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EPA AND THE CORPS FINALIZE WATERS OF THE US RULE

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After more than a decade of uncertainty following two Supreme Court decisions called into question the scope of federal jurisdiction under the Clean Water Act, the Obama administration has finalized its Waters of the US Rule, now referred to as "the Clean Water Rule," describing the range of waters which will be regulated under the Act.

In our firm's view, the rule remains a broad expression of the Administration's view of its authority under the Act. Compared to the proposal, the final rule provides a level of additional clarity about what's jurisdictional and what's not because the Administration has substituted several distance-based definitions for the science-based ones originally proposed**.** For example, the terms "floodplain" and "riparian area" have been eliminated and replaced with distance-based measures and the FEMA 100-year floodplain.

The broad categories of jurisdictional waters in the final are very similar to the proposal

The set of jurisdictional waters is generally the same in the final as in the proposal:

1. Those that have been, are, or could be used in interstate commerce
2. Interstate waters
3. The territorial seas
   (or ease of reference, below, I refer to 1, 2, and 3 as the "core waters").
4. Tributaries of the core waters

5. Waters adjacent to the above
6. Waters with a significant nexus to a core water
7. Impoundments of the above.

The immediately-jurisdictional waters

As a result of the additional clarity in the final rule, under the rule, waters are always jurisdictional starting at interstate waters and the territorial seas, as far up tributaries as there is an ordinary high water mark and a bed and bank and outward from that bed and bank at least 100 feet (and up to 1,500 feet if in the FEMA 100-year floodplain). In addition, waters within 1,500 feet of a high tide line or the ordinary high water mark of a Great Lake are always jurisdictional.

As with the proposed rule, there is no requirement that any of these upstream waters actually contain water – the bed and bank and ordinary high water mark, along with the distance from that feature is sufficient.

The Significant Nexus Test

The significant nexus test itself is essentially unchanged from the proposal – any waters, including wetlands, that, on a case-by-case basis, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest traditionally navigable core water. . .) significantly affects the chemical, physical, or biological integrity of a core water. . . For an effect to be significant, it must be more than speculative or insubstantial. In other words, if you intend to impact one such water, the agency will determine its jurisdictional status by examining the significance of the nexus to the downstream water of all such waters in the applicable watershed.

While the final test is the same as proposed, the waters subject to the test have changed. The Administration has identified five types of wetlands that "are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest" traditionally navigable or interstate water or territorial sea. These are:

(A) Prairie potholes, located in the upper Midwest,

(B) Carolina bays and Delmarva bays, that occur along the Atlantic coastal plain,

(C) Pocosins, found predominantly along the Central Atlantic coastal plain,

(D) Western vernal pools, located in parts of California, and

(E) Texas coastal prairie wetlands, located along the Texas (and possibly western Louisiana) Gulf Coast.

In addition, the Agencies will aggregate – throughout the watershed draining to the nearest "traditionally navigable water"- all "similarly situated" waters located within

- 4,000 feet of the high tide line or ordinary high water mark of any other jurisdictional water (including dry tributaries)
- the 100-year floodplain of a traditionally navigable or interstate water or territorial sea

Unlike the five types of waters described above, these waters will not automatically be aggregated – they must have similar functions for aggregation to occur.

Exclusions

The rule contains a broad array of exclusions. These include:

- Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.
- Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
- The following ditches:
  - 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.
  - Ditches that do not flow, either directly or through another water, into a core water.
- Artificially irrigated areas that would revert to dry land should application of water to that area cease;
- 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;
- Artificial reflecting pools or swimming pools created in dry land;
- Small ornamental waters created in dry land;
- 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
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
- Puddles.
- Groundwater, including groundwater drained through subsurface drainage systems.
- Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.
- 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.

The agencies have made a large concession regarding ditches. At the time of the proposal, ditches would have been jurisdictional if constructed in waters in whole or in part. Given the expanse of the rule's definition of waters and the fact that ditches are generally constructed in lower-lying areas, the regulated community feared that almost all ditches would be considered jurisdictional. The Agencies have changed their approach to ditches under the final rule – going forward, ditches will only be jurisdictional if they are (1) ephemeral or intermittent ditches excavated in a tributary or constructed in order to relocate a tributary or (2) intermittent ditches that drain wetlands.

http://www2.epa.gov/cleanwaterrule

FHWA ISSUES ENVIRONMENTAL JUSTICE REFERENCE GUIDE

Submitted by

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On April 1, 2015, FHWA released a comprehensive guidebook that synthesizes environmental justice requirements and resources relating to the planning, implementation, and operation of highway projects.[1] The guidebook "does not establish any new requirements or replace any existing guidance." (p. 1) Instead, it serves as a compendium of existing information related to environmental justice compliance.

