BRACEWELL

INSIGHTS

Clean Water Act News: Final Rulemaking Defining Waters of the United States Released

April 21, 2020

*By: **Ann D. Navaro**, **Sara M. Burgin** and **Daniel J. Pope***

On April 21, EPA published the revised definition of "Waters of the United States," or "WOTUS," in the ***Federal Register***. WOTUS is a lynchpin phrase in the Clean Water Act that determines the jurisdictional reach of multiple agencies. The Clean Water Act regulates all kinds of discharges into "navigable waters" and navigable waters is defined simply as "the waters of the United States, including the territorial seas." The murky definition of WOTUS has been the subject of considerable debate and controversy, and it has been one of the primary goals of this Administration's WOTUS rulemaking to clarify the scope of the phrase and provide regulatory certainty to industry, project developers, landowners, and other stakeholders across the United States. The revised definition—titled the Navigable Waters Protection Rule—becomes effective on June 22, 2020.

Prior agency rulemaking and practice had significantly expanded the jurisdictional reach of WOTUS, covering various geologic features that had nearly any kind of hydrological connection to the kinds of waters typically thought of as "navigable." The result was that determining WOTUS became an exhausting, fact-intensive inquiry for any potential WOTUS. This expansive view of jurisdiction also conflicted with state water statutes, many of which go beyond the federal Clean Water Act to protect other kinds of surface waters and groundwater. This Administration has pushed back on that expansive view of the statute, and has emphasized—both in the proposed rulemaking and in the final—that states are to have a significant role in obtaining the restorative goals of Clean Water Act.

The new rule adopts a more predictable, categorical approach that reinforces legal limitations on the federal regulation of waterbodies. Clean Water Act jurisdiction may be asserted over four types of waters—territorial seas and waters currently, formerly, or possibly used in interstate commerce; tributaries; lakes, ponds, and impoundments of jurisdictional waters; and adjacent wetlands. Each of these categories receives additional clarification via precise definitions: for example, a tributary must, among other things, have "perennial" or "intermittent" flow during a "typical year." These key concepts in turn are defined to provide additional certainty to the regulated community and will assist both the agencies and the regulated community when considering what is—and what is not—regulated as WOTUS. The rule also provides a number of exclusions which explicate the types of waters exempt from Clean Water Act jurisdiction.

The final rule remains much the same as the proposed rule, although some significant adjustments are worth mentioning. In the proposed rule, an ephemeral feature that connected

a jurisdictional water and an upstream waterbody would "break" the jurisdiction of the Clean Water Act for that upstream body—because the upstream body lacked a perennial or intermittent connection to a WOTUS, it was no longer WOTUS itself. The final rule allows for jurisdiction to that upper waterbody when the ephemeral waterbody "maintains a channelized surface water connection to downstream jurisdictional waters in a typical year." "Typical year" does a lot of work for the definition of tributary as well, and the Agencies have clarified that a "typical year" involves the evaluation of a rolling 30-year period to minimize the effects of excessively wet years and drought years on the evaluation. The final rule also removes an individual category for ditches: ditches that meet the definition of a tributary would be jurisdictional, and all other types of ditches would be excluded from regulation as a WOTUS.

Clarifying WOTUS has been one of this Administration's major goals in the environmental and natural resources arena, and it's difficult to overstate how significant this final rulemaking has been (and could be). We expect that the rule, will be challenged by a number of environmental and other public advocacy organizations, many of which have already expressed serious disagreement with the new rule. Such litigation could affect the applicability of the new WOTUS rule if the rule is enjoined, just as litigation challenging the 2015 WOTUS rule left different areas of the country navigating very different WOTUS regimes. Such challenges won't simply be caused by policy differences between different interest groups and industries—it will be the consequence of the fractured Supreme Court decision *Rapanos v. United States* and the lack of judicial clarity regarding the statutory text itself. We will be watching the litigation over the new WOTUS rule, as one of the cases may very well lead to the Supreme Court's next major decision on the jurisdictional reach of the Clean Water Act. Stay tuned to the Energy Legal blog for updates on the legal theories behind the upcoming wave of litigation, as well as the venues in which these lawsuits are filed.