Clean Water Rule

CLEAN WATER ACT RULE

REVIEW OF THE CLEAN WATER ACT JURISDICTIONAL RULE
CONSIDERATIONS FOR MOVING FORWARD

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INTRODUCTION

"Waters"

More than 40 years after its passage, the two agencies charged with administering the federal Clean Water Act (CWA) still struggle to address perhaps the most fundamental aspect of its implementation — identifying the "waters" it protects. The US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) published a rule in June 2015 intending to do just that. 80 Fed. Reg. 37054 (June 29, 2015). The ensuing melee among stakeholders reflects the legal confusion and political divisiveness that continues to grow around this issue.

Executive Order

The latest twist in this ongoing saga is the Trump Administration's issuance of Executive Order 13778 (EO 13778 or "Order"), which, among other things, requires EPA and the Corps ("Agencies") to rescind or revise the "Clean Water Rule" in accordance with certain policy considerations. 82 Fed. Reg. 12497 (March 3, 2017), (*see* Taylor, *TWR* #157). The upcoming rulemaking process provides a unique opportunity for the regulated community to shape the future of CWA jurisdiction.

Clean Water Rule

Much has been written about the Clean Water Rule (Rule) since the Agencies first proposed it in April 2014 — mostly about its many shortcomings. While regulated interests have voiced numerous legitimate concerns, the Rule has potentially favorable aspects that have received scant attention. To maximize its opportunity, the regulated community should understand the Rule in context, and take honest stock of what it needs from a new rule.

Exclusions

This article addresses the Rule with an eye toward regulated interests in Colorado, where the Rule, with refinement, could actually improve the current system. More specifically, it focuses on the Rule's jurisdictional exclusions, which are key to alleviating concerns of federal overreach, and directing CWA authority to higher value aquatic resources. Despite this focus, many of the considerations raised herein are relevant to regulated entities in other parts of the country, particularly the arid West.

This article first provides context for the Rule by explaining where it fits into the CWA and how the Rule relates to the existing jurisdictional regime. It then addresses specific provisions that Colorado entities should consider as the regulatory process unfolds.

BACKGROUND

Congress passed the modern-day CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Given the appalling state of the nation's waters at the time, the Act found strong support and cruised through both houses of Congress. The Act stated ambitious goals, including the complete elimination of the discharge of pollutants by 1985. *Id*.

Discharge Prohibition

The Act's primary functional element is the "Discharge Prohibition," which prohibits the discharge of a pollutant by any person except in compliance with a permit. *Id*. at §1301(a). The Act defines "discharge of a pollutant" in relevant part as "any addition of any pollutant to *navigable waters* from any point source." *Id*. at §1362(12) (emphasis added). The meaning of the phrase "navigable waters," therefore, defines the CWA's jurisdictional reach and, thus, where the CWA applies.

"Navigable Waters"

Congress defined the phrase "navigable waters" in relevant part as "waters of the United States." *Id*. at §1362(7). This definition, of course, is vague and not very helpful, which is why the extent of CWA jurisdiction remains a topic of heated debate.

The Agencies' recent rulemaking effort was prompted primarily by confusion caused by two United States Supreme Court opinions and subsequent Agency guidance on how to assess jurisdiction in the wake of those opinions. The resulting uncertainty has created what is often a cumbersome process involving case-by-case jurisdictional determinations of coverage that are time-consuming and inconsistent across the country. This situation prompted requests by diverse interests for a new regulation. 80 Fed. Reg. at 37056; 82 *Fed. Reg.* 12532 (March 6, 2017).

"Significant Nexus"

The Rule would change the foundational approach to defining "Waters of the United States" from one rooted in Commerce Clause considerations (see Existing Regulation, below), to one based on a "significant nexus" analysis (see The *Rapanos* Decision, below). The Rule would define jurisdiction for all sections of the Act, including the Section 402 and 404 permitting programs (33 U.S.C. §1342 and §1344 respectively), Section 401 state water quality certification (33 U.S.C. §1341), and the Section 303 water quality standards and total maximum daily load programs (33 U.S.C. §1313). Under this approach, the CWA would cover

Clean Water Rule

Jurisdiction

the following waters:

- Traditional navigable waters, interstate waters, and the territorial seas ("Principal Waters"); and
- Waters having a significant nexus to Principal Waters (i.e., those that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of Principal Waters).

The Rule further divides the significant nexus category into:

- Waters assumed by rule to have such a significant nexus (tributaries, adjacent waters, and impoundments); and
- Waters determined to have such a significant nexus on a case-specific basis.

80 Fed. Reg. at 37104-5 (33 CFR §328.3(a)).

Bright-Line Approach

The Rule employs a bright-line approach intended to clarify and simplify its implementation by reducing the need for case-by-case jurisdictional determinations. *Id*. at 37055. This would certainly change the Act's coverage, but the extent to which it would do so is difficult to gauge without actual application in the field. The Rule's basis for asserting jurisdiction does not translate to a clear expansion or contraction of existing practices. This created uncertainty for the regulated community.

Not surprisingly, the Rule drew sharp criticism. Shortly after its publication, both houses of Congress advanced proposals to prohibit its implementation. *See e.g*., S. 1140 sponsored by Wyoming Senator John Barrasso; H.R. 1732, sponsored by Pennsylvania Representative Bill Schuster. States, along with groups representing both regulated and environmental interests jumped into the fray, filing numerous lawsuits. Where to properly file such challenges — in a federal district or appeals court — was unclear, so those challenging the Rule filed in both. This led to a complex tangle of legal proceedings across the country.

