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10 Takeaways for Developers After Publication of the New "WOTUS" Rule

On April 21, 2020, the joint U.S. EPA/Army Corps' ("the Agencies") revised "waters of the U.S." ("WOTUS") rule, released informally three months ago, finally appeared in the *Federal Register*. Here are the 10 most important takeaways for developers responding to inquiries about the publication.

1. What happens now?

Publication starts the official clock running on the right to appeal the new rule. Based on a 2018 U.S. Supreme Court decision, it will be a long clock. Appeals can be filed up to six years after a claim accrues under the new rule, and can be filed in district courts across the country. 17 states and more than 20 environmental groups have already filed appeals in courts in CA, MA, MD and SC, and more are in the wings. Unless the appeals are consolidated in one court, we are likely to see a series of fractured, potentially conflicting, rulings from different courts on the legality of the new rule. That is what occurred during the appeals of the previous rule, where at one point close to half of the states were operating under different versions of the rule.

2. When does the new rule go into effect, and will it be stayed?

The new rule goes into effect on June 22. At least one filing of a motion to stay the rule from going into effect has been filed. More are certain to follow, but whether they will be granted is uncertain. Generally speaking, a stay requires a showing of: (i) a substantial likelihood of success on the merits, (ii) potential irreparable harm if the rule is not stayed, (iii) no harm to others if the rule is stayed, and (iv) public interest being served if the rule is stayed. While courts have broad discretion in making this decision, absent an agreed stay, some type of clear defect or procedural error is generally needed to stay a rule until a ruling on the merits. For the previous version of the WOTUS rule, revisions the Agencies made between the proposed and final versions created procedural errors that led to stays being entered by several courts. For the new version, the convoluted steps used in the "repeal/replace" process prior to

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issuance of the proposed revised rule, or allegations that the rule violated requirements under the Endangered Species Act, are potential grounds for a motion for a stay.

Based on the number of appeals to be filed in district courts scattered across the county, the odds are strong that at least one court will grant a stay, while others will deny it. Unfortunately, that will further contribute to the risk of fractured rulings and different versions of the rule being applicable while the appeals run their course.

Because district court rulings are generally controlling only within their district, developers and their legal counsel will need to stay abreast of: (i) what court encompasses the county where a new or planned development is underway, (ii) whether an appeal has been filed in that court, (iii) the status of the appeal, in particular, whether a stay has been requested or granted, and (iv) if a stay has been granted, whether it is limited to the parties to the case or perhaps a nationwide stay. If a planned project involves, for example, a network of small ephemeral streams, the answers to these questions can make a significant difference in whether permits will be required, along with the attendant costs and potential delays.

3. What else could happen to keep the new rule from going into effect?

Politics, politics, and more politics. The revised rule is the culmination of the Agencies' response to President Trump's 2017 Executive Order, instructing them to "reconsider" the 2015 version, and consider narrowing its scope, consistent with the plurality's holding in the 2006 *Rapanos* decision. No previous President issued an order to revise the rule, which has undergone multiple revisions over a span of several decades and been the subject of at least five U.S. Supreme Court rulings. Thus, opponents refer to the rule as "Trump's Dirty Water Rule."

On May 8, 2020, U.S. Representatives DeFazio and Napolitano introduced a bill to bar the rule's implementation and order a revised rule that would require permits to fill all wetlands and streams that "affect the physical, chemical or biological integrity of traditionally navigable…waters based on the best available scientific

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evidence." Such rule would be broader than the 2015 rule that drew widespread criticism for its breadth and lack of clarity. The bill is unlikely to gain traction until, at the earliest, sometime after the November elections, after many House and Senate seats and the Presidency are decided. Nevertheless, the combination of a likely fractured appeals process and the potential for a change of leadership in Washington make planning a project where proposed filling of wetlands or streams is involved rife with uncertainty for at least the rest of this year, if not longer.

4. If the rule is not stayed, what are the three most important changes that affect developers?

First, the new rule eliminates the requirement to obtain a permit to fill ephemeral streams, defined as surface features that carry water only in direct response to precipitation. Such small rivulets and channels make up the majority of waterways proposed for filling in developments across the country. Because the Clean Water Act ("CWA") regulates discharges to surface water, but reserves land use rights to the states, in the Agencies' view, ephemeral streams are land features that are dry the vast majority of the year, and thus are the discretionary province of the states to regulate, not the federal government.

Second, the new rule eliminates the controversial "significant nexus test" ("SNT") used in the previous rule to determine when small feeder streams, and wetlands not abutting a jurisdictional water, were themselves jurisdictional because they significantly impacted the physical, chemical and biological integrity of a downstream jurisdictional water. The Agencies found the SNT to be so vague and subjective that it violated due process by failing to provide fair notice to developers of their obligations. They also found it unworkable for employees, taking more than 10 pages of guidance to explain, leading to a series of protracted lawsuits over its application to wetlands many miles away from the nearest jurisdictional water.

Third, the new rule eliminates the requirement to obtain a permit to fill a nonabutting wetland that does not have a continuous surface connection to a downstream jurisdictional water. The Agencies' purpose here is twofold: (i) to recognize and give more credence to

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Congress' exclusion of groundwater from regulation under the CWA, and (ii) to stop the "jurisdictional creep" that began shortly after the U.S. Supreme Court decided in 2001 that the CWA does not regulate the filling of isolated wetlands, when the Agencies and some courts responded by finding that wetlands with underground hydrological connections to a jurisdictional water were not isolated.

