



## Clean Water Rule Opens Litigation Floodgates

07.09.2015

With much fanfare, EPA and the Army Corps of Engineers (“Corps”) recently issued a final rule clarifying which bodies of water are “waters of the United States” protected under the Clean Water Act (“CWA”). Coming in the wake of the Supreme Court’s confusing decision in *Rapanos*, the so-called “Clean Water Rule” was issued to, among other things, make it easier to determine when waters are subject to federal jurisdiction. The litigation floodgates were opened the day the rule was issued. Sixteen States immediately filed suit to challenge the rule in U.S. district court in Texas, and a coalition of 13 States filed suit just days later in U.S. district court in North Dakota. Plaintiffs argue the CWA provides States with primary regulatory authority over such waters, and that the final rule significantly expands federal jurisdiction in an unconstitutional manner.

Among other things, plaintiffs allege the agencies failed to consider frequency, duration and flow in defining “tributaries.” The rule identifies tributaries as waters that are characterized by the presence of physical indicators of flow – such as a bed, bank, or a high water mark. Plaintiffs contend that failing to account for frequency, duration and flow means federal jurisdiction can be asserted over dry ponds, ephemeral streams, and ditches that conveyed water only at some point in the past.

In its defense, EPA in the rule’s preamble states that the rule actually decreases the number of waters that will be regulated. It says this is so because of important qualifiers and exclusions in the rule for certain categories of waters that will avoid case-by-case determinations.

The changes made by the rule are important because obtaining a permit to discharge fill material into waters of the United States can be a long and expensive process. Failure to obtain a permit prior to any such discharge may result in significant civil penalties of up to \$37,500 per day, along with criminal liability. We expect other States and industry groups will file or join similar lawsuits in the near future. Consequently, resolution of this issue will be years in the making.

**“Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37054 (June 29, 2015).**

## **Related People**

## **Related Services**

- Environment & Natural Resources