

1. INTRODUCTION

On June 29, 2015, the U.S. Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) published in the Federal Register a final rule defining the phrase “waters of the United States” under the Clean Water Act (CWA). The final rule is in response to the U.S. Supreme Court’s *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) and *Rapanos v. United States* and *Carabell v. United States* (Rapanos) decisions (79 Federal Register 22188). Although it not known how the agencies will interpret the final rule, it is expected to expand the agencies’ geographic scope of jurisdiction under Section 404 of the CWA when compared with how the agencies currently determine the geographic scope of their Section 404 jurisdiction.

The final rule establishes three broad categories of waters and wetlands:

- Those that are categorically jurisdictional by rule;
- Those that are not jurisdictional by rule; and
- “Other waters” to be evaluated on a case-specific basis under the “significant nexus” test to determine jurisdictional status.

This approach is intended to establish bright-line categories and reduce the number of case-by-case jurisdictional determinations by the agencies.

The final rule also:

- Maintains the existing exemptions for agriculture;
- Clarifies that groundwater is not a water of the U.S. (WUS);
- Addresses the jurisdictional status of irrigation ditches; and
- Establishes numerous new terms.

2. WHAT’S JURISDICTIONAL?

Under the final rule, the following were considered jurisdictional in the past and will remain jurisdictional by rule:

- (a)(1) Traditional navigable waters (TNWs) – Waters that are currently used, were used in the past, or may be susceptible to use in the future for interstate or foreign commerce;
- (a)(2) Interstate waters and wetlands – Waters and wetlands that flow across or form parts of state boundaries regardless of navigability;
- (a)(3) Territorial seas;
- (a)(4) Impoundments – Impoundments of TNWs, interstate waters and wetlands, the territorial seas, and now tributaries (see below); and

For the first time, the following will be jurisdictional by rule:

- (a)(5) All “tributaries”; and
- (a)(6) All waters “adjacent” to TNWs, interstate waters, territorial seas, or tributaries.

Other Waters

“Other waters” are those that are not jurisdictional by rule or categorically excluded from jurisdiction and are determined, on a case-specific basis, to have a significant nexus to a TNW, interstate water, or territorial sea. The final rule includes two types of waters that may be determined jurisdictional on a case-by-case basis. The first type of waters are five identified categories of waters and wetlands (prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands), none of which occur in Colorado. The second type of waters are those that are within the 100-year floodplain (which is not mapped for many drainages in Colorado) of a jurisdictional water (a)(1) through (a)(3) and all waters within 4,000 feet of the high tide line or ordinary high water mark

(OHWM) of a jurisdictional water (a)(1) through (a)(5). A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly (must be more than speculative or insubstantial) to the chemical, physical, or biological integrity of the nearest TNW, interstate water, or territorial sea. The final rule identifies nine aquatic functions to be considered in determining a significant nexus (sediment trapping, nutrient recycling, pollutant trapping/transformation/filtering/transport, retention and attenuation of flood waters, runoff storage, contribution of flow, export of organic matter, export of food resources, and provision of life cycle-dependent aquatic habitat).

The final rule uses a variety of terms, many of which are new to Section 404 of the CWA (Table 1). Most of the new terms are related to defining the geographic scope of Section 404 jurisdiction and the case-specific significant nexus determination for “other waters.”

Table 1. Terms associated with the final rule.

