



WHITING PETROLEUM CORPORATION

# Waters of the U.S. EPA and Corps Joint Proposed Rule



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The background of the slide is a collage of oilfield-related images. On the left, there are two smaller images: the top one shows an oil pumpjack at dusk, and the bottom one shows two workers in hard hats and safety gear. On the right, there are two larger images: the top one shows an oil rig at night with bright lights and a lightning bolt in the dark sky, and the bottom one shows an oil rig at sunset. The central part of the slide is a solid green rectangle containing the title.

# Disclaimer

- The proposed rule linked in the online Bloomberg article<sup>1</sup> is the basis for this presentation
- It may or may not be the proposed rule sent to the Whitehouse OMB

The background of the slide is a collage of oilfield-related images. On the left, there are two small inset photos: the top one shows an oil pumpjack at dusk, and the bottom one shows two workers in safety gear on a rig. On the right, there are two more photos: the top one shows an offshore platform at night with a lightning bolt striking nearby, and the bottom one shows a platform at sunset. The central part of the slide is a large green rectangle containing the title. The bottom half of the slide features a large, faded silhouette of an offshore platform structure over a light background.

# Topics

- Background
- Proposed rule
- What to expect



# What Is This Rulemaking About

- “Navigable Waters”
  - Defined in CWA as “waters of the United States, including the territorial seas”<sup>2</sup>
- CWA agencies must interpret and further define “waters of the United States”

The slide features a green header with the word 'Relevancy' in white. The background is a collage of oilfield-related images: an oil pumpjack at sunset, workers in safety gear, a night view of an offshore platform with lightning, and a silhouette of a platform against a sunset. The main content area has a faded background image of an offshore platform with a person on a staircase.

# Relevancy

- SPCC applicability
- NPDES program
- Spill reporting
- Water quality standards
- §404 program
- §401 certification program



# Supreme Court Cases

- The proposed “Waters of the U.S.” rule is based, in part, on 3 Supreme Court cases
  - *United States v. Riverside Bayview Homes, Inc.*<sup>3</sup> (1985)
  - *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*<sup>4</sup> (2001)
  - *Rapanos et al. v. United States*<sup>5</sup> (2006)





## *Riverside Bayview (1985)*

- Concerned wetland adjacent to a body of navigable water
- Conceded the Corps has a difficult task in determining where water begins and ends
- The CWA term “navigable” does not limit jurisdiction to only traditionally navigable waters
- “Waters of the U.S.” include wetlands that abut on traditional navigable waters



# SWANCC (2001)

- Abandoned sand and gravel pit provided habitat for migratory birds
- Group of cities and villages wanted to develop the site into a nonhazardous waste disposal facility
- Corps attempted to assert jurisdiction on the basis the water in question provided migratory bird habitat – “Migratory Bird Rule”





# SWANCC



- First use of “significant nexus” language
- Struck down the Migratory Bird Rule
- Although limited in importance, “navigable” cannot be ignored



# Corps Rulemaking

- Following *SWANCC*, the EPA and Corps proposed rules but never finalized
- Corps told field staff to assert jurisdiction over
  - Navigable waters,
  - Waters neighboring traditional navigable waters, and
  - Tributaries of navigable waters
    - Those having an ordinary high water mark<sup>6</sup>



# *Rapanos (2006)*

- Split Court
  - 4-1-4 split
  - No majority opinion
- Considered whether a wetland was “adjacent to” a tributary of “waters of the U.S.”
- Federal agencies and courts generally have adopted Justice Kennedy’s concurring opinion
- Some courts have held that either Justice Scalia’s plurality opinion or Kennedy’s concurring opinion establish precedent



# *Rapanos* Plurality Opinion

- Greatly limited Agency jurisdiction in its interpretation of “significant nexus”
- “Relatively permanent, standing or continuously flowing” waters are “waters of the U.S.”
- Wetlands must have a continuous surface connection to “waters of the U.S.”
- Channels with intermittent or ephemeral water flows are not “waters of the U.S.”
- Felt that Kennedy’s interpretation of “significant nexus” rewrote the CWA



