

EPA, Army Corps Propose New Rule to Govern Federal Clean Water Act Jurisdiction

Intended to clarify confusion from prior US Supreme Court decisions, the rules could have far-reaching implications for many stakeholders.

The US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (Corps) jointly released a proposed rule on March 25, 2014 which would represent the most sweeping change in a generation to the rules governing federal Clean Water Act (CWA) jurisdiction. Federal jurisdiction under the CWA extends to a variety of activities including dredging, filling, discharging pollutants, reporting hazardous substances releases and oil spill control. Stakeholders of all types — industry, agriculture, real estate development, oil and gas, utilities and municipal government — will want to remain informed of the scope of the proposed changes and their impact on business practices, regulated activity and environmental protection. This *Client Alert* summarizes the provisions of the proposed rule and provides a comparison with the current regulatory regime. The agencies are soliciting comments, which may be submitted within 90 days when the formal comment period opens upon publication of the proposed rule in the Federal Register. Publication had not yet occurred as of Monday, April 7, 2014.

Key Takeaways

The release of the proposed rule presages yet another period of intense debate on the reach of the CWA. By rolling up three decades of jurisprudence and agency interpretation into an omnibus rule, the agencies may be inviting a future, broad-based rulemaking challenge, with the potential to settle a variety of persisting issues. Key takeaways from the agencies' announcement include:

- **Landscape Jurisdiction:** The proposed rule arguably sweeps into its ambit not only lands that are wet and, in many cases, without bed and banks, but also associated lowlands and transitional zones between open waters and upland areas. New definitions including the new concept of “a single landscape unit” leave ambiguity about what portion of each watershed is beyond the reach of federal regulators under the CWA. The agencies state that the proposed rule respects state and local land use authority; however, real-world implementation of the proposed rule possibly could erode local authority.
- **Upland Features:** The proposed rule exempts ditches cut into uplands from CWA jurisdiction, but does not clearly state whether other features cut into uplands, including municipal and private storm drain systems and construction sites located in upland areas, are similarly exempt. Likewise, the proposed rule does not contain a definition of the term “upland” whereas it provides new definitions for several other key terms.

- **“Significant Nexus” as Legal Term of Art or Scientific Term:** The proposed rule interprets “significant nexus” as a uniquely scientific term, finding jurisdiction wherever science supports such a nexus. This interpretation is founded on the draft version of an EPA report synthesizing published peer-reviewed scientific literature on the nature of connectivity and the effects of streams and wetlands on downstream waters. The final version of this report has not yet been published; EPA has said that it will not finalize the proposed rule until the final version of the report is published. The US Supreme Court arguably had something more practical in mind, as the nexus concept grew out of the 1985 decision finding wetlands “inseparably bound” to traditionally navigable waters to be jurisdictional. The Supreme Court expressed reluctance to extending CWA jurisdiction over “lands” not so situated — even those that are wet. The origins of this legal term of art suggest a common sense plain meaning of “significant,” so as to make the jurisdictional reach of the CWA simpler to discern for practitioners and landowners. Whether the Supreme Court will agree that science-driven nexus is a touchstone for jurisdiction remains to be seen.
- **Navigability and “Significant Nexus”:** Supreme Court precedent arguably did not extend “significant nexus” to the entire category of “other waters.” The agencies argue that an extrapolation to the category is warranted. In so doing, the agencies may be reading the concept of navigability too far out of the Act, especially as the Supreme Court has said the term must be given its place.
- **Agencies’ Public Rollout:** The EPA and the Corps have embarked on a public process for presenting the proposed rule, including the rationale for the proposed changes. The agencies have said that the proposed changes are meant to respond to uncertainty created by Supreme Court decisions interpreting the CWA term “navigable waters.” EPA Administrator Gina McCarthy’s statements have struck what arguably could be characterized as a dismissive tone towards those decisions. Of course, the Supreme Court may in the future have an opportunity to weigh in on the proposed rule now being circulated by EPA.

