

# E – OUTLOOK

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## *EPA and Army Corps Attempt to Clarify Clean Water Act Jurisdiction*

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Earlier this year, on March 25, 2014, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers jointly released a proposed rule to clarify what constitutes “waters of the United States” for purposes of Clean Water Act jurisdiction. Due to a series of lawsuits and Supreme Court decisions (e.g., *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”), 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006)), determining which upstream waters fell under Clean Water Act protections became so confusing and uncertain that stakeholders and the public requested a rulemaking to clarify the issue.

The comment period was originally scheduled to end in late June, 2014. After receiving comments noting the complexity of the proposed rule, the Corps and EPA extended the comment period on the proposed rule until October 20, 2014, giving an additional 90 days to analyze and comment.

The EPA's press release stated that the definition in the proposed rule is consistent with the Supreme Court's narrow reading of Clean Water Act jurisdiction. Generally, apart from the more obvious protected waterways (e.g. navigable rivers and streams, interstate waters, territorial seas), the protections extend to:

- Impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;

- Tributaries of traditional navigable water, interstate water, the territorial seas or impoundment (including perennial, intermittent, or ephemeral waterways and waterways that at some point flow through a culvert, pipe, etc.);
- All waters, including wetlands, adjacent to (i.e. integrally linked to chemical, physical or biological functions of) a traditional navigable water, interstate water, the territorial seas, impoundments or tributary; and
- Other waters, including wetlands, that when evaluated on a case-specific basis, have a “significant nexus” to a traditional navigable water, interstate water or the territorial seas either alone, or in combination with other similarly situated waters, including wetlands.

“Significant nexus,” as it relates to this last category, means that a water, alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of the traditional navigable water, interstate water, or the territorial seas. The EPA and Army Corps are specifically requesting comments that might help streamline this analysis to avoid or limit case-specific assessments.

Existing exemptions and exclusions for agriculture remain in place in the proposed rule. An interpretive rule, prepared in coordination with U.S. Department of Agriculture, attempts to clarify activities considered exempt under the Section 404 dredge-and-fill permitting program. EPA explained this rule ensures conservation practices that protect or improve water quality will not be subject to Section 404 dredge-and-fill permits. Comments on the interpretive rule indicate that questions remain regarding exempt activities.

Early responses to the proposed rule appear to be varied. Some, particularly organizations representing agricultural interests, believe it has expanded federal jurisdiction over the nation’s water. Others think it will provide positive economic impact by better protecting headwaters and providing clarity. Given the mixed response, it is likely the proposed rule will undergo additional edits before it is finalized.

Additional information and a full version of the proposed rule may be viewed at the U.S. Environmental Protection Agency’s website at:

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

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If you would like to contribute to E-Outlook or have any comments, please contact the E-Outlook Editor, Sarah Liljefelt, at [s.liljefelt@water-law.com](mailto:s.liljefelt@water-law.com) or (503) 281-4100.