

BLOG POST

Administration to Propose Water Jurisdiction Rule That May Affect Energy and Infrastructure Developers

September 18, 2013

On Tuesday, the Obama Administration gave in to pressure from Congress, environmental NGOs and industry, announcing that it has drafted a proposed rule intended to clarify the waters over which the federal government has jurisdiction under the Clean Water Act. This is an important and contentious question which has been at issue for the past 15 years largely because of two Supreme Court decisions on the topic, most notably the Court's splintered 2006 plurality decision in [*Rapanos v. United States*](#). The rulemaking has the potential to expand the federal government's oversight of activities based on their possible impact to aquatic resources. The eventual rule 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. If the final rule expands federal jurisdiction, more developers will need wetland permits than currently do.

The proposed rule was announced on September 17, 2013 via a [*post on the U.S. Environmental Protection Agency's "EPA Connect" blog*](#). According to the post, EPA and the U.S. Army Corps of Engineers based the proposed rule on a [*draft scientific report*](#) that "synthesizes more than 1,000 peer-reviewed pieces of scientific literature about how smaller, isolated water bodies are connected to larger ones and represents the state-of-the-science on the connectivity and isolation of waters in the United States." The proposal has been submitted to the Office of Management and Budget for interagency review before being made available for public review and comment. The OMB review process should take 90 days or less unless it is extended by the head of the rulemaking agency or the OMB Director.

The White House had been reviewing draft guidance from EPA and the Corps on this subject for more than a year and a half, and this announcement coincides with the withdrawal of that draft guidance. References and links to the draft guidance have been removed from the "waters of the United States" [*page on the EPA website*](#), although (as of today) the draft guidance is still available by going to [*the url where it had been previously located*](#).