



► Regulatory Update for the Oil and Natural Gas Industry

Scott R. Smith

November 7, 2014





▶ PROPOSED RULE: “WATERS OF THE UNITED STATES”

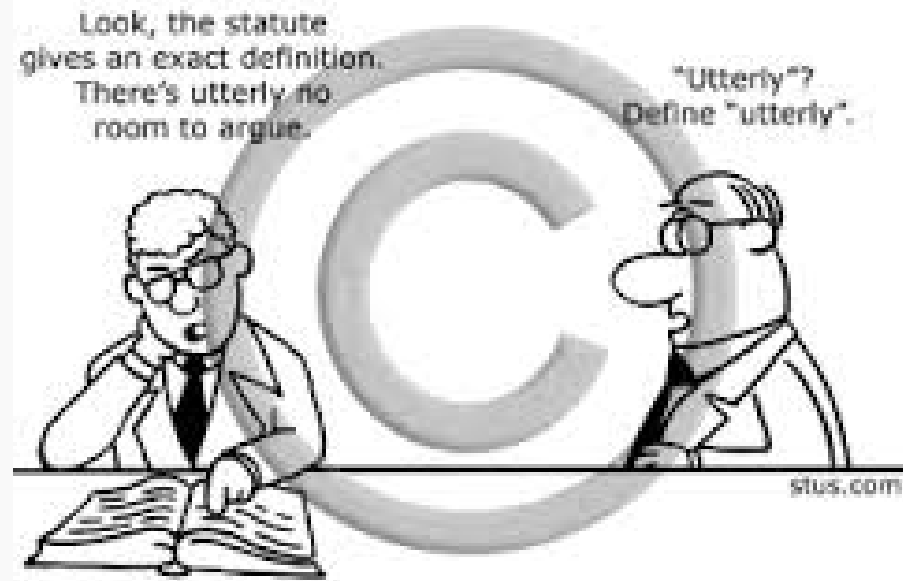


WATERS OF THE U.S - BACKGROUND

Why should you care?

▶ Applicability

- The Clean Water Act applies to discharges to “navigable waters” or “Waters of the U.S.”.
- The proposed rule applies to ALL parts of the Clean Water Act – not just 404 permits.
- CWA defines “navigable waters” as “Waters of the United States, including territorial seas”



WATERS OF THE U.S - BACKGROUND

Recent Timeline



- ▶ Clarification of the term “WOTUS” has been needed because of prior guidance and competing court cases.
 - **2001** – *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 51 U.S. 159 (2001).
 - Interpreted Section 404 of the Clean Water Act (discharge of dredged or fill materials into “Navigable Waters”).
 - **2003** – “Joint Memorandum” issued by EPA and the Corps to provide “clarifying guidance regarding SWANCC”
 - **2006** – *Rapanos v. U.S.*, 547 U.S. 715 (2006)
 - a 4-1-4 decision
 - Challenged federal jurisdiction to regulate isolated wetlands under the Clean Water Act
 - **2008** – “Joint Memorandum” issued by EPA and the Corps to support the agencies as they implement Rapanos
 - **2011** – Guidance issued by EPA and the Corps
 - addresses the scope of the CWA’s key term “waters of the United States” for all CWA provisions that use the term
 - **2014** – Proposed rule

WATERS OF THE U.S - BACKGROUND

Recent Timeline

Mar. 25th



The proposed rule

- A pre-publication copy of the rule was released March 25, 2014.
- Published in the *Federal Register* on April 21.
- Public comment has been extended to November 14, 2014.
- The agencies will review public comments and (1) terminate the rulemaking; Or, (2) continue the rulemaking but change aspects of the rule to reflect new issues; Or (3) proceed with a final rule.
- The agencies' response will be published in the *Federal Register*.
- Final rules are generally effective no less than 30 days after date of publication.



Final Rule

WATERS OF THE U.S.

What does the proposed rule say?



▶ The proposed rule **expands the definition of WOTUS**

- Revises the definition of **tributary** to include all natural or manmade features (pipes, ditches, culverts), including wetlands that have evidence of flow (surface or subsurface) to another water.
- Expands the scope of **adjacent**, to include riparian areas and floodplains.
- Includes a “catch-all” provision for undefined **other waters** and makes them subject to a case-by-case analysis at the agencies’ discretion.

WATERS OF THE U.S.

