

Draft Rulemaking Likely to Expand Clean Water Act Jurisdiction

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OVERVIEW

On September 17, 2013, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) announced a joint proposed rule that purports to clarify which streams, wetlands and other waters are “waters of the United States” and subject to jurisdiction under the federal Clean Water Act (CWA). The agencies sent the proposed rule to the White House’s Office of Management and Budget (OMB) but have not yet released it to the public.

In support of the proposed rule, the agencies have released a draft science report titled “*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*” ([Draft Study](#)). The Draft Study is a compilation of independent peer-reviewed scientific literature that when finalized, is intended to provide the scientific basis for the agencies to clarify CWA jurisdiction through the rulemaking process. The agencies could issue a final version of the Draft Study and publish a draft rule in the *Federal Register* in early 2014.

In 2012, the agencies announced their intent to undertake a rulemaking to clarify which waters of the United States are jurisdictional in light of U.S. Supreme Court decisions that have “muddied the waters.” One focus of the Draft Study, and likely the joint proposed rule, is the important effect that “ephemeral” and “intermittent” streams have on downstream rivers, lakes, estuaries and oceans. Another focus of the Draft Study, which is likely to lead to regulatory changes, is the important effect on downstream waters from wetlands and open waters that are located within floodplains and riparian corridors. The Draft Study also addresses the effect of isolated wetlands. It is very likely that the agencies will use the findings in the Draft Study to expand their jurisdiction over waters of the United States.

The Draft Study includes a helpful visual aid, which demonstrates the connectivity between various types of water bodies. See a copy of the visual aid at the end of the Alert.

BACKGROUND

Clean Water Act. The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To advance this purpose, the CWA prohibits the discharge of any pollutant into “navigable waters” except as authorized by the statute. The statute defines “navigable waters” as “the waters of the United States, including the territorial seas.” If a water body is not considered part of the “waters of the United States,” then the federal government has no authority to regulate the use of that non-jurisdictional water under the CWA, however, state and local governments may choose to regulate the water. Several different mechanisms in the statute authorize the agencies to regulate the discharge of pollutants, including CWA section 402, which establishes the National Pollutant Discharge Elimination System (NPDES) permitting program; and CWA section 404, which authorizes the permit program for the discharge of dredged or fill material (Dredge and Fill Program) into navigable waters.



Both the EPA and the Army Corps' existing regulations enumerate a list of seven types of waters that are considered "waters of the United States." In practice, agencies must make a case-by-case determination as to whether a particular water body, such as a stream or wetland that only flows after a rain storm, is part of the "waters of the United States." This practice is time and resource intensive and has led to a great degree of uncertainty among the regulated community, land owners and the courts.

U.S. Supreme Court Decisions. The U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States (Rapanos)* (and the companion case *Carabell v. U.S. Army Corps of Engineers (Carabell)*) limited the agencies' ability to assert jurisdiction over certain waters under the CWA. In 2001, *SWANCC* removed hydrologically isolated waters from federal CWA jurisdiction where the only interstate connection was the use of such waters by migratory birds. In 2006, the 4-1-4 split *Rapanos* decision created dual "tests" to determine whether particular wetlands are part of the "waters of the United States."

The *Carabell* case involved 16 acres of wetlands adjacent to a ditch, which ran one mile before emptying into a lake. The wetlands were separated from the ditch by a berm, which prevented any surface water connection to the ditch. The *Rapanos* case involved the alleged illegal filling of wetlands on three different parcels of land. While none of the parcels directly abutted a truly navigable body of water, they all had direct surface water connections to nearby drainages, which then flowed many miles to the nearest body of truly navigable water. The Army Corps pursued a civil action against the landowner for discharging pollutants into "navigable waters" without a permit, in violation of the CWA. The *Rapanos* decision created two different tests for courts to use when determining federal jurisdiction under the CWA: (1) Justice Scalia's "continuous surface connection" standard (the "Plurality" test) and (2) Justice Kennedy's "significant nexus" standard (the "Significant Nexus" text).

Under the more stringent Plurality test, CWA jurisdiction should be asserted over "only those relatively permanent, standing or flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]. . . oceans, rivers, [and] lakes.'" The Plurality test established a two-step process for evaluating federal wetland jurisdiction: first, an agency should determine whether ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and second, the agency should determine whether there exists a continuous surface connection between the wetland and the nearby ditches or drains.

