

Proposed Rule on Scope of Clean Water Act Jurisdiction

EPA and the U.S. Army Corps of Engineers sent a proposed rule intended to clarify federal jurisdiction over “waters of the United States” under the Clean Water Act to the Office of Management and Budget for interagency review. EPA also released a draft scientific report on the “connectivity” of streams and wetlands to downstream waters, which is expected to provide scientific support for the proposed rule.

EPA and the Army Corps jointly implement the Clean Water Act’s Section 404 permitting program, which regulates discharges of dredged or fill material to “waters of the United States.” A series of Supreme Court cases, including *Rapanos v. United States* (2006), and *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001), created uncertainty in determining whether a water body falls within the “waters of the United States.” These decisions produced two competing jurisdictional tests, the “significant nexus” test and the “continuous surface water connection” test.

Under the “significant nexus” test, a wetland or “marginal” water body is subject to the Clean Water Act’s regulatory scheme if it has a “significant nexus” to a traditional navigable waterway. This nexus exists if a wetland or marginal water body “significantly affect[s] the chemical, physical, and biological integrity” of traditional navigable waters. Potentially relevant to application of this test, the draft scientific report concludes that streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters, and that wetlands in floodplains of riparian areas have significant chemical, physical, and biological impacts on downstream waters.

According to EPA, the proposed rule will “clarify the jurisdiction of the Clean Water Act,” provide “clarity on which waters are not subject to Clean Water Act jurisdiction, and greater certainty on which activities do not require Clean Water Act permits.” The agency stated that the proposed rule “does not propose changes to existing regulatory exemptions and exclusions, including those that apply to the agricultural sector” such as the exemption for “prior converted cropland.”

Public comments on the draft report are due November 6, 2013.

The draft report can be found [here](#).

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