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**EPA and Army’s New WOTUS Definition and Another Finalized Rule
This Spring**

Joseph Retzer*

On December 30, 2022, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Department of the Army Corps of Engineers announced their finalized “Revised Definition of ‘Waters of the United States’” rule.¹ This definition is important because it triggers the jurisdiction of the Clean Water Act, which prohibits the discharge of pollutants into “navigable waters” that are defined in the Act as “waters of the United States” (“WOTUS”).² This new rule was spurred into action by Executive Order 13990, where President Biden directed all agencies to review and take action on all regulations “that conflict with national policies of science-based decision making in order to improve public health, protect our environment, and ensure access to clean air and water.”³ According to the agencies, the new definition “restores essential water protections that were in place prior to 2015 under the Clean Water Act for traditional navigable waters, the territorial seas, interstate waters, as well as upstream water resources that significantly affect those waters.”⁴ The new regulatory rule defining WOTUS is meant to bring together the latest in science, administrative expertise, and Supreme Court decisions.⁵

This announcement comes over a year after the proposed rule was signed on December 7, 2021.⁶ Following that announcement, the public comment period lasted two months,⁷ where the EPA received 115,048 comments and

¹ Press release, Environmental Protection Agency, EPA and Army Finalize Rule Establishing Definition of WOTUS and Restoring Fundamental Water Protections (Dec. 30, 2022) <https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental>.

² *Id.*

³ EPA and Dept. of the Army, Regulation, *Revised Definition of “Waters of the United States,”* 7 (forthcoming 2022).

⁴ EPA, *supra* note 1.

⁵ *Id.*

⁶ EPA, *Revising the Definition of “Waters of the United States,”* <https://www.epa.gov/wotus/revising-definition-waters-united-states> (Dec. 30, 2022).

⁷ *Id.*

posted 2,295 of them to its rulemaking docket, presenting the perspectives of interested parties like the Makah Indian Tribe and the Georgia Chamber of Commerce.⁸ In the agencies' response to these comments, it noted that many comments commended the benefits stemming from protecting water quality and the need for a definition that is both clear and concise.⁹ Agreeing that the rule should be both clear and implementable, the agencies "revised the rule to improve the clarity, implementability, and durability of the definition" before releasing the final rule at the end of the year.¹⁰ To accomplish this revision, the agencies added a list of waters excluded from the definition and a review of implementation resources and tools.¹¹

The response also includes an acknowledgement of the comments that asked the agencies to consider climate change and environmental justice, where it explained that climate change was not considered in determining the scope of WOTUS, although agencies themselves can consider climate change to an extent under the significant nexus standard.¹² Finally, the agencies explained that they only expect a "slight and unquantifiable" increase of waters falling under the jurisdiction of the Clean Water Act under this new definition and any potential costs will be created by existing programs that use the definition of WOTUS.¹³

To help explain the new definition of WOTUS, the agencies published a Fact Sheet where such waters can be broken into three main categories: (1) those in paragraph (a)(1)-(4) of 33 CFR § 328.3, (2) waters meeting the relatively permanent standard, and (3) waters meeting the significant nexus

⁸ EPA, *Revised Definition of "Waters of the United States,"* <https://www.regulations.gov/docket/EPA-HQ-OW-2021-0602/comments> (last visited Jan. 5, 2023).

⁹ EPA and U.S. Dept. of the Army, *Revised Definition of "Waters of the United States" Response to Comments Document*, 1 https://www.epa.gov/system/files/documents/2022-12/01_2022_General_RTC.pdf (last visited Jan. 5, 2023).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

standard.¹⁴ According to the Fact Sheet, the following waters are likely to be jurisdictional under paragraph (a)(1)-(4): “traditional navigable waters,” like the Mississippi River and the Great Lakes Lake Tahoe; “interstate waters,” “tributaries,” like Wolftrap Run in Virginia and Puppy Creek in Arkansas; and “adjacent wetlands,” like the Horicon Marsh in Wisconsin.¹⁵ It also explains that the relatively permanent standard is met when “relatively permanent, standing, or continuously flowing waters connected to [traditionally navigable waters] or waters with a continuous surface connection to such relatively permanent waters or to [traditionally navigable waters].”¹⁶ Meanwhile, the significant nexus standard is met when “the waterbody (alone or in combination) significantly affects the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters.”¹⁷ Adjacent wetlands, tributaries, and “additional waters” each must meet either the relatively permanent or the significant nexus standard to be jurisdictional.¹⁸