Rule Stayed

Colorado was one of many states to challenge the Rule. It joined 12 other states in a suit filed in the US District Court for the District of North Dakota. Petitioners in that action convinced the court to stay implementation of the Rule on August 27, 2015, the day before it was to take effect. *North Dakota v. U.S. Environmental Protection Agency*, 127 F. Supp. 1047 (D.N.D. August 27, 2015). The court later clarified that its stay only applied in the 13 states represented in the suit. *North Dakota v. U.S. Environmental Protection Agency*, 3:15-cv-59 (D.N.D. September 4, 2015). The other district courts entertaining challenges to the Rule did not issue stays.

Sixth Circuit Consolidation

Meanwhile, the United States Judicial Panel on Multidistrict Litigation moved all challenges filed in circuit courts into the Sixth Circuit Court of Appeals in Cincinnati. *In Re: EPA and Dep't of Defense Final Rule* 80 Fed. Reg. 37054, Published on June 29, 2015, MCP No. 135 (July 28, 2015). In an effort to "temporarily silence[] the whirlwind of confusion" generated by the Rule and its uncertain legal status, the Sixth Circuit stayed implementation of the Rule nationwide, effective October 9, 2015. *In re: EPA and Dep't of Defense Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015).

In issuing the stay, the Court determined that the petitioners challenging the Rule had demonstrated a substantial possibility of success on the merits of their claims. *Id*. at 807. In particular, the Sixth Circuit questioned whether the Rule was consistent with US Supreme Court precedent, and whether its promulgation complied with Administrative Procedure Act requirements. *Id*.

Oddly, the Sixth Circuit only determined that it was the proper forum to hear the case on February 22, 2016 — four months after granting the stay. *In Re EPA and Dep't of Defense Final Rule,* 817 F.3d 261 (6th Cir. 2016). The National Association of Manufacturers petitioned the US Supreme Court (Supreme Court) for review of the Sixth Circuit's proper forum ruling, which the Supreme Court granted on January 13, 2017. *National Association of Manufacturers v. Dep't of Defense*, 137 S.Ct. 811 (January 13, 2017). The Sixth Circuit has not ruled on the merits of the case.

Executive Order 13778

Six weeks later, President Trump issued EO 13778, which declares it to be in "the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." To further this policy statement, the Order also:

Rule Review

- Directs the Agencies to review the Rule for consistency with the foregoing policy, and to publish for notice and comment a proposal to rescind or revise the Rule as appropriate and consistent with law;
- Directs the Agencies and all other executive departments and agencies to review all orders, rules, regulations, guidelines, or policies implementing or enforcing the Rule for consistency with the policy and to rescind or revise those actions as appropriate and consistent with law;
- Authorizes the Attorney General to take those measures he deems appropriate regarding any litigation related to the Rule pending completion of the Agencies' review; and

Scalia Opinion

- Requires the Agencies in any future rulemaking to "consider interpreting the term 'navigable waters'… consistent with" Justice Antonin Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (see The *Rapanos* Decision, below).

Clean Water Rule

Rule Revision?

The Agencies reacted quickly, publishing a notice one week later of their intent to review and rescind or revise the Rule. 82 Fed. Reg. 12532 (March 6, 2017). In that same notice, the Agencies further stated their intent to propose a rule consistent with the Order. *Id*.

The Supreme Court's acceptance of certiorari to address the proper forum issue has temporarily halted the Sixth Circuit's consideration of the merits of the challenge to the Rule. The Supreme Court, however, denied the Administration's request to pause its proceedings pending efforts to rescind or revise the Rule. *National Association of Manufacturers v. Dep' of Defense*, 2017 WL 1199467 (April 3, 2017). This sets up a potential race between the Administration's efforts to issue a revised rule, and judicial efforts to evaluate the merits of the Rule.

Scalia Opinion

While it is virtually certain the Rule will not survive in its current form, its exact fate is less clear. The Agencies have yet to explicitly identify the substantive approach they will take with the replacement rule. EO 13778 directs the Agencies to "consider" Justice Scalia's opinion in *Rapanos*, as opposed to "follow" or "implement" it. This may just be an effort to protect any resulting rule from challenge as arbitrary and capricious by not directing any particular outcome. However, it remains open to debate whether Scalia's *Rapanos* opinion is itself consistent with the CWA.

Rulemaking Records

Moreover, the Agencies compiled a substantial administrative record to support the Rule. They cannot simply reverse course and issue a different rule without another formal rulemaking and reasoned support for the change. Developing a new record sufficient to support Scalia's approach could present a formidable task.

Any new or revised rule will almost certainly be challenged, which means that the ultimate resolution of CWA jurisdiction may still be years off. In the meantime, absent the issuance of new guidance, the Agencies will continue to assess jurisdiction under the regulatory regime and associated guidance existing prior to the intended effective date of the Rule (August 28, 2015).

EXISTING REGULATION

EXPANSIVE JURISDICTIONAL CONVERAGE

EPA has defined its CWA jurisdiction broadly since shortly after the Act's passage. *See* 38 Fed. Reg. 13528, 13529 (May 22, 1973). The Corps required prompting to follow suit. *See Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975), which struck down the Corps' initial regulation defining CWA jurisdiction as too narrow. However, both Agencies have taken similar approaches to jurisdiction since 1975, at least in terms of official regulation and policy, if not actual implementation in the field. *See* 40 Fed. Reg. 31320, 31324 (July 27, 1975).

