

WATER & THE LAW

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Summer 2015 Issue

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If you have any questions or if you would like to see something discussed in the future, please let us know by sending an e-mail to info@smithlawonline.com

or contact one of us directly through the following links:

[Craig Smith](#)
[David Hartvigsen](#)
[Jeff Gittins](#)
[Adam Long](#)
Nathan Bracken

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Upcoming Events

Rural Water Assoc. of Utah
Private Nonprofits
Conference
Aug. 12, 2015
American Fork, UT
For more information click:
[here](#)

Rural Water Assoc. of Utah
Northern Utah Conference
Aug. 31 to Sep. 3, 2015

Welcome to the Summer 2015 Issue of *Water & The Law*. We hope you will find this newsletter to be helpful and informative. As always, we welcome your feedback. If you have questions or comments, please reply to this e-mail or call us at 801-413-1600.

Smith Hartvigsen, PLLC

Smith Hartvigsen Welcomes Nathan Bracken to the Firm

Smith Hartvigsen is pleased to announce that Nathan Bracken has joined the firm. Previously, Nathan served as the assistant director and general counsel for the Western States Water Council, where he represented state engineers, water quality administrators, and other water managers from Utah and seventeen other western states. He has experience in water rights, water quality, energy, public policy, and government relations. A trained mediator and facilitator, Nathan has led multi-stakeholder initiatives that have influenced federal legislation and policies involving the Clean Water Act, groundwater, and tribal and federal reserved water rights. Nathan began his legal career as an attorney and mediator with Dart, Adamson & Donovan in Salt Lake City.

Obama Administration Finalizes Clean Water Act Rule By Nathan S. Bracken

On May 27, the Obama Administration announced that it has finalized its controversial "Waters of the United States" or "Clean Water Rule" rule, which is intended to strengthen and clarify the scope of the Clean Water Act (CWA). The announcement sets up a political clash between environmental groups and Democrats against the agricultural community, property rights advocates, and Republicans over the proper extent of the CWA.

I. Background

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) developed the rule to clarify the scope of CWA jurisdiction following the U.S. Supreme Court's decisions in *SWANCC v. U.S. Army Corps of Engineers* and *Rapanos v. United States*. Those rulings, which the Court issued in the 2000s, created significant uncertainty about the scope of the CWA,

Layton, UT
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**Rural Water Assoc. of
Utah Irrigation Company
Conference
Sep. 9, 2015
American Fork, UT**
For more information click [here](#)

**American Water Works
Assoc. Intermountain
Section Conference
Sep. 16-18, 2015
Logan, UT**
For more information click [here](#)

**Utah Municipal Attorneys
Assoc. Fall Conference
Sep. 18, 2015
Salt Lake City, UT**
For more information click [here](#)

****Important Event****

Tune your radio to AM 1430 each Friday at 4:00 p.m. through mid August for KLO's segment "It's the Law." Attorneys from Smith Hartvigsen will be the featured guests each week to discuss various legal issues.

especially as applied to wetlands and isolated water bodies. Much of this confusion is due to Rapanos, in which the Justices set forth competing jurisdictional tests for determining whether a water is subject to the CWA but failed to agree upon which test should apply. The ensuing confusion has required lengthy and often costly case-by-case determinations to determine if a water is subject to CWA regulation, prompting calls from all sides for a clarifying rule.

The new rule attempts to resolve this uncertainty by describing the process EPA and the Corps will use to determine whether a water is subject to CWA jurisdiction consistent with SWANCC and the competing tests in Rapanos. EPA and the Corps say the rule does not create new permitting requirements for agriculture and maintains all previous exemptions and exclusions. The agencies also say the rule only protects waters that have historically fallen under the CWA, and that the scope of jurisdictional waters will decrease under the new rule when compared with historic practice. Nevertheless, an EPA economic analysis for the rule estimates that positive jurisdictional determinations will increase between 2.84% and 4.65% annually.

II. Features of the Final Rule

The final rule creates a framework in which certain "bright line" waters are categorically jurisdictional and others are explicitly excluded. At the same time, certain waters that are not categorically jurisdictional or excluded may be jurisdictional subject to a case-by-case analysis.

