

EPA Publishes Draft Scientific Report To Support Significant Expansion of Clean Water Act Jurisdiction

On September 17, 2013, the Environmental Protection Agency announced the release of a draft scientific report that is widely seen as a prelude to upcoming regulations that would significantly expand federal permitting jurisdiction under the Clean Water Act. [See our update](#) for more information about the draft report, which is titled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." In 2006, the Supreme Court's fractured 4-1-4 decision in *Rapanos v. United States*, 547 U.S. 715 (2006) significantly limited federal jurisdiction under the Clean Water Act. The deciding vote was Justice Kennedy's lone concurrence, which established that a "significant nexus" to a navigable water (such as a river or lake) is a prerequisite for asserting federal jurisdiction over non-navigable waters such as streams, ponds, and wetlands. But for the last seven years, it has been far from clear what the term "significant nexus" means in practice. In the wake of this uncertainty, the threshold question of whether the Clean Water Act applies has perplexed landowners and regulators, as legislative attempts to resolve the issue have gone nowhere and administrative efforts to develop definitive guidance have been mired in controversy. It is clear that the new draft report lays the scientific foundation for an expansive reading of "significant nexus." The draft report finds that all of the nation's streams, and most of its ponds and wetlands, are connected to and have important effects on navigable waters. When the report is finalized, it will serve as the basis for regulations addressing *Rapanos* and defining the extent of Clean Water Act jurisdiction. Proposed regulations have been submitted to the Office of Management and Budget for internal review, but have yet to be made public. Comments on the EPA's draft report are due by November 6. Stay tuned.

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