Common wisdom among the regulated community is that the Rule significantly expands the Act's reach. This somewhat ignores the potentially sweeping coverage of the rule it would replace ("Existing Rule"), and how the Agencies have asserted jurisdiction in recent years.

Existing Rule (Scope)

The Existing Rule encompasses the following as "Waters of the United States:"

a. All waters currently used, previously used, or susceptible to use in interstate or foreign commerce, including those subject to tidal effects ("Traditional Navigable Waters");
b. All Interstate Waters;
c. 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 that:
    i. Are or could be used by interstate or foreign travelers for recreational or other purposes; or
    ii, From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    iii. Are or could be used for industrial purposes by industries in interstate commerce;
d. All "Impoundments" of otherwise jurisdictional waters;
e. All "Tributaries" of waters identified in a. through d.;
f. The Territorial Seas;
g. Wetlands "adjacent" to the forgoing waters.

See 33 CFR §328.3(a); 40 CFR §122.2.

Clean Water Rule

The Rule is similarly structured, but extends the "adjacency" category from "wetlands" to all "waters," and replaces the "Other Waters" category in the Existing Rule with a case-specific "significant nexus" category. *See* 80 Fed. Reg. 37054, 37104 (June 29, 2015) (33 CFR §328.3(a)). It also defines certain key terms not currently defined in the Existing Rule.

Clean Water Rule

Interstate Commerce

The Agencies intended the "Other Waters" category of the Existing Rule to extend the Act's reach to the maximum extent permissible under the Commerce Clause of the United States Constitution. *See e.g., Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975); 42 Fed. Reg. 37122, 37144 n. 2 (July 19, 1977). Since courts have found impacts to interstate commerce in seemingly trivial localized activities, the potential reach of the Existing Rule is extensive. *See Wickard v. Filburn*, 317 US 111 (1942) (growing wheat for personal consumption impacts interstate commerce). But compare *United States v. Morrison*, 529 U.S. 598 (2000) that held that the Commerce Clause does not provide Congress authority to enact a federal civil remedy; and *United States v. Lopez*, 514 U.S. 549 (1995) where the court held that a statute prohibiting possession of firearms in a school zone exceeds Congress' Commerce Clause power. While the Supreme Court has issued two opinions checking broad assertions of CWA jurisdiction, notably neither case invalidated any portion of the Existing Rule.

Migratory Bird Rule

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), a 5-4 majority refused to extend federal jurisdiction to wholly intrastate ponds created by sand and gravel mining (some of which were seasonal) solely because the ponds provided habitat for migratory birds. The basis for asserting jurisdiction in this case was the so-called "Migratory Bird Rule."

The Migratory Bird Rule was not a rule promulgated in accordance with Administrative Procedure Act requirements. It arose in clarifications the Agencies provided in Federal Register preambles to explain how broadly they interpreted the "Other Waters" category in the Existing Rule.
Specifically, they would have extended "Other Waters" to:

- Waters that are or would be used as habitat by birds protected by Migratory Bird Treaties
- Waters that are or would be used as habitat by other migratory birds which cross state lines

51 Fed. Reg. 41206, 41217 (November 13, 1986); 53 Fed. Reg. 20764, 20765 (June 6, 1988).

SWANCC Limit

The Migratory Bird Treaty Act (16 U.S.C. §§703-12) covers over 1000 bird species in the US, including common species such as robins, mourning doves, and crows. It even applies to some birds that do not actually migrate. 80 Fed. Reg. 30032, 30033 (May 26, 2015). Given this breadth, the Corps' attempt to assert jurisdiction over the ponds based solely on migratory bird use was quite a reach, and the Court was not willing to allow it without a clear expression of congressional intent. *SWANCC* at 172-3. One might ask, however, whether the Supreme Court would have rejected jurisdiction if the ponds had stronger commerce connections. For instance, if they also hosted water skiing and fishing tournaments that attracted participants from around the country.

The _Rapanos_ Decision

In *Rapanos*, the Supreme Court held that the Corps improperly asserted jurisdiction over wetlands adjacent to non-navigable ditches and drains that eventually flowed to Traditional Navigable Waters (TNWs). However, a majority of the Court's Justices could not agree on a rationale for the holding and the case resulted in a plurality opinion.

Plurality Opinion

Four Justices concluded that the Agencies' assertion of jurisdiction was a reasonable interpretation of the Act. *Rapanos* at 787-812. Four Justices, in an opinion written by Justice Scalia (the "Plurality"), stated that CWA jurisdiction extends only to "relatively permanent, standing or continuously flowing bodies of water" connected to TNWs, and to wetlands having a "continuous surface connection" to such waters. *Id*. at 739 and 742. (*Rapanos* is the opinion referenced in EO 13778).

Scalia Opinion

"Significant Nexus"

Justice Kennedy broke the tie, siding with the four justices that found that the Corps lacked jurisdiction over the waters at issue. However, his underlying rationale differed from the other justices. He reasoned that the Corps lacked jurisdiction because it never established that the wetlands at issue, either alone or in combination with other similarly situated wetlands in the region, significantly affected the chemical, physical, and biological integrity of a TNW. *Rapanos* at 780. This came to be known as the "significant nexus" approach and Kennedy's concurring opinion provides the foundation for the Rule.

Agencies' Guidance

Characterizing *SWANCC* and *Rapanos* as broadly repudiating expansive CWA jurisdiction is a bit misleading. As previously mentioned, neither case invalidated any portion of the Existing Rule. Moreover, after *Rapanos* the Agencies issued guidance that essentially allows jurisdiction to be established under either Justice Kennedy's significant nexus approach or Justice Scalia's approach. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (December 2, 2008) ("Post-*Rapanos* Guidance"); available at: www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents. Through this guidance the Agencies have continued to assert jurisdiction over most of the same waters they had been regulating prior to Rapanos.

