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Categories:
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Agencies Propose Significant Changes To “Waters Of The U.S.” Rule

In a Dec. 11, 2018, prerelease of an upcoming Federal Register notice, U.S. EPA and the Army Corps of Engineers (the Agencies) issued a proposed rule redefining “Waters of the U.S.” (WOTUS) under the Clean Water Act (CWA). The 253-page proposal (available on EPA’s website) responds to President Trump’s Feb. 28, 2017, Executive Order by reducing the scope of the June 29, 2015, rule in three significant ways:

- Eliminating the requirement to obtain a federal permit when proposing to fill or grade ephemeral streams, to be defined as surface waters that flow only in direct response to precipitation;
- Eliminating the controversial “significant nexus test” (SNT) used to determine when tributaries and nonadjoining¹ wetlands are jurisdictional when they impact downstream jurisdictional waters; and
- Eliminating the requirement to obtain a federal permit when proposing to fill or grade nonadjoining wetlands that do not have a continuous surface connection to a jurisdictional water.

The Agencies’ decision to make these changes was guided by four legal principles.

First, the CWA regulates discharges to surface bodies of water, not to land, and expressly reserves land use rights to the states. In the Agencies’ view, ephemeral streams are land features, as they carry flow only in direct response to precipitation, and thus are dry the vast majority of a typical year. Unlike perennial and intermittent waters, which the Agencies define as WOTUS, ephemeral streams do not have a connection with (1) groundwater that when elevated provides perennial or seasonal surface flow, or (2) upgradient snowpack that when melted provides perennial or seasonal surface flow. The Agencies’ opinion is that regulating the filling or grading of ephemeral streams is the discretionary province of the states, not

the federal government.²

Second, the Agencies found the SNT – used to determine if a sufficient biological, chemical, and physical nexus exists between a tributary or nonadjoining wetland and a downstream jurisdictional water – to be so vague and subjective that it (1) violates due process by failing to provide fair notice to developers of their regulatory obligations, and (2) is unworkable for their own employees.³

Third, the CWA does not regulate groundwater.⁴ Consequently, the Agencies propose to eliminate jurisdiction overfilling or grading of wetlands whose sole connection to a downstream jurisdictional water is through a subsurface hydrological connection. Instead, the Agencies would find jurisdiction over wetlands only when they abut a traditional jurisdictional water, or have a direct, continuous surface connection with a downstream jurisdictional water.

Fourth, the Agencies studied the Supreme Court's 1985, 2001, 2006, 2012, and 2016 decisions (i.e., *Riverside Bayview*, *SWANCC*, *Rapanos/Carabell*, *Sackett*, and *Hawkes*, respectively) looking for common themes about the scope of WOTUS and related issues, and then applying those themes to support the proposed revisions.

The Dec. 11 prerelease represents the most concerted effort ever made by the two Agencies to balance federal protection of surface waters with (1) states' right to regulate land use, (2) Congress' exclusion of groundwater from the CWA, (3) developers' right to fair notice of their regulatory obligations, and (4) the need for a workable rule that promotes consistent, repeatable jurisdictional findings. It addresses most of the criticisms levied by developers, farmers, and many states in response to the 2015 revised rule. Whether it will survive the legal challenge threatened by several environmental groups in the past few weeks is uncertain, but one thing is clear – the structure and content of the prerelease demonstrate that the Agencies are preparing to do battle to support the proposed revisions.

In addition to reducing the scope of WOTUS, the Agencies seek to clarify its terms in several ways:

- Specifying that for tributaries, lakes and ponds, and nonadjacent wetlands to be jurisdictional they must contribute perennial or intermittent flow to a jurisdictional water in a “typical year,” to be defined as the normal range of precipitation over a rolling 30-year period for a particular geographical area, thus excluding periods of extensive drought or flooding;
- Revising the definition of “adjacent wetlands” to state that a direct hydrologic surface connection exists between a jurisdictional water and a nearby wetland when, in a typical year, the water inundates the wetland, or the wetland provides perennial or intermittent flow to the water, and to specify that when a wetland is separated from a jurisdictional water by upland or structures like dikes and barriers, and otherwise lacks a direct hydrologic surface connection, the wetland is not adjacent and thus not jurisdictional;
- Revising the definition of “tributary” to clarify that it must be a naturally-occurring surface channel, and that a channel that meets the definition of a tributary does not lose its jurisdictional status when its flow is broken by a natural or artificial break (such as a culvert, dam, etc.) as long as perennial or intermittent flow continues on the downside of the break;
- Clarifying that permits are not required to dredge or fill ditches and other man-made channels unless they are constructed inside or adjoining a jurisdictional tributary or wetland, but also clarifying that ditches may still be point sources subject to CWA permitting for the discharge of pollutants;
- Adding a definition for the “prior converted cropland” exemption, with a summary of the conditions required to maintain the exemption; and
- 6. Adding a definition for “upland” and codifying longstanding principles that exclude man-made ponds, reservoirs, retention basins, and irrigation practices from regulation.

