

INSIGHTS

Comment Period Open for Proposed WOTUS Rule

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The comment floodgates are open for the proposed federal Waters of the United States (“WOTUS”) rule. The rule would re-define the phrase “waters of the United States” which dictates the geographic reach of the Clean Water Act. The Environmental Protection Agency and the Department of the Army made the pre-publication rule available starting on December 11, 2018, but the comment period has only now officially begun with a notice in the Federal Register published on February 14, 2019. Currently, due to litigation over the Obama Administration’s 2015 WOTUS rule, pre-2015 regulations and guidance apply in some states, while the 2015 rule applies in others.

The proposed rule is intended to narrow federal jurisdiction and to provide simplicity, consistency and predictability to identifying which types of waters are federally regulated under the Clean Water Act. For example, the proposed WOTUS rule would exclude ephemeral waters, which are surface waters that pool or flow only in direct response to precipitation. Intermittently flowing waters would still be WOTUS, but the proposed rule gives clarity to that previously undefined term; “intermittent” would mean surface water that flows continuously during certain times of year and more than in direct response to precipitation. The proposed rule also clarifies what kinds of connections are required between traditionally navigable waters and tributaries, ditches, and lakes, and defines “adjacent wetlands” to exclude wetlands behind dikes or berms unless they are connected in a typical year.

The 60-day comment period for the new rule closes on April 15, 2019, although various stakeholders are already clamoring for an extended comment period. If the proposed rule remains substantially the same after public comment and goes into effect, the new definition would limit the reach of the Clean Water Act with respect to land use and project permitting. Given the significance of this rulemaking, we expect that the agencies will receive a large volume of comments on legal issues, policy questions, and detailed input on how the proposed rule would work in practice.