Rule Impact

To provide some context in this regard, the Agencies have estimated that, compared to the Existing Rule and historic practices (pre-*Rapanos*) of assessing jurisdiction, the Rule will decrease the scope of jurisdictional waters. Compared to more recent practices (post-*Rapanos*), the Agencies have estimated that the Rule would increase positive jurisdictional determinations 2.84% to 4.65% annually. 80 Fed. Reg. at 37101. It should be noted, however, that many have disputed these figures.

Clean Water Rule

State Authority

Colorado Definition

COLORADO DEFINES STATE WATERS BROADLY

With EPA approval, a state can run its own Section 402 (effluent discharge) and Section 404 (dredge and fill) permitting programs. Colorado lacks Section 404 permitting authority, but EPA has granted Colorado Section 402 authority, which the State administers through its Colorado Discharge Permit System (CDPS) program. Under this program, one must obtain a CDPS permit before discharging pollutants to "State Waters." 5 Colo. Code Regs. § 1002-61.3(1)(a) (2017).

Colorado defines "State Waters" more broadly than the Agencies define "Waters of the United States" under either the Rule or the Existing Rule. "State Waters" include "any and all surface and subsurface waters which are contained in or flow in or through this state… ." Colo. Rev. Stat. § 25-8-103(19) (2016). Thus, for instance, "State Waters" covers groundwater, which the Rule specifically excludes.

In addition to CWA Section 402 permitting, the definition of "State Waters" delineates CWA jurisdiction in Colorado for purposes of water quality certification, water quality standards, and development of **t**otal **m**aximum **d**aily **l**oads (TMDLs). Thus, the Rule would have little practical effect in Colorado outside of the CWA Section 404 permitting context. For example, some have expressed concern that the Rule would increase federal regulation of pesticide application. However, Colorado regulates pesticide discharges through its CDPS program (CWA Section 402), in which the definition of "State Waters" controls.

Variable Impact

THE RULE WOULD IMPACT DIFFERENT AREAS OF THE COUNTRY DIFFERENTLY

The Rule would expand jurisdiction in some circumstances and narrow it in others. This dynamic would differ across the country.

"Isolated" Waters

One aspect of the Rule that could significantly expand jurisdiction is its treatment of five categories of "isolated" waters (Prairie Potholes, Carolina and Delmarva Bays, Pocosins, Western Vernal Pools in California, and Texas Coastal Prairie Wetlands). The Rule assumes that waters in these five categories are "similarly situated" for purposes of a case-specific significant nexus evaluation. 80 Fed. Reg. at 37104-5 (33 CFR §328.3(a)(7)).

This assumption increases the chance that such waters will be jurisdictional, and has the potential to significantly increase the number of jurisdictional waters in certain areas of the country. This aspect of the Rule, however, would not affect Colorado since these waters do not occur in the State.

Bright Lines & Exclusions

THE RULE PROVIDES A WORKABLE STRUCTURE FOR DEFINING JURISDICTION

The Rule uses bright jurisdictional lines where possible to clarify jurisdiction and decrease the need for case-specific analyses. This increases certainty for regulated entities, but can also create a rigid regulatory scheme. To help counter this, the Rule excludes specific waters and features from coverage. Many of these exclusions codify prior Agency treatment of certain waters and features that were identified in past Federal Register preambles ("Preamble Exclusions"). 51 Fed. Reg. 41206, 41217 (November 13, 1986); 53 Fed. Reg. 20764, 20765 (June 6, 1988).

"Recapture" Jurisdiction

Two related aspects of the Rule's exclusions are particularly noteworthy. First, under the Preamble Exclusions, the Agencies reserve the right to declare on a case-specific basis that a given water is jurisdictional even though it falls within an excluded category. *Id*. The Rule does not allow such case-specific analyses. 80 Fed. Reg. at 37098. Second, under the Rule, a water or feature meeting the terms of an exclusion cannot be "recaptured" under any jurisdictional category (i.e., once out, always out). 80 Fed. Reg. at 37073 and 37096.

Thus, under the Rule, exclusions are key to appropriately focusing the Act's protections. To function properly, however, the exclusions must be clearly articulated and appropriate in scope. As discussed below, several exclusions important to Colorado need further attention in this regard.

CONSIDERATIONS and IMPLICATIONS MOVING FORWARD

Replacement Rule

The Agencies recently indicated that they will pursue a two-step process to implement EO 13778: first rescind the Rule while maintaining the current approach to assessing jurisdiction; and then propose a replacement rule that "takes into consideration the principles" of the Scalia test. *See* www.epa.gov/wotus-rule/rulemaking-process#2Step. A strict Scalia approach would likely render further discussion of refinements to the Rule irrelevant, at least in the short term.

Such an approach, however, would represent a significant change to the jurisdictional status quo, and regulated interests should consider the implications. A thorough identification and discussion of the issues this raises is beyond the scope of this article, but even a cursory evaluation suggests challenges ahead.

