CLEAN WATER ACT JURISDICTION: WHERE WE'VE BEEN AND WHERE WE'RE GOING

Jeremy Greenhouse
The Environmental Law Group, Ltd.
November 19, 2014
OVERVIEW

I. Where It All Started

II. Where We’ve Been

III. Where We Are Going

IV. Bumps In the Road
I. WHERE IT ALL STARTED
“The Congress shall have power
….. to regulate commerce with
foreign nations, and among the
several states, and with the Indian
tribes”

U.S. Constitution, Art. I, § 8
“Navigable” Waters
The term “navigable waters” means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7)
II. WHERE WE’VE BEEN
U.S. v. Riverside Bayview Homes (1985)

Adjacent Wetlands
Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (“SWANCC”) (2001)

Split Decision
Scalia: "relatively permanent" with "continuous surface connection"

Kennedy: “Significant nexus”
III. WHERE WE ARE GOING
Proposed Rule

EPA, U.S. Corps

Definition of “Waters of the United States” Under the Clean Water Act

Bright-Line Jurisdictional Categories

Traditional Navigable Waters (TNWs)

Interstate Waters
Bright-Line Jurisdictional Categories

Territorial Seas

Impoundments
Bright-Line Jurisdictional Categories

Tributaries

New Definition

- Bed and banks
- Ordinary high water mark
- Contributes flow, directly or indirectly to a TNW, interstate water, territorial sea, or impoundment
Bright-Line Jurisdictional Categories

Adjacent Waters

bordering, contiguous, or neighboring
“Neighboring” (Adjacent)

- Waters located within the riparian area or floodplain of a TNW, interstate water, territorial sea, tributary or jurisdictional impoundment, or

- Waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a TNW, interstate water, territorial sea, tributary or jurisdictional impoundment
“Other Waters”
“Significant Nexus”

Waters that alone or in combination with other similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of a TNW, interstate water, or territorial sea.
Categorical Exemptions from Jurisdiction
Exempt Ditches

- Ditches excavated wholly in uplands, draining only uplands, and that have less than perennial flow

- Ditches that do not contribute flow, either directly or through other waters, to a traditionally navigable water, interstate water, or territorial sea
IV. BUMPS IN THE ROAD
Bright-Line Jurisdictional Categories

Adjacent Waters

bordering, contiguous, or neighboring
“Neighboring” (Adjacent)

- Waters located within the riparian area or floodplain of a TNW, interstate water, territorial sea, tributary or jurisdictional impoundment, or

- Waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a TNW, interstate water, territorial sea, tributary or jurisdictional impoundment
“Significant Nexus”

Waters that alone or in combination with other similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of a TNW, interstate water, or territorial sea.
Bright-Line Jurisdictional Categories

Tributaries

New Definition

- Bed and banks
- Ordinary high water mark
- Contributes flow, directly or indirectly to a TNW, interstate water, territorial sea, or impoundment
Exempt Ditches

- Ditches excavated wholly in uplands, draining only uplands, and that have less than perennial flow

- Ditches that do not contribute flow, either directly or through other waters, to a traditionally navigable water, interstate water, or territorial sea
CLEAN WATER ACT JURISDICTION: WHERE WE'VE BEEN AND WHERE WE'RE GOING

Jeremy Greenhouse
Links: www.jeremygreenhouse.com