

environmental lawflash

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U.S. Government Proposes Controversial Rulemaking Regarding the Clean Water Act

The proposed rule offers a definition of “waters of the United States” that expands the Clean Water Act’s jurisdiction.

On March 25, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, the Agencies) released a highly anticipated proposed rulemaking (Proposed Rule) that seeks to set the jurisdictional scope of the Clean Water Act and address the aftermath of several high-profile, but confusing, court rulings.¹ In doing so, the Agencies propose to expand the Clean Water Act’s reach by extending it to various smaller-sized waters and to areas where waters may flow infrequently. Because regular discharges to such jurisdictional waters must be permitted under the Clean Water Act, and many construction projects require permits because of dredge and fill activities, the Agencies’ proposal raises the specter of increased permitting and mitigation costs, reduced project flexibility, and enhanced enforcement exposure for the regulated community.

The Struggle to Define the Scope of the Clean Water Act

The Clean Water Act’s jurisdiction extends to all navigable waters, defined as “waters of the United States, including the territorial seas.”² The current regulations define “waters of the United States” to include traditional navigable waters; interstate waters; all other waters that could affect interstate or foreign commerce; impoundments of waters of the United States; tributaries; the territorial seas; and adjacent wetlands.³

In a number of rulings, federal courts have attempted to refine the boundaries of jurisdiction under the Clean Water Act and give further practical content to the terms, but the rulings have caused confusion and uncertainty for regulators and the regulated community. Most notably, the U.S. Supreme Court issued a divided opinion in *Rapanos v. United States*.⁴ In *Rapanos*, a four-Justice plurality found that “waters of the United States” covered “relatively permanent, standing or continuously flowing bodies of water” that are connected to traditional navigable waters and wetlands with continuous surface connection to such bodies.⁵ Justice Anthony Kennedy, in a concurring opinion, disagreed with the plurality’s standard and advanced a standard that would involve case-by-case review in many circumstances, with waters being “jurisdictional” if they had a “significant nexus” to other jurisdictional waters, such as between a wetland and a neighboring navigable water.⁶

In the aftermath of *Rapanos*, the lower federal courts struggled to make sense of the ruling. Because no single opinion collected a majority of the Justice’s votes, the lower federal courts offered contradictory conclusions regarding the controlling test to establish jurisdiction under *Rapanos*. The Supreme Court, however, denied a number of petitions for writ of certiorari to address the uncertainty. The Agencies attempted to address the uncertainty administratively by issuing guidance memoranda and employing a case-by-case approach to

1. View the Proposed Rule at http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf.

2. 33 U.S.C. § 1362(7).

3. 33 C.F.R. § 328.3; 40 C.F.R. § 122.2.

4. 547 U.S. 715 (2006).

5. *Id.* at 739, 742.

6. *Id.* at 780 (Kennedy, J., concurring).

jurisdictional determinations. These determinations sometimes required the Agencies to build extensive administrative records to support their determinations, with associated time and costs for the regulated community to navigate the process. Those efforts, however, failed to definitively resolve the post-*Rapanos* uncertainty regarding the Clean Water Act's scope.

In the U.S. Congress, a number of efforts were made to amend the Clean Water Act to clarify its jurisdiction, but those legislative efforts also failed.⁷ The Agencies contemplated issuing additional guidance as a further step. The draft guidance, however, was not issued because the Agencies faced opposition from stakeholders on the use of guidance documents, as opposed to formal rulemaking, to address the issue. Likewise, federal court rulings pressed the Agencies on their reliance of interpretative guidance in lieu of rulemaking.⁸

Proposed Rule

The Proposed Rule defines all tributaries and waters adjacent to bodies otherwise classified as waters of the United States as jurisdictional, regardless of their size, flow, type, permanence, or physical connection to actual waters of the United States (i.e., traditional navigable waters, interstate waters, territorial seas, and impoundments of waters of the United States). Notably, under the Proposed Rule, regulated tributaries would include any body of water as long as its water eventually drains into waters of the United States, including small, intermittent, or ephemeral waters; those that are man-made or man-altered; and those broken by man-made or natural obstacles. Moreover, all waters (not just wetlands, as the rules currently provide) adjacent to waters of the United States would be jurisdictional. Put another way, such tributary and adjacent waters would be categorically jurisdictional and deemed to always have a significant nexus to waters of the United States.

