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Comments on the U.S. Army, Corps of Engineers (ACE) and U.S. Environmental Protection Agency (EPA) notice of proposed rule entitled **Definition of “Waters of the United States” Under the Clean Water Act**”, found at the following link as of April 3, 2014 (<http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act>).

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The proposal was signed by the ACE on March 24 and the EPA on March 25, 2014. There will be a 90-day comment period following actual publication in the Federal Register. Comments will need to be submitted by the end of June or mid-July, 2014.

In their 370 page proposed rule, the ACE and EPA state their goals are to define Clean Water Act (CWA) jurisdiction in a manner that: provides greater clarity and predictability; reduces paper work and resources required to confirm jurisdictional waters; and fulfills the agencies’ responsibility under the CWA (pages 3 and 14 of the proposed rule and throughout). The proposal will revise the definition of “waters of the United States” and related regulatory requirements contained at:

- 33 CFR 328.3;
- 40 CFR Parts 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 300 Appendix E, 302.3 and 401.11.

Overall, the proposed rules appear to incorporate prior policy and interpretations into existing regulatory language. There are some good points and language that will clarify some areas of inconsistency or confusion in the past. On first review, there could be expansion of jurisdictional authority and case-specific applications remain, which I am not sure will necessarily meet the goal of greater clarity and predictability or reduced paper work and resources required to confirm jurisdictional waters. The comprehensive nature of the proposed rules (ACE jurisdiction under Title 33 of the CFR and several EPA programs under Title 40 of the CFR) bears close scrutiny to confirm how the revisions may affect other related environmental programs.

While it may be laudable to include more current scientific data to support the basis for some clarity in definition and potential expansion of jurisdiction, I am not sure whether this is consistent with the statute and case law. This will need to be evaluated, debated and comments made by competent environmental attorneys.

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A brief summary of the proposal is provided below.

**33 CFR 328.3 Definitions** will be amended by removing introductory text and revising subsections (a), (b) and (c). Related revisions will be made to the above referenced parts of 40 CFR.

**33 CFR 328.3 subsection (a)** will contain a revised definition of “waters of the United States”.

The proposal includes the following longstanding understood jurisdictional waters: traditional navigable waters; interstate waters, including interstate wetlands; territorial seas; tributaries to and impoundments of the prior listed waters; and wetlands adjacent to these identified waters (page 43 of the proposal).

The proposal defines tributaries as having a stream bed and banks with an ordinary high water mark (33 CFR 328.3(e)) and includes ***all tributaries*** as jurisdictional waters, even if they are not directly connected to traditional navigable waters described above (pages 43, 44 and 54-57 of the proposal). Justification is based upon “significant nexus” or indirect connection/contribution to navigable waters, interstate waters or territorial seas. This may expand the application of jurisdictional waters or clarify current application. Discussion of significant nexus is presented (pages 93-95 and 99-103 of the proposal).

Finally, the definition of jurisdictional “other waters” (originally found at 33 CFR 328.3 (a) (3)) is narrowed, but there is provision for case-specific evaluation of “other waters”, including wetlands, for jurisdictional purposes based upon “significant nexus” to navigable waters, interstate waters or territorial seas (pages 43, 44 and 90-93 of the proposal). This may also expand the application of jurisdictional waters.

**33 CFR 328.3 subsection (b)** will expand the list of waters **excluded** from jurisdiction (pages 44-45) to those identified below, though some of these may be subject to interpretation.

- waste treatment systems including ponds or lagoons designed to meet CWA requirements;
- “prior converted cropland” (although EPA maintains authority over determination and jurisdiction of these areas);
- upland ditches that do not have perennial flow and do not contribute flow directly (or through another water) to a traditional navigable water, interstate water, territorial sea or jurisdictional impoundment;
- artificially irrigated upland areas;
- artificial lakes or ponds ***excavated from dry land*** and used only for stock watering, irrigation, rice growing or as a settling basin (no aquaculture);
- artificial swimming, reflecting or ornamental pools/waters ***excavated from dry land***;

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- water filled depressions incidentally created from construction activities;
- groundwater, including subsurface drained groundwater; and
- gullies, rills and non-wetland swales.

**33 CFR 328.3 subsection (c)** will include definitions for “Adjacent”, “Neighboring”, “Riparian Area”, “Floodplain”, “Tributary”, “Wetlands” and “Significant Nexus”. Of note is a proposal to revise jurisdictional authority over “wetlands adjacent” to waters defined in 33 CFR 328.3(a) to include riparian areas and floodplains and using the term “adjacent waters” (pages 46-47, 74-88 of the proposal).

The specific language changes to the various regulations can be found on pages 325 – 370 of the proposed rule.

We will be following the progress of this proposed rule. If you need any assistance in interpreting these changes or we may assist you in any other way, please contact us.

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