CWA's Broad Reach

As an initial matter, one can expect considerable debate around whether the Scalia test is a defensible interpretation of the Act. For example, courts have cited the CWA's legislative history to support a broad constitutional reach, recognizing the need to control pollution at its source in order to achieve the Act's goals. *See e.g., United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 133 (1985). A strict Scalia test may be too limited in this regard. Additionally, Justice Stevens, in his dissenting opinion in *Rapanos*,

Clean Water Rule

***Rapanos* Meaning?**

CWA Requirements

CWA Support

asserted that CWA jurisdiction exists if either the Scalia or Kennedy test is met. *Rapanos* at 810. Many lower courts struggling to divine the meaning of the 4-4-1 *Rapanos* decision have accepted this approach as governing law. *See e.g., United States v. Donovan*, 661 F.3d 174, 184 (3rd Cir. 2011).

Second, the Agencies developed a substantial administrative record to support the Rule. Developing a new record to support a significantly different approach could be a formidable challenge. How the Agencies will address this challenge remains unclear, but it may compel consideration of a rule that blends concepts from the Rule, the Existing Rule, and the Scalia approach.

Third, reducing federal jurisdiction will not eliminate the Act's requirements, such as attaining and maintaining water quality standards. It will merely *shift* the burden of meeting these requirements. If the Agencies correctly concluded that impacts to outlying waters covered by the Rule significantly affect the chemical, physical, and biological integrity of downstream TNWs, then eliminating protection of such waters would shift the cost of compliance from those causing the impacts to downstream users. Furthermore, it would almost certainly increase the burden on state budgets, and reduce national uniformity in regulating water quality.

Finally, the CWA is an iconic environmental statute enacted after decades of gradually increasing federal efforts to address the nation's deteriorating water quality. It enjoyed overwhelming congressional support when passed. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States — State, Local, and Federal Efforts, 1789-1972: Part II*, 22 Stan. Envtl. L.J. 215, 285-6 (2003). While there seems to be little risk of slipping back to the days of burning rivers, the Act is still popular, and efforts perceived as weakening it will likely generate strong opposition. Such efforts would also risk reversal under a future administration.

Of course, as previously mentioned, the Sixth Circuit made it clear that the Rule has its own vulnerabilities. While detailed discussion of these issues is also beyond the scope of this article, to the extent that the Rule's rulemaking did not meet Administrative Procedure Act requirements, a new rulemaking would render such procedural shortcomings moot. As to portions of the Rule that may be inconsistent with Supreme Court precedent, the Trump Administration would almost certainly support paring back such potential regulatory overreach. (For example, eliminating the assumption that certain waters are similarly situated for purposes of a case-specific significant nexus analysis.)

JURISDICTIONAL EXCLUSIONS: COLORADO and OTHER STATES

Given the uncertainty surrounding the upcoming rulemaking, it is important for Colorado entities to understand the potentially favorable provisions of the Rule regardless of how the proposed replacement is structured. Many aspects of the Rule have similar implications nationwide. For instance, the exclusions for puddles or stormwater control features do not appear to raise significantly different issues in Colorado than they do along the East Coast. Other aspects of the Rule deserve specific consideration by Colorado entities.

Ditch Exclusion

Ditch as Tributary

Ditch Exclusion

Colorado's early settlers constructed an intricate network of irrigation ditches and reservoirs to make water available at the times and places needed to grow crops, raise livestock, and supply towns and industry. These ditches remain fixtures on the land and routinely raise CWA permitting issues (particularly in the Section 404 context).

The Agencies have long considered ditches in general to be jurisdictional as tributaries. *See e.g., In re Town of Buckeye, Arizona*, 1977 WL 28254 at 1 (November 11, 1977), which found the Arlington Canal, an earthen irrigation ditch — whose flow consisted primarily of groundwater pumped from wells, irrigation return flows, and treated sewage effluent — to be jurisdictional. In *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407, 417 (4th Cir. 2003), the court held that the fact that the ditch at issue "is man-made rather than a natural watercourse is…irrelevant" to its status as a jurisdictional tributary. Meanwhile, in 40 Fed. Reg. 31320, 31321 (July 25, 1975), a Corps' rule defines "navigable waters" to include certain man-made canals, but specifically excludes drainage and irrigation ditches. In fact, under the Existing Rule as implemented with post-*Rapanos* guidance, the Corps takes jurisdiction over many, if not most, irrigation ditches in Colorado.

Irrigation Ditch in Northern Colorado
Irrigation ditches are designed and managed to maximize conveyance efficiency.

The Rule, as proposed ("Proposed Rule"), added certain ditch exclusions. 79 Fed. Reg. 22188, 22268 (April 21, 2014). However, the Agencies crafted these exclusions in a way that seemed to preclude their application to most irrigation ditches.

Clean Water Rule

Ditch Types Excluded

The Agencies received many comments on the proposed ditch exclusions and tried to clarify them in the final Rule. Contrary to the Agencies' claims, the ditch exclusions remain confusing. *See* 80 Fed. Reg. 37097: "These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies.")

The Rule excludes the following ditches from jurisdiction:

- 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; and
- Ditches that do not flow, either directly or through another water, into a Principal Water.

80 Fed. Reg. at 37105 (33 CFR §328.3(b)(3)).

As an initial matter, a ditch meeting the third criterion does not even constitute a "tributary" as defined, so the operable exclusions are the first two. The two operable exclusions state ambiguous concepts in a way that suggests their meaning is obvious. To the extent the Agencies explain these concepts, they do a poor job.

"Relocated Tributary"

The Agencies provide a confusing and seemingly contradictory explanation of what constitutes a ditch that is a "relocated tributary." They state that a "*stream*…that has been *channelized or straightened* because its natural sinuosity has been altered, cutting off the meanders, *is not a ditch*." They then state that a "*ditch* that relocates a stream is *not an excluded ditch*..., and a stream is relocated either when *at least a portion of its original channel has been physically moved*, or when the majority of its flow has been redirected." *Id*. at 37078 (emphasis added).

