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EPA and Army Propose New “Waters of the United States” Rule Rejecting Controversial 2015 Obama Rule

On December 11, 2018, EPA and the Army Corps of Engineers (ACE) rolled out their much anticipated proposed rule revising the definition of “Waters of the United States” (WOTUS) and setting the scope of federal authority to regulate waterways and wetlands under the Clean Water Act.

In one of his first acts in office, President Trump signed an executive order in February 2017 directing EPA and the ACE to rescind and replace the 2015 WOTUS rule promulgated by the Obama Administration. This proposed rule is the result of that effort to replace the 2015 Obama rule, which had been the subject of multi-jurisdictional litigation and whose implementation had been stayed in several states.

Although the task in this proposed rule is simply to define “waters of the United States,” it took 253 pages to do so. In explaining the approach to the proposed new rule, EPA Acting Administrator Andrew Wheeler said it is based on the principle that landowners should “be able to tell for themselves whether they have a federal waterway or not without hiring outside consultants.” In furtherance of the Administration’s commitment to federalism, agency officials also emphasized the continuing role of states and tribes in the protection of nonfederal waters.

[How is this proposal different from the Obama Administration’s 2015 rule and previous attempts to define “waters of the U.S.”?](#)

In the new proposed rule, EPA and the ACE took a fundamentally different approach than the previous Administration, creating six categories of waterways that would fall under CWA jurisdiction and excluding all others. The six categories of covered waters are:

1. Traditional navigable waters

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2. Tributaries to those navigable waters, meaning perennial or intermittent rivers and streams that contribute flow to a traditional navigable water in a typical year
3. Certain ditches, such as those used for navigation or those affected by the tide
4. Certain lakes and ponds that are similar to traditional navigable waters or that provide perennial or intermittent flow in a typical year to a traditional navigable water
5. Impoundments such as check dams and perennial rivers that form lakes or ponds behind them
6. Wetlands that abut or have a direct hydrologic surface connection to another water in the U.S.

Excluded from the rule are the following items which were included in previous rulemakings: ephemeral waters (such as dry washes or streams that only flow in direct response to precipitation); groundwater of any kind; artificial depressions, like sand and gravel pits; roadside ditches; agricultural ditches; quarries that fill up with water; and artificially irrigated areas like fields flooded for rice or cranberry bogs, among other waterways.

Areas for Which Comment is Sought

The preamble to the proposal solicits comment on several specific alternatives.

Tributaries: The proposal would define WOTUS to include streams that flow year-round and intermittent waterways that carry water only at certain times of year. However, EPA/ACE seek comment on whether the definition should be limited to just perennial waterways. This would be a significant narrowing of the CWA's current jurisdiction and that in the proposed rule. Alternately, EPA/ACE seek comment on extending jurisdiction to water features that contribute less than intermittent flow.

Wetlands: The proposal significantly reduce the wetlands currently protected under the federal CWA by limiting jurisdiction to those that touch or have a direct surface water connection to protected rivers, streams and lakes. EPA/ACE also seek comment on an even narrower definition limited to wetlands that are separated from downstream waters by levees or dikes, even if they are still hydrologically connected.

Traditionally Navigable Waters: The proposal wouldn't change the definition of these traditionally navigable waters.

EPA will seek comment for 60 days after the proposed rule is published in the Federal Register (anticipated in January, 2019).

The Context for This Latest Regulatory Proposal

Since the passage of the Clean Water Act in 1972, the executive branch and the judicial branch have struggled mightily to define and identify what waters Congress intended to be subject to federal jurisdiction when it referred to "waters of the United States." Few issues have been more controversial and few issues have generated as much attention. Hundreds of thousands of comments have been submitted each time EPA has proposed to address this issue. Numerous judicial decisions, including several Supreme Court opinions, have struggled to come to grips with Congress' intent when it passed the 1972 law. This proposed rule is the latest attempt to draw a line between what waters and wetlands come under federal jurisdiction and what come under the jurisdiction of the states.

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