A. Bright Line Categories

Under the rule, most of the "bright line," categorically jurisdictional waters have long been subject to CWA jurisdiction, such as large interstate rivers and lakes used in interstate and foreign commerce.

The rule, however, also categorically includes all tributaries that have a bed and bank, an ordinary high water mark, and directly or indirectly contribute flow to "bright line" jurisdictional waters. The preamble to the rule further states that dry ephemeral and intermittent streams may be jurisdictional tributaries if they contribute flow to a "bright line" jurisdictional water. The inclusion of dry ephemeral and intermittent streams is likely stir controversy in the West where such streams are common and some may not have been subject to the CWA previously.

The rule further states that "adjacent" waters that border "bright line" jurisdictional waters will be subject to CWA jurisdiction. "Neighboring" waters may also be deemed to be "adjacent" if they are located partly or wholly within:

- (1) 100 feet of the ordinary high water mark of a "bright line" jurisdictional water;
- (2) The 100-year floodplain of a "bright line" jurisdictional water and within 1,500 feet of the jurisdictional water's ordinary high water mark; or

(3) 1,500 feet of the high tide line of certain "bright line" jurisdictional waters.

According to critics, this definition for "adjacency" could represent an expansion of CWA jurisdiction because prior CWA regulations only referenced adjacent wetlands, whereas the new definition will encompass both wetlands and other types of waters. On the other hand, EPA and supporters of the rule say this interpretation is necessary to address the interconnected nature of most water bodies.

B. Exclusions

To view more information about water law in Utah, visit our water blog at

utahwaterrights.blogspot.com



The rule excludes a number of waters from CWA jurisdiction, including features such as groundwater, puddles, and ditches. The rule also excludes certain features located in dry land, such as stock and irrigation ponds, stormwater control features, swimming pools, certain erosional features, and wastewater recycling features, among others. Notably, the final rule does not include language EPA and the Corps proposed in an earlier draft that would have used "shallow, subsurface hydrologic" connections to establish jurisdiction between surface waters. That language had raised concerns that it would undermine the rule's groundwater exclusion.

EPA, the Corps, and the rule's supporters point to these exclusions as evidence of the rule's limited scope. Opponents, however, are arguing that the rule's exclusions appear overly narrow when compared to the total number of waters that may be jurisdictional, citing the rule's need to exclude swimming pools and puddles as an indication of its broad scope.

The rule's exclusion for ditches has also generated perhaps the most attention, particularly among the agricultural community. Under the rule, a ditch will not be jurisdictional if it does not flow, either directly or through another water, into certain "bright line" jurisdictional waters. Other ditches may also qualify for the exemption if they have ephemeral or intermittent flow, subject to certain conditions. Presumably, those ditches that do not qualify for the exclusion may be subject to CWA jurisdiction. While this language is broader than what EPA and the Corps proposed in earlier drafts of the rule, the American Farm Bureau and other agricultural groups have criticized this exclusion for being too narrow and have warned that many ditches will be classified as jurisdictional tributaries under the final rule.

C. Case-by-Case Analyses

The final rule states that EPA and the Corps will use case-by-case analyses to determine the jurisdictional status of certain waters that do not fall within the "bright-line" jurisdictional categories or qualify for an exclusion. In performing these determinations, the rule says EPA and the Corps will use the so-called "significant nexus" test that Justice Anthony Kennedy set forth in *Rapanos*. Under the rule, a water or wetland will be jurisdictional under this test if it "significantly affects" other jurisdictional waters. In determining a water's impact on jurisdictional waters, the rule will evaluate the impact a water has "either alone or in combination with other similarly situated waters in the region" (emphasis added). In other

words, the rule will aggregate the effects of one water with those of other similar water bodies. To assist with this determination, the rule outlines a number of factors the agencies will consider, such as nutrient recycling, sediment trapping, and contribution of flow, among others.

