

EPA Releases Final Rule Defining “Waters of the United States”

JUNE 18, 2015

On May 26, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers finalized a rule defining “waters of the United States” subject to the Clean Water Act (CWA). The long-awaited rule comes nearly ten years after the Supreme Court’s decision in *Rapanos v. United States*, which exacerbated the uncertainty regarding the scope of the CWA’s jurisdiction. EPA and the Corps jointly developed the rule in an effort to increase predictability during jurisdictional determinations and to reduce the number of case-specific analyses required. The rule establishes eight categories of jurisdictional waters, six of which are *per se* covered by CWA and two of which may be subject to the CWA after a case-specific significant nexus analysis. The rule also establishes a number of exclusions from the definition of “waters of the United States.”

For the first time, the rule defines a tributary as a water characterized by the presence of a bed and banks and an ordinary high water mark that contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or territorial sea. This definition has been criticized by observers as overly broad and difficult for regulators to consistently implement. The rule also creates a broad definition of adjacent waters, which are *per se* jurisdictional if they border, are contiguous to, or neighbor a traditional navigable water, interstate water, territorial sea, or tributary. If a case-specific analysis is required, the rule creates a significant nexus test to evaluate whether a water, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea.

The rule has been criticized as an expansion of regulatory authority that creates further uncertainty in jurisdictional determinations. Challenges to the rule from industry groups and states are expected to be filed once the rule is published in the Federal Register. Meanwhile, bills to block the rule from taking effect have been introduced in both the [House](#) and [Senate](#) by Rep. David Rouzer (R-NC) and Sen. John Barrasso (R-WY), respectively.

2 Min Read

Author

[Eleni Kouimelis](#)

Related Locations

Chicago

Washington, DC

Related Topics

Water

Rulemaking

Related Capabilities

Environmental

Related Regions

North America

Related Professionals



Eleni Kouimelis

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.