

# Info Alert

## National Conference of State Legislatures Office of State-Federal Relations

March 25, 2014

### EPA Unveils Proposed “Waters of the U.S.” Rule

On March 25, the U.S. Environmental Protection Agency (EPA) along with the U.S. Army Corps of Engineers (USACE) released the long-awaited [Definition of “Waters of the U.S.” Under the Clean Water Act proposed draft rule](#) to clarify which of the nation’s waterways fall under the Clean Water Act (CWA) permitting requirements. EPA originally submitted clarification for CWA jurisdiction for waters of the U.S. to the Office of Management and Budget (OMB) as a guidance document in 2011. However, in September 2013 EPA announced they would be moving forward with a rulemaking process and retracting the guidance document that was still under review at OMB.

NCSL has [long urged](#) the administration to undertake a formal rulemaking process instead of issuing guidance to clarify “waters of the U.S.” under the CWA, and was pleased to see EPA take this step. EPA noted in the proposal that they will continue to work closely with the states with respect to development of a final rule.

On an outreach call with state and local associations today, Acting Assistant Administrator for Water Nancy Stoner explained that the waters/wetlands that will be covered under the CWA in the proposed rule will include: all interstate waters, including interstate wetlands; all waters which are currently used for interstate or foreign commerce; the territorial seas; tributaries and impoundments of the above mentioned waters, and all adjacent waters to the above mentioned waters.

The proposed rule does not add new types of waterways that have not historically been covered under the CWA. Furthermore, the draft rule has a number of exemptions for waterways that will not be required to have CWA permits, including waste treatment facilities, converted cropland, ditches that do not have perennial flow and [agricultural activities](#).

Additionally, for those waterways that are geographically isolated from navigable waterways (known as “other waters”), the rule would define the scope of regulatory jurisdiction as was outlined in the U.S. Supreme Court Case [Rapanos v. United States](#) and aims to stick closely with the court’s interpretation. To this end, the proposal will initiate a case-specific significant nexus

evaluation for any “other water” or wetland before it is determined to fit under the CWA jurisdiction.

Along with the release of the draft proposal, the EPA and USACE simultaneously released an “interpretative rule” effective immediately that ensures 53 specific conservation practices that protect or improve water quality will not be subject to CWA permitting requirements.

The proposed rule will be open for public comment for 90 days past the date it is published in the Federal Register (expected imminently). EPA officials noted they do not expect a final rule to be released until 2015, at the earliest.

As always, if you have any questions or concerns regarding the announcement please do not hesitate to contact NCSL staff [Ben Husch](#) (202-624-7779) or [Melanie Condon](#) (202-624-3597).