The Significant Nexus test, which results in broader CWA jurisdiction, requires that the relationship between the wetland and the downstream navigable water be evaluated in light of the purposes of the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." According to Justice Kennedy, a significant nexus can be found "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters..."

ANALYSIS OF THE DRAFT STUDY AND LIKELY IMPLICATIONS

Initial Conclusions. The Draft Study reaches three initial conclusions, all of which imply that the agencies' proposed rule is likely to expand the scope of CWA jurisdiction. The Draft Study concludes: (1) "[s]treams,



regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters;” (2) “wetlands and open-waters in floodplains of streams and rivers and in riparian areas are integrated with streams and rivers;” and (3) there is insufficient information to determine the role isolated wetlands and open-waters play in the connectivity of downstream waters. These conclusions are discussed below.

All Streams May Be Considered Jurisdictional. The Draft Study very clearly concludes that all streams, no matter their size, their flow rate, or how often they flow in a calendar year, are “physically, chemically, and biologically connected to downstream rivers.” This conclusion is significant. In *Rapanos*, Justice Scalia’s Plurality Test limited jurisdictional waters to waters with a relatively permanent flow that possessed a continuous surface connection with more traditional types of waters. The Draft Study emphasizes that the study participants concluded that streams do not need either of these characteristics to impact the three enumerated purposes of the CWA: “to restore and maintain the **chemical, physical** and **biological** integrity of the Nation’s waters.”

Wetlands and Open Waters in Floodplains and Riparian Areas. The Draft Study’s second conclusion is that wetlands and open-waters located in floodplains and riparian areas strongly influence downstream waters by affecting flow, trapping and reducing pollutants, and exchanging biological species. This conclusion would appear to undercut the Plurality test that now requires wetlands to have a direct surface water connection to a traditional water body in order to be considered jurisdictional. EPA and the Army Corps may rely on this conclusion to create a “bright-line” test for regulating all wetlands located in floodplains and riparian corridors as being “waters of the United States” and avoid the need for any “significant nexus” analysis.


Unidirectional Wetlands. The final conclusion in the Draft Study relates to wetlands and open-waters that are outside of riparian areas and floodplains, referred to in the Draft Study as “unidirectional wetlands.” The Draft Study ultimately concludes that there is insufficient data in the available science to determine the connectivity of such water bodies, including those commonly referred to as “isolated waters,” to downstream traditional rivers, streams and oceans. However, the Draft Study does describe the various importance functions of these unidirectional wetlands. Based on the level of information supplied during the public comment period, the final study may revisit its conclusion on so-called “unidirectional wetlands.” Further, depending on further development of that record, EPA and the Army Corps may then support expanding CWA jurisdiction to these type of wetlands and isolated waters or take a more nuanced case-by-case approach to their regulation.

STATUTORY EXCLUSIONS

According to information released by EPA in connection with the Draft Study, the joint proposed rule will not propose changes to existing statutory and regulatory exemptions or exclusions. These exemptions and exclusions primarily concern the agricultural sector.

Exemptions from CWA permitting requirements will continue for:

- Agricultural stormwater discharges.
- Return flows from irrigated agriculture.

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- Normal farming, silvicultural, and ranching activities.
 - Upland soil and water conservation practices.
 - Construction and maintenance of farm or stock ponds or irrigation ditches.
 - Maintenance of drainage ditches.
 - Construction or maintenance of farm, forest, and temporary mining roads.

Exclusions from CWA jurisdiction will continue for:

- Prior converted cropland.
- Waste treatment systems.

The Proposed Rule submitted to OMB includes expansions of the current exclusions from CWA jurisdiction for:

- Non-tidal drainage, including tiles, and irrigation ditches excavated on dry land.
- Artificially irrigated areas that would be dry if irrigation ceases.
- Artificial lakes or ponds used for purposes such as stock watering or irrigation.
- Areas artificially flooded for rice growing.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.
- Pits excavated in uplands for fill, sand, or gravel that fill with water.

