

About us:

With over 20 attorneys in Alabama, Florida, Georgia and Mississippi focused exclusively on environmental law, and another dozen extensively engaged in environmental litigation, the Environmental and Natural Resources Section of **BALCH & BINGHAM** is one of the largest environmental practice groups in the country.

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EPA and Corps' Propose March 25, 2014 Rule to Expand Clean Water Act

On March 25, 2014, the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency released a pre-publication proposed rule expanding the definition of 'Waters of the United States' subject to the Clean Water Act. The new rule adds 'neighboring' areas; riparian areas; and areas 'adjacent' to waters of the United States to the regulatory program which carries requirements for permitting; enforcement; and mitigation.

Photo 29. Ephemeral tributary, a concrete flood control channel, Santa Barbara, CA.



Source: U.S. ARMY CORPS OF ENGINEERS JURISDICTIONAL DETERMINATION FORM INSTRUCTIONAL GUIDEBOOK (2007)

Hundreds of thousands of miles of ditches and water conveyances will be regulated if an ordinary high water mark ('OHWM') exists and the ditch contributes flow to a stream river, wetland, bay or other water. A created or altered ditch is considered a tributary if, *for any length*, there is at least one 'natural break' (such as wetlands at the head of or along the ditch or stream) so long as a bed and banks and an OHWM can be identified upstream of the 'natural break.' A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches. Also included are areas separated from rivers, streams or wetlands by man-made dikes or barriers, natural river berms, beach dunes "and the like."

The proposed rule is a result of the expansion of Clean Water Act jurisdiction resulting from the divided Supreme Court of the United States (SCOTUS) decision in *Rapanos v. United States* (2006). EPA and the Corps rely on the opinion of the sole Justice Anthony Kennedy on the divided 4-1-4 *Rapanos* decision as the guiding authority for the proposed rule. EPA and the Corps have since issued numerous guidances expanding the CWA scope based upon Justice Kennedy's opinion as explained by former EPA enforcement attorney and Balch partner Richard E. Glaze. *Rapanos Guidance III: Waters Revisited* (42 ELR 10118, Feb. 2012). The proposed rule can be found here:

http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_20140325_prepublication.pdf

Comments are due 90 days following publication of the rule in the Federal Register, Docket ID No. EPA-HQ-OW-2011-0880, and may be filed at www.regulations.gov. EPA is also requesting comment on an interpretive guidance regarding exempted agricultural activities.