

EPA Proposes Rule Defining Waters Subject to Protection Under Clean Water Act

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On March 25, 2014, the EPA and U.S. Army Corps of Engineers jointly released a proposed rule defining the term “waters of the United States” under the Clean Water Act. Under the proposed rule, most seasonal and rain-dependent streams and wetlands near rivers and streams would be protected. Other types of waters with more uncertain connections to downstream jurisdictional waters would need to be evaluated on a case-by-case basis to determine whether they have a significant nexus to such waters. Although the Agencies claim the proposed rule does not expand Clean Water Act jurisdiction over waters of the U.S., the proposed rule does significantly expand the definition of a “tributary,” which is one of several types of jurisdictional waters, to include man-made waters and waters at which there are one or more man-made or natural breaks. Wetlands would also be considered tributaries even if they lack a bad and banks or an ordinary high water mark, as long as they contribute flow, either directly or indirectly, to certain jurisdictional waters.

The Agencies have requested comment on alternative approaches to determine which waters have a significant nexus to jurisdictional water and are therefore also subject to Clean Water Act protection. EPA is considering an approach that would consider waters in specific ecological or hydrologic landscape regions as similarly situated for purposes of the significant nexus evaluation. EPA is also seeking comment on the types of waters that should be determined non-jurisdictional. According to the agencies, the proposed rule is based on the most current peer-reviewed science, including the draft EPA report, [Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#). EPA’s draft report is currently undergoing review by the EPA’s Scientific Advisory Board.

In addition to the proposed waters of the U.S. rule, the Agencies also issued a final interpretive rule exempting specific agricultural conservation practices from Clean Water Act Section 404 permitting requirements. The interpretive rule is effective immediately.

In a [HuffPost blog post](#), EPA Administrator Gina McCarthy defended the proposed rule as necessary to clarify which waters are protected under the Clean Water Act, following the Supreme Court’s decisions that “narrowed legal protections.” Ms. McCarthy insisted that the rule does not expand the scope of waters historically protected under the Clean Water Act, but others who adhere to the more limited view of the Clean Water Act’s jurisdiction are disappointed that the EPA’s proposed rule will unduly expand the statute’s protection.

The Agencies will accept comment on the proposed rule for 90 days after it is published in the *Federal Register*, which has not yet occurred.

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