NEXT STEPS

According to the EPA, any final regulatory action related to CWA jurisdiction will be based on a final version of the Draft Study. However, the EPA has not indicated whether the joint proposed rule will be released for public comment before the Draft Study is finalized, after it is finalized, or concurrently with the release of the final version. The EPA will accept public comment on the Draft Study until October 31, 2013, and has announced that it will hold public meetings on December 16-18, 2013, in Washington, D.C.

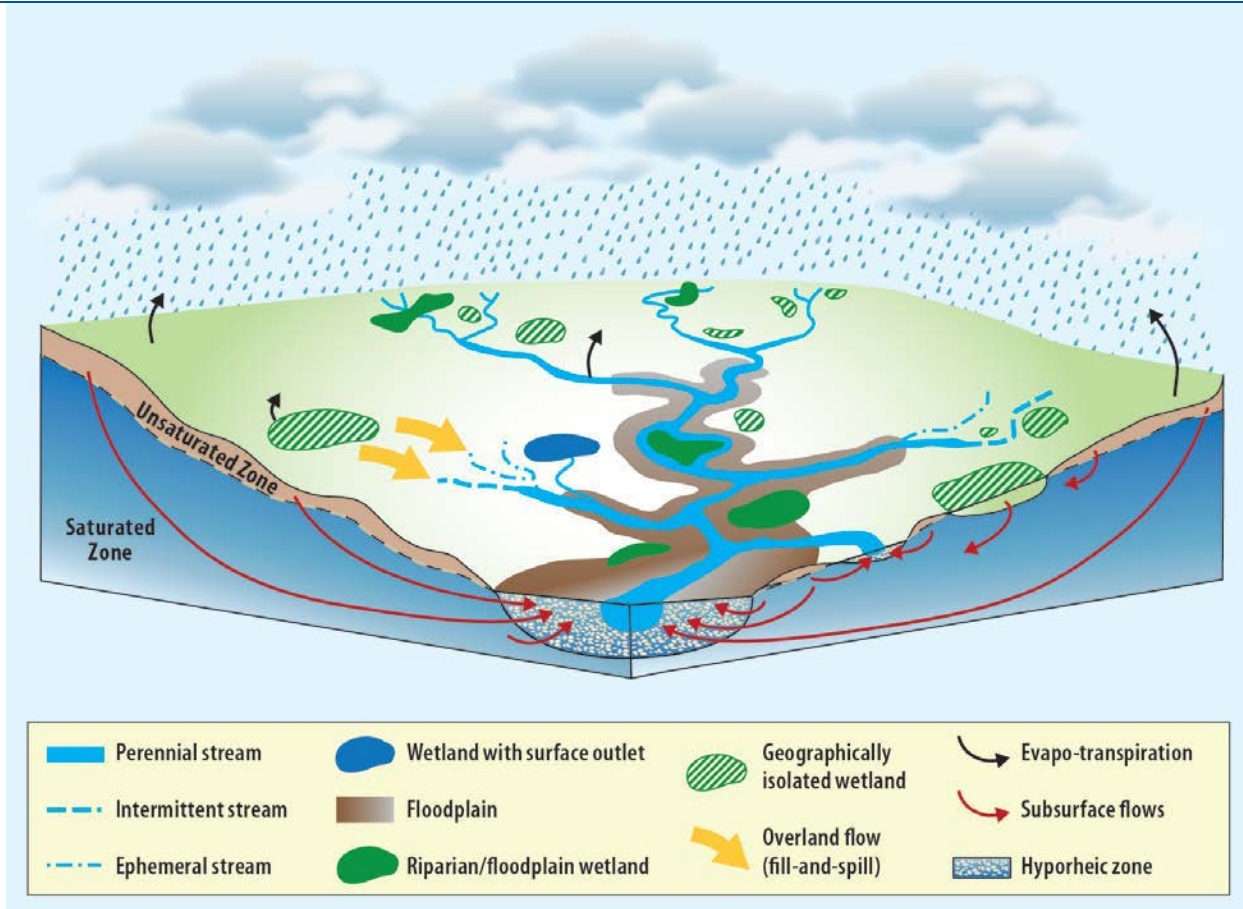
FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the Draft Study or assistance with participation in the public comment process, please contact [Brent Carson](#), [Joseph Nelson](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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SOURCE: Draft Study at 1-1.