

Waters of the United States

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Significant Nexus From *Rapanos*

- “Significantly Affect” in New Rule
- Change or clarification?

Paragraph 4 of the new definition (Adjacent Wetlands)

- Wetlands adjacent to Paragraph 1 waters (i.e., traditional navigable waters, territorial seas and interstate waters)
- Wetlands adjacent to and with a continuous surface connection to Paragraph 2 waters (impoundments of WOTUS) or Paragraph 3 jurisdictional tributaries (tributaries to Paragraph 1 or Paragraph 2 waters, if the tributaries “relatively permanent” or meet the “significant nexus” standard) when the wetlands meet the “significant nexus” standard
- Significant nexus to a significant nexus?

Paragraph 5 of the new definition (Other Intrastate Waters)

- Intrastate waters not identified in Paragraphs 1 through 4 that are relatively permanent or meet the significant nexus standard
- What is the need for Paragraph 4?

Significant Nexus

- Either alone or in combination with similarly situated waters *in the region*
- **Significantly affect**
 - Chemical
 - Physical
 - Biological
- Integrity of Waters

Significantly Affect

- Material Influence
- Considering Functions and Factors

Functions

- Contribution of flow
- Trapping
- Transformation
- Filtering
- Transport of Materials (nutrients, sediment, other pollutants)
- Retention and attenuation of floodwaters or runoff
- Modulation of temperature
- Provision of habitat and food for aquatic species

Factors

- Distance from navigable water
- Frequency, duration, magnitude, timing and rate of hydrologic connection
- Size
- Density or number of waters that are “similarly situated”
- Landscape position
- Climate variables (temperature, rainfall, snowpack)

Source of Functions and Factors

- EPA Office of Research and Development, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, 2015
- The basis of a rule proposed by the administration of President Obama that became effective only in a portion of the country

Challenges to the Rule

- Indirect and Direct Challenges

Indirect Challenge

- *Sackett*
- Rule not at issue in *Sackett*
- *Sackett* decision could affect the “significant nexus” or “significantly affect portions of the rule

Texas Challenge

- Direct Challenge to the Rule
- Argues the Rule is beyond the authority of the EPA
- Could ask the Supreme Court, on an emergency basis, to stay or enjoin the effectiveness of the Rule

Early Takeaways

- Requires consultation with experts (a layman landowner probably cannot make a reliable jurisdictional determination)
- Apparently, a lot of discretion currently rests with USACE
- Uniform national standards of interpretation would be helpful
- Are some functions or factors more important (given greater weight in the decision making process)
- Does the new rule broaden the scope of jurisdiction (broader than Navigable Waters Protection Rule)?
- Can a landowner win a challenge?