The guidebook includes:

- The **history of environmental justice** requirements, beginning with the Civil Rights Act of 1964 and continuing with Executive Order 12898 on environmental justice, which was issued by President Clinton in 1994. (pp. 3-4)

- The **relationship between environmental justice and Title VI** of the Civil Rights Act. The guidebook explains that environmental justice policies require federal agencies to take actions to identify and address disproportionately high and adverse effects on low-income and minority populations, while Title VI prohibits recipients of federal funds (such as State DOTs) from engaging in discrimination on the basis of race, color, or national origin. (pp. 4-6)

- **Definitions** of key terms used in environmental justice policies and guidance documents, including "low income," "minority," "disproportionately." "population," "adverse effect," and "disproportionately high and adverse." (pp. 10-11).

- An overview of **data sources** for conducting identifying and evaluating effects on environmental justice populations, including links to various databases with

[1] The guidebook is posted on FHWA's website at http://www.fhwa.dot.gov/environment/environmental_justice/resources/reference_guide_2015/.

population and transportation data. The guidebook also includes links to **data analysis tools** that integrate data from multiple sources, such as EPA's "EJView" screening tool. (pp. 15-21).

- Advice on **identifying low-income and minority populations.** The guidebook states that "in planning analyses, it may be sufficient to identify populations at the Census-tract level" but "[i]n project analyses, practitioners should go beyond this first level to identify minority and low-income persons or populations at a more detailed level using multiple sources of information." (p. 14)

- Advice on identifying effects that are **"disproportionately high and adverse."** The guidebook notes that, under USDOT and FHWA orders, such effects include an adverse effect that is (1) "predominantly borne by a minority population and/or a low-income population" or (2) "will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the nonminority population or non-low-income population." (p. 13)

- Advice on **identifying study area boundaries** for an EJ analysis. The handbook recommends setting boundaries carefully "so as not to artificially distort the representation of minority and low-income individuals in the affected population." (p. 22).

- Advice on **integrating environmental justice considerations into each stage of project planning, development, and operation,** including:

    - Transportation planning (pp. 25-32)
    - Environmental review, including compliance with the National Environmental Policy Act (NEPA) (pp. 40-49)
    - Design (p. 49-51)
    - Right-of-way acquisition (p. 51-55
    - Construction (pp. 55-57)
    - Maintenance and Operations (pp. 57-63)
    - Safety (pp. 63-65)

- Advice on **public involvement methods** for engaging minority populations and low-income populations in all stages of transportation planning, project development, implementation, and operation. This topic is thoroughly covered in several existing research reports and handbooks; therefore, the reference guide only briefly addresses this topic and includes references to those other existing resources.

- Advice on incorporating environmental justice compliance into **government-to-government consultation with Indian tribes.** (pp. 65-69) The handbook notes that Native American populations are included within the definition of "minority populations" under FHWA EJ order.

- Advice on assessing the environmental justice impact of **road pricing and tolling.** (pp. 58-60) The guidebook recommends identifying tolling as part of a project's funding package during the transportation planning process (before the NEPA process begins) and then using the NEPA process to assess the potential effects of tolling on minority populations and low-income populations. It identifies two types of effects of tolling: (1) the potential for tolls themselves to place a disproportionate economic burden on minority and low-income populations; and (2) the potential for tolls to cause changes in traffic patterns that have disproportionate effects on minority and l-low-income populations. The guidebook also summarizes a range of potential methods for mitigating these effects.

- Overview of **Title VI compliance at the program level**. (pp 69-72) The guidebook explains that USDOT's Title VI program requires State DOTs to conduct an annual review to determine the effectiveness of the State DOT's efforts to avoid discrimination. If the review identifies disproportionately high and adverse impacts on minority populations, the State is required to determine whether program alternatives that cause a less disparate impact are available.

In each section, the reference guide also includes cross-references and links to applicable regulations, orders, guidance, and data sources. Brief case studies also are included throughout the guide. Because of its comprehensiveness, the guide provides an excellent resource for environmental justice practitioners.

