Understanding Legal Challenges and Next Steps for the Clean Water Rule
Welcome!

If you have any technical difficulties during the webinar you can send us a question in the webinar question box or call Marla at (207) 892-3399.
Before we get started... let’s practice using the audio & web interface

• You must select the correct audio in the audio box.

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  Bottom right corner of monitor

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Webinar Tech Check-in

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Before we get started... let’s practice using the audio & web interface

- Red arrow button – maximize / minimize the web interface
Presenters

- Roy Gardner, Professor of Law and Director, Institute for Biodiversity Law and Policy, Stetson University College of Law

- Kim Diana Connolly, Professor, Director of Clinical Legal Education, Vice Dean for Legal Skills, SUNY Buffalo Law School
Moderator

- Jeanne Christie, Executive Director, Association of State Wetland Managers
Today’s Agenda

- Introductions, Jeanne Christie (10 Minutes)

- Federal Agency Actions to Prepare for Implementation of the Clean Water Rule, Kim Diana Connolly (15 Minutes)

- Overview and Next Steps for Legal Challenges to the Clean Water Rule, Roy Gardner (25 Minutes)

- Riders to Appropriations Bills to Stop the Clean Water Rule, Kim Diana Connolly (10 Minutes)

- Discussion, All (20 Minutes)
The New Rule

U.S. Army Corps of Engineers and
U.S. Environmental Protection Agency
May 2015

Clean Water Rule: Definition of “Waters of the United States”
FEDERAL REGISTER

Vol. 80       Monday,
No. 124       June 29, 2015

Part II
Department of Defense
Department of the Army, Corps of Engineers
33 CFR Part 328

Environmental Protection Agency
EPA’s website

Clean Water Rule

Clear Protection for Clean Water

Streams and Wetlands Matter

Streams and wetlands form the foundation of our nation's water resources. Clean water upstream means cleaner water flowing into rivers, lakes, bays, and coastal waters. Learn more about why streams and wetlands matter.

What the Rule Does

The rule ensures that waters protected under the Clean Water Act are more precisely defined, more predictably determined, and easier for businesses and industry to understand. Learn more about what the rule does.

What the Rule Does Not Do

The rule does not protect any new types of waters, regulate most ditches, apply to groundwater, create any new permitting requirements for agriculture, or address land use or private property rights. Learn more about what the rule does not do.
Corps’ website
Resources

Documents Related to the Clean Water Rule

On this page:
- The final Clean Water Rule
- Media
- Webinars
- Fact sheets
- Streams and wetlands
- Additional information
- Public comments
- Background information

The final Clean Water Rule:
- The final rule
- New definition of "Waters of the United States" at 40 CFR 230
- Technical Support Document for the Clean Water Rule: Definition of Waters of the United States
- Economic Analysis of the EPA-Army Clean Water Rule
- Environmental Assessment
- Response to Comments
A place to check often (at least for now)
Big Picture (covered in last webinar)

- Some things unchanged (TNR, interstate, territorial seas, impoundments, some exclusions, use of 1987 manual and regional supplements)
- Modifications and clarifications
  - Clarified exclusions (many ditches, artificially irrigated areas, certain artificial lakes, certain artificial pools and ornamental waters, certain incidental depressions, certain erosional features, puddles)
  - Clarified non-waters (groundwater, certain stormwater control features, certain wastewater recycling, basins, ponds, and distribution structures)
- Clarified Significant Nexus (defining tributaries, ditches, adjacent waters, neighboring, similarly situated, etc.)
Additional implications

- NWPs
- Some existing JDs (if life of permit extended, etc.)
- 402 (unlikely but possible)
- 303/305 (ensuring consistency a work in progress)
Emerging Q&A (from Corps’ Fact Sheets)

Grandfathering
Q: Are preliminary jurisdictional determinations affected by the new rule?
Q: What is the status of an approved jurisdictional determination associated with a pending complete nationwide permit pre-construction notification (PCN)?

