

The Clean Water Rule

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Four Categories of Waters Essentially Unchanged

JURISDICTIONAL BY RULE

Traditional Navigable Waters

**Rule language is unchanged:
categorically waters of the
U.S.**

Waters that are, were, or could be used in interstate or foreign commerce, including commercial waterborne recreation

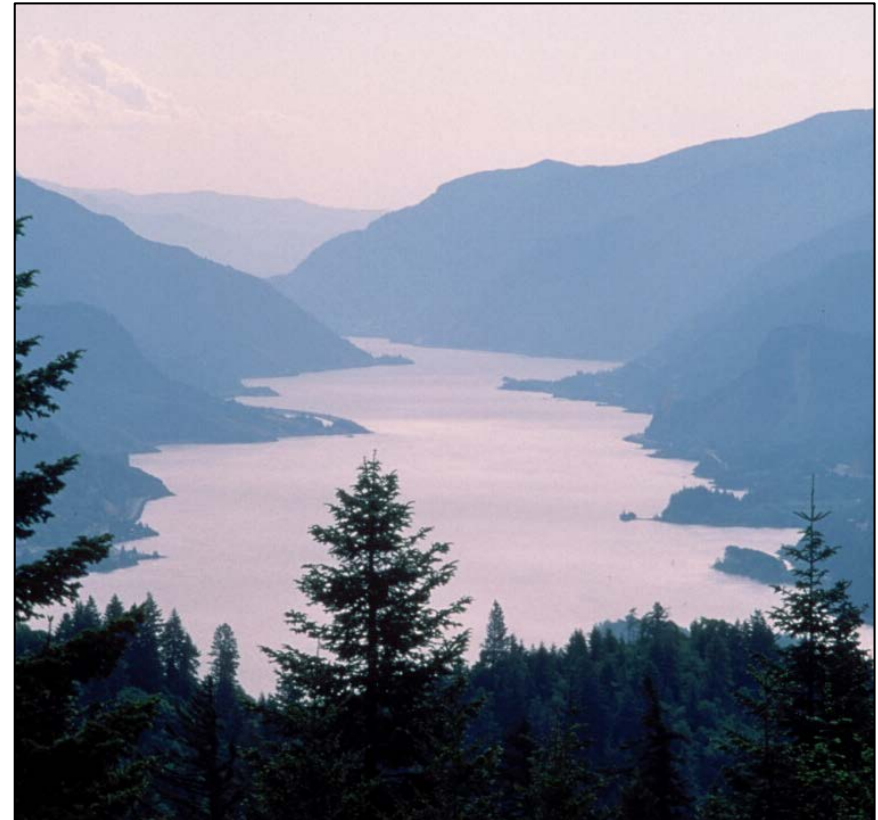


Interstate Waters

**Rule language is unchanged:
categorical waters of the U.S.**

Flow across or form a part of state boundaries.

Supports ability of states to know that waters will not be polluted from outside their borders.



Territorial Seas

**Rule language is unchanged:
categorically waters of the U.S.**

Specifically mentioned in the Clean
Water Act

- “Navigable waters” means “the waters of the United States, including the territorial seas.”



Impoundments

**Rule language is unchanged:
impoundments of
jurisdictional waters
remain jurisdictional**



Two Categories of Waters Clarified

JURISDICTIONAL BY RULE: CATEGORICAL SIGNIFICANT NEXUS

Tributaries

Categorically waters of the U.S.

“Tributary” defined for first time:

- Bed and banks;
- Ordinary high water mark; &
- Contribute flow to traditional navigable water, interstate water, or territorial sea



Adjacent Waters

Categorically waters of the U.S.

Definition unchanged

- Bordering, contiguous, neighboring; or
- Separated by constructed or natural features such as dikes, berms, dunes

No longer limited to wetlands

No longer applies to waters in normal farming, ranching, or forestry activities

“Neighboring” defined for the first time



Adjacent – What Neighboring Means

Waters located, at least in part, within:

- 100' of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary;
- The first 1,500' of the 100-year floodplain of such waters; or
- 1,500' of the high tide line or the Great Lakes



