

## EPA & USACE Clarify Protection for Nation's Streams & Wetlands

EPA-HQ-2011-0880 (Release Date: 3/25/14)

Comment Period ends 90 days once draft ruling appears in Federal Registry

Final Rule goes into effect 60 days following publication in Federal Register

The EPA & USACE (agencies) are interested in comments, scientific and technical data, caselaw, and other information that would clarify which 'other waters' should be considered jurisdictional and which do not have a significant nexus and might not be jurisdictional. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.

The benefit of the draft ruling is to "increase efficiency in determining coverage of the Clean Water Act". EPA Administrator Gina McCarthy stated, "We are clarifying protection for the upstream waters that are absolutely vital to downstream communities." Though "most seasonal & rain-dependent streams are protected,.... other types of waters may have more uncertain connections with downstream water and protection will be evaluated through a case specific analysis of whether the connection is or is not significant."

The proposed ruling was in response to U.S. Supreme Court cases **Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers** (SWANCC, 2001; Supreme Court ruled that the definition did not cover isolated, non-navigable ponds whose only connection to interstate commerce was their use by migratory birds), **U.W. v Riverside Bayview**, and **Rapanos v United States** (Rapanos, 2006; where a fractured Supreme Court, through Justice Kennedy's oft-cited concurring opinion, further limited the CWA's coverage to those waters that have a "significant nexus" to a navigable waterway.)

"The agencies propose to define 'waters of the United States' ..... to mean: traditional navigable waters; interstate waters, .... and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional 'waters of the United States' by rule – no additional analysis would be required. The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw."

"In addition, the agencies propose that 'other waters' (those not fitting in any of the above categories) could be determined to be 'waters of the United States' through a case-specific showing that, either alone or in combination with similarly situated 'other waters' in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated 'other waters' in the region should be identified."

“The agencies acknowledge that there may be more than one way to determine which waters are jurisdictional as “other waters.” To best meet their goals and responsibilities, the agencies request comment on alternate approaches to determining whether ‘other waters’ are similarly situated and have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas. In the discussion of ‘other waters’ later in the preamble, the agencies seek comment on these other approaches and whether they could better meet the goals of greater predictability and consistency through increased clarity, while simultaneously fulfilling the agencies’ responsibility to the CWA’s objectives and policies to protect water quality, public health, and the environment. Commenters will specifically be asked to comment on whether and how these alternate approaches may be more consistent with the goal of clarity, and the CWA, the best available science, and the caselaw.”

Submit comments, identified by Docket ID No. EPA-HQ-OW-2011-0880 by:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *E-mail:* [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include EPA-HQ-OW-2011-0880 in the subject line of the message
- *Mail:* Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.
- *Hand Delivery/Courier:* Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OW-2011-0880. Such deliveries are accepted only during the Docket’s normal hours of operation, which are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is 202-566-2426.

A few of the comments raising some concern of the proposed rule point out that in July 2013, the EPA assembled a Scientific Advisory Board to peer review a study the agency compiled called the *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The Board’s report is supposed to help develop any final rules. “This report, when finalized, will provide the scientific basis needed to clarify CWA jurisdiction, including a description of the factors that influence connectivity [of streams] and the mechanisms by which connected waters affect downstream waters.” EPA sent its proposed rules clarifying CWA jurisdiction to OMB on September 17, 2013, and released its draft scientific assessment for public comment on the same day. However, the scientific advisory panel did not meet for the first time until December 16, 2013, after the proposed rule was sent to OMB. As a result, the proposed rules have been drafted before the report was finalized. When there is a significant difference between proposed and final rules, courts may decide that agencies must start the process over again by drafting new proposed rules. According to the D.C. Circuit Court of Appeals, “Given the strictures of notice-and-comment rulemaking, an agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.” [*Environmental Integrity Project v. U.S. Environmental Protection Agency*, 425 F.3d 992 (D.C. Cir. 2005).] This may create an issue should the final rules differ significantly from the proposed rule.