Characteristics of Tributaries and Erosional Features
Q: What is the difference between tributaries under the Clean Water Rule and erosional features which are not considered “waters of the U.S.” under the Rule?
Q: What is a “bed and banks”?
Q: What is an “ordinary high water mark” (OHWM) and what are its indicators?
Q: Where do erosional features occur?
Q: How can I determine the difference between a tributary and an erosional feature in the field?

Adjacent and Case-Specific Waters
Q: What waters may be covered under the adjacent category of waters
Q: What waters may be covered under the site-specific significant nexus categories of waters under paragraph (a)(8)?
Q: What are considered wetland waters under the Rule?
Q: What types of non-wetland waters are included as adjacent waters or as site-specific significant nexus waters?
Agencies’ Commitments

- Frequent postings to answer questions
- Webinars (promised bi-weekly)
- Recognizing role of local coordination and work through local POCs
- Working on “tools”
- Conducting joint assessments in the spring
- Open to new ideas
August 27th EPA-Corps Webinar

The Final Clean Water Rule

Thursday, August 27, 2015
1-hour Webinar

Eastern: 1:00 p.m.-2:00 p.m.
Central: 12:00 p.m.-1:00 p.m.
Mountain: 11:00 a.m.-12:00 p.m.
Pacific: 10:00 a.m.-11:00 a.m.

Join us to learn more details about the U.S. Environmental Protection Agency’s (EPA) and U.S. Department of the Army’s final Clean Water Rule. This webinar will provide a review of the final rule, survey some commonly asked questions, and discuss what to expect as the rule is implemented.

In a historic step for the protection of clean water, EPA and the Army signed the Clean Water Rule on May 27, 2015, to protect the streams and wetlands that form the foundation of the nation’s water resources from pollution and degradation. The final rule is effective August 28, 2015.

Registration: You must register in advance to attend this webinar. Please register at: http://mp118985.cdn.mediatraining.com/118985/ml/mp/4000/5345/5417/51065/Lobby/default.htm

Registration Questions?
Please contact Stefanie Gera at Stefanie.Gera@tetratech.com

Upshot...

Stay tuned....
WOTUS Lawsuits: Overview

- How many lawsuits?
- Who are the plaintiffs/petitioners?
- What courts are they in and why?
- What are their claims?
  - Procedural
  - Clean Water Act (statutory)
  - Constitutional
  - Other
- What are the possible remedies?
Number of Lawsuits

- United States District Courts
  - At least 11 cases filed (1 of which has been voluntarily dismissed)

- United States Circuit Courts of Appeals
  - At least 14 petitions for review
Who are the plaintiffs/petitioners?

States/Industry/Associations

- American Farm Bureau Federation
  - American Forest & Paper Association
  - American Petroleum Institute
  - American Road and Transportation Builders Association
  - Greater Houston Builders Association
  - Leading Builders of America
  - Matagorda County Farm Bureau
  - National Alliance of Forest Owners
  - National Association of Home Builders
  - National Association of Manufacturers
  - National Association of Realtors
  - National Cattlemen’s Beef Association
  - National Corn Growers Association
  - National Mining Association
  - National Pork Producers Council
  - National Stone, Sand, and Gravel Association
  - Public Lands Council
  - Texas Farm Bureau
  - U.S. Poultry & Egg Association

- Ohio
  - Attorney General Bill Schuette on Behalf of the People of Michigan
  - Tennessee

- Georgia
  - West Virginia
  - Alabama
  - Florida
  - Indiana
  - Kansas
  - Kentucky
  - North Carolina Department of Environment and Natural Resources
  - South Carolina
  - Utah
  - Wisconsin

- Murray Energy Corporation

- Chamber of Commerce of the United States of America
  - National Federation of Independent Business
  - State Chamber of Oklahoma
  - Tulsa Regional Chamber
  - Portland Cement Association
Plaintiffs/Petitioners (continued)