The agencies currently are in the process of gathering input on the proposed rule from interested parties and are holding discussions across the country.¹ On April 7, 2014, EPA hosted a webcast on the “Waters of the U.S. Proposed Rule” during which Nancy Stoner, Acting Assistant Administrator, Office of Water, EPA, and Donna Downing, Jurisdiction Team Leader, Wetlands Division, EPA, presented on the proposed rule and responded to questions. Questions focused generally on the scope of the proposed rule, clarification regarding various terms and the effect of the proposed rule on current jurisdictional exemptions. The questions also revealed ongoing concern that the proposed rule is an unwarranted administrative expansion of Clean Water Act jurisdiction. The speakers noted that the proposed rule should be published in the Federal Register during the week of April 7, and two public teleconferences on April 28 and May 2 will be held to take input on the EPA report regarding its proposed science-based interpretation of “significant nexus.”²

Supreme Court Precedent

The proposed rule purports to rely on three key Supreme Court decisions over the last three decades that have addressed the scope of “waters of the United States” regulated under the CWA.

- In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), a unanimous decision upheld CWA authority over wetlands adjacent to navigable-in-fact open waters.
- In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) the issue of the scope of “waters of the United States” rose before the Supreme Court again. In a 5-4 decision, the Court held Congress did not authorize the agencies to regulate

isolated, intrastate waters. Relying on *Riverside Bayview Homes*, the Court found that there must be a “significant nexus” to traditionally navigable waters, including a Commerce Clause connection far stronger than the Migratory Bird Rule invalidated by the decision.

- In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court reached the term “waters of the United States” in a situation that involved wetlands that were neither wholly isolated, nor inseparably bound with navigable-in-fact open waters. A four-vote plurality of the Court held that “navigable waters” regulated under the CWA are limited to “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features,’” such as streams, oceans, rivers and lakes. Wetlands with a “continuous surface connection” to such bodies of water, so that “there is no clear demarcation between them,” are “adjacent to” such water bodies and also are covered. Justice Kennedy concurred in the judgment of the plurality, but did so on different grounds, relying on the “significant nexus” test that the Court articulated in *SWANCC* and the significant ecological functions that wetlands adjacent to tributaries can serve.³

What the Agencies Are Saying

EPA and the Corps state that the *SWANCC* and *Rapanos* decisions “resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA” and that, through this rulemaking, the “agencies are providing clarity to regulated entities as to whether individual water bodies” are or are not jurisdictional and discharges are or are not subject to permitting.”⁴ EPA Administrator Gina McCarthy noted the need to clarify the CWA, which has been “bogged down by confusion” caused by the Supreme Court’s decisions in *SWANCC* and *Rapanos*.⁵ She states these cases have “muddled everyone’s understanding” of what waters are covered under the CWA, particularly with respect to smaller interconnected streams and wetlands.⁶ She states further that the proposed rule makes clear that most seasonal and rain-dependent streams, as well as wetlands near rivers and streams, are protected, while other types of waters with more uncertain connections with downstream water will be evaluated on a case-specific basis.⁷

The agencies also repeatedly have asserted that the proposed rule “will not add to or expand the scope of waters historically protected under the CWA.”⁸ This issue came up several times during the EPA and Corps budget hearings on March 26 and March 27, 2014. In contrast, Congressman Ken Calvert (R-CA) remarked that the proposed rule is “the greatest expansion of federal control over land and water resources in the 42-year history of the Clean Water Act,” and could subject “every small business and farmer...to EPA fines if they disturb a puddle on their land.”⁹ Similarly, Congressman Hal Rogers (R-KY) argued that the proposed rule “will place strict new standards on thousands of miles of streams in this country.”¹⁰

Addressing these concerns, the agencies have underscored what the proposed rule will not do as much as they have articulated what it will do. EPA’s website states that the proposed rule does not protect new types of waters, broaden CWA’s coverage, regulate groundwater, or expand jurisdiction over ditches.¹¹ Administrator McCarthy explained that the proposed rule does not regulate groundwater or tile drainage systems, or increase the regulation of irrigation or drainage ditches.¹² She added that the proposed rule not only keeps intact existing exemptions for agricultural activities, but expands them by exempting 53 additional conservation practices.¹³

The Proposed Rule

Specifically, the CWA’s jurisdiction reaches all “navigable waters,” which are defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.”¹⁴ The proposed rule would overhaul

the definition of “waters of the United States” in the administrative regulations which implement the various sections and programs of the Act.

