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EPA'S NEW DEFINITION OF WATERS OF THE UNITED STATES

Jurisdictional Explanation





CURRENT DEFINITION:

“Waters of the United States” currently defined:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands”;
- (c) All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) *Which are or could be used by interstate or foreign travelers for recreational or other purposes;*



CURRENT DEFINITION:

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.



PROPOSED NEW DEFINITION:

Under the EPA's proposed new definition, "waters of the United States" includes:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;



PROPOSED NEW DEFINITION:

- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

WHY THE CHANGE?

Rapanos v. United States, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006)

In 1989, John Rapanos backfilled wetlands on a parcel of land in Michigan he sought to develop. The land included wetlands that were close to manmade ditches that emptied into a navigable body of water. The EPA determined the wetlands were waters of the United States and could not be filled absent a 404 permit.

After 12 years of litigation, the Supreme Court found in favor of John Rapanos but under a split 4-1-4 vote. Without specifically defining the EPA's jurisdiction, the Supreme Court came out with two different tests for determining what is and what is not "waters of the United States."



WHY THE CHANGE?

Justice Scalia Plurality

- “Only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers and lakes,’” that are connected to navigable-in-fact waters are subject to regulation under the Clean Water Act.
- They do “not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”
- “Only those wetlands with continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and are covered by the Act.

WHY THE CHANGE?

Justice Kennedy Concurrence

- Affect test to define waters of the U.S. Include any water that possesses “a significant nexus to waters that are navigable-in-fact or that could reasonably be so made”
- Affect test to define jurisdictional wetlands. “Wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetland, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.”

See Also:

U.S. v. Riverside Bayview Homes, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); and Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675 (2001)