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New Rule Issued by EPA and the Army Corps of Engineers Expands Federal Jurisdiction over Waters and Wetlands

MAY 29, 2015 | PUBLICATIONS

On May 27, 2015, EPA and the Corps of Engineers released a final [rule](#) that expands federal jurisdiction under the Clean Water Act. The rule expands on existing law by asserting jurisdiction *by rule* over *all* tributaries to traditional navigable waters, without regard to the quantity or timing of flow. Tributaries are defined in the rule as “waters that are characterized by the presence of physical indicators of flow – bed and banks and ordinary high water marks – and that contribute flow directly or indirectly to a traditional navigable water, an interstate water, or the territorial seas”.

In addition, the rule asserts jurisdiction *by rule* over *all* “adjacent waters”. The definition of “adjacency” in the rule includes waters that are “bordering, contiguous or neighboring”, and covers waters that are not currently regulated. The definition of “neighboring” for purposes of establishing “adjacency” is quite broad, and includes waters located within 100 feet of the ordinary high water mark of a traditional navigable water or tributary, as well as waters located in the 100-year floodplain and that are within 1500 feet of the ordinary high water mark of a traditional navigable water or tributary.

Case-specific determinations of “significant nexus” will still be made for any water that is not categorically jurisdictional or excluded.

The final rule will significantly affect any business that develops or alters land, including state and local governments, utilities, energy companies, and developers. Some projects that previously would not have required a Clean Water Act permit may now require one.

The new rule takes effect 60 days after it is published in the Federal Register. If you have any questions concerning the rule, please contact Mike Comodeca or Katie Jo Wheeler.

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