AIRCRAFT REFUELING SPILL AT BOSTON LOGAN AIRPORT

NOT MARITIME ACTIVITY

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This case addressed the question of whether damages caused by an upland fuel spill may be recovered under federal maritime law. It also addressed the difficulty confronted by a plaintiff who was required to meet a 90 day "presentment requirement" as well as comply with a three year statute of limitations, but was not provided the information that he needed in time to comply with both.

Denehy was a commercial clamdigger whose livelihood was harmed when a spill during aircraft refueling at Logan Airport damaged clam beds in the nearby bay. He sought damages from the Massachusetts Port Authority, which operates the airport, as well as the contractor whose employee caused the spill. Two claims invoked the federal court's maritime jurisdiction. The defendants moved to dismiss these claims on the grounds

that the court lacked maritime jurisdiction because the activity that caused the damage, aircraft refueling, was not a traditional maritime activity. The plaintiff argued that jurisdiction was proper because clam digging was maritime in nature, and relied on older case law holding that fishing is a traditional maritime activity. However, the court relied on a more recent succession of cases that have defined the nexus required to support maritime jurisdiction. First, there must be a potential for the incident to affect maritime commerce, and second, there must be a "substantial relationship" between the incident and traditional maritime activity. In determining whether this substantial relationship exists, the focus is on the tortfeasor's activity, not that of the injured party. Because aircraft refueling was not a traditional maritime activity, there could be no federal maritime jurisdiction, and the court dismissed these claims.

The plaintiff also sought damages under the federal Oil Pollution Act, 33 U.S.C. § 2701 (OPA). The statute requires a plaintiff to present its claims to responsible parties at least 90 days before filing suit. However, the Coast Guard is responsible for identifying the responsible parties, and in this case did not do so until less than 90 days remained prior to the statute of limitations deadline. The court noted that the plaintiff was "wedged in an untenable space between the two provisions," and it was not possible for him to comply with both. The plaintiff chose to comply with the statute of limitations, and filed suit less than 90 days after presenting his claims to the responsible parties. The court concluded that it could harmonize those requirements, and presumably avoid an unfair outcome, by issuing an order to stay the timely-filed OPA claims until the 90 day presentment period had expired.

*Denehy v. Massachusetts Port Authority,*42 F.Supp. 3d 301 (D. Mass. 2014)

10TH CIRCUIT REJECTS CHALLENGE TO EXCHANGE OF REFUGE LAND FOR COLORADO PARKWAY

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The Tenth Circuit Court of Appeals rejected NEPA and Endangered Species Act challenges to an exchange of land for a transportation parkway involving the Rocky Flats National Wildlife Refuge in Colorado. *WildEarth Guardians v. U.S. Fish and Wildlife Service,* 784 F.3d 677 (10th Cir. 2015). As authorized by an act of Congress establishing the Wildlife Refuge, the U.S. Fish and Wildlife Service approved a land exchange adding land to the Wildlife Refuge in exchange for conveyance of land for the construction of a transportation parkway. The land transferred for the parkway included the critical habitat of the Preble's jumping mouse -- an endangered species.

Plaintiffs challenged the Service's Finding of No Significant Impact and its Endangered Species Act (ESA) biological opinion arguing that the Service (1) inadequately evaluated hazardous material risks associated with the former Rocky Flats nuclear

weapons facility, (2) inadequately evaluated air quality impacts of the parkway construction, (3) failed to provide for public comment on the biological opinion referred to in the environmental assessment, and (4) failed to approve any incidental take of the jumping mouse as required by the ESA.

The Tenth Circuit rejected all challenges. The Court concluded that the Service appropriately relied on the certification of the U.S. EPA that the area of the exchange did not present significant hazardous material risk. It upheld the Service's reliance on air quality studies applying the then-existing federal ozone standards, and concluded that the Service appropriately relied on state and local commitments to comply with air quality requirements applicable to construction of the parkway. Relying on a line of cases holding that agencies have considerable discretion to determine the extent of public involvement in an EA, the Court concluded that the Service was not required to provide an opportunity for public comment on documents referred to in the EA.

The Court similarly rejected all ESA challenges. The Court summarily rejected the claim that the Service failed to include the required incidental take statement in the biological opinion. The biological opinion included a section titled "Incidental Take Statement" and also required the agencies constructing the parkway to obtain an incidental take permit regarding the jumping mouse impacts.