Items raised by Perkins Coie (a legal firm) included:

- The *Rapanos* decision raised considerable doubt as to whether tributaries with only intermittent or ephemeral flows are subject to the CWA. The new rules would resolve this uncertainty by categorically establishing federal jurisdiction over tributaries regardless of their size or flow. And the new rules would define “tributary” to include virtually any natural or man-made channel or wetland that contributes flow, either directly or indirectly, to a downstream [jurisdictional] water body.
- In making “adjacent” waters subject to federal authority, the new rules would nullify the decision in *San Francisco BayKeeper v. Cargill Salt*, 481 F.3d 700 (9th Cir. 2007). In that case, the Ninth Circuit ruled that the existing regulations cover only adjacent **wetlands**, whereas adjacent waters that do not qualify as wetlands (such as ponds that lack wetland characteristics) are beyond federal authority.
- The new rules would substantially broaden the definition of “adjacent” to encompass all waters located within a floodplain or riparian area of, or that have a surface or shallow subsurface hydrologic connection to, a jurisdictional water body such as a river or lake. This revision would essentially eliminate the jurisdictional restriction under the agencies’ 2008 guidance interpreting *Rapanos* that an “adjacent” water must be in reasonably close physical proximity to the river or lake.
- The new rules would make it clear that **all** interstate waters – and thus all tributaries of, and all water bodies “adjacent” to, an interstate water – are covered by the CWA regardless of whether the interstate water is navigable or not.
- Even for small isolated waters that have no hydrological connection to a jurisdictional water body and are not located within a floodplain or riparian area, the new regulations would allow for the assertion of permitting authority on a case-by-case basis. In particular, the Corps and EPA would have the power to regulate these isolated waters if they can point to a “significant nexus” to a jurisdictional water body such as a river or lake. And this significant nexus can be shown if the isolated water, in combination with other similar waters in the same watershed, has anything more than a “speculative or insubstantial effect” on the chemical, physical or biological integrity of the river or lake.

Issue raised by Tana Kappel at the Nature Conservancy - Pollution in San Pedro River, Arizona: Storm water from construction sites carried oil, grease, and other pollutants into tributaries to the San Pedro River – an internationally recognized river ecosystem supporting diverse wildlife. However, the waters in question only flow for part of the year. EPA has had to discontinue all enforcement cases in this area because it was so time-consuming and costly to prove that the Clean Water Act protects these rivers.

*Pertinent Excerpts from the 371 page Proposed Ruling:*

*“The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation.”*

*“EPA’s Office of Research and Development prepared 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 (U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. The Report is under review by EPA’s Science Advisory Board, and the rule will not be finalized until that review and the final Report are complete.”*

*“The Report...explains how this scientific information supports the proposed rule.” The agencies are specifically requesting information that would inform the decision on how best to address “other waters”.*

*“The proposed rule will reduce documentation requirements and the time currently required for making jurisdictional determinations.”*

*“As a result of the Supreme Court decisions in SWANCC and Rapanos, the scope of regulatory jurisdiction of the CWA in this proposed rule is narrower than that under the existing regulations.”*

*“The most substantial change is the proposed deletion of the existing regulatory provision that defines “waters of the “United States” as all other waters such as intrastate lakes, rivers, streams (including intermittent streams), .... the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: which are or could be used by interstate or foreign travelers for recreational or other purposes; ..... Under the proposed rule, these “other waters” (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus as defined by the proposed rule. Waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas would not be “waters of the United States.” In addition, the proposed rule would for the first time explicitly exclude some features and waters over which the agencies have not generally asserted jurisdiction and in so doing would eliminate the authority of the agencies to determine in case specific circumstances that some such waters are jurisdictional “waters of the United States.”*

*Under the proposed first section of the regulation, .... the agencies propose to define the “waters of the United States” .... of the CWA to mean:*

- *[(a)(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;*
- *[(a)(2)] All interstate waters, including interstate wetlands;*
- *[(a)(3)] The territorial seas;*

- [(a)(4)] All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- [(a)(5)] All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- [(a)(6)] All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- [(a)(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 traditional navigable water, interstate water or the territorial seas.

“..... the rule would not change the following provisions of the existing rule ..:: traditional navigable waters; interstate waters; the territorial seas; and impoundments of “waters of the United States.”

The agencies propose that all tributaries as defined in the proposed rule are “waters of the United States.” While tributaries are “waters of the United States” under the existing regulation, the rule would for the first time include a regulatory definition of “tributary.”

