

EPA AND ARMY CORPS OF ENGINEERS PROPOSE NEW RULE DEFINING “WATERS OF THE UNITED STATES”

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On Tuesday, December 11th, The United States Environmental Protection Agency (EPA) and the Army Corps of Engineers released a proposed rule clarifying which waterways are subject to jurisdiction under the Clean Water Act. The rule is intended to rescind and replace President Obama’s 2015 Clean Water Rule, which defined “waters of the United States” for all sections of the Clean Water Act (CWA) “to include the traditional navigable waters (a)(1), interstate waters (a)(2), the territorial seas (a)(3), impoundments of jurisdictional waters (a)(4), covered tributaries (a)(5), and covered adjacent waters (a)(6).” Furthermore, the original 2015 rule identifies certain types of waters that can be “waters of the United States” where a case-specific determination has found a significant nexus between the water and traditional navigable waters. The original rule affirms that five specific types of water (Prairie potholes, Delmarva and Carolina bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) are “‘similarly situated,’ and thus are to be considered in combination in a significant nexus analysis.”

In the 2015 rule, EPA and the Army Corps base their definition of “waters of the United States” on U.S. Supreme Court Justice Anthony Kennedy’s opinion in *Rapanos v. U.S.*, a case that attempted to illustrate the range of Clean Water Act jurisdiction. In his opinion, Justice Kennedy expressed a view of Clean Water Act applicability that was dependent upon the waters in question exhibiting either a significant nexus to a traditional navigable water or the ability to “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

The newly-proposed rule clarifying the definition of “waters of the United States”, on the other hand, takes a different approach to determining what kinds of waters are subject to CWA jurisdiction. Like the Obama-era EPA, the EPA and Army Corps under the Trump administration looked to *Rapanos* to craft their definition of “waters of the United States.” Yet, unlike the previous administration’s EPA, Trump’s EPA and Army Corps looked to Supreme Court Justice Antonin Scalia’s plurality opinion from the case, which defines a “water of the United States” as “relatively permanent, standing or flowing bodies of water.[...] None of these terms encompasses transitory puddles or ephemeral flows of water.”

In the proposed rule, EPA and the Army Corps create seven categories of waterways that will be covered under the Clean Water Act and exclude all others. The seven categories of covered waters are: “(1) All waters which are currently used, or 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) 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; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.”

Shortly after the proposed rule was propagated, several environmental advocacy groups, such as the Natural Resources Defense Council, criticized it for reducing protections that were included in the Obama-era rule.

The California Environmental Lawyers at Bick Law LLP will continue to monitor the actions of administrative agencies and their potential impacts on businesses around the country.