determined by the agencies’ ‘best professional judgment’ and ‘aggregation.’”
- Economic analysis flawed
- Asks EPA/Corps to withdraw rule



Congressional Opposition

- Senate / Congressional Western Caucus sent letter to EPA on 5/8
- EPA failed to consult with the governors of the Western states with sizeable ranching and farming operations that would be significantly affected
- Proposed rule specifies agricultural practices that are exempt from Section 404 permitting; application of pesticides at or near waters on farms and ranches is not listed among those practices
- EPA Response on (5/12) - Prasad Chumble (an EPA official) stated nothing really changes” with respect to pesticide spraying operations subject to NPDES permitting requirements – pesticide spraying activities that currently don't require NPDES permits will still not be subjected to the permitting requirements





Looking Ahead

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- Public Comment period set to end on July 21, 2014; will likely be extended
- EPA/Corps want to finalize the rule by 2015
- If finalized, expect challenges for judicial review



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Practical Impacts?

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- Additional 3% of U.S. waters subject to CWA jurisdiction
- 17% of this estimated increase relates to “other waters” non-jurisdiction under existing regulations and 2008 guidance
- Increased costs to regulated entities and governments
 - Permit application process, mitigation credits, administrative review of permit
- Benefits to ecosystem and newly protected waters



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Questions & Answers



Contact Information

Thomas K. Maurer

Partner
Foley & Lardner LLP
111 N. Orange Avenue
Suite 1800
Orlando, FL 32801
407.244.3242
tmaurer@foley.com

Sarah A. Slack

Senior Counsel
Foley & Lardner LLP
150 E. Gilman Street
Suite 5000
Madison, WI 53703
608.258.4239
sslack@foley.com

Catherine M. Basic

Associate
Foley & Lardner LLP
777 E. Wisconsin
Avenue
Milwaukee, WI 53202
414.297.5865
cbasic@foley.com





Thank You!

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- A copy of the PowerPoint presentation and a multimedia recording will be available on the event Website early next week
<http://www.foley.com/environmental-law-update-federal-jurisdiction-over-wetlands-and-the-proposed-clean-water-act-rule-are-epa-and-the-army-corps-navigating-new-waters/>
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