Types of “Waters of the U.S.”



▶ The proposed rule **changes the process to determine a WOTUS:**

- Lists **SEVEN** types of Waters of the U.S. and groups them into **TWO** categories

CATEGORY 1: **Jurisdiction by rule:** the agencies automatically take jurisdiction over the water. Jurisdictional waters are the waters that the proposed rule attempts to define.

CATEGORY 2: **Case by Case (Discretionary) Jurisdiction:** the agencies can determine jurisdiction.

WATERS OF THE U.S.

Types of "Waters of the U.S"



▶ Category 1: Jurisdiction by Rule:

- The agencies automatically take jurisdiction over:

- (1) **Traditional Navigable Waters:** All waters currently used, used in the past, or susceptible to use in interstate or foreign commerce;

- (2) All **interstate waters**, including wetlands;

- (3) **Territorial seas**;

- (4) Impoundments of (1) through (3);

- (5) All **tributaries** of (1) through (4);

- (6) **All waters, including wetlands adjacent to (1) through (5).**

- This is a NEW category

WATERS OF THE U.S.

Types of “Waters of the U.S”



▶ Category 2: Discretionary Jurisdiction

- This is a NEW category
- The agencies can determine jurisdiction over these “other waters”.
- These waters may be isolated wetlands, non-connected ephemeral streams, ditches, etc., that are not a tributary or adjacent water.
- The “other waters” will have a “*significant nexus*”.
- The agencies will be able to issue blanket jurisdictional determinations on similarly situated waters in the same watershed.

WATERS OF THE U.S.

Definitions



▶ **Tributary:** water with a bed and bank and ordinary high water mark that provides downstream flow

- Duration and volume of water do not matter
- Can be natural or man-made
- Does not lose status as tributary if there are man-made breaks so long as bed and bank can be identified
- Specifically includes ditches unless otherwise excluded

WATERS OF THE U.S.

Definitions



- ▶ **Adjacent:** bordering, contiguous or *neighboring* waters separated from waters of the U.S. by dikes or barriers
 - New category
 - Does not have to touch

Neighboring: waters in the riparian area or floodplain of traditional navigable waters, interstate waters, or their tributaries

WATERS OF THE U.S.

Definitions



▶ Significant nexus

- Determined on a case-by-case basis (part of “Discretionary Jurisdiction” Category)
- Must be more than speculative or insubstantial effect
- Can be based on “similarly situated” waters when they perform similar functions and are located sufficiently close together
- Broadens the area and scope of waters considered

WATERS OF THE U.S.

What is being said?



▶ EPA/USACE's stated purpose for the change:

- “enhance protection of the nation’s public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of “waters of the United States” protected under the Act.”
- “Ditch the Myth”

Opposition

- Small Business Administration
- Congress
- American Farm Bureau
- Homebuilders Association
- U.S. Chamber



▶ EPA's Air Rules for the Oil and Natural Gas Industry

EPA'S AIR RULES FOR THE OIL AND NATURAL GAS INDUSTRY

Summary of Action



▶ July 1, 2014 EPA Updates and Clarifications

- Provide additional detail on requirements of handling of liquids during well completion operations;
- Clarify requirements for storage tanks;
- Define low pressure wells;
- Clarify certain requirements for leak detection at natural gas processing plants;
- Update requirements for reciprocating compressors; and
- Update the definition of “responsible official.”

EPA'S AIR RULES FOR THE OIL AND NATURAL GAS INDUSTRY

Clarifications to Well Completion Requirements



- ▶ EPA proposed 3 distinct stages of a well completion operation, with specific requirements for handling liquids during each stage, including clarifying when green completion equipment must be used.
 - **Initial flowback stage**-Would extend from the beginning of the flowback following hydraulic fracturing or refracturing and would end when there is enough gas present for a separator to operate.
 - **Separation flowback stage**-Operators must direct the flowback to use special equipment to separate gas and liquid hydrocarbons.
 - **Production stage**-Begins when the flowback volume has subsided and stabilized and the well is producing gas continuously to a flowline, separate and recovered condensate, produced water and crude oil must be routed to storage tanks and operators must begin the process of estimating tanks emissions of VOCs.

EPA'S AIR RULES FOR THE OIL AND NATURAL GAS INDUSTRY

Updates and Clarifications to Storage Tanks Requirements



- ▶ The proposal clarified that VOC emissions that are captured as a result of permit requirements do not count toward determining if a tank is subject to emission control requirements.