5. Are there other changes that may benefit developers?

A few clarifications. First, the definition of "tributary" is revised to clarify that it must be a naturally-occurring surface channel, but also that it does not lose jurisdictional status if the flow is broken by some type a natural or artificial break (culvert, dam, etc.) as long as flow continues on the downside of the break. Second, the rule clarifies that permits are not required to fill ditches and other man-made channels unless they were constructed inside or adjoining a jurisdictional tributary or wetland. Third, language is added to clarify the "prior converted cropland" exemption and add a summary of conditions to maintain the exemption, which are important not just for farmers, but for developers buying farmland for development. And language is also added to clarify longstanding exemptions for man-made ponds, reservoirs, retention basins and certain irrigation practices.

6. What are the short term impacts of the new rule?

Eliminating more small channels, ditches, and isolated wetlands from federal permitting obligations will save time and mitigation costs. In addition, because USGS topographical maps identify perennial and intermittent streams as solid and dashed blue lines, respectively, but do not identify ephemeral streams, identifying jurisdictional and non-jurisdictional waters during the planning stage of a project should be easier.

Eliminating the SNT from jurisdictional determinations will also add more certainty to the planning process and reduce the time required to obtain a permit. And without the vague, subjective SNT, the hesitancy of some consultants to provide clear, definitive opinions on jurisdiction should decline, as should the hesitancy to stand firm against a potentially overly expansive finding of jurisdiction by an Army Corps employee.

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7. What are the long term impacts of the new rule?

Unless states take action to require permits to fill wetlands that only have a subsurface connection to a jurisdictional water, additional wetlands will be lost to the nation's wetland inventory. According to USDA's Natural Resources Conservation Service, one-third of all species of birds, 190 species of amphibians, and all of America's wild ducks and geese need wetlands at some stage of their life to thrive. Thus, losing more wetlands could potentially lead to more endangered species, which is one of the arguments made by some opponents of the new rule.

With respect to small channels and rivulets, many are primary headwaters, home to newts, salamanders, and other amphibians that do not thrive in larger, more open, water environments. Perhaps more importantly, the process of grading or culverting such surface features leads to additional impervious surface area and increased runoff, thus increasing the risk of erosion and sedimentation of downgradient jurisdictional intermittent and perennial waters. This risk is greater if the absence of a permitting obligation is not accompanied by a corresponding increase in required planning and controls over stormwater runoff from a finished project.

8. Are any states taking action other than just appealing the new rule?

Yes. At least three states (OH, CA and AZ) so far have begun the process of enacting statutes, adopting rules, or issuing draft permits that will regulate the proposed filling of ephemeral streams and/or wetlands with only a subsurface connection to a downstream jurisdictional water. In CA and AZ, their actions will require permits for filling isolated wetlands. In OH, where permits have been required since 2001 to fill isolated wetlands, on May 8, 2020, Ohio EPA issued for comment a draft general permit that would expand coverage for the filling of isolated wetlands to include filling of ephemeral streams. In the draft permit are terms for preconstruction notification, site restoration and mitigation mirrored after the federal requirements under the previous federal WOTUS rule.

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Unless there is a law that prohibits a state from having a program more stringent than its federal counterpart, other states are likely to follow the lead of these three states,. In addition, many consultants and legal practitioners prefer a state permitting program where possible, because it tends to be quicker and less expensive to obtain the necessary permits.

9. How will the new rule impact pending applications or pending enforcement actions?

If a site has an approved jurisdictional determination ("AJD"), because of the binding, appealable nature of AJDs, the new rule does not impact them unless: (i) they have expired, (ii) a condition exists that meets the criteria for revision of an AJD, or (iii) the permit holder requests a new AJD under the new rule. For other pending applications, including preliminary jurisdictional determinations (PJD), the applicant is free to submit a revised application or request a new PJD under the new rule.

The impact of the new rule on pending enforcement actions involving waters that were jurisdictional under the old rule, but not so under the revised rule, is not addressed in the preamble to the revised rule, but presumably the Agencies will be revisiting their position in these actions.

10. What is the inside scoop for developers?

Without question, the revised WOTUS rule addresses many of the criticisms levied by developers, farmers, and some states in response to the 2015 rule. Whether it survives the onslaught of filed and pending legal challenges is uncertain, but one thing is clear. The Agencies spent a substantial portion of the 85+-page preamble to the revised rule explaining: (i) how it better conforms to the CWA's prohibitions against regulating groundwater and land use and more closely follows the U.S. Supreme Court's decisions interpreting it, and (ii) why a rule based on the scientific principal of "connectivity" (*i.e.*, everything in nature is connected to everything else) is not consistent with the text of the CWA. In many respects, the preamble looks more like an opening legal brief than an explanation of an important rulemaking. But it leaves no doubt that the Agencies are prepared to do battle to support the revised 2020 version of

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the rule.

The revised WOTUS rule is not a harbinger to a return to the days of the "burning Cuyahoga River," as some environmental groups have coined. At the same time, however, the 2015 version did not require farmers to obtain permits in order to reroute a drainage ditch to promote successful crop rotation, as some trade groups claimed in videos with swimsuits, beach balls, and empty canoes sitting in dry ditches. Somewhere between these rhetorical extremes lies a CWA that strikes a proper balance between protecting water quality and promoting important economic development, and between principals of federal and state comity. Unfortunately, it will be a long time before the new appeals are completed and we see where the courts decide the revised rule falls along this spectrum.

If you have any questions about the revised WOTUS rule or want to learn more about the Ohio EPA's new draft general permit for filling ephemeral streams, please contact Steve Haughey or another member of Frost Brown Todd's Environmental Practice Group.

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