



## **"Texas Coastal Prairie Wetlands" and the new Clean Water Act Rule**

On June 29, 2015, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) finalized their much-discussed joint Clean Water Act "waters of the United States" definition and rule.

The new rule dramatically expands jurisdiction under the Clean Water Act and the ramifications of the rule are enormous for business - especially for the homebuilding, land development, construction and transportation infrastructure sectors. The U.S. Chamber of Commerce concludes that under the new rule, "virtually any business that owns or operates a facility or has property would be adversely affected, particularly if it has ditches, retention ponds for storm water runoff, fire/dust suppression ponds, or other surface impoundments on site." The rule has been blocked by two courts putting off implementation of the new rule for now.

While the legal wrangling continued in multiple courts across the nation, a group of Houston area business organizations stepped forward and filed a lawsuit on November 13, 2015 in Federal District Court in Galveston. The suit specifically addresses the final rule's "Texas coastal prairie wetlands" provision and requests that the Court among other things: (1) Declare that the "Texas Coastal Prairie Wetlands" provision of the Final Rule is unlawful because it is inconsistent with, and in excess of, the EPA's and U.S. Army Corps of Engineers' statutory authority under the CWA; and (2) Vacate the "Texas Coastal Prairie Wetlands" provision of the Final Rule.

Coastal prairie wetlands are located along the Gulf of Mexico from western Louisiana to south Texas. These freshwater wetlands occur as depressions, ridges, flats, and mounds on the landscape. According to the Corps, these wetlands act collectively as a complex and can be connected to each other and contribute flow to downstream waters.

The new rule identifies five subcategories nationally (Texas Coastal Prairie Wetlands or "prairie pothole wetlands" are one of them) as waters that regulators are told they must consider via a case-by-case analyses and as a system. That is to say, in addition to considering the importance of an individual wetland alone, a regulator would also have to consider that wetland in combination (within a watershed) with many other nearby wetlands to determine if they all, together, are important enough to merit Clean Water Act protection. The new rule did not provide clear definition of the geographic area, but it did suggest a link to specific geologic formations. It likely includes prairies around Beaumont, Houston, Bay City, Victoria, Corpus Christi, and Kingsville.

Given the costs and complexity associated with the securing a permit, the risk of litigation, and the relatively limited scope of waters likely to be excluded from jurisdiction, many applicants will choose not go through the process, instead conceding jurisdiction and moving forward with permitting all wetlands and waters on their property, jurisdictional or not. This will result in fewer applicants seeking nationwide permits or general permits (which require much less processing to obtain) and forcing them to secure individual permits.

### **Why is this Important?**

If the Texas specific part of rule is permitted to stand the economic vitality of our region will be severely damaged and land owners will have to forego the use of their property. While other lawsuits seek to take down the entire new rule, our legal strategy is designed to remove the weakest, most capricious, and scientifically vulnerable portion of the rule - the Texas Coastal Prairie Wetlands provision. The Texas portion of the new rule is a broad, subjective, "catch-all" approach by regulators to establish jurisdiction over vast swaths of land. This will severely threaten individual property rights, deter business investment, discourage relocation of new businesses, and would limit or even eliminate expansion of local business operations.

Land use options will be restricted, financing of projects will be jeopardized, permitting and compliance costs will significantly increase, regulatory uncertainty and construction delays will take place, and mitigation costs for developers will increase because the new rule will make it easier for the Corps to regulate more wetlands located along the gulf coast. More stringent federal rules would also limit the availability of raw materials for sand, stone, and gravel that are often located near water. Not only would these industries be hurt, but the construction of highways, public works, and residential and commercial building projects would be seriously impacted.

If you have a Spill Prevention, Control, and Countermeasures (SPCC) plan, you may need to modify it to cover any newly-additional jurisdictional waters. And if you don't have an SPCC plan, you may need to implement one if your operations have the potential to impact areas formerly thought to be "dry" that are now considered wet.

Retailers, shopping centers, and other businesses with paved parking lots will be more likely to be required to treat their stormwater runoff before it leaves their property. For example, "big box" retail stores with garden centers or vehicle maintenance services are particularly likely to face more stringent Clean Water Act permitting required by EPA and the Corps. In some cases, these businesses would be required to obtain stormwater quality permits for the very first time.



CONTRIBUTION FORM

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Thank you for taking time to support this vital effort!

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