



Scope of Clean Water Act Jurisdiction Set to Change

On April 21, 2020, the U.S. Army Corps of Engineers (“Corps”) and the Environmental Protection Agency published the finalized Navigable Waters Protection Rule in the *Federal Register*, ushering in significant changes to the definition of Waters of the United States (“WOTUS”), those waters federally regulated under the Clean Water Act. The rule affects multiple Clean Water Act programs, including Section 404 (wetlands), Section 402 (end-of-the-pipe discharges), and Section 311 (oil and hazardous substance spills). The rule is available [here](#), and an EPA fact sheet regarding the rule is available [here](#). For more background information, our latest article regarding the WOTUS saga is available [here](#).

The rule is the second step in a two-step process to review and revise the Obama era definition of WOTUS, as directed by the February 2017 Presidential Executive Order 13778. EPA’s first step, in October 2019, was to repeal the Obama administration’s 2015 WOTUS rule, temporarily returning the state of WOTUS law to pre-2015 times. Now, in this second step, EPA and the Corps have finalized their replacement for the Obama era rule. This new rule will become effective on June 22, 2020.

The new rule interprets Waters of the United States to encompass four primary types of waters: (1) the territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) tributaries; (3) lakes and ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other waters of the United States. The simplicity of this four-part definition has the potential to mislead; facilities are not likely to experience jurisdictional debates with regulators quickly resolving themselves.

The rule expressly excludes certain waters from the definition of WOTUS:

1. waters not identified in the four categories above;
2. groundwater, including groundwater drained through subsurface drainage systems;
3. ephemeral features, including ephemeral streams, swales, gullies, rills, and pools
4. diffuse stormwater run-off and directional sheet flow over upland;
5. ditches that are neither territorial seas nor waters currently or formerly used in interstate or foreign commerce nor tributaries, and those portions of ditches constructed in adjacent wetlands that do not themselves satisfy the definition of adjacent wetlands;
6. prior converted cropland;
7. artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;
8. artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in nonjurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet certain enumerated conditions;
9. water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in nonjurisdictional waters for the purpose of obtaining fill, sand, or gravel;
10. stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;
11. groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and
12. waste treatment systems.

EPA and the Corps state that the new rule will “restore and maintain the integrity of the nation’s waters by maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress’ policy directive to preserve States’ primary authority over land and water resources.” Furthermore, the rule “increases the predictability and consistency of Clean Water Act programs by clarifying the scope of [WOTUS].”

Interested parties will almost certainly file numerous legal challenges to the rule. The rule generated more than 1.1 million public comments submitted to EPA and the Corps.

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