



## MAJOR FEDERAL WETLANDS RULEMAKING OUT FOR COMMENT

The United States Environmental Protection Agency and the Army Corps of Engineers, have issued a major wetlands rulemaking, for public comment.

Over the last several decades, there have been a number of court cases which have resulted in what have come to be case-by-case decisions on wetlands delineation and determinations, which have confused the regulatory community and delayed important projects. Further, there are state by state variations, all of which have served to make the wetlands delineation, protection, and mitigation process, unnecessarily confusing and inconsistent in the United States.

Joining the rulemaking is the U.S. Department of Agriculture, as more than 53 Natural Resources Conservation Service farmland Best Management Practices, shown in the Table which follows, do not require wetlands permitting approval to implement.

Under the Rulemaking, the following will always be jurisdictional wetlands:

- All "tributaries", including any water (wetlands, lakes, and ponds) that contribute flow, either directly or through another water, to downstream traditional navigable waters, interstate waters, or territorial seas.
- All waters "adjacent" to such tributaries. The proposed rule broadly defines "adjacent" to include all waters located within the "riparian area" or "floodplain" of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

The proposed rule would, however, codify existing policies and categorically exempt from federal CWA jurisdiction the following:

- Ditches excavated wholly in/only draining uplands, and less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas.
- Artificially irrigated areas that revert to upland should water application cease.
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools created by excavating and/or diking dry land.

- Small ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created incidental to construction activity.
- Groundwater, including groundwater drained through subsurface drainage systems.
- Gullies and rills and non-wetland swales.

The proposed rule's net effect is that more smaller and remote upstream bodies of water will fall within federal CWA jurisdiction; resulting in federal permit requirements and mitigation for any activities that may fill or add pollutants to such water bodies.

### **Agricultural Interpretive Rule**

The agencies' proposed jurisdictional rule does not address CWA jurisdictional exclusions for waste treatment systems or prior converted croplands, contentious issues that the agencies have intended to address in future agency guidance documents. Nor does it affect any of the exemptions from CWA Section 404 permitting provided by CWA Section 404(f), including those for normal agriculture, forestry, and ranching practices, nor the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture.

However, on March 25, 2014 - the same day as the proposed jurisdictional rule was released for public comment - the agencies, in conjunction with the U.S. Department of Agriculture, enacted an interpretive rule regarding CWA § 404(f)(1)(A), the statutory exemption from Corps dredge and fill permits for "normal forming, silviculture, and ranching activities." The new agricultural interpretive rule, which took effect immediately when issued, states that discharges associated with 53 specific Natural Resources Conservation Service ("NRCS") practices, listed in a separate document, are exempted. The list can be found at the end of this email blast.

### **Potentially Impacted Business Sectors**

The proposed rule has implications for permitting, facility siting, land use options, required mitigation, and even the availability of financing. Developers and private and public landowners may experience costs associated with additional permits, restrictions on options for land use, and greater restrictions on available financing. Sectors dependent on the availability of developable land - such as industry, manufacturing, energy, mining, transportation, and retail may be similarly impacted in terms of project timing, scope, and costs. Finally, federal and state agencies may need to expand regulatory requirements for activities affecting jurisdictional waters, including increased permitting for stormwater discharges or uses of materials such as pesticides that may reach surface waters.

### **Comment Period for the Draft Rule**

Comments on the Draft Report must be received by July 21, 2014. The agencies are asking for public comment on all aspects of the proposed rule, including interpretations and scientific underpinnings. They have expressly asked for comment on:

- Parameters for future application of the significant nexus test on a case-by-case basis.
- Additional classes of waters to categorically deem either jurisdictional or non-jurisdictional.

Given the proposed rule's reliance on the Connectivity Report, comments should address both scientific

and legal concerns about the proposed rule.

*Comments on the proposed Rulemaking are due by July 21, 2014. As this Rulemaking has great national significance, and with significant impacts on our clients current and future business, and will affect many mitigation projects, RT plans to submit comments on the Rule.*

*Please submit any comments you suggest we add to our comment letter, by July 5th.*

You can also find more information on this Rule, in a recent Newsletter from Marten at [www.martenlaw.com/newsletter/20140519-expand-federal-reach-wetlands](http://www.martenlaw.com/newsletter/20140519-expand-federal-reach-wetlands) (Excerpts included in this article).

## NRCS CONSERVATION PRACTICE STANDARDS EXEMPT FROM PERMITTING UNDER CLEAN WATER ACT SECTION 404(f)(1)(A)

<b>Practice #</b>	<b>Practice Name</b>	<b>Creation Date</b>	<b>Notes</b>
314	Brush Management	Sep-09	
315	Herbaceous Weed control	Apr-10	
320	Irrigation Canal or lateral	Sep-10	
326	Clearing and Snagging	Jul-10	
327	Conservation Cover	Sep-10	
338	Prescribed Burning	Sep-10	
342	Critical Area Planting	Dec-13	
353	Monitoring Well	Sep-10	
380	Windbreak/Shelterbelt Establishment	May-11	
382	Fence	Apr-13	
383	Fuel Break	Apr-05	
386	Field Border	Dec-13	
388	Irrigation Field Ditch	Apr-11	
390	Riparian Herbaceous Cover	Sep-10	
391	Riparian Forest buffer	Jul-10	
393	Filter Strip	Dec-13	
394	Firebreak	Sep-10	
395	Stream Habitat Improvement and Management	Sep-10	
396	Aquatic Organism passage	Apr-11	
398	Fish Raceway or Tank	Sep-09	
399	Fishpond Management	Sep-11	
400	Bivalve Aquaculture Gear and Biofouling Control	Apr-11	
412	Grassed Waterway	Apr-10	activities that convert waters to non-waters are not exempt
422	Hedgerow Planting	Sep-10	
423	Hillside Ditch	May-08	
453	Land Reclamation, Landslide Treatment	Feb-05	
455	Land Reclamation, Toxic Discharge	May-05	

	Control		
460	Land Clearing	Sep-11	
484	Mulching	May-11	
490	Tree/Shrub Site Preparation	Jan-06	
500	Obstruction Removal	Jan-10	
511	Forage Harvest Management	Apr-10	
512	Forage and Biomass Planting	Jan-10	
528	Prescribed Grazing	Sep-10	
533	Pumping Plant	May-11	
544	Land Reclamation, Abandoned Mined Land	Aug-06	
548	Grazing land Mechanical Treatment	Sep-10	chiseling or deep ripping in wetlands is not exempt
550	Range Planting	Apr-10	
568	Trails and Walkways	Jan-10	
575	Animal Trails and Walkways	Apr-10	
578	Stream Crossing	Sep-11	
587	Structure for Water Control	Apr-10	
601	Vegetative Barrier	Jan-10	
612	Tree/Shrub Establishment	May-11	
643	Restoration and Management of Rare and Declining Habitats	Sep-10	
644	Wetland Wildlife Habitat Management	Sep-10	
646	Shallow Water Development and Management	Sep-10	
647	Early Successional Habitat Development/Management	Sep-10	
650	Windbreak/Shelterbelt Renovation	Jul-10	
654	Road/Trail/Landing Closure and Treatment	Nov-08	
655	Forest Trails and Landings	Sep-11	
657	Wetland Restoration	Sep-10	
659	Wetland Enhancement	Sep-10	
660	Tree/Shrub Pruning	Jan-06	
666	Forest Stand Improvement	May-11	



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