

Client Alert

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Draft Rule Would Expand Clean Water Act Jurisdiction Over Many New Areas, Including Ditches and All ‘Waters’ Within Floodplains

The US Environmental Protection Agency (EPA) and the US Army Corps of Engineers have sent to the Office of Management and Budget (OMB) for interagency review a draft proposed rule defining the scope of federal Clean Water Act (CWA) jurisdiction. A copy of the [draft proposed rule](#) was obtained by Bloomberg BNA and has been made publicly available. The draft rule would regulate ditches as “tributaries” and all waters and wetlands within floodplains. The draft rule’s broad definition of “waters of the US” will have far-reaching consequences on the regulated public and the economy.

The draft rule relies heavily on EPA’s draft report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,” which has not yet been peer-reviewed or completed, to support its definitions. The draft connectivity report is currently being examined by a Science Advisory Board expert panel, which will convene to review public comments on December 16–18 in Washington, D.C.

The following are key points in the draft rule:

- The rule provides a broad definition of tributaries, allowing for regulation of anything with flow (including ditches), regardless of frequency or duration of flow;
- The rule expressly claims jurisdiction over desert areas in the arid West that are wet only during infrequent rainfall events;
- The rule defines ditches as jurisdictional tributaries, and other man-made conveyances that drain or connect would also likely qualify as tributaries (e.g., agricultural, roadside, irrigation and stormwater ditches);
- The rule establishes jurisdiction over wetlands or waters based on location within riparian or floodplain areas, but does not limit the concept of “floodplain” and instead leaves it to the agencies’ “best professional judgment” to determine the flood interval (e.g., 2-, 10-, 100- or 1,000-year floodplain) to be considered; and
- The rule establishes jurisdiction over “other waters” that are not considered tributaries or adjacent based on aggregation of those waters within a “single landscape unit,” which is undefined.

The rule would apply to all CWA programs.

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