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Clean Water Agencies Propose to Redefine and Limit “Waters of the United States”

The United States EPA and the United States Army Corps of Engineers are proposing to redefine—and significantly limit—the scope of “Waters of the United States” (“WOTUS”) that are subject to federal jurisdiction under the Clean Water Act.

Affected industries include land and infrastructure developers; linear projects such as roads, pipelines, and transmission lines; petroleum and chemical storage facilities subject to spill prevention and containment requirements; and a wide range of industries subject to stormwater management requirements.

A comparison between the current rule and the proposed rule is provided below. The agencies propose as a “baseline concept” that “waters of the United States” are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes and ponds, and wetlands, and that not all waters are “waters of the United States.” The stated intent of the revisions is to establish “bright line jurisdictional boundaries” that are “easily implementable.” Notable changes include the following:

- Limiting the category of “adjacent waters” to “adjacent *wetlands*,” and limiting “adjacent wetlands” to those that abut a jurisdictional water or have a “continuous surface water connection” to one;
- Excluding “ephemeral streams” and “ephemeral features” altogether;
- Excluding most ditches and other man-made water bodies; and
- Eliminating “case by case” jurisdictional determinations.

Formal notice of the proposed rule will be published in the Federal Register shortly, opening a 60-day comment period. We expect a contentious and highly publicized rulemaking, with legal challenges to any final rule a certainty.

In addition to considering whether to comment on the proposed redefinition, clients subject to Clean Water Act regulatory programs should consider the potential effect of any final rule on existing jurisdictional



determinations, permits, and compliance plans. As federal requirements contract, such documents should be reviewed to ensure they do not retain unnecessary obligations or liabilities. This is important, because non-compliance with any element of such documents—potentially including elements no longer required—could create exposure to citizen-enforcement suits and significant federal statutory penalties.

Clients interested in learning more, in evaluating and commenting on the proposed redefinition, or in determining how existing compliance should be revised after adoption of a final rule, are invited to contact any of the attorneys on the first page of this alert, who have extensive experience with the Clean Water Act from a litigation, project planning, and permitting perspective, and who also assist clients in the legislative and rulemaking process.

Comparison Between Current WOTUS Rule and Proposed Redefinition

| Category of Water | 2015 WOTUS Rule | 2018 Proposed Redefinition |
|--------------------------------------|--|--|
| Traditional Navigable Waters (“TNW”) | Covered | Covered |
| Tributaries | Covered | Ephemeral features excluded |
| Adjacent waters | Covered | Limited to adjacent wetlands |
| Adjacent wetlands | Covered, including: (1) wetlands with a hydrological connection to a covered water, (2) waters within 100 feet of a covered water, (3) waters within the 100-year floodplain of a covered water, (4) waters within 1500 feet of the high tide line of a TNW | Covered, but limited to wetlands that abut or have a continuous surface-water connection to a covered water |
| Ponds and lakes | Not recognized as a separate category, but potentially covered as a TNW, tributary, or “adjacent water” | Recognized as a new category and covered only if categorical criteria are met or if the feature contributes perennial or intermittent flow to, or is flooded by, a covered water in a typical year |
| Case-by-case waters | Potentially covered, subject to a case-by-case significant nexus determination: (1) waters within the 100-year floodplain of a TNW or within 4000 feet of the high tide line or ordinary high water mark of any jurisdictional water; (2) specific features such as prairie potholes & Carolina bays | Not covered unless criteria above are met |
| Ditches | Covered unless specifically excluded | Excluded unless the “tributary” criteria are met AND the ditch (1) alters or relocates a tributary; or (2) is constructed in an adjacent wetland |

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

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