

The Final Waters of the US Rule: Remaining Ambiguity

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Our [first two posts](#) on the [final *Waters of the US* rule](#) noted that, in the final rule, the Administration has provided an additional degree of clarity in distinguishing between jurisdictional and non-jurisdictional waters, both by definition and in practice. But, as we discussed earlier, the proposal was extremely ambiguous and a fair amount of ambiguity remains. Yesterday, we identified some of this ambiguity and today we will briefly summarize a bit more.

- “Traditionally Navigable Waters.” A good part of this rule keys off these waters. TNWs are one of the three types of core waters (along with interstate waters and the territorial seas) that the Agencies consider to be jurisdictional without reliance on the significant nexus test. TNWs are also the “single point of entry” for the significant nexus test watershed analysis (i.e., the waters aggregated for the significant nexus test are those in the watershed draining to the nearest TNW). Thus, understanding which waters are TNWs is a key to understanding jurisdiction under the rule. But despite their name, TNWs aren’t those traditionally used for navigation. Instead, the rule defines these waters as those that “are currently used, were used in the past, **or may be susceptible to use** in interstate or foreign commerce.” Commerce includes “commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments).” Thus, this key definitional term is dependent in part on a determination by the Agencies that a particular water could be used for boating, fishing or other commerce. In short, ambiguity exists because there is no current, definitive list, of what waters are TNWs.
- The Agencies have identified five types of waters that will always be aggregated to the nearest TWN for purposes of the significant nexus test. Moreover, unlike the waters covered by the second part of the significant nexus test, they are aggregated regardless of their distance from a tributary or other water. As we discussed on Friday, the Agencies are therefore very likely to consider them to be jurisdictional. But the waters, while described in the proposed rule, are not defined, even in the preamble. For example, the rule describes one of the five sets of waters, “Carolina bays and Delmarva bays” as “ponded, depressional wetlands that occur along the Atlantic coastal plain.” The preamble, however, states that they “occur along the Atlantic coastal plain from northern Florida to New Jersey” and provides little guidance as to how to distinguish these types of wetlands from other wetlands which may occur in the same geographical area. Similar ambiguity exists with regard to several of the other sets of water. Thus, it’s not possible for a layperson to know which wetlands actually fall within these classes of waters.

- The contentious definition of “tributary” provides that a feature is jurisdictional upstream from a TNW, interstate water or territorial sea as far upslope as the feature has a bed and bank and ordinary high water mark. But tracing the feature upstream to the end of the bed and bank doesn’t mean that one can stop looking. That’s because the agencies interpret this provision so that “a natural or constructed break in bed and banks or other indicator of ordinary high water mark does not constitute the upper limit of a tributary where bed and banks or other indicator ordinary high water mark can be found farther upstream.” And, while it is therefore clear that one can’t simply stop looking upslope, there is no indication of how far upslope one has to look to see if one can identify the “disconnected” bed and bank.
- Ordinary High Water Mark. Identification of a tributary’s bed and bank is not the only hard part – defining the OHWM may also pose a challenge. That’s because “[c]urrent Corps regulations and guidance identify bed and banks as indicators of the ordinary high water mark.” Thus, “[t]he definition of ‘tributary’ in th[e] rule requires the presence of a bed and banks and an additional indicator of ordinary high water mark such as staining, debris deposits, or other indicator identified in the rule or agency guidance.” Those “other indicators” cover a wide range of options, some of which do not involve even going out in the field, including the desktop analysis of topographic data, aerial photographs and LIDAR (light detection and ranging) data, as well as regional regression analysis and hydrologic modeling. Thus, you may not think that there is an OHWM based on field observations, but might be trumped based on Agency desktop analysis or modeling.

There are other examples of ambiguity remaining in the final rule, but, we presume we’re exhausting your stamina at this point. Tomorrow, to give credit where credit is due, we’ll look at some of the Administration’s concessions and clarifications.

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