



End of the Line? EPA and Corps of Engineers Finalize New Definition of "Waters of the United States"

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As reported in a number of our newsletter articles over the past several years, both the Obama Administration, through its Clean Water Rule, and the Trump Administration have pursued major changes to the scope of federally-regulated waters under the Clean Water Act. The focus of attention has been on the definition of "waters of the United States" (WOTUS). The latest step in this effort has now been issued as a final rule, called the Navigable Waters Protection Rule (NWPR). It supplants the placeholder definition issued last fall as an interim replacement of the Clean Water Rule. The definition of WOTUS is critical to federal regulation and protection of surface waters under various Clean Water Act programs and even other environmental statutes, so the changes in the NWPR have great significance for federal permitting, enforcement, and review of projects that may impact surface waters and wetlands.

Scheduled to take effect June 22, 2020, the NWPR addresses certain categories of regulated/jurisdictional waters and unregulated/nonjurisdictional waters with more specificity than previous definitions under the Clean Water Rule. In doing so, it offers some notable new exceptions to jurisdictional coverage, especially certain ephemeral water features, isolated wetlands, and artificial water bodies and conveyances.

1. **What's in.** The NWPR expressly includes certain water bodies within the scope of jurisdictional "waters of the United States," though significant complexities exist. They are:

a. *Territorial seas and traditional navigable waters.*

b. *Perennial and intermittent tributaries that contribute surface water flow to [territorial seas and traditional navigable waters].* A "tributary" is defined as "a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds or impoundments, or adjacent wetlands."

c. *Certain lakes, ponds and impoundments of jurisdictional waters.* These terms are defined as "standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland." A "lake, pond or impoundment of a jurisdictional water" retains its jurisdictional status in the same manner as with tributaries.

d. *Wetlands adjacent to other jurisdictional waters.* The NWPR defines the term "wetlands" to mean "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." The notion of adjacency is also defined, so that "adjacent wetlands" are only those that (i) "abut" one of the previously listed jurisdictional waters or an impoundment thereof; (ii) are inundated by flooding from one of these jurisdictional waters or an impoundment thereof during a "typical year"; (iii) are separated from one of them or an impoundment thereof "only by a natural berm, bank, dune or similar natural feature"; or (iv) are separated from one of them or an impoundment thereof "only by an artificial dike, barrier or similar artificial structure" (e.g., a culvert, flood or tide gate, or pump) if there is still a "direct hydrological surface connection to one of those waters in a "typical year."?

2. **What's out.** Other water bodies and water features are expressly excluded from the definition of "waters of the United States" and therefore are nonjurisdictional. They are:

1. Groundwater, including that drained through subsurface systems;
2. Ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills and pools;
3. Diffuse stormwater runoff and directional sheet flow over upland;
4. Ditches that are not traditional navigable waters or tributaries, or that are not constructed in adjacent wetlands, subject to certain limitations;
5. Prior converted cropland;
6. Artificially irrigated areas that would revert to upland if artificial irrigation ceases;
7. Artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters;
8. 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;
9. Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate or store stormwater runoff;
10. Groundwater recharge, water reuse and wastewater recycling structures constructed or

excavated in upland or in non-jurisdictional waters; and

11. Waste treatment systems.

3. **Other Nuances.** As is clear from the summary of main elements of the definition and exclusions, many nuances exist as to when such water bodies may retain their jurisdictional status even when seemingly unregulated features are in play. In this regard, and even as to the basic determination of jurisdictional status, certain revised or new definitions play key roles and need to be thoroughly considered, particularly the definitions of "abutment" and "typical year."

4. **Federal v. State Jurisdiction.** Finally, and as has been discussed in our previous newsletter articles, the changes made through the NWPR only pertain at the federal level. Many states have their own programs to regulate surface water, wetlands and groundwater that are unaffected by these changes. Therefore, even if the NWPR offers new and clearer exclusions for ephemeral streams and certain relatively isolated waters and wetlands, state law may yet require permitting for impacts to these resources. Even with the NWPR, then, projects discharging to surface waters remain subject to regulation at the federal and/or state levels, so plan accordingly.

The running debate on the proper scope of WOTUS, especially since the U.S. Supreme Court's 2006 opinion in *Rapanos v. United States* (discussed in prior newsletter articles), will no doubt continue. Environmental groups and/or regulated parties are certain to challenge the NWPR. As a result, the fate of the full meaning of WOTUS continues to be far from certain.

The Navigable Waters Protection Rule: Definition of "Waters of the United States" 85 Fed. Reg. 22250 (April 21, 2020).

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