

Waters of the United States/U.S. EPA Proposed Rule: Arkansas Game and Fish Commission Comments



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The United States Environmental Protection Agency (“EPA”) has received thousands of comments in the Administrative Docket for the proposed revisions to the Clean Water Act definition of Waters of the United States (“WOTUS”). See Docket No. : EPA-HQ-OW-2018-0149.

A few of the submitted comments have originated from organizations or entities located in the State of Arkansas

EPA and the United States Corps of Engineers (“Corps”) proposed revisions to WOTUS on December 11, 2018. Further, they had previously rescinded the Obama era revision clarification of WOTUS

The definition of WOTUS is arguably one of the three critical jurisdictional terms of the Clean Water Act. Its importance is magnified by the fact it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substance Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

The December 11th proposed changes to the rules were briefly delineated here. (See previous post [here.](#))

One of the Arkansas organizations that submitted comments on the proposed rule is the Arkansas Game and Fish Commission (“AGFC”). The comments submitted by AGFC were signed by Pat Fitts, Director.

The AGFC comments note that its staff reviewed the proposed rule and initially states its appreciation for the effort to grant:

. . .State and tribal authority over their own land and water resources.

It is further stated that while Arkansas’s waters of the state law is broad, AGFC currently relies “on the federal process to review proposed impacts to our streams and wetlands because we do not have the funding or staff to assume this responsibility.”

Additional points raised by AGFC include:

- By omitting ephemeral streams the United States Environmental Protection Agency and Corps of Engineers (collectively “EPA”) would actually eliminate the opportunity for the state of Arkansas to make decisions about the discharge of pollutants into their waters through Section 401 of the Clean Water Act certification process. (i.e., the state of Arkansas would not be able to replicate this process with existing state resources).

- EPA's economic analysis did not consider the cost to states for assuming greater responsibility in administering the regulatory program established by the proposed rule.
- Funding is not identified for the responsibilities imposed upon the states to establish geospatial data sets of waters of the United States
- A comment period extension is requested.
- Referencing the proposed concept that wetlands separated by dikes or barriers are not jurisdictional because they do not have a direct hydrologic surface connection is possibly rebutted by a reference to relief wells installed by the Corps of Engineers outside levees along the Mississippi Rivers and Tributaries project.
- Wetlands should be included within the 100 year floodplain jurisdiction because they regularly contribute to the chemical, biological, and physical integrity of the regulated water.
- The scientific basis for the proposed rule to not include water. . .that flows only in response to precipitation; groundwater,. . . is questioned.
- Failure to consider backwater flooded streams and their capacity to store floodwater, cuts against against their ability to reduce flood risk.
- Requests that any waterway that was ever a part of a Congressionally authorized Civil Works project be considered jurisdictional.

A copy of the comments can be found [here](#).