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EPA and Army Corps Again Propose to Redefine Waters Regulated Under the Clean Water Act

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On December 11, 2018, the U.S. Environmental Protection Agency and Army Corps of Engineers (the "agencies") announced once again that they are proposing a new rule to redefine the scope of waters and wetlands subject to regulation under the federal Clean Water Act ("CWA"). Since taking office in January 2017, President Trump has made rolling back the Obama Administration's 2015 rule defining "waters of the United States" ("WOTUS")—the CWA's jurisdictional touchstone—a top environmental priority. The new proposal would do just that by significantly reducing the categories of waters subject to federal jurisdiction under the CWA.

Comments will be due in mid-February, 2019, 60 days after the agencies notice the proposal in the Federal Register.

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Proposed New WOTUS Definition

The new proposed WOTUS definition takes a significantly narrower view of CWA jurisdiction than the version currently in place and would institute a new test that focuses on flow for determining whether a feature qualifies as a jurisdictional water.

Under the proposal, the agencies attempt to simplify jurisdictional determinations by reducing and clarifying the categories of waters that qualify as WOTUS. Specifically, the agencies identify six categories of jurisdictional waters:

1. Traditional navigable waters, including territorial seas;
2. Tributaries to those navigable waters, including perennial (defined as "surface water flowing continuously year-round during a typical year) or intermittent (defined as water flowing continuously during certain times of a typical year, not merely in direct response to precipitation) rivers and streams that "contribute flow in a typical year";
3. Ditches that are used for navigation, affected by the tide, or sited within otherwise jurisdictional waters;
4. Lakes and ponds that are similar to traditional navigable waters or that provide perennial or intermittent flow in a "typical year" to a traditional navigable water or adjacent wetland;
5. Impoundments of otherwise jurisdictional waters, such as check dams and perennial rivers that form lakes behind them; and
6. Wetlands that abut (i.e., touch at either a point or side) or have a direct hydrologic *surface* connection to other "waters of the United States."

These new proposed categories of jurisdictional waters make clear that the Trump Administration has a far more conservative view of CWA jurisdiction than both the Obama Administration and the George W. Bush Administration, the latter of which was responsible for developing a regulatory strategy for responding to the U.S. Supreme Court's muddled 2006 non-decision on the scope of federal jurisdiction in *Rapanos v. United States*. In particular, the new proposal would expressly exclude numerous categories of waters from CWA jurisdiction: any features not specifically enumerated above; groundwater; diffuse stormwater runoff; all ditches other than those identified above; all ephemeral waters; artificially irrigated areas; artificial lakes and ponds constructed in uplands that do not qualify as jurisdictional lakes/ponds or impoundments above; water-filled depressions in uplands resulting from mining or construction activities; pits excavated in uplands for purposes of obtaining fill or

sand/gravel; stormwater control features created in uplands; wastewater recycling structures (e.g., detention and infiltration ponds); and those wetlands not directly connected by surface waters to another jurisdictional feature. Additionally, the proposal would retain the longstanding regulatory exclusions for prior converted cropland and waste treatment systems.

To help the regulated community determine whether a particular feature falls within the new categories of jurisdictional waters, the proposal identifies new standards that focus on hydrologic flow and surface connections. For tributaries to be considered a WOTUS, they must exhibit regular surface flow (not in direct response to precipitation) and "contribute flow in a typical year" to navigable waters. The proposal defines the "typical year" as the average hydrologic contribution of that feature over a 30-year period. Similarly, for wetlands to be jurisdictional, they must either touch or have a direct surface connection to another WOTUS.

Conclusions and Implications

If finalized as proposed, the new WOTUS rule would accomplish the Trump Administration's goal of significantly scaling back the scope of federal jurisdiction under the agencies' CWA regulations. To accomplish that, the proposal would abandon the Obama Administration's exclusive reliance on Justice Kennedy's "significant nexus" test from *Rapanos* and adopt key elements from the far narrower Scalia test. While that change almost certainly would bring greater clarity to federal CWA jurisdiction, it also would bring legal challenges because only four Justices in *Rapanos* endorsed the Scalia test.

In the meantime, inconsistency and confusion will continue over regulation of waters of the U.S. As a result of numerous challenges across the country to the 2015 Obama-era WOTUS rule, that rule is the law of the land in 22 states while the previous regulations remain in effect everywhere else.

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