# *Rapanos* Roberts' Concurrence

- Upset the EPA and Corps failed to follow through on post-SWANCC rulemaking that would identify the outer limits of jurisdiction
- Foreshadowed the *Rapanos* decision would lead to greater confusion





# *Rapanos* Kennedy's Significant Nexus

- Both Kennedy and Plurality agree that a wetland being merely adjacent to a tributary is not enough without a showing of significant nexus to a navigable water
- A wetland without a “significant nexus” to a navigable water is not a “water of the U.S.”
- Believed a wetland located next to a ditch or drain, in a remote and insubstantial way, that eventually flows to a navigable water is not a “water of the U.S.”
- The focus of a “significant nexus” determination must lie in the purpose of the CWA – to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”



# *Rapanos* Kennedy's Significant Nexus

- A “significant nexus” is established where a wetland significantly affects the chemical, physical, and biological integrity of a navigable water
- Must consider whether a wetland “either alone or in combination with similarly situated lands in the region” affect the integrity of a navigable water
- Opened the door for the Agencies to classify certain categories of tributaries as “waters of the U.S.”
- Believed a significant nexus can exist where the connection is intermittent or ephemeral



# Post-*Rapanos*

- Confusion
  - Plurality or Kennedy?
  - Split courts
- In 2008, EPA and the Corps finalized Waters of the U.S. guidance document
  - Both the Plurality and Kennedy apply
- In 2011, EPA and the Corps proposed an updated Waters of the U.S. guidance document
  - Greater emphasis on Kennedy significant nexus
  - Asserted greater authority
  - Never finalized



# Waters of the U.S. Rulemaking

- September 2013
  - EPA and Corps sent proposed rule to White House OMB
  - EPA and Corps released a draft Report for public comment that is the scientific basis for the proposed rule<sup>7</sup>
    - *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*<sup>8</sup>
  - Agencies withdraw 2011 draft guidance from OMB consideration
- Agencies anticipate finalizing the rule after all Report comments are received and reviewed





# Conclusions From The Report

- Streams big and small that flow occasionally or all the time affect downstream waters
- Wetlands and open-waters in floodplains of and in riparian areas have a strong influence on downstream waters





# Conclusions From The Report

- Wetlands and open-waters outside of floodplains and riparian areas that have either a surface or shallow subsurface water connection to downstream waters affect the condition of downstream waters
- Absent these easily demarcated connections, “the significance of the connection is difficult to generalize across the group of waters”



# Conclusions From The Report

- The effects of small water bodies in a watershed need to be considered in the aggregate
  - Including ephemeral streams



# Overview of the Proposed Rule

- The Agencies seek to increase CWA program
  - Transparency
  - Predictability
  - Consistency
- The Agencies claim the proposed rule will
  - Reduce documentation requirements
  - Reduce time required for making jurisdictional determinations → more resources freed up to protect waters



# Overview of the Proposed Rule

- Unchanged in scope of jurisdiction
    - Traditional navigable waters
    - Interstate waters
    - Territorial seas
  - Impoundments of “waters of the U.S.” (to a degree)
  - Previous exemptions for agriculture, silviculture, ranching, and other named activities
- (a)(1)-(3) waters

The background of the slide features a collage of oilfield-related images. On the left, there are two smaller images: the top one shows an oil pumpjack at dusk, and the bottom one shows two workers in safety gear on a platform. On the right, there are two larger images: the top one shows an oil rig at night with a bright lightning bolt striking nearby, and the bottom one shows an oil rig at sunset. The central text is set against a dark green rectangular background.

