

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency Proposes New Rule



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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On December 11th the United States Environmental Protection Agency and United States Corps of Engineers (collectively “EPA”) announced the proposal of a new rule addressing the Clean Water Act definition waters of the United States (“WOTUS”).

EPA had previously rescinded the Obama era revision/clarification of WOTUS. See 80 Fed. Reg. 37054 for the 2015 revision/clarification rule.

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 final 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 argues in the December 11th proposed rule that the agencies are:

...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.

The agencies further argue that the proposal:

... respects the constitutional and statutory limits of federal government to regulate navigable water under the Clean Water Act and give states and tribes more flexibility to determine how to best manage waters within their borders.

EPA identifies changes to the 2015 rule and pre-2015 practice which include:

- Traditional navigable waters
- No change, except that the territorial seas are identified in the proposal as a type of traditional navigable water.

- Interstate waters
- No longer an independent category of jurisdictional waters under the proposal; jurisdictional if they satisfy the conditions of another category of jurisdictional waters.
- Independent category of jurisdiction under 2015 Rule and pre-2015 practice.
- Tributaries
- Rivers and streams that contribute perennial or intermittent flow to downstream traditional navigable waters in typical year are jurisdictional under the proposal; no ephemeral features are considered jurisdictional under the proposal.
- Both the 2015 Rule and pre-2015 practice found some ephemeral streams jurisdictional.
- Ditches
- Fewer ditches will be considered jurisdictional under the proposal, mostly because no ditches constructed in upland and no ditches with ephemeral flow would be considered jurisdictional.
- Both the 2015 Rule and pre-2015 practice found ditches jurisdictional where they were a tributary, including ditches constructed in upland with perennial or intermittent flow.
- Lakes and Ponds
- Lakes and ponds were not a separate category in the 2015 Rule or pre-2015 practice.
- This proposal more closely adheres to the pre-2015 practice of regulating lakes and ponds as traditional navigable waters or as part of the tributary network of traditional navigable waters, with added clarity to make implementation more straightforward and for consistency.
- Under this proposed definition, fewer lakes and ponds may be jurisdictional than under the 2015 Rule because non-navigable, isolated lakes and ponds were considered adjacent waters together with isolated wetlands under the expanded definition of “neighboring” in the 2015 Rule.
- Impoundments
- Impoundments of jurisdictional waters would remain jurisdictional under the proposal, as they were under the 2015 Rule or pre-2015 practice.
- Adjacent Wetlands
- Under the agencies’ proposal there are more limited circumstances where wetlands would be considered adjacent relative to both the 2015 Rule and pre-2015 practice.
- Under the 2015 Rule and pre-2015 practice wetlands behind a berm or dike were considered adjacent. Under the agencies’ new proposal wetlands must either abut jurisdictional waters or have a direct hydrological surface connection to jurisdictional waters in a typical year to be jurisdictional themselves; wetlands physically separated from jurisdictional waters by a berm, dike, or other barrier are not adjacent if they lack a direct hydrologic surface connection to a jurisdictional water in a typical year.

Not surprisingly, various groups have come out with opposite reactions to the proposed rule. For example, the American Farm Bureau states:

We appreciate the months of hard work that the Administration, especially the EPA and Army Corps of Engineers, invested in making sure the new Clean Water Rule was done right. Unlike the 2015 WOTUS Rule, this new rule protects our resources, respects the law and provides greater clarity so the agencies and public can identify regulated federal waterways.

An opposite view is taken by the Center for Biological Diversity, which states:

... an initial analysis by the Center for Biological Diversity estimates that today’s proposal from the Environmental Protection Agency and U.S. Army Corps of Engineers would cut Clean Water Act protections for streams and wetlands across 3,000-plus watersheds in the western United States. The plan could accelerate the extinction of more than 25 endangered species, from steelhead trout to California tiger salamanders.

Regardless of the outcome of the struggle for the appropriate scope of WOTUS, it is important to remember that delegated states (including 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.

An example is found in Arkansas.

The arguably corresponding Arkansas statutory term “waters of the state” is broader than the proposed definition for WOTUS. The Arkansas Air and Water Pollution Control Act provides that “[i]t shall be unlawful to place . . . waste in a location where it is likely to cause pollution of any waters of the state.” Waters of the state are defined as:

All streams, lakes, marshes, ponds, water courses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies where accumulations of water, surface and underground, natural or artificial, public or private, which are confined within, flow through or border upon the state or any portion of the state.

As a result, non-Clean Water Act NPDES programs undertaken by Arkansas should not be affected by a change in the definition of WOTUS because they are driven by the state definition “waters of the state.”

A copy of the EPA fact sheet can be found [here](#) and a link to the prepublication proposed rule [here](#).