Channelizing

Channelizing or straightening a stream to cut off its meanders would require moving at least a portion of the original channel. The examples seem contradictory in terms of whether the manipulated portion of such a water constitutes a "ditch" or a "stream."

"Excavated"

In one respect this may just be semantics — the water is jurisdictional in both instances. However, the distinction could be relevant in certain circumstances. For instance, the Section 404(f)(1)(C) permitting exemption applies to, among other things, "ditches" but not "streams." *See* 33 U.S.C. §1344(f)(1)(C). Moreover, the explanation does little to clarify this aspect of the exclusion. Additionally, the Agencies never really even attempt to explain what constitutes a ditch "excavated in a tributary." Thus, these exclusions need further clarification.

Ditch v. Stream

The ditch exclusions and corresponding preamble discussions in the Rule and Proposed Rule suggest the Agencies may lack a sound understanding of irrigation ditches and attendant Western water management. Along these lines, in conjunction with the release of the Rule, then EPA Administrator Gina McCarthy explained that ditches that "still look and act like a stream, [are] a stream." *More Waterways Likely Protected under New EPA Rule*, Elizabeth Shogren, DC Dispatch, May 28, 2015 at www.hcn.org/articles/epa-federally-protected-streams-wetlands-water-obama-mccarthy.

Ditch Maintenance

Irrigation ditches are designed and maintained to maximize conveyance efficiency. Features that hinder conveyance efficiency tend to increase seepage losses and complicate deliveries to the lower end of the ditch. Thus, irrigation ditches normally lack features that create habitat in natural streams, such as meanders, large rocks, and woody debris. In fact, typical annual ditch maintenance includes burning and clearing to remove vegetation and other obstructions that accumulate over the previous year.

Aquatic Function

Irrigation ditches, therefore, typically provide minimal aquatic function. What little function they might provide is artificially sustained and subject to complete elimination by mere change in ownership of the underlying water rights.

Broad Exclusion?

The Agencies note that the Rule's language reflects careful consideration of public input received on the proposal, including input seeking clarification and expansion of the ditch exclusions. *Id*. at 37097. Given their comments, and considering the nature of irrigation ditches, one could conclude that the Agencies intended a fairly broad application of the ditch exclusions that would cover most irrigation ditches in whole or in part. What they actually provided, however, seems unnecessarily complicated.

Drainage Ditches

The CWA recognizes two types of ditches — irrigation ditches and drainage ditches — and treats them differently. CWA Section 404(f)(1)(C) creates differing levels of permitting exemptions for the two types of ditches. Specifically, this provision exempts from permitting the *construction or maintenance of irrigation* ditches, but only the *maintenance of drainage* ditches. 33 U.S.C. §1344(f)(1)(C).

Similarly, the Agencies by regulation recognize two types of ditches, and the Corps has issued detailed guidance distinguishing them. 40 CFR §232.3(c)(3); 33 CFR §323.4(a)(3); Regulatory Guidance Letter 07-02, *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act*, Corps (July 4, 2007) ("RGL 07-02"). In contrast, the Agencies lump the two types of ditches together for purposes of the ditch exclusions in the Rule.

Irrigation Ditch Exclusion

Moving forward, the better approach for ditches may be to distinguish the two types of ditches by rule, and to specifically exclude irrigation ditches. A specific exclusion would be consistent with statutory structure and past Agency practice in certain permitting contexts. It would also enable more efficient use of CWA resources by allowing the Agencies and regulated community to focus protection on more ecologically significant waters.

Clean Water Rule

Wetlands Source

"Shut Off" Requirement

Artificially Irrigated Areas Exclusion

The Rule excludes "artificially irrigated areas that would revert to dry land should application of water to that area cease." 80 Fed. Reg. at 37105 (33 CFR §328.3(b)(4)(i)). This provision grew from a similar Preamble Exclusion for "artificially irrigated areas which would revert to upland if the irrigation ceased." 51 Fed. Reg. at 41217 and 53 Fed. Reg. at 20765.

In RGL 07-02, the Corps, referencing the Preamble Exclusion, explained that wetlands "established solely due to the *presence of irrigation water, irrigated fields, or irrigation ditches*" are not jurisdictional. *Id*. at 3 (emphasis added). An accompanying footnote further clarified that "waters, including wetlands, created as a result of irrigation would not be considered waters of the United States even when augmented on occasion by precipitation." *Id*. at note 1. The wording of the Rule arguably supports a more limited exclusion than that reflected by RGL 07-02 and prior preambles.

However, under current practices, the Agencies can deem wetlands that would otherwise qualify for the corresponding Preamble Exclusion, to be jurisdictional on a case-specific basis. The Rule categorically excludes them.

To demonstrate that wetlands qualify for this Preamble Exclusion, Corps offices in Colorado typically require one to "shut off" the water to the area in question for a period of years until the area dries out. Irrigation needs, project schedules, and ownership and control over irrigation systems and practices render this unrealistic, and effectively eliminate the exclusion. If science and policy support this exclusion, it should be available as a practical matter.

Artificially Irrigated Area
Large wetland area on left created by seepage from ditch on right.

