



## WATERS OF THE UNITED STATES UPDATE

- **A proposed rule from EPA would redefine “waters of the United States” under the Clean Water Act to include all natural and man-made tributary streams, lakes, ponds, ditches, and wetlands that affect downstream navigable waters, including those that are adjacent to, or separated from jurisdictional wetlands or waters by artificial berms.**
- **A connectivity report that EPA claims will justify the rule has not been fully reviewed, nor given legitimate time for public input and scrutiny.**

**Position:** ICSC opposes this proposed rule. Property owners, developers, and other stakeholders are concerned that the proposed rule is so broad that it effectively gives the EPA regulatory control over all man-made and natural bodies of water in the U.S. and could cause significant delays in the permitting process.

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**Background:** In November 2013, a draft rulemaking was released from the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers that would significantly expand the jurisdiction of the Clean Water Act. The rule would apply Clean Water Act (CWA) standards to all natural and man-made tributary systems, including streams, lakes, ponds, wetlands, and ditches. EPA released the rule less than 24 hours after the due date for public comments on the agency’s draft report, “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,” which served as the basis of the new rulemaking. Over 100,000 comments on the study were reportedly submitted, including comments submitted by ICSC through its role in the Waters Advisory Coalition (WAC). Moreover, the rulemaking was released before the completion of a review of the connectivity study by the Science Advisory Board (SAB). The EPA and the Corps have been pushing the proposed rule in order to avoid the need to make case-by-case nexus determinations and create a more efficient process to identify federally protected waters, or “waters of the United States.”

**Rationale:** Expanding determinations in how Clean Water Act regulations are applied will have a considerable impact on the ability of ICSC members to obtain timely permits to continue existing operations or develop new or expanding enterprises. The proposed expansion of the Clean Water Act will result in additional permitting of pollution discharges, some of which could take years to complete. The rule also takes the step of defining ditches as jurisdictional tributaries; and all other man-made conveyances that drain or connect would also likely qualify as tributaries. Of additional concern is that groundwater, which has been routinely excluded from federal jurisdiction by virtue of numerous court rulings, would now be included under CWA authority. Further, the rule expressly claims jurisdiction over desert areas in the arid West that are only wet during infrequent rainfall events.

It is important to note that past attempts by Congress to pass legislation to expand federal control of non-navigable waters have failed, including 2009 legislation to change the definition of “navigable” waters in the Clean Water Act. That legislation was opposed by ICSC and others in the real estate, agriculture, and energy sectors. Further, the rulemaking appears to be at odds with U.S. Supreme Court Justice Anthony Kennedy’s holding in the 2006 case of *Rapanos v. United States* — that waters must have a significant effect on traditional navigable waters in order for the federal government to have jurisdiction. By rushing through this process, EPA and the Corps are ignoring important constitutional checks and balances in an attempt to “rubber stamp” a pre-determined agenda. The rule also contradicts the Clean Water Act’s intention to grant states authority over land and water.

**Status:** ICSC is working with members of Congress, key staff, and industry stakeholders to promote the message that any changes to the Clean Water Act must be based on the finalized findings of the SAB and be considered by Congress. Several letters to EPA from the Congressional committees of jurisdiction have concurred with ICSC’s position.