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Waters of the United
States**

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A-1 Waters of the United States

U.S. Supreme Court decisions in 2001 and 2006, along with subsequent guidance issued by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), failed to resolve confusion over the definition of “waters of the United States,” a key term in determining whether water is subject to the federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA). Whether specific waters are within the jurisdiction of the CWA is significant because those waters are subject to stringent water quality and pollution control requirements.

In April 2014, the EPA and the Corps jointly published a proposed rule relating to the CWA. The proposed rule updated the existing rule to comply with Supreme Court decisions; specifically, it addressed the definition of the waters of the United States by making it clear such waters do not only include navigable waters but also waters with a “significant nexus” to navigable waters.

In July and September 2014, EPA leadership, in its official blogs, stated Spring 2015 was the target for publishing the final rules; however, the proposed rules would not be finalized until the report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review of Synthesis of the Scientific Evidence (Report)* was finalized. The final Report was published in January 2015. (For more information on the final Report, see below.)

On June 29, 2015, the final rule was published in the *Federal Register* and became effective on August 28, 2015. The EPA published a chart identifying the differences between the proposed rule and the final rule. The chart can be viewed at http://www2.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf.

On June 30, 2015, the Kansas Attorney General announced Kansas joined eight other states to file a lawsuit against the EPA and the Corps. Twenty-two other states have divided into four groups and filed similar lawsuits. The complaint argues the final rule usurps the states’ primary responsibility for the management, protection, and care of the intrastate waters and lands. The complaint also asks for the rule to be declared illegal, an injunction to be issued to prevent enforcement, and an order requiring the agencies to draft a new rule that complies with the law as it relates to states’ authority. The complaint can be accessed at <http://1.usa.gov/1U4xXLR>.

On August 27, 2015, a federal district court judge for the District of North Dakota issued an injunction to block the rule from going into effect until a full trial on the legality of the rule could be conducted. There were differing opinions over whether the injunction applied only to the 13 states named in the lawsuit or whether the injunction applied to the rule nationwide.

On October 9, 2015, the Court of Appeals for the Sixth Circuit issued a stay of the rule nationwide pending further order of the Court. The Court stated the EPA's new guidelines for determining whether water is subject to federal control – based mostly on the water's distance and connection to larger water bodies – is at odds with a key Supreme Court ruling.

History of the Clean Water Act and Waters of the United States

The CWA governs pollution of the nation's surface waters. It was originally enacted in 1948 and completely revised in 1972. In the 1972 legislation, a declaration was made to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The goals were to achieve zero discharge of pollutants by 1985 and obtain water quality that was both "fishable and swimmable" by mid-1983. Even though the dates have passed, the goals and efforts to attain those goals remain.

In 1987, multiple amendments were made to the CWA that turned the focus to nonpoint source pollution (storm water runoff from farm lands, forests, construction sites, and urban areas) and away from point source pollution (wastes discharged from discrete sources, such as pipes and outfall). States were directed to develop and implement nonpoint pollution management programs. Qualified states have the authority to issue discharge permits to industries and municipalities and to enforce permits. Kansas is authorized to administer this permit program.

The CWA is carried out by both federal and state governmental agencies. The federal government sets the agenda and standards for pollution abatement, and states carry out day-to-day implementation and enforcement.

Jurisdiction is a point of uncertainty and contention when state and federal governments are required to enforce the CWA. The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Under the CWA, the term "navigable waters" means "the waters of the United States, including the territorial seas." A Codified Federal Regulation expands the definition of "traditional navigable waters" as "waters subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 CFR § 328.3(a)(1).

U.S. Supreme Court Cases

Two U.S. Supreme Court cases address the issue of jurisdiction as it pertains to navigable waters.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (2001)

The Supreme Court held that the Corps exceeded its authority in asserting CWA jurisdiction over isolated intrastate, non-navigable waters based on their use as a habitat for migratory birds. The *Solid Waste Agency of Northern Cook County (SWANCC)* ruling eliminated CWA jurisdiction over isolated waters that are intrastate and nonnavigable, where the sole basis for asserting CWA jurisdiction is:

- The actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations;
- Any of the factors listed in the Migratory Bird Rule, such as use of the water as habitat for federally protected endangered or threatened species; or
- Use of the water to irrigate crops sold in interstate commerce.

Rapanos v. United States (2006)

The *Rapanos* case addressed whether a wetland or tributary is a water of the United States. The Justices issued five separate opinions with no

single opinion commanding a majority of the Court; therefore, the EPA and the Corps issued a memorandum to provide clarification of the findings shared by a majority of Justices as it relates to jurisdiction. The findings of *Rapanos* are as follows:

The CWA has jurisdiction over the following waters:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Non-navigable tributaries to traditional navigable waters that are relatively permanent, where the tributaries typically flow year-round or have continuous flow at least seasonally; and
- Wetlands that directly abut such tributaries.

The CWA has jurisdiction over the following waters if a fact-specific analysis determines they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent;
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and
- Wetlands adjacent to but do not directly abut a relatively permanent non-navigable tributary.

The CWA does not have jurisdiction over the following features:

- Swales or erosional features; and
- Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The significant nexus standard should be applied as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of the downstream traditional navigable waters; and

- Significant nexus includes consideration of hydrologic and ecologic factors.

Connectivity of Streams and Wetlands to Downstream Waters: A Review of Synthesis of the Scientific Evidence

The final Report published in January 2015 was used to inform the EPA and the Corps in drafting the final rule. (The full report can be accessed at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>.) The final Report made the following conclusions:

- The scientific literature unequivocally demonstrates that *streams*, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function;
- The scientific literature clearly shows that *wetlands and open waters in riparian areas* (transitional areas between terrestrial and aquatic ecosystems) and *floodplains* are physically, chemically, and biologically integrated with rivers *via* functions that improve downstream water quality. These systems act as effective buffers to protect downstream waters from pollution and are essential components of river food webs;
- There is ample evidence that many wetlands and *open waters located outside of riparian areas and floodplains*, even when lacking surface water connections, provide physical, chemical, and biological functions that could affect the integrity of downstream waters. Some potential benefits of these wetlands are due to their isolation rather than their connectivity. Evaluations of the connectivity and effects of individual wetlands or groups of wetlands are possible through case-by-case analysis;
- Variations in the degree of connectivity are determined by the physical, chemical, and biological environment, and by human activities. These variations support a range of stream and wetland functions that affect the integrity and sustainability of downstream waters; and

- The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across

entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.

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