Term	Effect on How CWA Jurisdiction will be Determined
Tributary	Tributaries are jurisdictional by rule. A “tributary” is characterized by the presence of the physical indicators of a bed and banks and an OHWM and contributes flow, either directly or through another water (including an impoundment), to downstream TNWs, interstate waters, or territorial seas. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, ephemeral and intermittent drainages, canals, and ditches not excluded by the final rule.
Neighboring	Used to define “adjacent.” All waters located within a minimum of 100 feet of jurisdictional waters and within the 100-year floodplain to a maximum of 1,500 feet of the OHWM are “neighboring.” Many tributaries do not have the 100-year floodplain mapped.
Similarly situated	Used to determine the jurisdictional status of other waters. Waters in the same category or the same resource type are “similarly situated” (e.g., tributaries and adjacent wetlands) relative to a TNW when evaluating the presence or absence of a significant nexus. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters.
In the region	Used to determine the jurisdictional status of other waters. Waters are considered “in the region” if they fall within the same watershed that drains to the nearest TNW, interstate water, or territorial sea. “In the region” is used for the purposes of grouping “similarly situated” wetlands or waters for determining the presence or absence of a significant nexus for “other waters.”
Significant nexus	Used to determine the jurisdictional status of other waters. A water, including wetlands, either alone or in combination with other “similarly situated” waters “in the region,” that significantly affects the chemical, physical, or biological integrity of a TNW, interstate water, or territorial sea. Waters shall be assessed by evaluating nine aquatic functions. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with “similarly situated” waters “in the region,” contributes significantly to the chemical, physical, or biological integrity of the nearest TNW, interstate water, or territorial sea.
Relocated tributary	The final rule excludes ditches with ephemeral or intermittent flows except where a ditch is excavated in or relocates a covered tributary. A tributary is relocated either when at least a portion of its original channel has been physically moved or when the majority of its flow has been redirected. A ditch that is a “relocated tributary” is distinguishable from a ditch that withdraws water from a stream without changing the stream’s aquatic character. The latter type of ditch is excluded from jurisdiction where it meets the listed characteristics of excluded ditches.
Dry land	Areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like. However, it is important to note that a “WUS” is not considered “dry land” just because it lacks water at a given time. Similarly, an area remains “dry land” even if it is wet after a rainfall event. “Dry land” should now be used in the context of Section 404 of the CWA when referring to areas that do not have the characteristics of waters or wetlands (previously commonly referred to as “upland”).
Adjacent	Bordering, contiguous, or neighboring.

3. WHAT IS NOT JURISDICTIONAL?

The final rule states that the following are not WUS:

- (b)(1) Waste water treatment systems
- (b)(2) Prior converted cropland
- (b)(3) The following 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; and
 - Ditches that do not flow, either directly or through another water, into a jurisdictional water.
- (b)(4) The following features:
 - Artificially irrigated areas that would revert to dry land should application of water to that area cease;
 - Artificially constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, and settling basins;
 - 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;
 - Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of a tributary; nonwetland swales; and lawfully constructed grassed waterways; and
 - Puddles.
- (b)(5) Groundwater;
- (b)(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land; and
- (b)(7) 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 build for wastewater recycling.

4. KEY PROPOSED CHANGES

The final rule would affect the geographic scope of the agencies' Section 404 jurisdiction in the following ways.

Eliminate the Isolation of Waters and Wetlands Based on Breaks in Jurisdiction

The final rule would significantly expand the geographic scope of Section 404 jurisdiction in the arid West where there are numerous intermittent and ephemeral drainages. The headwaters of many of these drainages are currently considered "isolated" (per guidance following SWANCC). Currently, when a drainage lacks continuous characteristics of a WUS (i.e., OHWM, bed, and bank), the reaches of the drainage and any associated wetlands upgradient of this break in jurisdictional characteristics are typically considered isolated and/or lacking a significant nexus to a TNW and are nonjurisdictional. The final rule proposes that a water that otherwise qualifies as a tributary does not lose its status as a tributary if, for any length, there are one or more man-made breaks, or one or more natural breaks so long as a bed, bank, and OHWM can be identified upstream of the break. The proposed elimination of breaks in jurisdiction isolating the upper reaches of drainages would translate to an increase in the scope of Section 404 jurisdiction on intermittent and ephemeral drainages and their associated wetlands.

Adjacent Waters are WUS

The final rule would make adjacent waters, rather than simply adjacent wetlands (the current situation), WUS. For example, open water ponds adjacent to a river with no outlet to the river are currently considered nonjurisdictional, but wetlands in these ponds are considered adjacent and jurisdictional. Under the final rule, both the water and wetlands in

the ponds would be considered adjacent and jurisdictional. See Table 1 for more information on “adjacency.”

Ditches

The final rule declined to define “ephemeral” and “intermittent” for ditches because these flow regimes are described earlier in the rule, have been used by the agencies consistently, and are readily understood by field staff and the public. However, where these terms are described earlier in the rule, they are described in the context of streams. The final rule is also not clear on what constitutes a relocated tributary. Many agricultural ditches in the western U.S. intercept the flow of drainages that may qualify as a tributary, including the situation where a tributary ends in a canal and the canal conveys the water carried by the tributary. Reference is also made in the final rule’s preamble that a ditch does not qualify for an exclusion if it “redirects the majority of a stream’s flow.” Many canals and ditches in the western U.S. derive their water from the exercise of lawful decreed diversions from rivers or streams, and it is not uncommon for a ditch or series of ditches along a stream reach to divert, under their respective priorities, the majority of the natural flow regime. The final rule is clear that the jurisdictional status of a ditch can be determined by ditch segment (i.e., it is possible to have jurisdictional and nonjurisdictional segments on the same ditch). Finally, it is unclear how the criteria for what renders a ditch nonjurisdictional applies to canals. There is no mention in the final rule of any exclusion for “canals” even though, in the western U.S., canals oftentimes operate in a manner similar to ditches. The definitions for ditch exclusions readily apply to constructed roadside ditches and drainage ditches, but they do not fit well with irrigation and water supply canals and ditches, which commonly occur throughout the western U.S.

