

# Client Alert

Tort &amp; Environmental Practice Group

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## EPA and U.S. Army Corps of Engineers Propose to Expand Federal Jurisdiction over Waters and Wetlands

### *Expansive New Definition of “Waters of the United States”*

On March 25, 2014, the United States Army Corps of Engineers and the United States Environmental Protection Agency, which share jurisdiction under the Clean Water Act, released for comment a proposed rule that would significantly expand the definition of “waters of the United States.”<sup>1</sup> Under the proposed rule, *all* tributaries (including intermittent and ephemeral streams and even manmade ditches), *all* adjacent waters, and *all* adjacent wetlands would be subject to federal jurisdiction. The rule also includes an expansive new definition of “adjacency” that will sweep in many additional waterbodies.

The definition of “waters of the United States” has been in a state of flux in recent years. In 2006, the United States Supreme Court considered the scope of the current definition of “waters of the United States” in the seminal case *Rapanos v. United States*. In a concurring opinion, Justice Kennedy found that “waters of the United States” includes wetlands with a “significant nexus” to traditional navigable waters. Following the case, the agencies used the “significant nexus” test to determine Clean Water Act jurisdiction on a case-by-case basis for certain tributaries and adjacent waters. Instead of initiating rulemaking, the agencies released guidance documents for implementing the *Rapanos* decision.<sup>2</sup>

In September of 2013, EPA released a draft report entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.<sup>3</sup> The purpose of this report was to review and summarize the scientific literature concerning the connectivity of streams and wetlands to larger bodies of water such as rivers, lakes, and oceans. The major conclusion of this report is that all tributary streams, and wetlands in riparian areas, are physically, chemically, and biologically connected with downstream rivers. The agencies are using this report and its conclusions for scientific support of the proposed rule. Thus, once the proposed rule is effective, there will no longer be an opportunity to challenge whether tributaries (including intermittent and ephemeral streams), adjacent waters, and adjacent wetlands are waters of the United States.

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The proposed rule would have a major impact on businesses that develop or alter land—including energy companies, mining operations, developers, road builders, pipeline operators, reservoir builders, and many others. Projects that arguably do not currently require a permit will require one if this rule passes; and projects that already require permits will likely have to spend significant sums to purchase additional mitigation credits.

The proposed rule could also significantly increase municipal and industrial stormwater prevention requirements by expanding the number of waterbodies requiring protection.

Comments will be accepted for 90 days after the rule is published in the Federal Register. Persons potentially affected by this rule should consider filing comments. King & Spalding is actively involved in this process and is available to assist, both in determining the potential impact of the rule on specific business operations, and in preparing comments if warranted.

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<sup>1</sup> A pre-publication copy of the rule is available at <http://goo.gl/kdbSQL>.

<sup>2</sup> Previous agency guidance, including post-*Rapanos* guidance can be found at: <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

<sup>3</sup> Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/Watershed%20Connectivity%20Report?OpenDocument](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report?OpenDocument).