

PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

Water categories included in EPA's "Waters of the U.S."

In the three previous articles that have dealt with the proposed rule issued by the Environmental Protection Agency and the US Army Corps of Engineers to provide a "Definition of 'Waters of the United States' Under the Clean Water Act [CWA]," we have provided: 1) an overview of the proposed rule, how to submit comments on the rule, and reactions by general farm organizations to the proposed rule; 2) US Supreme Court rulings on waters covered by the CWA and the need to identify a significant nexus between clearly covered waters and other waters that drain into those the regulation of which is unquestioned along with a list of waters that are excluded from existing regulations and the proposed rule; and 3) the ways in which the scientific literature clarifies the issues of "connectivity of waters" and "significance" providing the agencies a defensible way of identifying the significant nexus the Supreme Court said was needed for the agencies to have regulatory authority over a water feature or class of water features like wetlands in various locations.

In this article, we look at the definition of "waters of the United States" in the proposed rule. Existing regulations include **traditional navigable waters** in the definition and the agencies propose no changes to those regulations. The term "traditional navigable waters" includes "all waters that are currently used, or 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." In addition, traditional navigable waters include all waters that have been, currently are, or are susceptible to "being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."

The second broad category of covered waters is **interstate waters** "including interstate wetlands and the agencies' proposal today does not change that provision of the regulations. Interstate waters would continue to be 'waters of the United States' even if they are not navigable for purposes of Federal regulation... and do not connect to such waters."

In the next section, the agencies write, "the CWA and its existing regulations include '**the territorial seas**' as a 'water of the United States.' The agencies propose to make no changes to that provision of the regulation other than to move the provision to earlier in the regulation.... The CWA goes on to define the 'territorial seas' as 'the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and

the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.' The territorial seas establish the seaward limit of 'waters of the United States.'"

As to the fourth category, "The agencies do not propose to make any substantive changes to the existing regulatory language with respect to **impoundments** of waters otherwise defined as 'waters of the United States' under this definition. The changes proposed are clarifying. Impoundments are jurisdictional because as a legal matter an impoundment of a 'water of the United States' remains a "water of the United States' and because scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters traditional navigable waters, interstate waters, or the territorial seas. The Supreme Court has confirmed that damming or impounding a 'water of the United States' does not make the water non-jurisdictional."

It is with the next category, **tributaries**, that the agencies begin to use the significant nexus requirement to provide a new definition. "Under this proposal, the agencies provide a definition of 'tributary' supported by the scientific literature. The agencies also propose that all waters that meet the proposed definition of tributary are 'waters of the United States' by rule, unless excluded,... because tributaries and the ecological functions they provide, alone or in combination with other tributaries in the watershed, significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas."

A tributary is defined "as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined..., which contributes flow, either directly or through another water, to a water [previously] identified.... In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water [previously] identified...."

"A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more manmade breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary,

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including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches [that are] not excluded." The following ditches are excluded: "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, 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....[or] artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rive growing."

The rationale of the agencies for including tributaries is that they "have a significant impact on the chemical, physical, and biological integrity of waters into which they eventually flow—including traditional navigable waters, interstate waters, and the territorial seas—and they have a significant nexus and thus are jurisdictional as a category. The great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream environments. Tributaries serve to store water, thereby reducing flooding, provide biogeochemical functions that help maintain water quality, trap and transport sediments, transport, store and modify pollutants, provide habitat for plants and animals, and sustain the biological productivity of downstream rivers, lakes and estuaries."

The rule also discusses waters that are not a tributary under the proposed rule, including "ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries. The defined bed and bank no longer exists due to past normal farming practices such as plowing or discing...and these farming practices often pre-date the CWA. Such farm

field features are not tributaries even though they may contribute flow during some rain events or snowmelt."

Adjacent waters are waters that are "integrally linked to the chemical, physical, or biological functions of the...[previously listed] waterbodies to which they are adjacent.... The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'"

In the proposed rule, "'**other waters**' are not jurisdictional as a single category; rather, as the proposed rule language states, 'other waters' are jurisdictional provided that they are found, on a case-specific basis, to have a significant nexus to" traditional navigable waters, interstate waters, or territorial seas.

According to the agencies "one of the primary purposes and functions of the CWA is to prevent the discharge of petroleum wastes and other chemical wastes, biological and medical wastes, sediments, nutrients and all other forms of pollutants into the 'waters of the United States,' because such pollutants endanger the nation's public health, drinking water supplies, shellfish, fin fish, recreation areas, etc. Because the entire tributary system of the traditional navigable, interstate waters or the territorial seas is interconnected, pollutants that are dumped into any part of the tributary system eventually are washed downstream to traditional navigable waters, interstate waters, or the territorial seas where those pollutants endanger public health and the environment."

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