

WHAT THE PROPOSED DEFINITION OF “WATERS OF
THE UNITED STATES” UNDER THE CLEAN WATER
ACT COULD MEAN TO YOUR BUSINESS

33 CFR part 328
40 CFR parts 110, 112, 116, et al.

PROPOSED RULE PUBLISHED

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- 79 Fed. Reg. 22188
- Joint rule proposed by EPA and USACE.
- Comments due July 21, 2014

THE PROPOSED RULE

Three Categories:

- 1) Jurisdictional by regulation
- 2) Jurisdictional on a case-by-case basis
- 3) Not subject to jurisdiction

PROPOSED RULE

A. Waters jurisdictional by Rule

1. Traditionally navigable waters
2. Interstate waters and wetlands
3. Territorial Seas
4. All impoundments of 1-3
5. All tributaries of 1-4
6. All waters, including wetlands, adjacent to 1-5

Agency has made a determination that all waters in 4-6 have a significant nexus such that they are subject to jurisdiction.

PROPOSED RULE

- B. Additional “other waters” subject to jurisdiction on a case-by-case basis.

Waters, including wetlands, are jurisdictional if alone or in combination with other similarly situated waters, located in the same region, they have a significant nexus to an A(1-3) water.

PROPOSED RULE

- C. Excluded from jurisdiction by regulation; includes two types of ditches.
 - 1. Excavated wholly in uplands, drains only uplands, and has a less than perennial flow.
 - 2. Do not contribute flow either directly or indirectly to an (A)(1-4) water.

PROPOSED RULE

- C. Excluded from jurisdiction by regulation ;
includes certain “features,” including:

Gullies, rills, and non-wetland swales

Ground water

Certain pools and ponds created in uplands

(example: swimming pools)

MAJOR CHANGES - TRIBUTARIES

- Proposed Rule:
 - All tributaries to (A)(1-4) waters are jurisdictional. Tributaries is defined by regulation.
- Current Rule:
 - Asserts jurisdiction over tributaries but does not define the term.

MAJOR CHANGES - TRIBUTARIES

- Tributary is defined as:
 - Physically characterized by a bed and banks and an OHWM
 - Contributes flow “directly or through another water” to an (A)(1-4) water.

“one or more” natural or man-made break in physical characteristics do not break connection with (A)(1-4) water if a bed, banks, and OHWM can be identified upstream of the break.

Tributaries can be natural, man-altered or man-made.

MAJOR CHANGES – ADJACENT WATERS

- Current rule only speaks to adjacent wetlands.
- Proposed rule adds the concept of adjacent waters.
- Adjacent is defined as: bordering, contiguous, or neighboring. This remains unchanged. None of these terms are defined in the current rule.

MAJOR CHANGES – ADJACENT WATERS

- The proposed rule defines “neighboring.”
 - waters within a “floodplain” or “riparian areas” of (A)(1-5) waters.

OR

- waters with “shallow subsurface hydrologic connection” or “confined surface hydrologic connection” to an (A)(1-5) water.

Non-jurisdictional waters or features are never jurisdictional but can be a “confined surface hydrologic connection.”

MAJOR CHANGES – ADJACENT WATERS

- Riparian Area is defined as:

“an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.”

Surface hydrology includes rainfall.

“Bordering” is not defined.

MAJOR CHANGES – ADJACENT WATERS

- Floodplain is defined as:

“an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high flows.”

MAJOR CHANGES – OTHER WATERS

- Significant Nexus is defined as:

“water (including wetlands), either alone or in combination with other similarly situated waters in the region significantly affects the chemical, physical or biological integrity of an (A)(1-3) water.”

“Significant” is “more than speculative or insubstantial.”

MAJOR CHANGES - OTHER WATERS

- Similarly situated waters or wetlands –

perform similar functions and are located sufficiently close together OR sufficiently close to a “water of the US” so that they can be evaluated as a single landscape unit with regard to their effect on an (A)(1-3) water.

MAJOR CHANGES – OTHER WATERS

- What is a “region” ?

“The agencies propose to interpret the phrase ‘in the region’ to mean the water-shed that drains to the nearest traditionally navigable water, interstate water or the territorial seas through a single point of entry.”

This interpretation is not part of the proposed rule.



WEST SECTOR TRIBUTARIES

BUFFALO BAYOU



GREENTREE TRIBUTARY

BUFFALO BAYOU

SPECIFIC THREATS TO HOUSTON AND TEXAS

- EPA requests comments on approaches to determining when “Other Waters” are subject to jurisdiction. Three alternatives are identified.
 1. Determine by rule that “other waters” are similarly situated in certain areas of the country. (Ecoregion approach).
 2. Determine by rule that certain subcategories of waters would be jurisdictional. (the “type of wetland” approach).
 3. Other approaches, including the proposed case-by-case approach.

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The Ecoregion Approach

The agencies expect that determining all “other waters” within an ecoregion to be similarly situated would result in these “other waters” being determined to have a significant nexus and being found jurisdictional.

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The agencies consider “Level III ecoregions” to be the most appropriate for analysis.
- “The ‘other waters’ in these ecoregions are within a contiguous area of land with relatively homogenous soils, vegetation, and land form ... and generally provide similar functions to the downstream traditionally navigable waters....”

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The Ecoregion Approach

Level III ecoregions are the second most detailed level of ecoregions nationally.

There are 105 level III ecoregions.

The agencies list 25 regions “where waters are similarly situated and aggregation could be used.”

These include the Western Gulf Coast Plain and the Southern Coastal Plain.

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The Ecoregion Approach

Factors used to develop the list of Level III Ecoregions

1. Density
2. Soil permeability and surface of shallow subsurface such that the “other waters” can be considered hydrologically connected, such as many Texas coastal prairie wetlands
3. Water chemistry
4. Physical capacity
5. Co-location
6. Sufficiently near each other or the tributary system and thus function as an integrated habitat.

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The Type of Wetland approach

“Under this option the agencies could determine that waters such as prairie potholes, ..., Texas coastal prairie wetlands, ..., and perhaps other categories of waters, ... have a significant nexus and are jurisdictional.”

SPECIFIC THREATS TO HOUSTON AND TEXAS

- As a basis for determining the types of wetlands subject to federal jurisdiction the agencies will use:
 - “Connectivity of Streams and Wetlands to Downstream Waters: A review and synthesis of the Scientific Evidence,” (USEPA 2013). This report is currently in draft form. The final rule will not issue until the report is in final form.
 - Other scientific information submitted for the record.

SPECIFIC THREATS TO HOUSTON AND TEXAS

- The regulated community should comment and those comments must address not only policy but the ‘ science’ on which the rule is based.
- B.P. Wilcox, et al. “Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands,” Wetlands 31:451-458 (2011).

QUESTIONS?