Irrigation practices and infrastructure have created numerous wetlands in Colorado. Some of these areas are fairly extensive. One recent study indicates that water from irrigation practices and infrastructure sustains about 90% of the wetlands existing within the service area of a large Front Range irrigation company. Sueltenfuss JP, Cooper DJ, Knight RL, Waskom RM, *The Creation and Maintenance of Wetland Ecosystems from Irrigation Canal and Reservoir Seepage in a Semi-Arid Landscape***,** Wetlands (2013*),* 33: 799. doi:10.1007/s13157-013-0437-6. Anecdotal observation suggests this situation is likely common across the State, and demonstrates the potential scope of this exclusion in Colorado.

"Adjacent Waters"

Gravel Pits

Active Mining Permit

Water-Filled Depressions Created by Mining or Construction Activity Exclusion

The Rule expands the existing jurisdictional category of "Adjacent Wetlands" to cover "Adjacent Waters," and makes all such waters jurisdictional by rule. 80 Fed. Reg. at 37104 (33 CFR §328.3(a)(1)). This reflects the Agencies' determination that all waters meeting the definition of "adjacent" have a significant nexus to the Principal Waters, covered tributaries, and covered impoundments to which they are adjacent. *Id*. at 37069-70.

Relevant to this jurisdictional category, the Agencies have long recognized a Preamble Exclusion for "waterfilled [water-filled] depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." 51 Fed. Reg. at 41217; 53 Fed. Reg. at 20765. The Proposed Rule contained a similar exclusion but, without explanation, omitted all reference to mining activities. *See* 79 Fed. Reg. at 22263.

The Rule, also without explanation, reinstated the reference to mining activities with language that appears broader than the current Preamble Exclusion. It excludes "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." 80 Fed. Reg. at 37105 (33 CFR §328.3(b)(4)(v)).

Older Gravel Pit Lake Developing Wetland Characteristics

The Agencies note that the exclusion in the Rule contains "several refinements," but is "consistent with" the existing Preamble Exclusion. *Id*. at 37099. They do not mention that the Preamble Exclusion applies "unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." Some Corps offices interpret this language to require a sand and gravel pit to be under an active mining permit to be excluded. The Rule does not support such an interpretation. Moreover, under the Rule, once a feature falls within the exclusion the Agencies cannot recapture it under any jurisdictional category or on a case-specific basis (*see above* regarding "recapture").

Clean Water Rule

Mining Activities Exclusion

Significant aggregate production in Colorado comes from alluvial gravel deposits near streams. Mining these gravel deposits typically exposes shallow alluvial groundwater. These pits are often located close enough to streams to be considered "adjacent" under the Existing Rule or the Rule.

Municipalities and other entities frequently use mined-out sand and gravel pits for water storage, recreation, and parks and open space. Under the Existing Rule, the jurisdictional status of these features is often unclear, for example when older pits begin to display wetland characteristics.

Given the curious history of this exclusion during the rulemaking, the Agencies presumably intended to broaden the language referencing mining activities. Additionally, the exclusion in the Rule is consistent with *SWANCC*, which involved abandoned sand and gravel pits. Thus, the exclusion in the Rule appears to cover all sand and gravel pits created in dry land regardless of their permitting status, when they were excavated, or whether they develop wetland characteristics over time. This broader exclusion would be helpful to all entities that manage such features after mining is complete.

Recycling Exclusion Added

Wastewater Recycling Structures Exclusion

In response to numerous comments on the Proposed Rule, the Agencies added a new exclusion for:

> 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.

80 Fed. Reg. at 37105 (33 CFR §328.3(b)(7)) (emphasis added).

Groundwater Recharge

The exclusion recognizes "the importance of water reuse and recycling," particularly in dry areas of the country "like California and the Southwest." *Id*. at 37100. The Agencies note that groundwater recharge basins, along with percolation ponds, "are becoming more prevalent tools for water reuse and recycling." *Id*. The reference to groundwater recharge basins may capture augmentation or re-timing ponds used in water resource management, but it is unclear whether this exclusion would cover such ponds if they do not use wastewater.

"Waste Waters"

The exclusion itself, and the accompanying preamble text, seem to establish this exclusion as one applicable to "waste waters." However, the reference to groundwater recharge basins in the Rule does not specify wastewater. It would also seem odd to preclude augmentation and re-timing ponds from coverage merely because they do not utilize wastewater. This exclusion is potentially helpful for certain water resource management activities in Colorado, such as those commonly employed on the lower South Platte River.

Certain Erosional Features Exclusion

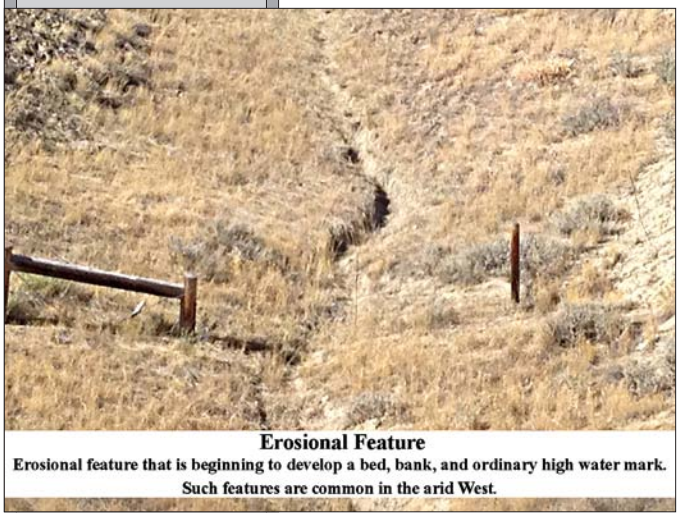
"Erosional Features"

The Rule excludes "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways." 80 Fed. Reg. at 37105 (33 CFR §328.3(b)(4)(vi)). There is no corresponding Preamble Exclusion, though the Post-*Rapanos* Guidance contains a similar concept. *Id*. at 11-12.

