

“Waters of the United States” Rule & Litigation

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WOTUS Legal Milestones

- EPA rules pre-SWANCC
- SWANCC decision
- Rapanos decision
 - 5-4 decision, multiple views
 - Kennedy opinion
- Issuance of draft guidance
- Issuance of proposed rule
- Issuance of final rule
- Multiple legal challenges filed

Key Aspects of Final Rule

- New way of determining if covered
- Traditional navigable waters
- Interstate waters and territorial seas
- Impoundments
- Tributaries
- Adjacent waters
- “Significant nexus” waters
- Exclusions

Exclusions in Final Rule

- Prior converted cropland
- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act
- 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 built for wastewater recycling

More Exclusions

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches within intermittent flow that are not a relocated tributary or excavated in a tributary or drain wetlands
- Ditches that do not flow, either directly or through another water, into a water used for commerce, an interstate water, or the territorial seas

Still More Exclusions

- 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

Still More Exclusions

- 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 tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles
- Groundwater
- Stormwater control features constructed to convey, treat or store stormwater that are created in dry land

Issues

- Grandfathering
- “Waters” baseline
- Stormwater systems/MS4s
- Ditches/erosional features
- Dry land
- Significant nexus

What Happens Next?

- Court of Appeals cases all in 6th Circuit
- District Court cases all over the place
- North Dakota district court issued stay for 13 States
- Then 6th Circuit issued nationwide stay
- 6th Circuit has now ruled (in 1-1-1 decision) that it has jurisdiction, but en banc review has been requested
- Even if full 6th Circuit decides that it has jurisdiction, not clear if that will lead to dismissal of other cases
- And what happens to stay if 6th Circuit decides against jurisdiction? If national stay goes away, then stay remains for 13 States in North Dakota case, but not for other States

And Then?

- After venue fight to choose court, case will be briefed, on CWA, APA and constitutional issues
- Case will likely go all the way to Supreme Court – but final decision may not be for a few years
- For now, rule stayed everywhere
- Legislation has been proposed to require EPA to go back and start over with new proposal, after making changes

Questions?

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