

EPA Withdraws Wetland Guidance, Issues Study That May Expand Federal Jurisdiction

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On September 17, 2013, EPA issued a new hydrological connectivity study that may expand the federal reach of the EPA and U.S. Army Corps of Engineers to regulate upstream waters and wetlands that do not have a permanent connection to traditional navigable waterways. In companion with this action, EPA has also withdrawn guidance intended to clarify the scope of Clean Water Act jurisdiction which the White House Office of Management and Budget has had since February 2012. In lieu of issuing guidance, EPA has sent a proposed rule to OMB for interagency review.

The scope of federal jurisdiction under the Clean Water Act to regulate non-navigable tributaries and wetlands that do not have a permanent connection to navigable-in-fact waters has been a source of confusion and uncertainty for many years. The most recent U.S. Supreme Court opinion only further muddied the waters in a split-decision concurring opinion authored by Justice Kennedy that set forth a “significant nexus” standard as to whether specific waters or wetlands may be regulated by the federal government. *Rapanos v. United States*, 547 U.S. 715 (2006).

One of the largest sources of debate has been whether intermittent or ephemeral waters that, while not permanent in nature, may nevertheless have some interconnection to downstream navigable waters, even if remote. According to EPA’s draft study, “[Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#),” it appears that the agency may now assert the existence of an adequate nexus between all tributary streams – even those that are only intermittent and ephemeral – and downstream waters. This would include, notably, wetlands and open waters in floodplains.

In addition to issuing the draft study, EPA has also sent a proposed rule to OMB for interagency review and withdrawn guidance that has been pending since February 2012. It is unclear at this time how much reliance, if any, the proposed rule relies upon findings from the recent EPA study.

EPA will hold public meetings on the draft study on December 16 and December 17 in Washington, D.C. EPA is also accepting comments on the study which may be submitted under EPA Docket EPA-HQ-OA-2013-0582.

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