



# U.S. EPA & Army Corps of Engineers Propose Revamp of "Waters of the United States"

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On December 11, 2018, in a move that follows on the heels of the litigation over the highly controversial 2015 move to redefine waters of the United States under the federal Clean Water Act, the U.S. EPA and the Army Corps of Engineers (collectively, the agencies) proposed a new definition of waters of the United States that would replace the 2015 Waters of the United States Rule (2015 WOTUS Rule). The proposed rule, if finalized, would change the definition of what is and is not considered water subject to Clean Water Act jurisdiction, with the stated goal of providing tribes and states more authority over their own water resources, while also providing greater regulatory certainty to the regulated industries and the public. The proposed rule does this principally by narrowing down what would be considered a water of the United States under the Clean Water Act.

It should be noted that while slimming down Clean Water Act jurisdiction may reduce the number of Clean Water Act Section 402 National Pollutant Discharge Elimination System Permits and Section 404 Permits for discharges of dredge and fill material that must be sought by the regulated community, it may also have a deleterious consequence for the regulated community's larger permitting efforts. Specifically, Section 404 permits often provide a federal nexus that enables nonfederal infrastructure agencies and developers to use the more streamlined and simpler Section 7 process to seek clearances under the federal Endangered Species Act for incidental impacts to species listed as endangered and threatened, and to habitat designated as critical habitat under that Act. Since Clean Water Act jurisdiction authorizing issuance of Section 404 permits would be more limited, the ability to establish a federal nexus as necessary to use the more streamlined Section 7 process for Endangered Species Act clearances would also be more limited.

In redefining waters of the United States the agencies focus on the overlap between the two separate opinions issued by the Justices of the U.S. Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006) regarding the scope and reach of jurisdictional waters. In this context, the agencies make a conscious move to codify in regulation those factors considered important for determining jurisdictional waters as described

in the opinion authored by Justice Scalia, rather than relying primarily on the opinion authored by Justice Kennedy as prior rules and guidance did. Against this legal backdrop, the agencies frame the proposed redefinition as proposing outer bounds for their authority under the Clean Water Act . . . . Specifically, the proposed redefinition makes the following changes:

- Removes the separate definitions of interstate waters and interstate wetlands as separate categories of waters of the United States;
- Redefines tributary to mean a river, stream, or similar naturally occurring surface water connection that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters. This is likely to decrease the number of waters that are considered jurisdictional tributaries;
- Excludes streams and drainages that flow only ephemerally from the definition of tributary;
- Adds definitions for perennial, intermittent, and ephemeral;
- Redefines ditches as simply artificial channels used to convey water and includes them as waters of the United States only if they meet specific criteria (that they are (1) otherwise a water of the United States; (2) are constructed in a tributary; or (3) are constructed in an adjacent wetland);
- Redefines lakes and ponds to be jurisdictional waters only in three instances (that they (1) are otherwise a water of the United States; (2) contribute perennial or intermittent flow to a water of the United States in a typical year; or (3) are flooded by another water of the United States in a typical year);
- Retains the regulatory definition of wetlands, but redefines adjacent wetlands to mean wetlands that abut or have a direct hydrologic surface connection to other 'waters of the United States' in a typical year. This redefinition excludes wetlands that are physically separated from waters of the United States or are present in uplands, and notably requires that the hydrologic connection between a water of the United States and an adjacent wetland be a surface connection. This is likely to decrease the number of wetlands considered jurisdictional adjacent wetlands, and responds to the concern that, under the 2015 WOTUS Rule, wetlands up to 1500 feet away from a jurisdictional water with no connection fell within Clean Water Act jurisdiction (notwithstanding the significant nexus requirements set forth in *Rapanos*);
- Clarifies that any feature that is not explicitly included in the definition of waters of the United States is excluded, in an attempt to limit the discretion of regulators to assert broader jurisdiction than set forth in the regulations on a case-by-case basis. Features that are not part of the proposed definition of waters of the United States include:
  - Groundwater, including groundwater drained through subsurface drainage systems;
  - Ephemeral surface features and diffuse stormwater run-off (including directional sheet flow over uplands);
  - Ditches that do not meet the newly-established requirements;
  - Prior converted cropland (which is subject to a new definition and explanation under the proposed rule);
  - Artificially irrigated areas;
  - Artificial lakes and ponds constructed in uplands;
  - Water-filled depressions in uplands;
  - Stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off;
  - Wastewater recycling structures constructed in upland; and
  - Waste treatment systems (which are subject to a new definition which would include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge).

The purpose of these changes is to create a rule with bright lines to clarify what is and is not subject to Clean Water Act jurisdiction, providing greater clarity for the agencies, States, Tribes, regulated entities, and the public. In the case of both prior converted cropland and waste treatment systems, the proposed rule is meant to clarify preexisting exclusions from waters of the United States by providing a clearer delineation for the bounds of the Clean Water Act's reach and when the exclusions may not apply. However, at least with respect to water treatment systems, the exclusion under the proposed rule is actually narrower, and not as helpful to the regulated community, as the exclusion under the 2015 WOTUS Rule.

If implemented, this proposed rule will have the dramatic effect of slimming down the Clean Water Act jurisdiction over adjacent wetlands and tributaries through the revised definitions, as well as through the introduction of additional exclusions from the definition of waters of the United States. It responds to multiple concerns raised about the broadened scope of Clean Water Act jurisdiction under the 2015 WOTUS Rule.

The proposed rule has not yet been published in the Federal Register, but once published, the agencies will be accepting public comment on the proposal for at least 60 days. The notice indicates that the agencies seek public comment on all aspects of the proposed rule. Responses to comments must be prepared and considered by the agencies prior to adopting the rule as final. After the proposed rule is adopted as final, it is likely that litigation will follow. Thus, it is likely that the currently applicable 2015 WOTUS Rule or its predecessor is likely to remain in effect for a substantial period of time. Whether the 2015 WOTUS Rule or its predecessor is in effect in any particular state varies based on the court rulings in multiple separate challenges to the 2015 WOTUS Rule. The rule in effect in a particular state can be determined by accessing this map available on the U.S. EPA website here.

The narrowing scope of what are considered waters subject to federal jurisdiction may drive states to fill the gap with state regulation. For those of you in California engaged in public infrastructure or private development, the proposed redefinition of waters of the United States will put great momentum behind California's adoption of new regulations creating an expansive state law permitting program for discharges of dredge and fill material. In California, the State Water Resources Control Board is expected announce those regulations before the end of this week, and to propose a hearing to adopt them on January 22, 2019. Check back with us for more coverage of the changes to California's dredge and fill program.