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WOTUS Rule



WOTUS Rule

- “Shorthand” for Waters of the United States, which is found in the Clean Water Act.
 - What does it mean?
 - Why does it matter?
 - Clean Water Act discharge permits
 - Wetland dredge and fill permits (most applicable to agricultural activities)



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Navigable waters

- The Clean Water Act gives the EPA and the Corps of Engineers authority over “navigable waters”
- Navigable waters are defined as “waters of the United States, including the territorial seas”



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Regulatory Definition

- Traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands
 - 33 C.F.R. § 328.3; 40 C.F.R. § 122.2



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Rapanos v. US

- 547 U.S. 715 (2006)
- Plurality Opinion (5-4 decision)
- Most courts apply the “significant nexus” test from Justice Kennedy’s concurring opinion



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Significant nexus

- The connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a “navigable water” under the Act Absent a significant nexus, jurisdiction under the Act is lacking.”
 - Justice Kennedy, *Rapanos v. US* (2006)



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Proposed rule

- Issued on April 21, 2014
- Proposed to provide “clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting”
- Over 1 million comments were filed



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Final rule

- Published on June 29, 2015
- Defined:
 - Waters of the United States
 - Tributaries
 - Adjacent Waters
 - Isolated Waters
 - Significant Nexus
 - Excluded Waters



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Waters of the US – Final Rule

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of waters otherwise identified as waters of the US;
- All tributaries of water of the US;
- All waters adjacent to waters of the US, including wetlands, ponds, lakes, oxbows, impoundments and similar waters;
- All waters where they are determined, on a case-specific basis, to have a significant nexus to a water of the US.



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Tributaries – Final Rule

- Water that contributes a flow, either directly or through another water, to a water of the US
- Characterized by the presence of a bed and banks and an ordinary high water mark
- Can be natural, man-altered, or man-made, including rivers, streams, canals and ditches



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Adjacent waters - Final Rule

- Bordering, contiguous, or neighboring a water of the US
- Includes waters (and wetlands) separated by constructed dikes or barriers, natural river berms, beach dunes and the like
- Waters being used for normal farming, ranching, and silvicultural activities are not adjacent (33 U.S.C § 1344(f))



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“Normal” Farming Activities

- Plowing
- Seeding
- Cultivating
- Minor drainage
- Harvesting for the production of food, fiber or forest products
- Upland soil and water conservation practices



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Isolated or “other” waters

- Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in CA, and TX coastal prairie wetlands when they have significant nexus.
- Includes waters with a significant nexus within the 100-year floodplain of a traditionally navigable water, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters



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Exclusions – Final Rule

- Waste treatment systems
- Prior converted cropland
- Certain ditches:
 - 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, excavated in a tributary or drain wetlands
 - Ditches that do not flow, either directly or through another water into a water of the US



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Exclusions – Final Rule

- Certain Other Features:
 - Artificially irrigated areas that would revert to dry land should application of water to that area cease
 - 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
 - Erosional features
 - Puddles
 - Groundwater
 - Stormwater control features
 - Wastewater recycling structures constructed in dry land



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Definition of Significant Nexus

- Water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a jurisdictional water



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Let's break that down

- “Similarly situated” – waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters
- “In the region” means the watershed that drains the nearest jurisdictional water
- “Significant” – must be more than speculative or insubstantial



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Significant Nexus

- Assessed by evaluated relevant aquatic functions
- A water has significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributed significantly to the chemical, physical, or biological integrity of the nearest jurisdictional water.



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Relevant Aquatic Functions

- Sediment trapping
- Nutrient recycling
- Pollutant trapping, transformation, filtering, and transport
- Retention and attenuation of flood waters
- Runoff storage
- Contribution of flow
- Export of organic matter
- Export of food resources
- Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a jurisdictional water



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Lawsuits Filed

- Arkansas joined a coalition of 13 states, led by North Dakota
- Filed Complaint in North Dakota District Court – June 29, 2015
- Filed Petition for Review with Eighth Circuit Court of Appeals



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North Dakota District Court

- Filed Motion for Preliminary Injunction
- Granted by the Court and applies to the 13 states in our coalition
- This meant that the new rule did not go into effect in Arkansas



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Circuit Court of Appeals

- Our Eighth Circuit Petition was combined with all other Circuit Court petitions into one action before the Sixth Circuit
- Our coalition and others, including American Farm Bureau Federation, filed Motions to Dismiss the case from Circuit Court – claiming that the Circuit Court did not have the authority (jurisdiction) to hear the case



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Sixth Circuit Court of Appeals

- Recently ruled – in a very fractured opinion from a 3-judge panel – that it did have jurisdiction to hear the case
- The parties asked for rehearing *en banc*, which was denied
- While considering the jurisdictional question, the court issued a nationwide stay of the rule which is still in place



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North Dakota District Court

- We have pending motions related to the administrative record and other procedural matters
- DOJ has filed a motion to dismiss our case based on the Sixth Circuit's decision








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QUESTIONS?

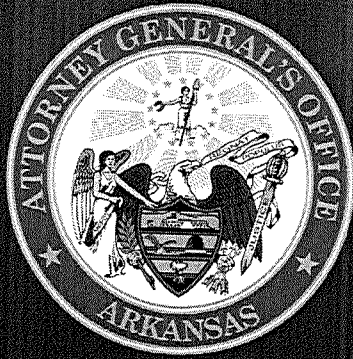
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