The Navigable Waters "Protection" Rule

Matt Schweisberg, PWS[1], Principal, Wetland Strategies and Solutions, LLC

Make things as simple as possible, but no simpler …
~Albert Einstein

In a tip of the hat to George Orwell, the Administrator of the U.S. Environmental Protection Agency (EPA) and Assistant Secretary of the U.S. Army for Civil Works (Army) on January 23, 2020, released what they call the "Navigable Waters Protection Rule" (the rule, new rule, or final rule). The rule re-defines the term "waters of the United States," and decidedly not in a manner that protects our nation's waters.

THE NEW RULE

The new rule re-interprets the term "waters of the United States" to encompass the following four categories of waters that are federally regulated under the Clean Water Act (CWA):

1. Territorial seas and traditional navigable waters;
2. Perennial and intermittent tributaries to territorial seas and navigable waters;
3. Certain lakes, ponds and impoundments of jurisdictional waters; and,
4. Wetlands adjacent to other jurisdictional waters.

The new rule identifies 12 categories of waters that will no longer or continue not to be "waters of the United States" and therefore, not federally regulated under the CWA. They include ephemeral features that flow only in response to rainfall, groundwater, many farm and roadside ditches, artificial lakes and ponds, and waste treatment systems. The rule also provides "clarifying" definitions of terms including "typical year," "perennial," "intermittent," "ephemeral," and "adjacent wetlands."

The new rule becomes effective 60 days after it is published in the Federal Register, pending several likely legal challenges.

Notably, until the rule takes effect, the term "waters of the United States" remains unchanged:

1. All waters which 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;
2. All interstate waters including interstate wetlands;
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 or could be used by interstate or foreign travelers for recreational or other purposes; or
   - From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
   - Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section.

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.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding CWA jurisdiction remains with EPA.

HOW DID WE GET HERE? … LITIGATION, OF COURSE

Going back to what might be called the beginning, here is a greatly abridged history of the most relevant litigation. (Note: For a thorough explanation of the history, see *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act.* Congressional Research Service, March 5, 2019.)

[1] Author contact: matt@wetlandsns.com

NRDC v. Callaway (1975): The Supreme Court ruled that by defining "navigable waters" in the Federal Water Pollution Control Act Amendments of 1972 to mean "waters of the United States," Congress intended to assert federal jurisdiction over the nation's waters to the maximum extent possible under the commerce clause. The Army Corps of Engineers' definition of navigable waters which limits the Corps' dredge and fill permit jurisdiction under § 404 of the FWPCA to waters which meet the traditional test of navigability is therefore invalid. The court orders the Corps to publish regulations clearly recognizing the statute's full regulatory mandate.

Riverside Bayview Homes v. United States (1985): The Court found that the language, policies, and history of the CWA compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other waters of the United States.

United States v. Wilson (1997): The Fourth Circuit found that part of the definition of waters of the U.S. — "the use, degradation or destruction of which *could affect* interstate or foreign commerce"— exceeded the Corps' statutory authority in the Clean Water Act and Congress's constitutional authority in the Commerce Clause. The Court ruled that regulated conduct must "substantially affect" interstate commerce in order to invoke Commerce Clause power. Subsequent Corps guidance in March 2000 on the effect of the decision on its CWA jurisdiction explained that, within the Fourth Circuit only, isolated waters must be shown to have an actual connection to interstate or foreign commerce. The 2000 guidance also provided clarification on certain nontraditional waters that the Corps considered part of the "waters of the United States." Jurisdictional waters, the Corps explained, included both intermittent streams, which have flowing water supplied by groundwater during certain times of the year, and ephemeral streams, which have flowing water only during and for a short period after precipitation events.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (2001): The Supreme Court held that the Corps' assertion of jurisdiction over isolated waters based purely on their use by migratory birds exceeded its statutory authority, that Congress did not intend to invoke the outer limits of the Commerce Clause in the CWA, and that the Corps could not rely on the Migratory Bird Rule as a basis for jurisdiction.

Rapanos v. United States, *Carabell v. U.S. Army Corps of Engineers* (2004): Writing for a four-Justice plurality, Justice Scalia adopted the bright-line rule that the word "waters" in "waters of the United States" means only "relatively permanent, standing or continuously flowing bodies of water"—that is, streams, rivers, and lakes. Wetlands could also be included, but only when they have a "continuous surface connection" to other waters of the United States. Justice Kennedy concluded that the Clean Water Act requires a more flexible approach: the Corps should determine, on a case-by-case basis, whether the water in question possesses a "significant nexus" to waters that are navigable-in-fact. For wetlands, a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable waterbody.

The agencies issued guidance in 2008 that adopted the view that jurisdiction exists over a waterbody that satisfies either the Scalia test or the Kennedy test.

CONFUSION REIGNS …

A few lawsuits were filed at first, then proliferated in the lower courts. In 2011, the agencies sought comments on proposed changes to the 2008 guidance, which the agencies acknowledged would increase the number of waters regulated under the Clean Water Act in comparison to its earlier post-*Rapanos* guidance. The perceived expansion of jurisdiction spawned Congressional attention, including a letter signed by 41 Senators requesting that the agencies abandon the effort. In response, the agencies abandoned the 2011 draft guidance in favor of developing a new rule defining the scope of waters of the United States, aka, the Clean Water Rule.

