

EPA and USACE Navigable Waters Protection Rule



On January 23, 2020, the Environmental Protection Agency and U.S. Army Corps of Engineers (Agencies) issued a prepublication version of the Navigable Waters Protection Rule defining the scope of waters subject to federal regulation under the Clean Water Act.

Overview

This Rule is the result of the requirements of Executive Order 13778 and reflects one front of the current administration's push to streamline environmental review and permitting. This new Rule defines waters of the United States or WOTUS and has major implications for all sections of the Clean Water Act (CWA). This new Navigable Waters Protection Rule (Rule) will become effective 60 days after its final publication in the Federal Register subject to legal challenges.

Major Changes

The Rule identifies four categories of waters that are WOTUS (aka jurisdictional waters) and specifically excludes any waters or features not included in these four categories:

1. Territorial seas and traditional navigable waters
2. Perennial and intermittent tributaries that contribute surface water flow to such waters

3. Certain lakes, ponds, and impoundments of jurisdictional waters
4. Wetlands adjacent to other jurisdictional waters

The two major changes in these categories are the specific exclusion of any waterbodies that are ephemeral in nature, and the revised definition of what comprises an "adjacent" wetland. The 2015 Clean Water Rule and the pre-2015 regulations both classified many or most ephemeral waterbodies as WOTUS. According to some estimates, and United States Geological Survey (USGS) data, the new definition will remove federal regulation for 18 percent of U.S. streams, lakes and impoundments.

The new definition of "adjacent" wetland includes wetlands that abut or are inundated by flooding from a WOTUS in a typical year, and generally those that might be separated by a natural or artificial feature but still have a direct hydrological surface connection to a WOTUS in a typical year. The definition of "adjacent" in the 2015 Clean Water Rule and the pre-2015 regulations was much broader. According to USGS data, the new definition will remove federal regulation for more than 51 percent of U.S. wetlands. The agencies are proposing new, geographic information system (GIS) tools to help classify flow regimes, but they have not provided a delivery date.

Implications

A change to the definition of WOTUS will affect all sections of the CWA that rely on the WOTUS definition. The most significant changes will be to Section 401 (Water Quality Certification [WQC]), Section 402 (National Pollutant Discharge Elimination System [NPDES] program), and Section 404 (Dredge and Fill Permits). As currently written, the new Rule will drastically reduce the number and scale of Section 404 permits issued across the country but especially in the arid western states and in areas with lots of isolated wetlands. Since the section 404 permit is often the only trigger for compliance with the National Environmental Policy Act and the National Historic Preservation Act, an associated drop in these types of consultations is expected, and a resulting scramble by states to protect environmental and cultural resources. For states that have tied their NPDES or Section 401 program to the federal definition of WOTUS, the new definition will take effect where it has been incorporated into their programs. A "federal" permit (e.g., United States Army Corps of Engineers [USACE] Section 404 permit) is required to trigger the need for Section 401 certification. Permits issued by a state or tribe through an authorized CWA program are not considered "federal" for purposes of Section 401. For example, a NPDES permit issued in the 47 states that

manage the NPDES program is not a federal permit and would not trigger the need for a WQC under Section 401. Wetlands or waterbodies that no longer require a Section 404 permit will also no longer require a Section 401 certification which will deny a state that does not have other authority over these features the ability to review, condition or deny the WQC.

Notably, the new Rule will not reduce a state's ability to regulate "waters of the state". One rationale used by the agencies used in support of the new Rule is that many states will pass new regulations to protect waters of the state, and though a few states have their own laws regulating dredge and fill activities in wetlands and waterbodies, most do not and rely almost exclusively on the Section 401/404 process. This means there will be a gap in coverage in most states until those states develop their own dredge and fill permitting requirements. In most states, and compared to any definition of WOTUS, definitions of waters of the state are much more inclusive, including practically any surface water and even groundwater. Implementation of state permitting programs is anticipated to take years in most states.

Takeaways

As of April 14, 2020, the Final Rule has not been published in the Federal Register and no publication date has been provided. As a result it will be at least 2 months and likely much longer before any changes are implemented.

The USACE is reportedly working on regional definitions of "ephemeral" and some GIS-based tools that will facilitate identification of these features. It is expected that these tools will be provided concurrently with or shortly after the Final Rule is published.

The Rule will not affect permit actions for ongoing projects and will not invalidate jurisdictional determinations issued by the USACE before this Rule, but an applicant can request a review under the new Rule.

The Rule will immediately be challenged by multiple groups and will likely be the subject of one or more preliminary injunctions. The definitions of "ephemeral" and "typical year" will be the source of much litigation. It is likely that the 2020 Final Rule will be stayed in some parts of the country and effective in others while the various parties appeal the divergent district court rulings. If the administration changes, the Rule could be immediately rescinded. Lawsuits are expected to generate a patchwork of regulation by Court District and State, as the various agencies try to develop and implement internal guidance and policies related to court decisions and existing (and soon to be promulgated) state laws.

This new Rule is Step Two in a two-step process to repeal the Obama administration's 2015 Clean Water Rule, which had expanded the extent of WOTUS in many states. Step One, which was the repeal of the 2015 Clean Water Rule and restoration of the regulatory text regarding WOTUS that existed prior to the 2015 Rule, went into effect on December 23, 2019.

If the Rule goes into effect as written, we can expect inconsistent permitting timeframes and guidance from agencies, particularly for projects that have impacts to WOTUS in multiple states and/or USACE Districts, and from states as they try to develop and implement internal guidance and policies based on the new Rule.

Over the next few years, as states develop their own permitting programs, we can expect a wide range of state-specific permitting requirements many of which will exert jurisdiction over waters of the state, to include many water features that are not currently regulated.

In states that develop regulations to exert jurisdiction over waters of the state, we can expect regulation of more waters, complications in permitting due to the differences between waters of the state and WOTUS, and longer permitting timelines. Some states may also enact regulation that provides protection for cultural and other resources associated with waters of the state. Implementation of state permitting programs is anticipated to take years in most states. In states that do not develop regulations to protect former WOTUS, CWA permitting will be much easier.

The USACE is reportedly working on some new revisions to the Nationwide Permit program that would increase the acreage of the impact/notification threshold, and offer more exemptions and exceptions for certain project types. Combined with this new Rule, these revisions are expected to reduce the permitting burden for many energy and infrastructure projects.

Jacobs has CWA specialists across the country and is ready to assist you with your questions and concerns about the new Navigable Waters Protection Rule and how it might affect your projects.

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