Importantly, the rule limits the application of the significant nexus test to two specific categories. The first consists of five specific types of regional water features, such as prairie potholes in the Upper Midwest and western vernal pools in California. The second category includes waters that are located in whole or in part within the 100-year floodplain or 4,000 feet of the high tide line or ordinary high water mark of certain "bright line" jurisdictional waters. Waters that fall outside of these categories will not be subject to the significant nexus test and will presumably not be jurisdictional.

III. Reactions

The rule's supporters, including many environmental groups, have largely praised the rule for providing needed clarity and strengthening protections for streams and wetlands, arguing that the rule restores federal protections for 60% of the nation's stream miles and millions of acres of wetlands. These water features, according to EPA and the rule's supporters, have historically fallen under the CWA's jurisdiction but lacked guaranteed protections following the confusion that SWANCC and Rapanos created.

On the other hand, the rule's critics have argued that the rule will improperly expand CWA jurisdiction beyond the limits the Court set in SWANCC and Rapanos. According to these critics, such an expansion will adversely affect land use decisions and property rights by requiring CWA permits to develop land and farmland that includes any wet features.

At the same time, many states have expressed concern that EPA and the Corps did not consult with them in the development of the rule. A number of these states have further noted that they have the ability to regulate waters not covered under the federal CWA pursuant to their "waters of the state" authorities. As a result, some western states have said the rule could limit their ability to determine how best to protect certain water features that are unique to the West, such as ephemeral streams and prairie potholes.

In Utah, the rule has drawn praise from the local chapters of environmental groups like the Sierra Club and Backcountry Hunter and Anglers. Conversely, it has produced skepticism and concern among the Utah Farm Bureau and the state's Congressional delegation, which has largely condemned the rule. Representative Rob Bishop (R-UT), who chairs the House Natural Resources Committee, has also said his committee will fight the rule's implementation.

IV. Implications and Potential Developments

EPA and the Corps will publish the final rule in the Federal Register shortly. The rule will then go into effect sixty days after its publication, meaning it likely will not become effective until August

or September. Prior to that time, EPA and the Corps will use existing rules and procedures to make jurisdictional determinations. In addition, the agencies will not re-open jurisdictional determinations issued before the new rule goes into effect. However, such determinations will be reviewed under the new rule once they expire or need to be renewed. EPA and the Corps have also indicated that they will engage in an extensive outreach campaign to implement the rule.

Going forward, the rule will face significant political, legislative, and legal challenges. Much of these challenges will likely focus on the rule's interpretation of Justice Kennedy's significant nexus test, which many critics have argued is improperly broad. Utah Senator Orrin Hatch (R) and others have also expressed concern that EPA may have violated the federal Anti-Lobbying Act in courting public support for the rule and countering opposition through an extensive public relations campaign that led up to the rule's finalization.

In Congress, Republicans and a handful of Democrats have introduced a number of bills to prevent EPA and the Corps from finalizing the rule. Last month, the U.S. House of Representatives passed the Regulatory Integrity Protection Act (H.R. 1732) to withdraw the rule and require EPA and the Corps to develop a new one in partnership with the states. President Obama, however, has threatened to veto this legislation and it is uncertain whether there are enough votes to override a presidential veto. In addition to stand-alone legislation, it is also likely the rule's critics will insert language into must-pass federal funding legislation to prevent EPA and the Corps from using federal money to implement the rule. Whether such efforts will be successful is unclear.

Given the considerable differences and variability in the nation's waters, it is likely the rule will impact each state differently. In Utah, the rule's possible impacts are uncertain and actual implementation is needed for its impact to be fully understood. On one hand, Utah already regulates many of the state's waters pursuant to its "waters of the state" authorities. This means that the primary question may not be whether a particular water is subject to regulation, but whether the water is subject to federal jurisdiction or state jurisdiction.

There is also some question as to whether the Sevier River Basin is subject to federal CWA jurisdiction under the new rule. The Sevier River is located entirely within Utah and terminates in Sevier Lake, a playa lake. Because the new rule focuses primarily on interstate waters and other waters connected to interstate waters, an argument could be made that much of the basin is not subject to federal CWA jurisdiction under the rule. If that is the case, further discussion about the ability of Utah law to regulate the basin is likely.

To read the rule and for more information, see:
<http://www2.epa.gov/cleanwaterrule>.