# Overview of the Proposed Rule

- What's new
  - Focuses on the concept of “significant nexus”
  - “Tributaries” defined and become *per se* jurisdictional
  - Clarification of “adjacent waters”
  - “Other waters” clarified





# Overview of the Proposed Rule

- What's new (cont'd)
  - Definitions for
    - Adjacent
    - Neighboring
    - Riparian Area
    - Floodplain
    - Tributary
    - Wetlands
    - Significant Nexus



# Overview of Proposed Rule

- Replaces definitions of “navigable waters” and/or “waters of the United States” for:
  - 33 C.F.R. § 328.3(a), (b), (c)
  - 40 C.F.R. § 110.1
  - 40 C.F.R. § 112.2
  - 40 C.F.R. § 116.3
  - 40 C.F.R. § 117.1(i)
  - 40 C.F.R. § 112.2
  - 40 C.F.R. § 230.3(s), (t)
  - 40 C.F.R. § 232.2
  - 40 C.F.R. § 300.5
  - 40 C.F.R. § 300, Appendix E to Part 330, 1.5
  - 40 C.F.R. § 302.3
  - 40 C.F.R. § 401.11



# Significant Nexus

- The cornerstone for the proposed rulemaking
- Not a “scientific term”
  - Requires analysis of facts and circumstances
- Water functions as an integrated system
- Focuses on the following types of connections between (a)(1)-(3) waters
  - Chemical
  - Physical
  - Biological
  - Hydrological
  - Ecological



# Significant Nexus

## ■ Definition

- “Means a more than speculative or insubstantial effect that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a water identified in paragraphs (a)(1) through (3) of this section), has on the chemical, physical or biological integrity” of an (a)(1)-(3) water.



# Significant Nexus

- Definition (cont'd)
  - “Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or close to a “water of the U.S.” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity” of an (a)(1)-(3) water.





# Tributaries

- *Per se* jurisdictional in some cases
- Existing science and law establish a significant nexus exists between tributaries and
  - Traditional navigable waters
  - Interstate waters
  - Territorial seas
- No more case-specific significant nexus determinations



# Tributaries

- Perennial, intermittent, and ephemeral tributary streams are connected physically, chemically, and biologically to downstream traditional navigable and interstate waters
  - Supply
    - Sediment
    - Wood
    - Organic Matter
    - Nutrients
    - Chemical contaminants
    - Organisms

A collage of four images related to the oil and gas industry. Top-left: An oil pumpjack against a sunset sky. Top-right: A night view of an oil rig with a bright lightning bolt striking nearby. Bottom-left: Two workers in safety gear operating machinery. Bottom-right: An oil rig silhouetted against a bright orange sunset sky.

# Tributaries

## ■ Definition

- Must have bed, banks, and ordinary high water mark
- Must contribute flow in some manner to an (a)(1)-(3) water
- Remains a tributary if flow is interrupted by manmade or natural breaks (e.g., dams, culverts, wetlands, underground flow and boulder fields) if bed, banks, and ordinary high water mark are present upstream or downstream of the break
- Can be manmade, man-altered, or natural
- Does not include “gullies, rills, non-wetland swales, and certain ditches” as per the preamble

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# Tributaries

- A wrinkle
  - A tributary to a non-(a)(1)-(3) water is not jurisdictional *per se* but could be jurisdictional after a case-specific determination



# Adjacent Waters and Wetlands

- Includes those waters “adjacent” to any “waters of the U.S.”
- Existing science and law establish a significant nexus exists between adjacent waters and wetlands and
  - Traditional navigable waters
  - Interstate waters
- No more case-specific significant nexus determinations (sort of)



The background of the slide features a collage of images related to the oil and gas industry. On the left, there are two smaller images: the top one shows an oil pumpjack at dusk, and the bottom one shows two workers in safety gear on an industrial site. On the right, there are two larger images: the top one shows an oil rig at night with a bright lightning bolt striking nearby, and the bottom one shows an oil rig at sunset. The central part of the slide is a solid green rectangle containing the title.