Affected Programs/Regulations

The new definition of “waters of the United States” would apply to the following programs administered by EPA, the Corps and the states:

- The section 303 water quality standards and total maximum daily load programs
- The section 311 oil spill prevention and response program
- The section 401 state water quality certification process
- The section 402 National Pollutant Discharge Elimination System (NPDES) permit program
- The section 404 permit program for the discharge of dredged or fill material into navigable waters

The proposed rule proposes identical language for 11 sections of the Code of Federal Regulations; nine containing CWA regulations, and the other two containing regulations for administration of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Oil Pollution Act (OPA) and the CWA:

- Clean Water Act Regulations
 - 33 CFR § 328.3 (*Army Corps of Engineers regulations for implementation of Clean Water Act*)
 - 40 CFR § 110.1 (*EPA regulations for discharge of oil*)
 - 40 CFR § 112.2 (*EPA regulations for oil pollution prevention*)
 - 40 CFR § 116.3 (*EPA regulations for designation of hazardous substances*)
 - 40 CFR § 117.1 (*EPA regulations for determination of reportable quantities for hazardous substances*)
 - 40 CFR § 122.2 (*EPA regulations for the NPDES program*)
 - 40 CFR § 230.3(s) (*EPA regulations for section 404(b)(1) guidelines for specification of disposal sites for dredged or fill material*)
 - 40 CFR § 232.2 (*EPA regulations for exempt activities not requiring section 404 permits*)
 - 40 CFR § 401.11 (*EPA regulations for effluent guidelines and standards*)
- CERCLA/OPA/CWA Regulations
 - 40 CFR § 300.5 and app. E to part 300, sec. 1.5 (*EPA regulations for the National Oil and Hazardous Substances Pollution Contingency Plan (NCP)*)
 - 40 CFR § 302.3 (*EPA regulations for designation, reportable quantities and notification under CERCLA and the Clean Water Act*)

Proposed Definition

In all 11 sections, the proposed rule would change the definition of “waters of the United States” to read as follows:

(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

- (4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;*
- (5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;*
- (6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and*
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.*

Exclusions

In all 11 sections, the new language also would specifically exclude the following from the “waters of the United States” definition:

- (b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section --*
 - (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.*
 - (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.*
 - (3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.*
 - (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.*
 - (5) The following features:*
 - (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;*
 - (ii) artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;*
 - (iii) artificial reflecting pools or swimming pools created by excavating and/or diking dry land;*
 - (iv) small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;*
 - (v) water-filled depressions created incidental to construction activity;*
 - (vi) groundwater, including groundwater drained through subsurface drainage systems; and*
 - (vii) gullies and rills and non-wetland swales.*

Defined Terms

Finally, the proposed rule would also establish a new set of seven defined terms for use in interpreting the jurisdictional reach of “waters of the United States,” in all 11 sections, as follows:

(c) Definitions --

(1) Adjacent: The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

(2) Neighboring: The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) Riparian area: The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) Floodplain: The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) Tributary: The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.

(6) Wetlands: The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) Significant nexus: The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section),

significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.

The existing regulatory definitions of “high tide line,” “ordinary high water mark” and “tidal waters” are not proposed to change.¹⁵ Similarly, the term “wetlands” would not be redefined from existing regulations.

Structure of the Proposed Regulations

The proposed rule creates a clear duality in the jurisdictional reach of the CWA between “waters of the United States” by rule and “waters of the United States” as determined by a case-by-case analysis. All categories are subject to exclusions, meaning that certain specified waters are excluded from regulation even if they would otherwise be included within one of the seven categories.

