

Proposed Rule for New “Waters of the United States” Definition Published in Federal Register

February 21, 2019

On February 14, 2019, the Environmental Protection Agency and the Department of the U.S. Army Corps of Engineers (collectively "the agencies") published the "Waters of the United States" ("WOTUS") proposed rule in the Federal Register. 84 Fed. Reg. 4154-4220 (Feb. 14, 2019)(to be codified at 33 C.F.R. pt. 328). According to the agencies, this proposed rule is intended to provide a clearer definition of which "navigable waters" are federally regulated under the Clean Water Act ("CWA").

The CWA regulates discharges of pollutants and other activities related to "navigable waters," which the CWA describes as "waters of the United States." 33 U.S.C. 1362(7). The CWA does not specifically define WOTUS, but the proposed rule will determine which bodies of water are under the jurisdiction of the agencies for regulation under various federal programs including: the National Pollutant Discharge Elimination System Program, National and Local Pretreatment Standards, Dredge or Fill Discharge Permit Program, Sewage Sludge Use and Disposal Program and Water Quality Management.

Decades of controversy, including rule changes and lawsuits spanning multiple administrations, have sought to clarify the reach of federal control over the nation's waterways. The United States Supreme Court has addressed this issue on multiple occasions beginning in 1985 and most recently in *Rapanos v. United States*, 547 U.S. 715 (2006). On February 19, 2019, the Supreme Court agreed to consider a Ninth Circuit opinion that held the CWA gives the government the authority to regulate discharges through groundwater, a provision that is an exception in the proposed rule as currently drafted. *Hawai'i Wildlife Fund v. Cnty. Of Maui*, 886 F.3d 737 (9th Cir. 2018).

As a brief background, in 2015, under the Obama Administration, the agencies published the "Clean Water Rule: Definition of 'Waters of the United States' (80 Fed. Reg. 37054, June 29, 2015)" that created an expanded definition of WOTUS. This definition substantially broadened the previous interpretation of WOTUS and subjected more bodies of water to the requirements of the CWA on the basis that they share a "significant nexus" with larger bodies of WOTUS like rivers, lakes and oceans. This "significant nexus" test was premised upon Justice Kennedy's concurring opinion in *Rapanos*. This new 2015 rule was immediately challenged in the courts and stayed by the 6th Circuit. *See, i.e., In re: Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, Nos. 15-3799/3822/3853/3887, (6th Cir., 2015); *Carolina Coastal Conservation League v. Pruitt*, D.S.C., No. 18-00330, 8/16/18.

On February 28, 2017, President Trump issued Executive Order 13778 titled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" which charged the agencies to "publish for notice and comment a proposed rule rescinding or revising the [2015] rule, as appropriate and consistent with law." 82 Fed. Reg. 12497 (March 3, 2017).

The proposed rule as published in the Federal Register creates six different categories of regulated waters including the following to be codified under 33 C.F.R. §328.3(a):

- 1) Waters** (Traditional Navigable Waters), including the territorial seas, waters subject to the ebb and flow of the tide and waters currently or in the past used in interstate and foreign commerce. 84 Fed. Reg. 4203, (to be codified under 33 C.F.R. §328.3(a)(1));
- 2) Tributaries** that contribute perennial or intermittent flow to traditional navigable waters. 84 Fed. Reg. 4203 (to be codified under 33 C.F.R. §328.3(a)(2)), *see also*, 84 Fed. Reg. 4155;
- 3) Certain ditches** that satisfy the requirements in (a)(1) -- traditional navigable waters or connected waters with a tributary or adjacent wetland that meets the definition of tributary. 84 Fed. Reg. 4203 (to be codified under 33 C.F.R. §328.3(a)(3)). Generally, ditches are not meant to be considered "waters of the United States", however specific ditches, including some adjacent wetlands as defined, may be included if specific requirements enumerated in the rule are satisfied. *See also*, 84 FR. 4155 and 4179.
- 4) Certain lakes and ponds** that satisfy any of the conditions in a traditional navigable water are proposed to be included. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(a)(4));
- 5) Impoundments** have historically been determined by the agencies to be jurisdictional because impounding a "water of the United States" generally does not change the water body's status as a "water of the United States." Most impoundments do not cut off a connection between upstream tributaries and a downstream traditional navigable water or territorial sea. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(a)(5)), *see also*, 84 Fed. Reg. 4172; and
- 6) Adjacent Wetlands** includes all adjacent wetlands to traditional navigable waters, including the territorial seas; tributaries to those waters; jurisdictional ditches; jurisdictional lakes and ponds; and impoundments of otherwise jurisdictional waters. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(a)(6)).

The proposed rule also includes 11 exemptions to be codified under 33 C.F.R. §328.3(b) as follows:

- 1) Waters or water features not referred to as a covered WOTUS. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(1));

- 2) Ephemeral features and diffuse stormwater runoff. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(3)) (i.e. waterbodies that only exist for a short period due to rain, snow melt or other precipitation);
- 3) Groundwater, including groundwater drained through such surface drainage systems. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(2)), *see also*, 84 Fed. Reg. 4190;
- 4) All ditches except those traditional navigable "waters of the United States" or ditches constructed in a tributary as long as those ditches also satisfy the conditions of the tributary definition; or ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(4));
- 5) Prior converted cropland. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(5));
- 6) Artificially irrigated areas including fields of flooded rice or cranberry growing that would revert to an upland if the irrigation ceased. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(6));
- 7) Artificial lakes and ponds constructed in an upland such as water storage reservoirs, farm and stock watering ponds, and log cleaning ponds 33 C.F.R.. 84 Fed. Reg. 4204 (to be codified under §328.3(b)(7));
- 8) Water filled depressions created in upland incidental to mining or construction activity and pits excavated for fill, sand or gravel. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(8));
- 9) Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater runoff. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(9));
- 10) Wastewater and recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, groundwater recharge basins. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(10)); and
- 11) Waste treatment systems. 84 Fed. Reg. 4204 (to be codified under 33 C.F.R. §328.3(b)(11)).

The agencies are accepting public comment on the proposal. The public comment period will close on April 15, 2019.

If you have any questions concerning the proposed WOTUS rule or any other federal or state environmental laws, please contact Randi Schillinger or Geri Albin of Saiber LLC's Environmental Law practice.

DISCLAIMER

This notice is for information purposes only and should not be relied upon as legal advice applicable. The reader should consult with an attorney to determine how the information discussed in this notice may apply to any particular context.