While the exclusion applies to all erosional features, colloquial names do not control. For example, just because something is referred to locally as a "gully" does not mean it would be excluded from jurisdiction. 80 Fed. Reg. at 37099. The key is whether the feature has a bed, banks, and an Ordinary High Water Mark (OHWM). If it does, it is a tributary. *Id*.

"Tributary" Definition

Many have expressed concern about the CWR's potential to increase coverage of very small headwater drainages in Colorado and the Southwest. *See e.g*., Freeman and Dougherty, "New Clean Water Act Rule Defining Waters of the United States," The Colorado Lawyer 43 (September 2015). This could be an important exclusion for addressing these concerns.



Erosional Feature
Erosional feature that is beginning to develop a bed, bank, and ordinary high water mark. Such features are common in the arid West.

As written, however, this provision is really more of a clarification than an actual exclusion. Most such features, if jurisdictional, would be covered as tributaries. Thus, even absent the exclusion, if the feature does not meet the definition of a tributary (i.e., bed, banks, and OHWM), it would not be jurisdictional.

Interestingly, the Agencies acknowledge that streams in more arid parts of the country can present different issues than those in other areas. The Rule Preamble even suggests that first-order streams in arid areas may often not be jurisdictional as tributaries. 80 Fed. Reg. at 37077. Moreover, the Corps in a leaked memorandum analyzing the legal vulnerabilities of the draft final Rule, expressed concerns about the over-inclusive nature of the Rule with respect to ephemeral dry washes in the arid Southwest. *Memorandum from Lance Wood, Assistant Chief Counsel, to John W. Peabody, Deputy Commanding General for Civil and Emergency Operations, Legal*

Clean Water Rule

Lakes or Ponds

Analysis of Draft Final Rule on Definition of "Waters of the United States" (April 24, 2015), p. 4. Available at: http://www.nssga.org/wp-content/uploads/2015/07/Corps-WOTUS-PDF.pdf.

This may suggest potential legal and scientific support for a broader exclusion. A blanket exclusion for first-order streams in the arid West could significantly reduce the concerns of Colorado regulated entities regarding expansion of coverage for some ephemeral drainages.

Certain Artificial Lakes or Ponds Exclusion

An existing Preamble Exclusion applies to "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and *which are used exclusively* for such purposes as stock watering, irrigation, settling basins, or rice growing." 51 Fed. Reg. at 41217; 53 Fed. Reg. at 20765 (emphasis added). The Rule contains a similar exclusion for "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." 80 Fed. Reg. at 37105 (33 CFR §328.3(b)(4)(ii)).

Artificial Pond Created in Dry Land and Used for Irrigation

The Rule removes the language about the "use" of the ponds and notes that the list is illustrative rather than exhaustive. The exclusion would apply to features constructed in dry land that do not connect to jurisdictional waters. The Agencies appear to intend that features that do connect to jurisdictional waters require a CWA Section 402 permit to be excluded. *Id*. at 37099. This exclusion can be helpful in Colorado, but it needs clarification, particularly regarding any Section 402 permitting requirement.

Connectivity to Principal Waters

Case Specific Jurisdictional Exclusion

In designating tributaries and adjacent waters as jurisdictional-by-rule, the Agencies have made sweeping generalizations about their connectivity to Principal Waters. These generalizations likely capture at least some waters that do not have a significant nexus to Principal Waters, such as certain ephemeral drainages in the southwestern United States. In fact, to support jurisdictional status for Adjacent Waters, the Agencies stated in the preamble to the Proposed Rule that such waters "are *likely, in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters." 79 Fed. Reg. 22210 (emphasis added). This statement acknowledges that in some cases, the connection is lacking.

A case-by-case exclusion — that allows an entity to show that a given jurisdictional-by-rule water is not jurisdictional because it lacks the required significant nexus to a Principal Water — would provide appropriate relief in certain circumstances, and help ease concerns of Agency overreach. If the Agencies have drawn reasonable bright lines in the Rule, these instances should be rare.

CONCLUSION

When it comes to CWA jurisdiction, the regulated community finds itself in the position of the dog that finally caught the car: it must now decide what to do with it. This will include determining whether the primary objective moving forward is killing the Rule, or effectively addressing the problem that has persisted for over 40 years.

In many regards, the upcoming rulemaking presents an unprecedented opportunity for regulated entities to shape the future of CWA jurisdiction under an administration that would be open to its concerns. This does not necessarily mean pursuing sweeping changes. While political winds seem to favor abandoning the concepts of the Rule, regulated interests should be wary of any approach that is vulnerable to challenge, or reversal by future administrations. It is not difficult to imagine a scenario where the jurisdictional issue comes full circle over the next few years and defaults back to the existing regulatory regime — which most consider flawed.

Regulated interests should evaluate their needs in the upcoming rulemaking and assess the best path forward for meeting those needs. This could involve a Scalia approach, or it could suggest a more pragmatic route. Despite its flaws, the Rule provides a workable structure for defining CWA jurisdiction while largely preserving an approach familiar to regulated interests. Entities in Colorado could gain regulatory certainty and significant regulatory relief by merely clarifying the CWR's existing exclusions. While the fix may be thornier in other parts of the country, relatively minor modifications, perhaps coupled with additional appropriately tailored exclusions, could go a long way in addressing remaining concerns.

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