“Waters of the United States” by Rule

Six categories of waterbodies would be “waters of the United States” by rule (e.g., *per se* jurisdictional waters), and would fall under the jurisdiction of the CWA with no additional analysis required. These waterbodies are traditional navigable waters or that unquestionably share a significant nexus to navigable waters:

- Traditional navigable waters - All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide
- Interstate waters - All interstate waters, including interstate wetlands
- The territorial seas
- Impoundments - All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary
- Tributaries - All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment
- Adjacent waters - All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary

“Other Waters” Require Case-specific Analysis

An additional category, “other waters,” consists of waterbodies not covered by the first six categories, which are not themselves navigable waters and may or may not share a significant nexus to navigable waters in and of themselves. Based on EPA’s study of scientific evidence regarding the connectivity of streams and wetlands to downstream waters,¹⁶ the proposed rule requires waterbodies in this seventh category to undergo a case-by-case analysis to determine whether the requisite significant nexus exists. These “other waters” may be regulated if they, alone — or in combination — with other similarly situated waters located in the same region, share a “significant nexus” to a traditional navigable water, interstate water or territorial sea.

“Significant nexus” as the proposed rule would define, would mean that the water at issue significantly affects the chemical, physical or biological integrity of a traditional navigable, interstate water or territorial sea. “Significant effects” must be more than speculative or insubstantial. “Similarly situated waters” are

those that perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with respect to their effect on the chemical, physical or biological integrity of a traditional navigable water, interstate water or territorial sea. The “region” is the watershed that drains to the nearest traditional navigable water, interstate water or territorial seas.

Comparison with Existing Regulations

The most significant textual change between the existing rule and the proposed rule is the proposed deletion of subpart (a)(3) of the existing definition, which includes:

*all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) which are or could be used by interstate or foreign travellers for recreational or other purposes; or (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) which are used or could be used for industrial purpose by industries in interstate commerce.*¹⁷

According to the regulatory preamble, these “other waters” under the proposed rule would be jurisdictional only upon a case-specific determination that they share a “significant nexus” to waters of the United States rather than the express heavy reliance on the Commerce Clause in the existing rule. This “significant nexus” concept, and several other significant changes between the old rule and the proposed rule, are discussed below.

Significant Nexus

Current regulation does not define “significant nexus,” but the agencies’ 2008 guidance document generally explains the current application of this standard.¹⁸

The proposed rule determines that certain types of waters share a “significant nexus” to the “waters of the United States” by definition and are thus jurisdictional by rule. These include, for example, tributaries (including small, intermittent, and ephemeral tributaries, tributary lakes, ponds, and wetlands, man-made and man-altered tributaries) and “adjacent waters” (including riparian and floodplain waters and wetlands with a confined surface or shallow subsurface connection, e.g., swales, gullies and rills, to a jurisdictional water).¹⁹ This is a change from the current rule and the 2008 Guidance, which refers to “adjacent wetlands” (instead of the proposed rule’s broader “adjacent waters”) and currently leaves much of the jurisdictional analysis to a case-by-case determination.

The proposed rule aims to reduce the need for case-by-case determinations per the 2008 Guidance regarding tributaries, by bolstering the existing rule’s categorical inclusion of all tributaries as “waters of the United States.”²⁰ For the first time, the agencies would define “tributary.”²¹ Wetlands, ponds and lakes would also be defined as tributaries — even if they lack a bed and banks or ordinary high water mark — provided that they contribute flow, either directly or through another water — to traditional navigable water, interstate waters, or territorial seas.²² The fact that there may be man-made breaks (such as bridges, culverts, pipes or even dams) or natural ones (including if a stream flows underground) is inconsequential.²³ EPA and the Army Corps of Engineers assert that scientific evidence supports this conclusion that a significant nexus exists between tributaries and “waters of the United States.”