Tributaries

Under the final rule, any water that meets the definition of a “tributary” is a WUS (Table 1). In addition to breaks in jurisdictional characteristics not isolating drainages (discussed above), the final rule would also establish other situations that do not eliminate jurisdiction including:

- Tributaries that have been channelized in concrete, or otherwise have been human altered, may still meet the definition of tributaries under the final rule so long as they still contribute flow to an (a)(1) through (a)(3) water.
- Waters that meet the definition of tributary under the final rule are jurisdictional even if there is an impoundment at some point along the connection from the tributary to the (a)(1) through (a)(3) water. Because an impoundment is considered by rule to not cut off a connection between upstream tributaries and a downstream (a)(1) through (a)(3) water, tributaries above the impoundment are still considered tributary to a downstream (a)(1) through (a)(3) water even where the flow of water is impeded due to the impoundment.
- The significant nexus between a tributary and a jurisdictional water is not broken where the tributary flows through a culvert or other structure.

Groundwater

The final rule states that groundwater is not a WUS. However, a shallow subsurface hydrologic connection can be used to demonstrate that a wetland or water is “adjacent” to a jurisdictional wetland or water. Guidance is not provided on how to demonstrate that a particular water or wetland does or does not have a shallow subsurface hydrologic connection. Groundwater monitoring studies can be time consuming, so the responsibility and cost will likely fall on the project proponent to demonstrate the lack of a connection or, in the interest of time, assume a connection and jurisdiction.

Significant Nexus Test

A significant nexus occurs when it is determined that an “other water” significantly affects the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water. As proposed, the significant nexus test for “other waters” would be applied to waters and wetlands, either alone or in combination with other similarly situated waters in the region (i.e., a watershed). This allows the determination of a significant nexus to consider the individual water or wetland at issue or to group the individual water or wetland with other waters or wetlands in the watershed. When the functional contributions of the aggregated waters and wetlands in a watershed are considered, it would be an unusual situation that in the aggregate there is no significant nexus to an (a)(1) through (a)(3) water. As proposed, a significant nexus for the aggregate translates to a significant nexus for the individual water or wetland in question. The combination of aggregating waters and wetlands in a watershed for the significant nexus test for jurisdiction for “other waters,” and including all tributaries as jurisdictional by rule (no jurisdictional breaks considered), would leave very few “other

waters” as nonjurisdictional. This becomes particularly clear when the agencies state that a hydrologic connection is not necessary to establish a significant nexus because, in some cases, the lack of a hydrologic connection would be a sign of the water’s function in relationship to an (a)(1) through (a)(3) water (e.g., sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, and provision of aquatic habitat).

5. WHAT WILL LIKELY HAPPEN?

The final rule will be effective 60 days after today, on August 28, 2015. During those 60 days, the Corps will not be able to issue any approved jurisdictional determinations. Those holding previously approved jurisdictional determinations that reached a conclusion that a water or wetland is nonjurisdictional based on isolation or lack of a significant nexus should carefully evaluate the likelihood of being able to receive an extension of the approved jurisdictional determination under the final rule. Project proponents should consider implementing their projects prior to the termination of their approved jurisdictional determination if the wetland or water previously determined nonjurisdictional is likely to be determined jurisdictional under the final rule.

The final rule needs to be viewed in a broader context to determine its potential effects on the regulated public. If the final rule is narrowly interpreted by the agencies in implementation, it will expand the scope of the agencies’ Section 404 jurisdiction as described above. Concurrently, there has been a trend of tightening the impact thresholds of nationwide permits (NWPs) each time the NWPs are renewed and modified. Increased geographic scope of jurisdiction, coupled with tightening the impact thresholds of the NWPs, will make it more challenging and expensive for project proponents to comply with Section 404 of the CWA and avoid impacts on jurisdictional waters and wetlands, and will likely increase the potential for projects to require the more lengthy Individual Permit process. The recent shift in how the Corps complies with Section 106 of the National Historic Preservation Act, combined with the final rule and expansion of jurisdiction, will likely result in more projects requiring cultural resource surveys and review by the State Historic Preservation Office.

Please feel free to contact Steve Dougherty, Moneka Worah, Steve Butler, or your ERO project manager if you have any questions.