



New waters of the United States definition released

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Introduction

The Army Corps of Engineers and the U.S. Environmental Protection Agency are rolling out a proposed rule restricting the federal government's jurisdiction over waterways under the Clean Water Act, by issuing a new and narrower definition of "waters of the United States" ("WOTUS").

The proposed new definition

The proposed rule sets forth six categories of waterways that will be federally regulated:

1. Traditional navigable waterways, including the territorial seas;
2. Tributaries that contribute perennial or intermittent flow to traditional navigable waterways;
3. Ditches that function like a traditional navigable waterway, such as the Erie Canal, as well as ditches that contribute flow to a traditional navigable waterway in a typical year;
4. Lakes and ponds that contribute flow to a traditional navigable waterway in a typical year;
5. Impoundments such as check dams and perennial rivers that form lakes and ponds behind them;
6. Wetlands that abut or have a direct hydrological surface connection to jurisdictional waters.

While all of the above were deemed WOTUS under the "Obama" WOTUS rule, any waterways that are not included in these six categories will not be federally regulated. For example, groundwater (including groundwater drained through subsurface drainage systems) is explicitly excluded from WOTUS. In addition, prior converted cropland, artificially irrigated areas, certain artificial lakes and ponds, water-filled depressions associated with mining or construction activity, stormwater control features, wastewater recycling structures and wastewater treatment systems are excluded. Also excluded as a direct attack on the Obama WOTUS rule are most ditches and tributaries with periodic flow.

However, wetlands that physically touch a jurisdictional water or that have perennial or intermittent flow between the wetland and the jurisdictional water will be federally regulated. In contrast, wetlands that are physically separated from jurisdictional waters by land, dikes, barriers or other structures and that also lack a direct surface connection to jurisdictional waters will not be WOTUS.

Regardless of groundwater's proposed exclusion as mentioned above, the Supreme Court's pending decision regarding [whether discharges to groundwater are regulated under the Clean Water Act](#) will likely continue to muddy the water.

In what may be troublesome to the likely court challenges to the proposed rule if and when it is finalized, the proposed rule eliminates Supreme Court Justice Kennedy's significant nexus test stated in *Rapanos v. U.S.*, 547 U.S. 715 (2006), which allowed for a case-by-case analysis of whether a particular waterway was sufficiently connected to a jurisdictional water to trigger a WOTUS finding. Instead, the new rule is in line only with Justice Scalia's plurality opinion in *Rapanos*, which held that federal jurisdiction should extend only to relatively permanent, standing or continuously flowing bodies of water connected to traditional navigable waters and to wetlands with a continuous surface connection to such waters.

Outlook

According to EPA, the proposed rule clarifies the grey area of whether or not a particular waterway is within the federal government's jurisdiction and will help landowners and developers to understand much more quickly whether or not a project will require a federal permit, and fewer projects overall will require a federal permit. However, it is important to note that even if a certain water is not within the scope of the Clean Water Act, it still may be regulated under state law and a state permit may be required.

The proposed rule will be published in the *Federal Register*, beginning the sixty-day public comment period. According to EPA's fall 2018 regulatory agenda, the EPA plan is to repeal the Obama WOTUS rule in March 2019 and finalize this proposed rule later in 2019. More likely, the two events will happen simultaneously, and then be followed by yet another round of the seemingly endless WOTUS court battles.

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