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Agencies Release Proposed Rule to Limit Clean Water Act Jurisdiction

The Environmental Protection Agency and the Army Corps of Engineers announced a [proposed rule to redefine the term "waters of the United States"](#) under the Clean Water Act on December 11, 2018. The proposed rule, which awaits public comment, would significantly limit the scope of water features subject to federal Clean Water Act jurisdiction.

How We Got Here

The Clean Water Act provides federal jurisdiction over "navigable waters." But the Act defines this critically important term—which determines whether a water body is subject to federal permitting requirements—merely as "waters of the United States." The lack of a clear definition in the statute has bedeviled agencies, courts and the regulated community for decades. The courts have always agreed that Congress intended for the Act to regulate more than navigable-in-fact bodies of water—such as rivers, lakes and bays—but the extent of this regulation has never been fully resolved. In the absence of a statutory definition, EPA and the Corps have been obliged to promulgate definitions via rulemakings. In two out of the three cases that reached the U.S. Supreme Court, the Court ruled that the federal government was attempting to regulate water bodies beyond those authorized by congressional intent.

The Supreme Court addressed the scope of federal jurisdiction most recently, and confusingly, in *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Antonin Scalia, writing for a four-justice plurality, opined that the agencies had defined regulated waters too broadly. Congress, he wrote, intended that the Act regulate only "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection to" traditional navigable waters. Justice Anthony Kennedy agreed that the agencies' definition of covered waters was unduly broad, but articulated a different standard. His solo concurring opinion asserted that the non-navigable waters that could be regulated were those that have a "significant nexus" to a navigable water. In dissent, four justices found no fault with the agencies' broad definition. The agencies were also rebuked by Chief Justice John Roberts in *Rapanos* for failing to draft a narrower definition after their last Supreme Court defeat five years previously. Because of confusion about how to interpret the fractured opinions, courts have struggled to decide whether the binding precedent is embodied in the Scalia plurality opinion, the Kennedy concurrence, or both.

During the Obama administration, EPA and the Corps in 2015 finally responded to Justice Roberts' rebuke by promulgating the Clean Water Rule. That rule broadly defined the scope of "waters of the United States" in express reliance on Justice Kennedy's "significant nexus" test from *Rapanos*. The Clean Water Rule was immediately challenged in multiple courts, and many of those cases remain pending. As a result of this litigation, the Clean Water Rule is currently enjoined in 28 states and effective in 22 states and the District of Columbia.

After President Trump took office, EPA and the Corps announced their intent first to rescind the 2015 Clean Water Rule and then to issue a new regulation to redefine the key phrase "waters of the United States." A [proposed regulation to rescind the Clean Water Rule](#) was published in July 2017; a final rule has not yet been issued. The current proposed regulation to redefine "waters of the United States" is the much-anticipated "Step Two" of the Trump administration's plan to rescind and replace the Clean Water Rule. (EPA and the Corps also

issued another rule to delay the applicability date of the Clean Water Rule until 2020. Federal district court decisions in South Carolina and Washington resulted in the so-called Applicability Rule being enjoined and then vacated nationwide, after the courts determined that the agencies did not follow proper rulemaking procedures.)

The Proposed Rule's Definition of "Waters of the United States"

The current proposed rule abandons the "significant nexus" test of the 2015 Clean Water Rule and Justice Kennedy's opinion in *Rapanos*, and instead hews much closer to Justice Scalia's test.

Jurisdictional Waters

The proposed rule lists six categories of jurisdictional waters.

- **Traditional Navigable Waters.** The proposed rule would maintain jurisdiction over waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including territorial seas and waters subject to the ebb and flow of the tide.
- **Tributaries.** The proposed rule would maintain jurisdiction over "tributaries" of traditional navigable waters, but would significantly change the prior definition of the term. The proposed rule no longer defines a tributary based on the presence of physical indicators of a bed, banks and an ordinary high-water mark. Rather, a tributary is defined by having perennial or intermittent flow. "Perennial flow" is continuous year-round surface water flow in a typical year. "Intermittent flow" is continuous surface water flow during certain times in a typical year and not merely in direct response to precipitation. Ephemeral channels of water that only flow in direct response to a precipitation event would be excluded under the proposed rule.
- **Wetlands.** The proposed rule would significantly limit jurisdiction over wetlands. A wetland would be jurisdictional only if it is "adjacent" to a jurisdictional water, which means it either abuts (i.e., touches at least one point or side of) a jurisdictional water or has a direct hydrologic surface connection to a jurisdictional water. The proposed rule would exclude wetlands that have only subsurface hydrologic connections to a jurisdictional water.
- **Ditches.** The proposed rule retains jurisdiction over some ditches (i.e., artificial channels) if they (1) are, were, or may be susceptible of being used in interstate or foreign commerce; (2) are constructed in a tributary or relocate or alter a tributary, and satisfy the definition of a tributary; or (3) are constructed in an adjacent wetland and satisfy the definition of a tributary. Notably, the preamble clarifies that "the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule."
- **Lakes and Ponds.** Lakes and ponds are jurisdictional if they (1) contribute perennial or intermittent flow to a traditional navigable water in a typical year (either directly or indirectly), or (2) are flooded by a non-wetland jurisdictional water in a typical year.
- **Impoundments.** The proposed rule retains federal jurisdiction over impoundments of jurisdictional waters.

Exclusions

The proposed rule excludes ephemeral features (defined as surface water that flows or pools only in direct response to precipitation) and diffuse stormwater runoff. The proposed rule retains many existing exemptions, including for groundwater, prior converted cropland, artificially irrigated areas, upland artificial lakes and ponds, artificial depressions such as mining and construction pits, upland wastewater recycling structures, stormwater control features and waste treatment systems.

Other Notable Changes

Additional significant elements of the 2015 Clean Water Rule that would be abandoned include the following:

- The proposed rule eliminates a category of jurisdictional waters known as "adjacent waters," which were defined based on their distance from other jurisdictional waters.
- The proposed rule no longer provides for certain wetlands and water bodies to be jurisdictional if they are determined, on a case-by-case basis, to have a "significant nexus" (either chemically, physically or biologically) to jurisdictional waters.
- The proposed rule removes "interstate waters" as an independent category of jurisdictional waters.

Implications

The proposed rule is intended to provide greater clarity and regulatory certainty by setting bright-line rules for delineating the jurisdictional reach of the Clean Water Act. On the whole, the proposed rule would significantly limit federal jurisdiction, particularly over wetlands and tributaries. The new definition of "tributary" is particularly notable for many parts of the Western United States where ephemeral washes are common; those features would no longer be subject to the Clean Water Act, even if they have a bed, banks and ordinary high-water mark.

Further, by limiting the circumstances in which a Clean Water Act permit would be required, the proposed rule would limit the circumstances in which an environmental impact analysis is required under the National Environmental Policy Act. Particularly in the arid West, a Clean Water Act permit may be the only basis for subjecting a project to NEPA. And once NEPA is triggered, the statute's connected action and cumulative impact doctrines generally will require that the environmental analysis extend well beyond the individual project component requiring a Clean Water Act permit.

The proposed rule will be published in the Federal Register in the coming days, which will begin a 60-day public comment period. The final rule will inevitably be challenged in court, so the scope of the Clean Water Act is likely to remain in flux for at least the next few years.

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