The proposed rule leaves “other waters” to a case-specific analysis based on the functional relationship and the connectivity (chemical connectivity, physical and biological) of the “other water” with a jurisdictional *per se* water of the United States. While the proposed rule clarifies that a “hydrologic connection is not necessary to establish a significant nexus,” the analysis of functional relationships and connectivity appears generally similar to that published by EPA and the Corps in the 2008 Guidance. In addition, the proposed rule explains for the significant-nexus inquiry, “other waters” will be “evaluated either individually, or as a group of waters where they are determined to be similarly situated in the region..., depend[ing] on the functions they perform and their spatial management within the ‘region’ or watershed.”²⁴

The proposed rule appears to rely heavily on a “draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters” prepared by EPA’s Office of Research and Development. This scientific report is currently under review by EPA’s Science Advisory Board and EPA states that the rule will not be finalized until the Science Advisory Board’s review is finalized and the scientific report is complete.²⁵ Appendix A to the proposed rule, itself over 100 pages, is an overview of scientific literature regarding connectivity and effects.²⁶

Tributaries

As discussed above, the agencies now propose for the first time a regulatory definition of “tributary.” Tributary status is not lost by man-made or natural breaks so long as the bed, bank and ordinary high water mark can be identified upstream of the break.²⁷ Nor does the permanence of a water affect its status. The proposed rule removes the 2008 Guidance’s distinction between permanent and intermittent tributaries; instead of an assessment of how long a flow is present, the only issue is whether there is evidence of a flow into “waters of the United States.”²⁸ The origin of the water, whether natural, man-altered or manmade, expressly does not matter.²⁹

Adjacent Waters

The agencies now propose that adjacent waters, rather than simply adjacent wetlands, are “waters of the United States.” The proposed definition for “adjacent” — meaning bordering, contiguous or neighboring — remains the same as under the existing regulations, but “neighboring” now includes waters located within the riparian area or floodplain of, and waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to, a traditional navigable water, interstate water, territorial sea, impoundment or tributary.

Ditches

The proposed rule would add two types of ditches to the list of excluded waters: (1) ditches that are excavated wholly in uplands, drain only uplands, and have ephemeral or intermittent flow; and (2) ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, territorial sea or an impoundment of a jurisdiction water.³⁰ Ditches not meeting these criteria could be considered “waters of the United States” if they meet the definition of a manmade tributary.³¹

EPA does not consider this addition to be a change of agency policy; the 2008 Guidance stated that EPA would not assert jurisdiction over intermittent upland ditches.³²

Waste Treatment Systems

The proposed rule does not change the regulatory exclusion of waste treatment systems, other than deleting a cross-reference to a since-removed section about cooling ponds.³³ EPA expressly states it does “not consider this deletion to be a substantive change to the waste treatment systems exclusion or how it is applied.”³⁴

Prior Converted Cropland

The proposed rule leaves unchanged the current rule’s exemption for prior converted cropland from jurisdiction under the CWA.³⁵ Like the current rule, the determination of an area’s jurisdictional status under this exemption for the purposes of the CWA remains with EPA, notwithstanding the determination of any other federal agency.

Groundwater

The proposed rule clarifies that groundwater — including groundwater drained through subsurface drainage systems — is not subject to regulation by the CWA as a “water of the United States.” The current rule and interpretive guidance do not address groundwater, so the proposed rule clarifies that “agencies have never interpreted ‘waters of the United States’ to include groundwater and the proposed rule explicitly excludes groundwater[.]”³⁶

Conclusion

If implemented, the proposed rule would have far-reaching effects on regulation of the nation’s waterways. It would define federal jurisdiction under the CWA to extend to most seasonal and rain-dependent streams as well as wetlands near rivers and streams, in addition to navigable waters. Further, the proposed rule provides that geographically isolated waters will be evaluated on a case-by-case basis. Exemptions would continue to apply for farming, silviculture, ranching, and other specified activities. This assertion of federal jurisdiction over tributaries, streams and wetlands could result in project delays due to the need for permits for dredging, filling, discharge or hazardous substances releases that may not previously have been required. In addition, the proposed rule creates several sources of considerable uncertainty, such as the jurisdictional reach to upland features and the precise practical definitions of terms including floodplain, riparian area, tributary, and ephemeral pond/pool or puddle. Latham & Watkins will continue to track and analyze the proposed rule, and will continue to provide updates.

