

Draft Clean Water Jurisdiction Rule Leaked

November 13, 2013

By [Lowell Rothschild](#) and Matthew Haynie

Rule Could Have Significant Impact on Infrastructure, Energy and Land Development

On September 18, we [blogged about](#) the pending release of a draft rule which would establish the scope of waters subject to the federal Clean Water Act – a rule which could have significant impacts on entities engaged in infrastructure or other land development activities, such as upstream and midstream oil and gas development, highway projects and real estate developers. While still not yet formally proposed, a leaked version of the draft rule has surfaced, providing insight on what the US Environmental Protection Agency and Army Corps of Engineers' proposed rule will eventually look like.

Under the leaked draft rule, more waters would be facially jurisdictional than under the current regime. In addition, the rule would enshrine the case-by-case "significant nexus" test that the agencies have used informally since 2006, using it further expand the scope of jurisdictional waters.

The leaked draft was published last Friday by BNA (Daily Environment Report, 217 DEN A-1 (Nov. 8, 2013). Copyright 2013 by The Bureau of National Affairs, Inc. (800-372-1033) (<http://www.bna.com>). It shows that EPA and the Corps plan to make fairly subtle, but significant, changes to the current definitions which describe the jurisdictional "waters of the US." The rule would both change the definition of "waters of the US" itself and for the first time define some of the key terms used to describe those waters.

The definition of "waters of the US" would be changed in two ways:

1. First, all waters (not just wetlands) adjacent to jurisdictional waters would themselves be jurisdictional; under the current rule, only adjacent wetlands are jurisdictional.
2. The second, and perhaps more significant change, is that the new definition would enshrine in the regulations the "significant nexus" test described in the Supreme Court's splintered 2006 plurality decision in [Rapanos v. United States](#). The new significant nexus test would specifically state that a particular water or wetland can have a significant nexus – and therefore be jurisdictional – even if it is not significant in and of itself. Instead, significance can be shown if the particular water or wetland is significant in combination with other similarly situated waters and wetlands in the same region. This fact-intensive "significant nexus" inquiry will occur on a case-by-case basis.

The other major change is that the leaked draft rule would define for the first time several critical terms, including "tributary," "neighboring," "floodplain" and "riparian area." The

definitions of tributary and neighboring are particularly notable, since they also increase the scope of waters that are jurisdictional on their face.