THE CLEAN WATER RULE

The Corps and EPA issued the Clean Water Rule (CWR) in May 2015 in an effort to clarify the bounds of jurisdictional waters in the wake of *SWANCC* and *Rapanos*. The agencies relied on a synthesis of more than 1,200 published and peer-reviewed scientific reports and over 1 million comments on the proposed version of the rule ("Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" January 2015) (aka the Connectivity Report). The CWR contains the same three-tier structure from the agencies' 2008 joint guidance, identifying waters that are (1) categorically jurisdictional, (2) may be deemed jurisdictional on a case-by-case basis if they have a significant nexus with other jurisdictional waters, and (3) categorically excluded from the Clean Water Act's jurisdiction. In an effort to reduce uncertainty about the scope of federal jurisdiction, the agencies sought to increase categorical jurisdictional determinations and reduce the number of waterbodies subject to the case-specific significant nexus test. That effort failed.

Unsurprisingly, the CWR was the subject of significant debate among observers, stakeholders, and members of Congress, and a 2015 Government Accountability Office report found that EPA violated publicity or propaganda and anti-lobbying provisions in prior appropriations acts through its promotion of the CWR on social media. To no one's surprise, a multitude of legal challenges to the CWR were filed (Note: Sorting through and explaining these challenges is beyond the scope of this article).

THE NEW RULE

The background section for the new rule states that,

> [t]o develop this revised definition of "waters of the United States," the agencies looked to the text and structure of the CWA, as informed by its legislative history and Supreme Court guidance, and took into account the agencies' expertise, policy choices, and scientific principles. … The final rule also provides clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. (*Emphasis added*)

For decades, some members of Congress, many environmental organizations, and some industry groups have urged the EPA and Army Corps to clarify the definition of waters of the U.S. based upon the best science, the long history of rulings from the courts, and the Congressional history for the CWA. Leaving aside that the agencies' authors of the new rule cherry-picked the legislative history of the CWA and many decisions and associated narrative explanations of several courts, the well-documented science, as well as ignored the expertise of their own staff, the new rule does little to clarify and improve predictability for federal agencies, states, tribes, the regulated community, and the public when dealing with jurisdictional issues revolving around the definition of waters of the United States.

Is the rule simple? Sure, but by not heeding Einstein's aphorism, the agencies made the definition far too simple. Consequently, it does a disservice rather than a service to the intended audience (federal agencies, states, tribes, the regulated community, and the public) and will likely continue the chronicle of legal challenges. Already, lawsuits are being prepared for filing.

Comparing the new definition to the existing definition, there will be several critical gaps in the types of waters that are covered by the CWA. For instance, the new rule defines the term intermittent as,

> … surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

In the East, when the groundwater table is elevated and causes an intermittent channel to flow during certain times of the year (e.g., spring), and that elevated water table inundates a wetland (maybe a seasonal pool where amphibians breed in most years) that is close to but does not abut the intermittent channel and there is no surface water connection between the channel and wetland, I read this definition to mean that the wetland would not likely be jurisdictional. Maybe I'm reading the new rule inaccurately?

If a pond with fluctuating water levels through the year has nearby wetlands that have no surface connection to the pond but whose water levels fluctuate in sync with the pond (i.e., there is a clear groundwater connection), I read this definition to mean that the wetland would not likely be jurisdictional. Maybe I'm reading the new rule inaccurately?

> In the West, are all playas no longer jurisdictional? Most playas fill with water only after spring rainstorms when freshwater collects in the round depressions of the otherwise flat landscape of West Texas, Oklahoma, New Mexico, Colorado, and Kansas. … Playas are important because they store water in a part of the country that receives as little as twenty inches of rain a year and where there are no permanent rivers or streams. Consequently, playas support an astounding array of wildlife. … Playas are important because they store water in a part of the country that receives as little as twenty inches of rain a year and where there are no permanent rivers or streams. Consequently, playas support an astounding array of wildlife. Two million waterfowl commonly winter in the playa lakes of the Southern High Plains. Mayflies, dragonflies, salamanders, Bald Eagles, endangered Whooping Cranes, jackrabbits and raccoons also can be found at playa lakes. Amphibians would not be present in this arid region if it were not for playas. Because playa lakes support such a wide variety of animals, they contribute significantly to the biodiversity of the High Plains. (See https://www.epa.gov/wetlands/playa-lakes, Learn About Wetlands, U.S. EPA)

What about closed depression stream and wetland systems (which can be extensive in the West) that do not flow to a 1(i)-(iii) water? As one delves into the new rule, the lack of sound science and its illogic become readily apparent.

WHAT'S NEXT?

Simple—Jurisdictional disputes and appeals, tortured explanations and justifications by EPA and Army, and lots of legal challenges. In its April 12, 2019, comments on the proposed rule (the final rule is nearly identical), the SWS listed several key conclusions about the effects of the proposed rule; all apply to the final rule. Among others,

- The rule is not based in sound science.
- The rule poses a significant threat to the integrity and security of our drinking water (quality and quantity), public health, and to fisheries, shellfish habitat and wildlife habitat. It increases the threat of damage to communities and infrastructure from flooding, severe storm events, and sea level rise, all of which have negative economic impacts on citizens, communities and businesses.
- The CWA's primary goal of restoring and maintaining the physical, chemical, and biological integrity of the nation's waters can only be achieved if the definition of WOTUS is grounded in sound science and recognizes all five parameters of connectivity (hydrologic, chemical, physical, biological, and ecological), as documented in the 2015 Connectivity Report. The rule only recognizes a limited subset of connectivity, and thereby will fail to properly implement the CWA.
- Many of the definitions and terms in the rule lack clarity and/or are not based in science, and many of the criteria for jurisdiction are not based in science and fail to meet the stated goal of clarity, predictability and consistency; instead, they will require lengthy and difficult field evaluations.

Perhaps what's next is best summed up by the following quotes.

> Headline from the January 23, 2020, edition of the Western Livestock Journal: "WOTUS' replacement has arrived! Though many celebrate, the new water rule will usher in new wave of litigation that may last years." ■

Lotic fringe wetland, Capitol Reef National Park, Utah. (Ralph Tiner)