

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency/Corps of Engineers Publishes Final Rule in the Federal Register



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The United States Environmental Protection Agency and United States Corps of Engineers (collectively “EPA”) published on April 21st the final new rule addressing the Clean Water Act definition of Waters of the United States (“WOTUS”) in the Federal Register. See 85 Fed. Reg. 22250.

The significance of the Federal Register publication is it, therefore, becomes effective on June 22, 2020.

The rule is denominated the Navigable Waters Protection Rule.

EPA had previously rescinded the Obama era revision/clarification of WOTUS.

The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified by the fact that 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 Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, it is easy to understand why the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

A Trump White House Executive Order had directed EPA to review the 2015 rule. See Presidential Executive Order on Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the “Waters of the United States” Rule.

EPA had previously argued in rescinding the 2015 rule that the agencies were:

...concerned that the previous administration’s 2015 Rule defining “waters of the United States” may have greatly expanded Washington’s control over local land use decisions.

They further argued that the proposal – respects the constitutional and statutory limits of federal government to regulate navigable water under the Clean Water Act and gives states and tribes more flexibility to determine how to best manage waters within their borders.

EPA also argues in announcing the Navigable Water Protection Rule that it “ends decades of uncertainty over where federal jurisdiction begins and ends.” It further states that EPA is for the first time recognizing the difference between federally protected wetlands and state protected wetlands.

EPA states that the revised definition identifies four of what it characterizes as “clear” categories of waters that are federally regulated under the Clean Water Act which are stated to include:

- The territorial seas and traditionally navigable waters (referencing the Atlantic Ocean and Mississippi River)
- Perennial and intermittent tributaries (referencing College Creek which flows to the James River near Williamsburg, Virginia)
- Certain lakes, pounds, and impoundments (referencing Children’s Lake in Boiling Springs, Pennsylvania)
- Wetlands that are adjacent to jurisdictional waters

The Navigable Water Protection Rule states that the following waters are not subject to Clean Water Act jurisdiction:

- Features that only contain water in direct response to rainfall
- Groundwater
- Many ditches including most farm and roadside ditches
- Prior converted cropland
- Farm and stock watering ponds
- Waste treatment systems

Also addressed are certain issues related to Clean Water Act jurisdiction such as:

- Removal of proposed separate categories for jurisdictional ditches and impoundments
- Revising the proposed definition of “typical years” which EPA states provides regional and temporal flexibility (which is said to be inserted to ensure jurisdiction is being accurately determined in times that are not too wet and not too dry)
- Defines adjacent wetlands as wetlands that are meaningfully connected to other jurisdictional waters (citing as an example those directly abutting or having regular surface water communication with jurisdictional waters)

The final rule is certain to be challenged by a number of states, environmental and public interest groups, and others arguing that it has greatly (and illegally) narrowed the scope of the term. It is further certain that other states, various agricultural, manufacturing, and energy organizations that supported the rescinding of the 2015 rule will weigh in judicially to support it. In fact, lawsuits have already been filed challenging the final rule on various grounds such as alleged violation of the Endangered Species Act and Clean Water Act.

Examples of the diametrically opposing viewpoints can be found in statements issued by two groups. They include the following. The Sierra Club stated on April 21st:

The Environmental Protection Agency today published a final rule in the Federal Register stripping Clean Water Act protections for more than half the nation’s wetlands and millions of miles of streams. The cuts put drinking water sources of millions of people in the U.S. at risk and jeopardized the ability to counter floods, droughts, toxic algal blooms, groundwater depletion and other worsening water issues driven by the climate crisis.

In contrast, the National Pork Producers Council stated in part in referencing the prepublication version of the final rule:

We are pleased EPA has finalized the common-sense rule, the Navigable Waters Protection Rule, that works with, not against, farmers to protect our nation’s waterways. . . The previous WOTUS rule was a dramatic government overreach and an unprecedented expansion of federal authority over private lands.

Today's action balances the role of federal, state and local authorities, protects property rights and provides clarity for farmers like me, while providing regulatory certainty to our farmers and businesses.

Regardless of the outcome of the struggle for the appropriate scope of WOTUS, it is important to remember that delegated states (such as Arkansas) have their own statutes to authorize their environmental regulatory activities. Further, many of these states have key jurisdictional definitions that may in fact be broader than the corresponding federal terms.

A link to the final rule in the Federal Register can be found [here](#).