**States/Industry/Associations**

- North Dakota
  - Alaska
  - Arizona
  - Arkansas
  - Colorado
  - Idaho
  - Missouri
  - Montana
  - Nebraska
  - Nevada
  - South Dakota
  - Wyoming
  - New Mexico Environment Department
  - New Mexico State Engineer
- Oklahoma
- Southeastern Legal Foundation, Inc.
  - Georgia Agribusiness Council, Inc.
  - Greater Atlanta Homebuilders Association, Inc.
- Texas
  - Louisiana
  - Mississippi
- Utility Water Act Group
- Washington Cattlemen’s Association
  - California Cattlemen’s Association
  - Oregon Cattlemen’s Association
  - New Mexico Cattle Growers Association
  - New Mexico Wool Growers, Inc.
  - New Mexico Federal Lands Council
  - Coalition of Arizona/New Mexico Counties for Stable Economic Growth
  - Duarte Nursery, Inc.
  - Pierce Investment Company
  - LPF Properties, LLC.
  - Hawkes Company, Inc.
Plaintiffs/Petitioners (continued)

Environmental Organizations

- National Wildlife Federation
- Natural Resources Defense Council, Inc.
- Puget Soundkeeper Alliance
  - Sierra Club
- Waterkeeper Alliance, Inc.
  - Center for Biological Diversity
  - Center for Food Safety
  - Humboldt Baykeeper
  - Russian Riverkeeper
  - Monterey Coastkeeper
  - Snake River Waterkeeper, Inc.
  - Upper Missouri Waterkeeper, Inc.
  - Turtle Island Restoration Network, Inc.
Courts

- **District Courts**
  - Northern District of Georgia
  - Southern District of Georgia
  - District of Minnesota
  - District of North Dakota
  - Southern District of Ohio
  - Northern District of Oklahoma
  - Southern District of Texas
  - Northern District of West Virginia

- A motion is pending before the U.S. Judicial Panel on Multidistrict Litigation to transfer the district court cases for consolidated pretrial proceedings

- Hearing set for October 1, 2015

- **Circuit Courts of Appeals**
  - Second Circuit
  - Fifth Circuit
  - Sixth Circuit
  - Eighth Circuit
  - Ninth Circuit
  - Tenth Circuit
  - Eleventh Circuit
  - District of Columbia Circuit

- All circuit cases were consolidated in the Sixth Circuit
Question about Jurisdiction

- Do the District Courts or the Circuit Courts have jurisdiction?
- Why the uncertainty?

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. Compare, E.I. du Pont de Nemours and Co. v. Train, 430 U.S. 112 (1977); NRDC v. EPA, 673 F.2d 400 (D.C. Cir. 1982); National Cotton Council of Amer. v. EPA, 553 F.3d 927(6th Cir. 2009) cert denied 559 U.S. 936 (2010) with, Northwest Environmental Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008); Friends of the Everglades v. EPA, 699 F.3d 1280 (11th Cir. 2012) cert denied 559 U.S. 936 (2010).
Legal Claims

- Procedural violations associated with the rulemaking process
  - Substantial changes to proposed rule without additional public comment
  - Final rule is not a “logical outgrowth” of the proposed rule
  - Failed to make all information relied upon available to the public
  - Failed to respond appropriately to comments

- Clean Water Act (statutory) violations
  - Exceeds the agencies’ CWA authority
  - Inconsistent with CWA’s plain language

- Constitutional violations
  - Commerce Clause
  - Tenth Amendment
  - Due Process Clause

- Other violations
  - Regulatory Flexibility Act
  - Unfunded Mandates Reform Act
  - National Environmental Policy Act
  - Anti-Lobbying Act
  - Executive Orders
Examples of relief requested in the lawsuits

- Declaratory relief
  - Declare the final rule unlawful
- Preliminary and permanent injunctive relief
- Stay, remand, and/or set aside/vacate the final rule
- Defer enforcement
- Stay the effective date
- Enjoin the agencies from implementing/enforcing/applying the final rule
The Potential Role of Congress

- Brief Review of Congressional Process
- Introduced Stand-alone Bills in Opposition
- Riders to Appropriations Bills to Stop the Clean Water Rule
- What to Watch
Legislative Process (from Congress.gov)
Final Résumé of Congressional Activity

SECOND SESSION OF THE ONE HUNDRED THIRTEENTH CONGRESS

The first table gives a comprehensive résumé of all legislative business transacted by the Senate and House. The second table accounts for all nominations submitted to the Senate by the President for Senate confirmation.