The Agencies request comments on all aspects of the proposed revised rule. A 60-day comment period is provided, starting from

the date the prerelease appears in the Federal Register. Commenting is certain to be extensive, with a final revised rule unlikely to be published until late in 2019.

As only a proposed rule, the prerelease technically does not impact how consultants or the Agencies' employees currently apply the existing WOTUS rule. However, regardless whether they apply the 2015 revised rule (12 states) or the pre-2015 rule and 2008 guidance (18 states) in response to ongoing litigation, it is fair to assume that jurisdictional findings by consultants and Agency employees will be influenced to some degree by the significant proposed changes in the definition of WOTUS.

¹"Nonadjoining" refers to wetlands that do not abut or adjoin a jurisdictional water. Adjoining wetlands have always been regulated as WOTUS. However, in decisions issued in 2001 and 2006, the U.S. Supreme Court ruled that nonadjoining, isolated ponds and wetlands, respectively, are outside the jurisdiction of the CWA. The SNT originated in now-retired Justice Kennedy's 2006 concurrence as his way to reduce the scope of isolated wetlands to those which, when considered alone or together with similarly-situated wetlands, lack a significant nexus with a downstream jurisdictional water. The SNT was adopted by the Agencies in a 2008 guidance document, and subsequently by a majority of federal courts, as the standard to determine whether small tributaries and nonadjoining wetlands have a sufficient nexus with a jurisdictional water to make them also jurisdictional.

²In response to the Supreme Court's 2001/2006 decisions that the CWA does not regulate grading/filling of isolated ponds and wetlands, at least half of the states, including Ohio, enacted statutes or adopted rules requiring permits and mitigation to fill such waters. If the proposed elimination of ephemeral streams from CWA dredge/fill permitting obligations survive a likely legal challenge, query whether a similar response will occur with respects to states stepping in to regulate the grading/filling of such waters. For example, in Ohio, the grading/filling of small ephemeral streams, referred to as primary headwater habitats, has been regulated for years under Ohio EPA's antidegradation rule.

³It takes 7 pages of the Agencies' 13-page 2008 guidance document to explain the criteria for determining when a tributary or nonadjoining wetland, alone or considered with other similarly-situated waters, has a significant biological, chemical and physical nexus with a downstream jurisdictional water. The lack of clear, objective, repeatable measurements for the SNT has created inconsistencies inside and between regional offices, and led to protracted lawsuits over disputed findings of jurisdiction. See e.g. *Orchard Hill Building Company v. U.S. Army Corps*, 2018 WL 3132797 (7th Cir. 2018) (12 years of appeals, including several remands and reconsiderations, for a significant nexus finding over wetlands 11 miles from a traditional jurisdictional water (Calumet River)); *Hawkes Company, Inc. v. U.S. Army Corps*, 2017 WL 359170 (D. Minn. 2017) (7 years of appeals, including two remands and an intervening U.S. Supreme Court ruling, for a significant nexus finding over wetlands 40 miles from a traditional jurisdictional water (Red River)); *Precon Development Corporation v. U.S. Army Corps*, 633 F. 3d 278 (4th Cir. 2011) (4 years of appeals, including an internal remand, for a significant nexus finding over wetlands 7 miles from a traditional jurisdictional water (Northwest River)).

⁴While the CWA does not regulate groundwater, other federal statutes, principally the Safe Drinking Water and Resource Conservation and Recovery Acts, regulate several aspects of groundwater, including underground injection of waste. Whether the CWA regulates point source discharges of pollutants into groundwater that reach a nearby surface water is the subject of several pending lawsuits, but beyond the scope of this advisory.

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