RECENT CASE SUMMARIES

Submitted by Richard A. Christopher

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Wisconsin Highway Add Lanes Project EIS Rejected Due to Traffic Analysis

When Wisconsin DOT decided to upgrade 19 miles of a State highway by going from two lanes to four, an EIS was necessary. A group opposed to the project filed suit after the ROD claiming that the traffic forecasts were not sound and that other alternatives, such as passing lanes, should have been considered in greater depth. WisDOT used two different approaches to forecast future traffic on the roadway. Since the different approaches yielded different results, WisDOT had a method to reconcile the differences. Although the method was disclosed, the results of the two different approaches were not disclosed. As a result, the Court found that it was unable to discern how the traffic forecasts in the EIS were generated. Without this disclosure, the EIS was flawed. Also, the Court found fault due to the lack of explanation of the effect of recent lower population forecasts on traffic. The Court found that the analysis of other build alternatives was adequate. The Court vacated the ROD.

1000 Friends of Wisconsin v. USDOT, et al., E.D. Wisconsin # 11-C-0545, May 22, 2015.

Illinois/Indiana Toll Highway EIS Rejected Due to No-Build Analysis

When Illinois DOT and Indiana DOT decided to build a new 55 mile toll highway, they prepared a Tier 1 EIS. After the ROD, a number of groups opposed to the highway filed

suit. The two DOT's decided not to use the population and employment forecasts prepared by the regional planning agencies in the two States and instead prepared their own forecasts. The Court found that this was permissible. The plaintiffs pointed out, however, that in an Appendix to the EIS explaining the forecasts the "No-Build" forecasts were supported by a number of proposed developments including the proposed new toll highway. This, the Court ruled, undercut the justification for the project in the Purpose and Need section in the EIS. Since the No-Build alternative was flawed, the Court held that the analysis of impacts of the build alternatives was also flawed. A large tallgrass prairie located just north of the preferred alternative was subject to protection under Section 4(f) of the DOT Act. The tier 1 EIS stated that it was too soon to tell whether the impacts of the project would constitute a constructive use of the prairie under Section 4(f). As such, the Court found that the findings under Section 4(f) were not ripe for review.

Openlands, et al. v. USDOT, et al., N.D. Ill. # 13 C 4950, June 16, 2015.

NOTES FROM THE CHAIR

Submitted by

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As I assume leadership of the Environmental Issues in Transportation Law Committee, I want to first thank Janet Myers for her dedication and service to TRB during her tenure as Chair. I had the privilege of working side-by-side with Janet at FHWA, and I know first-hand the challenge of balancing a full docket with TRB volunteer work. Janet did so gracefully and effectively.

Looking ahead, we will get together in Chicago during the 54th Annual Workshop on Transportation Law, on Tuesday, July 21 from 11:15 a.m. until 2:00 p.m. I hope many of you will be able to attend our Committee meeting in person during the Workshop. As usual, Committee members have volunteered this summer to present valuable and topical panels – one focused on best practices and strategies to manage administrative records in defense of project NEPA decisions, and another delving into the Council on Environmental Quality's revised Guidance on the analysis of Greenhouse Gas emissions impacts in NEPA documents. The Workshop agenda is packed with important topics, from project delivery and finance, to hot issues in transit and rail law, to hearing directly from DOT legal leadership.

In addition to our customary roundtable on hot topics in environmental law and planning for the 2016 TRB Annual Meeting, I hope to spend some time at our Committee meeting discussing ways to build on our successes. In particular, I will offer the possibility of having more frequent interactions, through Committee conference calls in between our regular July and January meetings. I also will describe TRB's newest innovation of "straight-to-recording" webinars. A couple of colleague and I recently served as guinea pigs for this new TRB process with a session focused on green infrastructure in transportation. I will encourage others to take advantage of this simple and effective

means of sharing information. In addition, I will encourage all of you to think about how to attract more members to the Committee, especially your more junior colleagues.

Finally, allow me to make the first of what will be many pitches to support this excellent publication. *The Natural Lawyer* is recognized throughout TRB as the best example of how we can fulfill the organization's mission of sharing information and important developments in our profession. Our editor-in-chief, Rich Christopher, does a fantastic job, but the publication is only as good as the submissions he receives. When you learn of a new court decision or some new agency guidance or regulation, please consider writing up a short summary and sending it to Rich. He and I will be extremely grateful.

I look forward to seeing you in Chicago!

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