This will eliminate the need to make a case-specific significant nexus determination for tributaries or for their adjacent waters because it has been determined that as a category, these waters have a significant nexus and thus are “waters of the United States.”

In ... (a)(6) of the proposed rule, the rule would clarify that adjacent waters, rather than simply adjacent wetlands, are “waters of the United States.” The rule would further clarify the meaning of “adjacent” by defining one of its elements, “neighboring.” The related terms of “riparian area” and “floodplain” are also defined in the proposed rule.

Unlike the categories of waters in ..(a)(1) through (a)(6), which would be jurisdictional by definition, these “other waters” would not be “waters of the United States” by definition; rather, these “other waters” would only be jurisdictional provided that they have been determined on a case-specific basis to have a significant nexus to a ... (a)(1) through (a)(3) water. Therefore, the rule also includes a definition of “significant nexus.”

The proposed section (b) excludes specified waters and features from the definition of “waters of the United States.” Those waters and features that would not be “waters of the United States” are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- Prior converted cropland.
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.
- The following features:

- *artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;*
- *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;*
- *artificial reflecting pools or swimming pools created by excavating and/or diking dry land;*
- *Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;*
- *water-filled depressions created incidental to construction activity;*
- *groundwater, including groundwater drained through subsurface drainage systems; and*
- *gullies and rills and non-wetland swales.*

*The rule does not affect longstanding exemptions in the CWA for farming, ... ranching and other activities, does not change regulatory exclusions for waste treatment systems and prior converted cropland, and does not change the regulatory status of water transfers. Where waters would be determined jurisdictional under the proposed rule, applicable exemptions of the CWA would continue to preclude application of CWA permitting requirements. For example, if “other waters” are aggregated as similarly situated in the region and determined to be jurisdictional, any exempt activities that include a discharge to those waters would remain outside the regulatory requirements of the CWA. Exempted discharges are established under CWA sections 402, 502, and 404 and include: agricultural stormwater discharges; return flows from irrigated agriculture; normal farming, silvicultural, and ranching activities; upland soil and water conservation practices; construction or maintenance of farm or stock ponds or irrigation ditches; maintenance of drainage ditches; and construction or maintenance of farm, forest, and temporary mining roads.*

*Summary of Significant Nexus Conclusions - .....Finally, some non-adjacent waters may have, in certain circumstances, a significant nexus to traditional navigable waters, interstate waters, and the territorial seas, but at this time the agencies are not proposing that a category of such “other waters” is jurisdictional by rule. These “other waters” may provide numerous functions of potential benefit to traditional navigable waters, interstate waters, and the territorial seas, including storage of floodwater; retention of nutrients, metals, and pesticides; and re-charge of groundwater sources of river baseflow. The functions of these “other waters” may affect downstream traditional navigable waters, interstate waters, and the territorial seas, depending on the characteristics of the connection to the river network. For “other waters,” connectivity varies within a watershed and over time, making it difficult to generalize about their connections to, or isolation from, traditional navigable waters, interstate waters, and the territorial seas. These “other waters” would be evaluated on a case-specific basis under the proposed rule.*

*Under the existing regulations, “other waters” (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be*

*jurisdictional if the use, degradation or destruction of the water could affect interstate or foreign commerce. Jurisdictional decisions for these waters are being made on a case-specific basis. As a practical matter in the past, the agencies generally relied on the presence of migratory birds to indicate an effect on interstate commerce. In 2001, the Supreme Court in SWANCC rejected the use of migratory birds as a sole basis to establish jurisdiction over such “isolated” intrastate nonnavigable waters.*

*Scientific literature establishes that “other waters” can have a relationship to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This relationship is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a “significant nexus.” There is a gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these “other waters” as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a “significant nexus.”*

*The other type of ditch that would not be a “water of the United States” is a ditch that does not contribute flow, either directly or through another water, to a water identified in .... (a)(1) through (4). Essentially, ditches that do not contribute flow to the tributary system of a traditional navigable water, interstate water or territorial sea would not be “waters of the United States.”*

*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.*

Full document can be found at: <http://www2.epa.gov/uswaters/definition-waters-united-states-under-clean-water-act>