DATA ON LEGISLATIVE ACTIVITY
January 3, 2014 through January 2, 2015

<table>
<thead>
<tr>
<th>Measures pending</th>
<th>Senate</th>
<th>House</th>
<th>Total</th>
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<td>Bills</td>
<td>1,452</td>
<td>2,605</td>
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</tr>
<tr>
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<td>350</td>
<td>624</td>
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DISPOSITION OF EXECUTIVE NOMINATIONS
January 3, 2014 through January 2, 2015

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<tr>
<th>Civilian nominations, totaling 534 including 2 nominations carried over from the First Session, disposed of as follows:</th>
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<tbody>
<tr>
<td>Confirmed</td>
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<tr>
<td>Withdrawn</td>
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<tr>
<td>Returned to White House</td>
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<tr>
<th>Other Civilian nominations, totaling 3,885, disposed of as follows:</th>
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<tr>
<td>Confirmed</td>
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<td>Withdrawn</td>
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<th>Air Force nominations, totaling 3,426, disposed of as follows:</th>
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<td>Withdrawn</td>
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<th>Army nominations, totaling 6,376, disposed of as follows:</th>
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<td>Withdrawn</td>
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<th>Navy nominations, totaling 3,977, disposed of as follows:</th>
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<td>Withdrawn</td>
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<th>Marine Corps nominations, totaling 878, disposed of as follows:</th>
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<tbody>
<tr>
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</tr>
<tr>
<td>Withdrawn</td>
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<tr>
<td>Returned to White House</td>
</tr>
</tbody>
</table>

Summary

| Total nominations carried over from the First Session | 7 |
| Total nominations received this Session | 19,796 |
| Total confirmed | 18,354 |
| Total unsuccessful | 9 |
| Total withdrawn | 16 |
| Total returned to the White House | 1,428 |
Substantive Bills

- H.R. 594, Waters of the United States Regulatory Overreach Protection Act of 2015, Rep Gosar (AZ) (introduced 1/28/2015); 185 cosponsors, referred to committee
- S.1140 Federal Water Quality Protection Act, Sen Barrasso, (WY) (introduced 4/30/2015), 43 cosponsors, 43 osponsors, reported out of committee July 2015
- Others...
“Riders” are controversial but frequently used devices of appropriations-based policy-making. Riders are amendments added to an appropriation bill. To be “germane” they must involve funds and spending. They amend appropriations bills to specifically prohibit or otherwise limit the use of federal funds for designated activities.
Former Versions of the Riders

House Interior & Env’t bill:

- **WATERS OF THE UNITED STATES 12 SEC. 422.** None of the funds made available in this Act or any other Act for any fiscal year may be used to develop, adopt, implement, administer, or enforce any change to the regulations and guidance in effect on October 1, 2012, pertaining to the definition of waters under the jurisdiction of the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.), including the provisions of the rules dated November 13, 1986, and August 25, 1993, relating to said jurisdiction, and the guidance documents dated January 15, 2003, and December 2, 2008, relating to said jurisdiction. See page 122 of draft: [http://appropriations.house.gov/uploadedfiles/bills-114hr-fc-ap-fy2016-ap00-interior.pdf](http://appropriations.house.gov/uploadedfiles/bills-114hr-fc-ap-fy2016-ap00-interior.pdf)

Senate bill:

- **SEC. 421.** None of the funds made available in this Act or any other Act for any fiscal year may be used to develop, adopt, implement, administer, or enforce any change to the regulations and guidance in effect on October 1, 2012, pertaining to the definition of waters under the jurisdiction of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251, et seq.), including the provisions of the rules dated November 13, 1986 and August 15, 1993, relating to said jurisdiction, and the guidance documents dated January 15, 2003 and December 2, 2008, relating to said jurisdiction. See page 135 of the draft: [https://www.congress.gov/114/bills/s1645/BILLS-114s1645pcs.pdf](https://www.congress.gov/114/bills/s1645/BILLS-114s1645pcs.pdf)
So....what happens next?

- New rule becomes active
- Litigation continues and ensues
- Attempts at Congressional action persist
- Permit applications continue...
- Law professors write many footnotes!
Discussion
Thank you!