EPA proposed to allow other mechanisms besides weighted thief hatches to ensure these hatch lids remain properly sealed.

EPA proposed that the date a storage tank is removed from service and the date a storage tank is returned to service be included in the notification requirements.

EPA'S AIR RULES FOR THE OIL AND NATURAL GAS INDUSTRY

Other Updates and Clarifications



- ▶ Definition of Low Pressure Well-Defined in response to public comments. Seeking comment on the alternative definition.

Leak detection requirements for certain natural gas processing plants. Updated the definition of equipment to clarify that leak detection equipment and repair requirements for addressing equipment leaks apply to equipment only at onshore natural gas processing plants.

“Connectors” were added to the list of equipment exempt from leak detection requirements.

EPA'S AIR RULES FOR THE OIL AND NATURAL GAS INDUSTRY

Other Updates and Clarifications



- ▶ Reciprocating Compressors-EPA proposing 3rd alternative to control emissions. The alternative would allow operators to reduce VOC emissions by routing gas that leaks to the engine for fuel.

Responsible Official-Officials responsible for facilities employing up to 250 employees to delegate authority after agency notification.

Additional Information:

<http://www.epa.gov/airquality/oilandgas>



▶ FRACKING



STATE OF *Kentucky*

FRACKING

Regulatory/Legislative Updates



- ▶ Oil and gas operations have historically been regulated mainly at the state level.

EPA has launched investigations into fracking activities in Wyoming, Texas and Pennsylvania.

The Agency is in the process of a multi year study on the impact of hydraulic fracturing operations on drinking water. It is planned that this will set the stage for a new approach that will expanded federal law.

Operators not only need to understand what restriction currently apply to them but also understand the regulatory evolution from other locations to understand what is going on.

FRACKING

Regulatory/Legislative Updates



- ▶ Hydraulic fracturing is exempt from regulation under the Safe Drinking Water Act, provided diesel fuel is not used as an additive.

EPA issued guidance in February 2014 to states for when diesel fuel is used.

Draft of EPA multi year study on drinking water impact is scheduled to be released later this year.

Pennsylvania, Illinois, California, Colorado and Ohio have recently developed comprehensive regulatory schemes to permit and regulate fracturing activities.

FRACKING

Regulatory/Legislative Updates



- ▶ Wyoming, Texas and Oklahoma added new rules for fracturing to existing programs.

An even larger group of states have adopted fracturing fluid disclosure laws.

In March 2014, Wyoming instituted one of the nation's strongest requirements for water well testing near drilling sites.

Colorado recently introduced the country's first standards for methane.

FRACKING

Regulatory/Legislative Updates



- ▶ Rather than waiting for federal regulators to intercede, industry is actively engaging with states and other stakeholders to develop rules that make sense for their operations.

The Center for Sustainable Shale Development (CSSD), a collaborative effort between environmental organizations and energy companies is an example of a trend to watch.

Develop an understanding of the “home rule” concept. Local governments through an amendment to a state’s constitution have the authority to pass self government laws.



▶ KENTUCKY

BOOK 551 PAGE 500

STATE OF *Kentucky*

KENTUCKY

Regulatory and Legislative Update



▶ **Well Site Reclamation:** The Cabinet is proposing a requirement for approved ‘reclamation plans’ for well sites – which will require erosion and sediment control BMPs.

Tank Batteries: The industry and Cabinet are discussing ways to remediate abandoned storage vessels. Right now the discussion is the establishment of a capital account in the Division of Oil and Gas and seeking an appropriation in next year’s budget session.

FracFocus Disclosure: The FracFocus website will be the frack-disclosure portal for hydraulic fracks that exceed 320,000 gallons of water.

KENTUCKY

Regulatory and Legislative Update



- ▶ DOW is now requiring KYR10 general stormwater permits for the oil and gas industry.

The industry used to have a federal exemption but that was rescinded.

The Berea Sandstone operators in Lawrence County are starting to get these permits.

QUESTIONS?

Contact Information



Scott R. Smith
Smith Management Group
(859) 231-8936 ext. 116
ScottR.Smith@smithmanage.com



▶ **THANK YOU**
from Smith Management Group

www.smithmanage.com

LEXINGTON
859-231-8936

LOUISVILLE
502-587-6482