# Adjacent Waters and Wetlands

## ■ Justification

- Sequestering and transformation of pollutants
  - e.g, nitrogen and phosphorus
- Water storage (surface and groundwater)
- Flood control
- Sediment trapping
- Organism habitat



# Adjacent Waters and Wetlands

- “Adjacent” definition
  - “[B]ordering, contiguous or neighboring”
  - Includes wetlands separated from “waters of the U.S.” “by man-made dikes or barriers, natural river berms, beach dunes and the like ...”
- “Neighboring” definition
  - “[I]ncludes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1)-(5) ... or waters with a surface or shallow subsurface hydrologic connection to such a jurisdictional water”



# Adjacent Waters and Wetlands

- “Riparian area” definition
  - “[A]n area bordering a water where surface or subsurface hydrology influence ecological processes and plant and animal community structure in that area.” These are “transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.”



# Adjacent Waters and Wetlands

- “Floodplain” definition
  - “[A]n area bordering inland and coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.”
- What is a “moderate to high water flow?”
  - “Best professional judgment” will be used to determine the appropriate flood interval to use



# Adjacent Waters and Wetlands

- Those waters and wetlands located outside of the floodplain or riparian area may be considered to be adjacent where
  - A surface or shallow subsurface connection to “waters of the U.S.” is present
- It is possible a surface or shallow subsurface connection exists but the distance between the waters is “sufficiently great” to consider the waters as adjacent





# Other Waters



- Non-*per se* jurisdictional waters
  - Do not meet the definition of any other “waters of the U.S.”
- Requires case-specific significant nexus determinations
  - Agencies claim this standard will assert jurisdiction over fewer other waters as jurisdictional compared to the previous analysis that considered whether “the use, degradation or destruction of which could affect interstate or foreign commerce standard”
- Agencies will consider the waters alone or in “in combination with other similarly situated waters in the same region”
  - i.e., view the waters as a group of waters in a single landscape (aggregation!)



# Other Waters

- Similarly situated if
  - Located close enough together so that they can be evaluated as a single landscape unit to determine whether the water has a sufficient effect on the chemical, physical, or biological integrity of an (a)(1)-(3) water
    - “[W]ithin a contiguous area of land with relatively homogeneous soils, vegetation and landform (e.g., plain, mountain, valley, etc.)”



# Other Waters



- Similarly situated if (cont'd)
  - Located close enough to a “water of the U.S.” for an evaluation of their effect on the chemical, physical, or biological integrity of an (a)(1)-(3) water.



# Other Waters



- In the same region if
  - The waters are in the watershed that drains into the nearest (a)(1)-(3) water



# *Per Se* Non-Jurisdictional Waters

- Even if a significant nexus exists, the following are not waters of the U.S.
  - Water treatment systems
  - Prior converted cropland
  - Artificial reflecting pools and swimming pools
  - Ornamental waters
  - Gullies and rills
  - Non-wetland swales
  - Puddles





# *Per Se* Non-Jurisdictional Waters

- Note: these can still serve as the hydrological connection for a significant nexus determination



# Impact

- Fewer case-specific determinations
- More enforceable
- More waters jurisdictional?



# What's Next

- Official proposal in the Federal Register
  - Before or after Report is finalized?
- Comment period
  - Soliciting comments on whether some categories of “other waters” identified in the Report warrant *per se* jurisdictional status
  - 2011 Draft Guidance received 230,000 comments
- Wait



# Questions?

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# References

- <sup>1</sup>Amena H. Sayid, *EPA, Corps Propose to Assert Jurisdiction Over Tributaries Affecting Navigable Waters*, Bloomberg BNA, Nov. 8, 2013, *available at* <http://www.bna.com/epa-corps-propose-n17179879956/>
- <sup>2</sup>33 U.S.C. § 1362(7) (2012)
- <sup>3</sup>*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)





# References

- *<sup>4</sup>Solid Waste Agency of Northern Cook Cty. V. Army Corps of Engineers*, 531 U.S. 159 (2001)
- *<sup>5</sup>Rapanos et al. v. United States*, 547 U.S. 715 (2006)
- *<sup>6</sup>33 C.F.R. 328.3(e)*



# References

- <sup>7</sup>78 Fed. Reg. 58536
- <sup>8</sup>U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (draft Sept. 2013), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS\\_ERD2\\_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf)