



Public Notice

U.S. Army Corps of Engineers, Norfolk District

CLEAN WATER ACT PROPOSED RULE FOR DEFINITION OF WATERS OF THE U.S.

On 21 April 2014, the USEPA and the Corps of Engineers (Corps) are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)*. The proposed rule was developed to enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations, will require significant public involvement and engagement. Such involvement and engagement will allow the agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies – particularly on the category of waters known as "other waters."

The agencies propose to define "waters of the United States" in section (a) of the proposed rule for all sections of the CWA to mean: traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional "waters of the United States" by rule – no additional analysis would be required. The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and case law.

In addition, the agencies propose that "other waters" (those not fitting in any of the above categories) could be determined to be "waters of the United States" through a case-specific showing that, either alone or in combination with similarly situated "other waters" in the region, they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas. The proposed rule also offers a definition of significant nexus and explains how similarly situated "other waters" in the region should be identified.

The agencies propose to exclude specified waters from the definition of "waters of the United States" in section (b) of the proposed rule. The agencies propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA, no change to the exclusion for prior converted cropland, and no change to the regulatory status of water transfers. The agencies propose, for the first time, to exclude by regulation certain waters

and features over which the agencies have generally not asserted CWA jurisdiction. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public. Waters and features that are determined to be excluded under section (b) of the proposed rule will not be "recaptured" as jurisdictional waters under any of the categories in the proposed rule under section (a).

The agencies' decision on how best to address jurisdiction over "other waters" in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters (U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, (Washington, D.C.: U.S. Environmental Protection Agency, 2013)) ("Report") and other available scientific information.

The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment.

National Issues Concerning the Proposed Rule: Similar public notices are being published concurrently by other Corps division or district offices. The Federal Register notice is the public's opportunity to provide comment on the proposed rule. For more information on the proposed rule, please visit: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationalNoticeandProgramInitiatives.aspx>.

DATES: Submit comments on or before July 21, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2011-0880 by one of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail*: ow-docket@epa.gov. Include EPA-HQ-OW-2011-0880 in the subject line of the message.
- *Mail*: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.
- *Hand Delivery/Courier*: Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20460, Attention Docket ID No. EPA-HQ-OW-2011-0880. Such deliveries are accepted only during the Docket's normal hours of operation, which are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is 202-566-2426.

FOR FURTHER INFORMATION CONTACT: Ms. Donna Downing, Office of Water (4502-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number 202-566-2428; e-mail address: CWAwaters@epa.gov. Ms. Stacey M. Jensen, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number 202-761-5856; email address:

USACE_CWA_Rule@usace.army.mil; and include the EPA Docket ID No. EPA-HQ-OW-2011-0880 in the subject line of the message.