Two Categories of Waters Require Case-specific Evaluation

SIGNIFICANT NEXUS ANALYSIS

Significant Nexus

Defined: Either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea



Significant Nexus – Three-step Evaluation

1. Identify “the region”

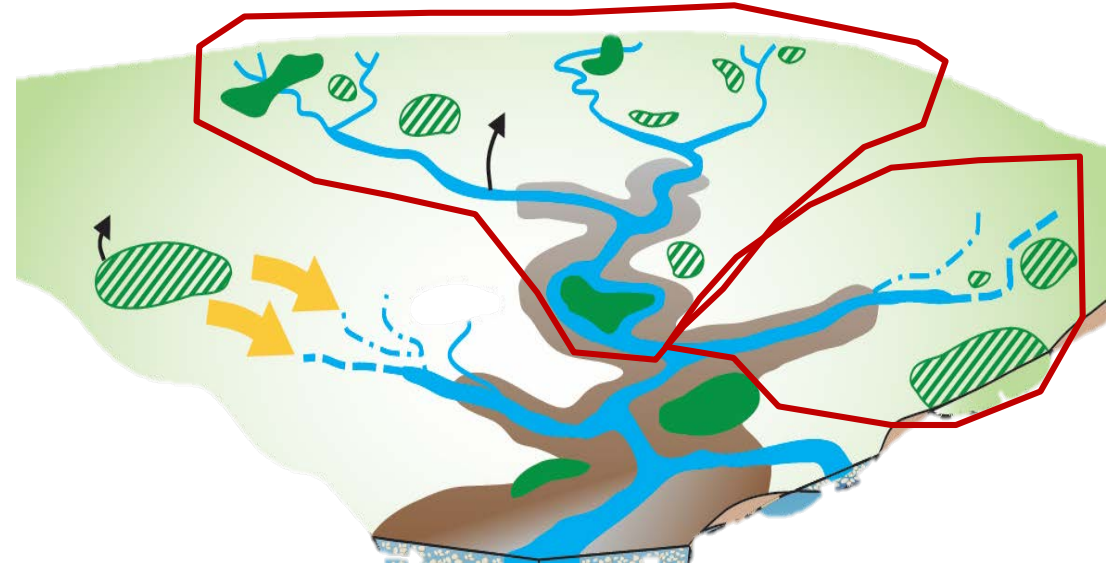
- The watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea

2. Identify “similarly situated” waters

- Function alike & are sufficiently close to function together

3. Determine “significance” of effect based on specified functions addressing:

- | | | |
|--------------|------------------|-----------|
| • sediments | • food | • runoff |
| • pollutants | • organic matter | • flow |
| • nutrients | • flood waters | • habitat |



Waters Similarly Situated by Rule

Five types

- Prairie potholes
- Carolina & Delmarva Bays
- Pocosins
- Western vernal pools in California
- Texas coastal prairie wetlands

Combine with others of the same type for the significant nexus analysis



Waters Not Similarly Situated by Rule

Non-adjacent waters located, at least in part, within:

- The 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or
- 4000' of those waters, tributaries, or impoundments

Require case-specific similarly situated & significant nexus determinations



Exclusions

FEATURES EXCLUDED BY RULE

Excluded Waters – No Real Change

Retained without change:

- **Prior Converted Cropland**
- Waste Treatment Systems

Codified:

- Artificially **irrigated areas** that would revert to dry land should application of water to that area cease
- Artificial reflecting pools or swimming pools created in dry land;
- Small ornamental waters created in dry land

Excluded Waters – Revised & Codified

- Artificial, constructed lakes & ponds created in dry land such as **farm & stock watering ponds, irrigation ponds**, settling basins, fields flooded for **rice growing**, log cleaning ponds, or cooling ponds
- Water-filled depressions created in dry land incidental to mining or construction activity

Excluded Waters – Certain Ditches

- Ditches that do not flow, either directly or through another water, into a traditional navigable water, interstate water or territorial sea
- 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

Exclusions Identified for the First Time

- Erosional features that do not meet the definition of tributary, non-wetland swales, & lawfully constructed **grassed waterways**
- Puddles
- Groundwater, including **groundwater drained through subsurface drainage systems**
- Stormwater control features constructed to convey, treat or store stormwater that are created in dry land
- Wastewater recycling structures constructed in dry land; detention & retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; & water distributary structures built for wastewater recycling

Implications, Implementation, & Litigation

Implications for Section 404 Permitting

- Corps approved JDs
 - Valid for five years (or life of permit)
 - Landowner may request reconsideration under new rule
- Permitting exemptions unchanged, including:
 - Normal farming, silviculture, & ranching activities
 - Maintenance, including emergency reconstruction, of currently serviceable features
 - Construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance (but not construction) of drainage ditches
 - Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment

EPA-Army Implementation Memos

- Increase Transparency
 - Make all agency jurisdictional determinations publically available
 - Create interactive website by end of 2015
- Improve Permit Process
 - EPA and Corps Workgroup – focus on Nationwide Permits
- Respond to Information Needs
 - Publish technical Q&A's
 - On hold while stay in effect
- Comply with the Stay
 - Use prior regulations, relevant case law, applicable policy, best science

Litigation Update

- Complaints in District Courts and Petitions for Review in Circuit Courts (consolidated in 6th Cir)
- 31 States challenging, 7 states in support, 38 industry groups filed complaints, 13 environmental groups filed petitions
- August 2015 – preliminary injunction issued by North Dakota District Court
- October 2015 – nationwide stay issued by 6th Circuit
- Next Steps:
 - Ruling by 6th Circuit re whether circuit courts have jurisdiction under CWA Section 509 (oral argument on 8 December)
 - Same issue also before the 11th Circuit (oral argument 22 Feb)

QUESTIONS?

<http://www2.epa.gov/cleanwaterrule>