

**EPA and Corps of Engineers Propose New Rule
Governing Clean Water Act Jurisdiction
By**

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In late March, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) released a proposed rule that would dramatically revise and expand the reach of the Clean Water Act's (CWA) jurisdiction. Unquestionably, determining the scope of the CWA's jurisdiction, particularly over streams and tributaries, has become confusing and complex following several Supreme Court decisions and various EPA interpretations issued in response to these decisions over the years. For nearly a decade, Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked for a rulemaking to provide clarity. The proposal is already generating much controversy, and will invite significant comment.

Background

The scope of federal jurisdiction under the CWA has been in an enduring state of confusion for decades. The issue is significant as whether the CWA applies has a tremendous impact on whether certain activities relating to dredging, filling, pollutant discharge, reporting obligations for releases, and a wide range of other activities pertinent to businesses, land owners, and other stakeholders are subject to CWA authority and thus subject to federal jurisdiction.

Key Proposed Changes

Arguably the most significant revision under the proposal relates to the way “tributaries” are treated. The proposed rule would expand the reach of the CWA by essentially determining that all “tributaries” and “adjacent waters including wetlands,” have a “significant nexus,” and thus they are subject to CWA jurisdiction. In EPA guidance interpreting *Rapanos*, a seminal 2008 Supreme Court case, EPA expanded the definition of “tributary” to include non-navigable tributaries that are somewhat permanent (as opposed to seasonal) and tributaries that have a significant nexus to navigable waters. The “significant nexus” test has proven to be challenging to apply in the real world. The proposed rule is intended in part to provide clarity. In so doing, however, CWA jurisdiction would expand to include all tributaries regardless of nexus, suggesting CWA jurisdiction may apply to every headwater of the United States.

The proposal would also define for the first time “tributary” physically by “the presence of a bed and banks and ordinary high water mark.” According to the proposal, CWA jurisdiction would reach “ephemeral waterways (including ditches) that may flow only intermittently and indirectly over a great distance to reach a navigable water.” This broad definition could sweep in more transient water ways, significantly expanding the reach of the CWA. This is especially concerning to areas of the country that are typically more arid like the western United States, and subject many more water ways to CWA jurisdiction.

There are many other proposed revisions and nuanced changes that will almost certainly generate significant controversy and comment. Importantly, a number of exclusions are

proposed, and should be carefully reviewed. Key among them is two types of “ditches,” carefully defined under the proposal. Importantly also, the current CWA agricultural exemptions are retained.

EPA notes that the final rule will be based on a peer-reviewed study on the connectivity of tributaries, wetlands, and other waters to downstream waters. This study is now under review by EPA’s Science Advisory Board.

Implications

The proposal broadly impacts stakeholders -- land owners, municipalities, businesses, non-government organizations, and others -- and will invite many more CWA regulatory actions, permitting applications and decisions, and related legal and regulatory interventions if the rule is issued in final as proposed. While it is EPA’s hope that the rule provides the much needed clarity stakeholders requested, some stakeholders can be expected to oppose the dramatic expansion of CWA jurisdiction. Stakeholders will want to review the proposal carefully and comment, as the implications of the revisions are far reaching. Comment will be accepted for 90 days once it is published in the *Federal Register* which, as of mid-April, has not yet occurred.

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