

## News & Media

### EPA and Army Corps Propose Expansive Regulation Identifying Jurisdictional Waters under the Clean Water Act

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Articles & Alerts

#### **What is About to Happen**

- *A rule has been proposed that would broadly and unreasonably expand the definition of “waters of the United States.”*

#### **Who is Affected**

- *Any person or business entity that is adjacent to water bodies, or that uses surface water, or with operations that affect or could affect a surface water body.*

#### **What It Could Mean**

- *Additional regulatory burdens, including permitting and monitoring for water bodies that do not meet the traditional or common sense notion of “navigable waters.”*
- *Significant delays to linear or large projects like pipelines and major construction activities.*

#### **What You Can Do Now**

- *The comment period ends October 20, 2014. Please send in comments or contact Eugene Dice at 717-237-4865 to sign on to group comments with other Buchanan Ingersoll & Rooney clients.*

In response to the U.S. Supreme Court’s failure to establish definitive guidelines in a recent case, *Rapanos v. U.S.*,<sup>1</sup> the U.S. EPA and the Army Corps of Engineers issued a proposed regulation<sup>2</sup> redefining the “waters of the United States” and expanding the scope of jurisdictional wetlands under the federal Clean Water Act (CWA).

The proposed rule has potentially broad ranging impacts, as it applies to all CWA programs: the Section 402 NPDES program, Section 404 dredge and fill permitting programs, the Section 311 spill prevention program and Section 401 state certification programs. If adopted as proposed, the rule has the potential to impact virtually all industries, businesses, municipalities and landowners. The proposed rule would categorically define virtually all tributaries and waters which are “adjacent” to navigable bodies of water as jurisdictional “waters of the United States,” regardless of whether they flow into the navigable waters and irrespective of their size or the permanence of their flow. The broad scope of the rule could be applied to include ephemeral and man-made streams. Moreover, even if the body of water in question does not meet the designated criteria, EPA and the Army Corps have authority to consider it as jurisdictional using a case-by-case, “significant nexus” criteria.

#### **An Ambiguous Standard Forces Action**

The term “navigable waters” is defined in the Clean Water Act as, “the waters of the United States, including the territorial seas.” At the time the *Rapanos* case was decided by the U.S. Supreme Court, the Army Corps regulation defined jurisdictional waters to include virtually all waters, “the use, degradation or destruction of which could affect interstate or foreign commerce,” as well as all “adjacent” wetlands.<sup>3</sup>

Justice Scalia, joined by Justices Thomas, Alito and Roberts, found in *Rapanos*, that the term “waters of the United States” included “only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes.”

Wetlands were “adjacent” to such waters only if they have “a continuous [not intermittent] surface connection to bodies that are waters of the United States.

Justice Kennedy concurred in the result of the plurality opinion<sup>4</sup> but for different reasons, and he set forth a different standard for determining whether wetlands are jurisdictional. His analysis employs a “significant

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nexus” criterion, so that if a water or wetland has such a nexus, it is jurisdictional and does not require a continuous surface connection to render it so. The “significant nexus” in Judge Kennedy’s Opinion must be established scientifically on a case-by-case basis, when non-navigable tributaries are involved. Because the Army Corps in the case at issue in *Rapanos* did not conduct an appropriate “significant nexus” analysis, Justice Kennedy would reverse and remand for such analysis.

### **The Result – Too Broad**

Rather than choosing between one of the two tests, or using both to create a clear standard, the proposed rule includes elements of both the Scalia and Kennedy tests. The result gives the agency the right to include virtually any wetland, however remote, as jurisdictional, based on a “significant nexus” analysis. If promulgated, the proposed rule will have far-reaching impacts on many industries such as midstream oil and gas companies, construction companies and other industries where the activities may involve impacts to streams and wetlands. These impacts will result from the potential need to obtain federal permits for activities affecting wetlands that are isolated and remote from navigable waters, on a case-by-case, subjective analysis by government officials, rather than objective, well-defined standards.

For pipeline companies, the rule creates more opportunities for agencies to exercise discretion in permitting, thereby increasing potential scheduling delays. The cost and delay due to pipeline rerouting and the ambiguities caused by the potentially broad application of the rule, if adopted in its present form, will be significant, and they may require the acquisition and/or construction of replacement wetlands in order to obtain the necessary permits. Wetland mitigation will become more critical regardless of the ultimate fate of this rule.

Moreover, despite the fact that the EPA Science Advisory Board has not yet completed its review of EPA’s streams and wetland connectivity study, which provides the technical basis for the draft rule, the agencies have nevertheless decided to proceed to publish the draft rule and intend to seek public comment through July 21, 2014.

### **Key Takeaways**

- The proposed rule would tend to broaden the scope of Army Corps and EPA jurisdiction over waters and wetlands, causing delay or added expense or preventing altogether the construction of projects affecting remote and isolated resources.
- The broad scope of this rule is not required by court precedent and is contrary to a reasonable interpretation of the CWA.
- Those affected by this rule should submit comments favoring a more objective and definitive standard that will categorically exclude the need for Federal permits on isolated, inconsequential wetland areas. In this regard, it should be noted that Pennsylvania and other states have their own, broad-ranging wetland regulations of non-navigable wetlands and that the delay and costs of duplicative regulation and permitting is not justified for the wetlands that have no significant impacts on waters of the United States.

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<sup>1</sup> 547 U.S. 715 (2006)

<sup>2</sup> The proposed rule was published on April 21, 2014 at 79 Fed. Reg. 22188-22274. The public comment period ends on October 20, 2014.

<sup>3</sup> In a prior Opinion, the Supreme Court had overturned the “migratory bird rule,” which defined isolated wetlands as jurisdictional if used by migratory birds. It also held that isolated wetlands that did not actually abut a navigable waterway were not included as waters of the United States. Following this decision, however, the Army Corps continued to include intermittent tributary streams and ditches as jurisdictional waters, such that adjacent wetlands were deemed jurisdictional. Also, “adjacent” was defined to include “hydrologically connected” or otherwise having a “significant nexus” to the navigable water. *Solid Waste Agency of Northern Cook County v. Army Corps.*, 531 U.S. 159 (2001)

<sup>4</sup> A plurality opinion occurs where a majority of the justices agree on a given result but do not agree on the legal basis for the decision.