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Endnotes

- ¹ EPA, Waters of the United States, available at <http://www2.epa.gov/uswaters>.
- ² *Id.*
- ³ See Latham & Watkins LLP, US Supreme Court Divided over Reach of Clean Water Act (June 21, 2006), available at <http://www.lw.com/search?searchText=rapanos>.
- ⁴ *Waters of the United States Proposed Rule* (Proposed Rule), available at <http://www2.epa.gov/uswaters>.
- ⁵ Gina McCarthy, *Clearer Protections for Clean Water*, The Huffington Post, March 25, 2014, available at http://www.huffingtonpost.com/gina-mccarthy/clearer-protections-for-c_b_5029328.html.
- ⁶ *Id.*
- ⁷ See generally Proposed Rule.
- ⁸ See note 5, *supra*.
- ⁹ Opening statement of Chairman Ken Calvert, Interior and Environment Subcommittee, House Committee on Appropriations, FY 2015 Budget Hearing, US Environmental Protection Agency, March 27, 2014, available at <http://docs.house.gov/meetings/AP/AP06/20140327/101941/HHRG-113-AP06-20140327-SD001.pdf>.
- ¹⁰ Opening statement of Chairman Hal Rogers, House Committee on Appropriations, Subcommittee on Energy and Water Development and Related Agencies, Fiscal Year 2015 Budget Hearing: U.S. Army Corps of Engineers, March 26, 2014, available at <http://docs.house.gov/meetings/AP/AP10/20140326/101933/HHRG-113-AP10-20140326-SD002.pdf>.
- ¹¹ *Waters of the United States Proposed Rule*, available at <http://www2.epa.gov/uswaters>.
- ¹² Gina McCarthy, *EPA: Clearer Protections for Clean Water Support a Strong Farm Economy*, Farm Journal Media, March 25, 2014, available at http://www.agweb.com/article/epa_clearer_protections_for_clean_water_support_a_strong_farm_economy_NAA_Guest_Editor/.
- ¹³ *Id.*
- ¹⁴ 33 U.S.C. § 1362(7).
- ¹⁵ See 33 CFR, part 328.3(d), (e) and (f).
- ¹⁶ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-11/098B, September 2013, External Review Draft, available at [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sept2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sept2013.pdf).
- ¹⁷ 33 CFR, part 328.
- ¹⁸ See generally EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2008) (2008 Guidance).
- ¹⁹ *E.g.*, Proposed Rule at 65–90.
- ²⁰ The current rule provides that tributaries of “waters of the United States” are “waters of the United States.” (33 C.F.R. § 328.3(a)(5).) Following the Supreme Court's decision in *Rapanos*, *supra*, EPA issued new guidance that provided a more restrained application of “waters of the United States” to tributaries. (See generally 2008 Guidance.) The 2008 Guidance asserts EPA jurisdiction over non-navigable tributaries of traditional navigable waters if the tributary had at least seasonally continuous flow, including adjacent wetlands with a continuous surface flow with the tributary. For more intermittently flowing tributaries, the agency decides jurisdiction based on a significant nexus determination.
- ²¹ 33 C.F.R. § 328.3(c)(5) (proposed).
- ²² *Id.*

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- ²³ *Id.*
- ²⁴ *E.g.*, Proposed Rule at 90-103.
- ²⁵ *Id.* at 13. The report is titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (US EPA, 2013).
- ²⁶ *Id.* at 133-272.
- ²⁷ *Id.*
- ²⁸ Proposed Rule at 56.
- ²⁹ 33 C.F.R. § 328.3(c)(5) (proposed).
- ³⁰ *Id.* § 328.3(b)(4) and (5).
- ³¹ Proposed Rule at 73.
- ³² 2008 Guidance at 12.
- ³³ 33 C.F.R. § 328.3(b)(1) (proposed).
- ³⁴ Proposed Rule at 115.
- ³⁵ *E.g.*, Proposed Rule at 24, 114-15.
- ³⁶ Proposed Rule at 118.