

MJB&A Permitting and Infrastructure Coalition White Paper ■ May 15, 2017

## Principles for a Revised Waters of the U.S. Rulemaking

In Executive Order 13778, President Trump directed the Environmental Protection Agency (EPA) to review the Clean Water Rule promulgated by the Obama Administration (“Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37054 (June 29, 2015)). In this paper, the MJB&A Permitting and Infrastructure Coalition offers key principles and suggests key definitions for consideration by EPA and the U.S. Army Corps of Engineers (Corps) as the Agencies develop a proposed new rule.<sup>1</sup> Given the opinions in *Rapanos v. United States*, 547 U.S. 715 (2006), it will be important for the Agencies to consider how best to define a physical surface connection between a wetland and a traditional navigable water and explore if there are ways to clearly define Waters of the U.S. that reflect the federal and state partnership.

---

Industry, including members of the MJB&A Permitting and Infrastructure Coalition, has long argued that EPA and the Corps should develop a Clean Water Rule that provides clear direction on which waters are jurisdictional and which waters are not jurisdictional. Current regulations, guidance documents, and case law have led to different interpretations in different regions of the U.S., adding to infrastructure siting challenges.

### Key Principles

In *Rapanos v. United States*, the U.S. Supreme Court split with four Justices joining an opinion authored by Justice Scalia, four Justices joining a dissent authored by Justice Stevens, and Justice Kennedy authoring a concurring opinion that agreed with the judgement of Justice Scalia’s opinion (that rejected the government’s broad interpretation of the language of the Clean Water Act) but proposing an alternative test for the government. Justice Kennedy proposed a “significant nexus” test for determining jurisdictional waters. Given that there was not a majority opinion in *Rapanos*, any proposed rule should be based on reasoning taken by the Justices who concurred in the judgment on the narrowest grounds as we would expect any new rule to ultimately be reviewed by the U.S. Supreme Court.

The U.S. Supreme Court’s decision in *Rapanos* did not provide a clear test for jurisdiction but both the plurality and Justice Kennedy agreed that the Corps had gone too far in its assertion of jurisdiction over tributaries and that “mere adjacency to a tributary” is insufficient. They also agreed that any hydrological connection between a wetland and traditional navigable water is not enough to establish jurisdiction but rather a meaningful relationship must be demonstrated.

---

<sup>1</sup> MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and Agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure projects can proceed in a timely and cost-effective manner. The member companies include: Dominion Energy, Entergy Corporation, NextEra Energy, and PG&E Corporation. This paper addresses key issues on which this coalition has focused related to the Waters of the U.S. rulemakings, but each company may support additional points through individual positions and through membership in other organizations.

As the Agencies consider a revised approach, it will be helpful to seek comment on how best to define a physical surface connection between a wetland and a traditional navigable water to ensure EPA and the Corps finalize a rule that provides industry and stakeholders business and legal certainty.

Recognizing the case law that exists and that some areas will need case-by-case evaluations, we propose the following principles to guide jurisdictional determinations:

- Any Waters of the U.S. must have a physical surface connection that has a predictable flow to a navigable water in order to demonstrate a significant nexus to reflect Justice Scalia’s opinion and Justice Kennedy’s opinion.
- By contrast, ephemeral streams, tributaries, and washes with low volume, infrequent, and short flow duration periods on an annual basis are not significantly connected to a navigable water. Such streams and tributaries that are absent of hydric soils, hydrophytic vegetation, or lifecycle-dependent aquatic species are not significantly connected to a navigable water. Wetlands that are solely dependent on groundwater or precipitation for inundation are not jurisdictional.

### Suggested Definitions

As part of a new rule, there are a number of terms on which it would be helpful for a proposed rule to seek comment, including the following.

- **Waters of the United States:** The definition of Waters of the U.S. must make clear that “waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act” are not Waters of the U.S.
  - Waters exempted from the definitions should also include: drainage ditches; stormwater detention/retention ponds; cooling water impoundments and reserve cooling water ponds and canals; intake and supply canals, including open-top canals, pipelines, and other man-made sources; discharge canals, including those used for heat dissipation; spill diversion ditches and containment ponds; polishing ponds; ditches and canals that connect units of a waste treatment system; and wastewater treatment tanks, including oil-water separators and sumps, and piping/conveyances.
  - The regulatory text should expressly exempt:
    - cooling ponds that are created in jurisdictional waters and that have a NPDES permit;
    - cooling ponds created to serve as part of a cooling water system with a valid state permit constructed in Waters of the U.S. prior to enactment of the Clean Water Act; and
    - any man-made structures (e.g., engineered bed, banks, and top of banks) that are not created from jurisdictional waters.
- **Tributary:** The definition of tributary should make clear that the term means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes frequent and consistent duration of flow, either directly or through another water, to jurisdictional waters provided that hydric soils, hydrophytic vegetation, or lifecycle dependent aquatic species are present. Man-made structures with engineered beds, banks, and top of banks that are not created from jurisdictional waters or whose construction pre-dates the Clean Water Act should not be considered a jurisdictional tributary.

- **Adjacent:** The term adjacent should be defined as bordering, contiguous, or neighboring. Adjacency must be demonstrated by the presence of aquatic species (i.e. fish, amphibians, mollusks and crustaceans) that move directly through a surface water connection from a navigable water to an adjacent water and are dependent on such waters for their entire lifecycle.
- **Neighboring:** The revised rule should make clear that neighboring should not be used by the Corps to link an “isolated” wetland that does not meet the definition of adjacent.
- **Riparian Area, Floodplain, Prairie Potholes, Vernal Pools, and Similarly Situated Waters:** These terms should not be included in any revised rule as their geographic placement in the landscape does not have a direct bearing on the jurisdictional characteristics of waters. Rather, the recommended central principles should guide whether such waters are jurisdictional.
- **Upland and Nonwetland:** Both upland and nonwetland are defined in the 1987 U.S. Army Corps of Engineers Wetlands Delineation Manual. Those definitions should be used in the revised rule, or in the alternative the final rule could just use “nonwetland” to simplify the potential interpretations. In the Wetlands Delineation Manual, the Corps defines upland as “any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of vegetation, soils, and/or hydrologic characteristics associated with wetlands. Such areas occurring within floodplains are more appropriately termed nonwetlands.” The Corps defines nonwetland as “any area that has sufficiently dry conditions that indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology are lacking.” As used in the manual, nonwetland would include any area that is neither a wetland, a deepwater aquatic habitat, nor other special aquatic site.
- **Dry land:** The revised rule should not use the term dry land. The prior rule under the Obama Administration used the term to describe areas that were excluded from the final rule. The term is confusing and does not provide additional clarity.

## Contacts

For more information on this topic, please contact:

Carrie Jenks  
Senior Vice President  
[cjenks@mjbradley.com](mailto:cjenks@mjbradley.com)  
(978) 369-5533

Tom Curry  
Vice President  
[tcurry@mjbradley.com](mailto:tcurry@mjbradley.com)  
(202) 525-5770

## About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information, we encourage you to visit our website: [www.mjbradley.com](http://www.mjbradley.com).