By contrast, the following waters would be categorically excluded from jurisdiction: wastewater treatment systems and converted cropland, along with new exclusions for upland ditches with less than perennial flow; ditches that do not contribute flow to waters of the United States; irrigation systems; artificial lakes, ponds, and pools; ornamental waters; depressions; groundwater; gullies; rills; and nonwetland swales.

Under the proposal, any water not categorically included or excluded (per the above) would continue to be subject to the existing case-by-case "significant nexus" determinations. Thus, any water not categorically determined would be subject to federal jurisdiction if it had a more than speculative or insubstantial effect on the chemical, physical, or biological integrity of bodies otherwise classified as waters of the United States. For example, individual water bodies that, in and of themselves, would not have a significant impact on a jurisdictional water could be grouped with other similarly situated water bodies whose overall collective impact could result in the entire group being designated as jurisdictional.

Impact to the Regulated Community

The Proposed Rule, if promulgated, could have far-reaching effects across all types of industries. For example, expanded jurisdiction could hinder the development of pipeline assets to transport natural gas from the well head to the consumer. Midstream oil and gas projects, which are already facing a host of regulatory challenges, could see their permitting burdens expanded. For such projects, the permit approvals require identification of various sensitive resources, such as cultural heritage sites and endangered habitats, and require that the proposed project plans reduce impact to those resources, often at the cost of economic and technical efficiency. The resulting environmental impacts must then be mitigated either through commensurate fees or actual restoration. Thus, each additional crossing of a water body declared jurisdictional under the Proposed Rule may present an additional set of challenges that may result in an additional potential rerouting of the project and negatively impact the schedule or budget.

More broadly, the Proposed Rule presents the potential for expanded challenges to many industries that involve construction and development of facilities, ranging from real estate to energy, infrastructure, and manufacturing.

7. See, e.g., Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003); Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (2005); Clean Water Restoration Act, S. 787, sec. 25, 111th Cong. (2009).

8. See, e.g., *Nat'l Mining Ass'n v. Jackson*, 880 F. Supp. 2d 119 (D. D.C. 2012).

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For large (and sometimes small) projects, it may take years to obtain the necessary authorizations and approvals, ranging from local zoning permits to coastal zone management approvals. Any preconstruction dredging requires a permit under section 404 of the Clean Water Act. Under the Proposed Rule, an intermittent and seemingly isolated stream could, in the future, trigger a section 404 permit requirement. The jurisdictional expansion could also create a backlog to an already lengthy application process, thus chilling new development by increasing project delays and costs.

Public Comment Period

Interested parties can comment on any aspect of the Proposed Rule, and the Agencies have identified a number of issues on which they specifically invite comment, including the following:

- Alternate approaches to determining whether “other waters” are similarly situated
- Alternate approaches to determining whether “other waters” have a significant nexus with waters of the United States
- Identification of “other waters” subcategories that may be universally deemed to have a significant nexus or no significant nexus to waters of the United States
- Identification of “other waters” subcategories that may require a case-by-case “significant nexus” determination
- More efficient technologies and approaches to determine which waters are subject to jurisdiction
- Ways to clarify the definition, extent, and aquatic features of tributaries as well as their distinguishing features from gullies, rills, and nonwetland swales
- Appropriate flow level for upland ditch exclusion
- Alternate connection types to identify “adjacent waters”
- The need for any more specificity as to when a water is deemed located in the floodplain of a water of the United States
- The definition of “neighboring,” as used to define “adjacent water”

The Agencies also seek information and data related to the following:

- The aquatic resource, implementation, and economic implications of the proposed definition
- Peer-reviewed literature to aid in review of the report
- Distinguishing features between jurisdictional and nonjurisdictional “other waters”

The public comment period will extend for 90 days after the publication of the Proposed Rule in the *Federal Register*, which should occur soon. Companies with substantial operating and construction activities that regularly bring them in contact with water bodies, even intermittent or small bodies, should review the proposal carefully for potential impacts on their future operations and consider submitting comments accordingly.

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