The Fact Sheet also provides a summary of waters excluded under the final rule to ensure clarity and certainty for stakeholders.¹⁹ There are eight exclusions in the final rule, including ditches, prior converted cropland, artificially irrigated areas, artificial lakes, and artificial pools.²⁰ Each exclusion includes a definition of the term to ensure the definition “does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.”²¹ Although the

¹⁴ EPA and Dept. of the Army, *Final Rule: Revised Definition of “Waters of the United States” Fact Sheet*, 2 (Dec. 2022) <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf>.

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ EPA and Dept. of the Army, *Final Rule: Revised Definition of “Waters of the United States” Fact Sheet*, 3 (Dec. 2022) <https://www.epa.gov/system/files/documents/2022-12/Public%20Fact%20Sheet.pdf>.

²⁰ *Id.*

²¹ *Id.*

exclusions are not new, litigation can be expected under the new rule due to the reinstatement of the significant nexus standard.²²

This brief description shows how important the definition of WOTUS is to provide authority to the federal government to prevent pollutants from being discharged into national waters. Additionally, once jurisdiction under the Clean Water Act is established upon a discharge into WOTUS, the reach of the Clean Water Act goes beyond pollutants for those applying for a federal permit.²³ §401 of the Clean Water Act (codified 33 U.S.C. 1341) requires that all applicants for a federal license or permit to build a facility that may result in any discharge, like those obtaining certification from the Federal Energy Regulatory Commission,²⁴ also obtain a certification from the appropriate state authority that the discharge will comply with other relevant sections of the Clean Water Act.²⁵ Therefore, the definition of WOTUS not only provides the federal government authority to prevent pollutants from entering those waters, but it also provides state governments authority to certify projects that may result in a discharge into WOTUS.

The authority of states under §401, however, was significantly restricted during the Trump Administration through the promulgation of the Clean Water Act Section 401 Certification Rule (2020 Rule) by rejecting the “activity as a whole” scope of review for the “discharge only” standard.²⁶

²² tiffany.dowell. *Navigable Waters Protection Rule (aka the New WOTUS Rule)*, (Sep. 28, 2020) <https://agrillife.org/texasaglaw/2020/09/28/navigable-waters-protection-rule-aka-the-new-wotus-rule/#:~:text=Navigable%20Waters%20Protection%20Rule%20%28aka%20the%20New%20WOTUS,jurisdictional%20waters%3B%20and%20...%202%20%282%29%20Non-Jurisdictional%20Waters.>

²³ 33 U.S.C. § 1341(a)(1).

²⁴ PUD No. 1 of Jefferson County v. Washington Dept of Ecology, 511 U.S. 700 (1994) (where the court held that an applicant for FERC certification must comply with the appropriate state authority’s guidelines to obtain 401 certification even when those guidelines arose from state law that created categories of land).

²⁵ 33 U.S.C. § 1341(a)(1).

²⁶ Environmental Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35318 [hereinafter 2023 Rule] (proposed June 9, 2022) (to be codified at 40 C.F.R. pt. 121, 122, 124).

Like the final rule for WOTUS announced on December 30, a new proposed rule for interpretation of §401 has been made consistent with President Biden’s Executive Order 13990, which called on the agencies to review the 2020 Rule and resulted in a host of changes.²⁷ At least two controversial provisions of §401, the “activity as a whole” scope of review and the “reasonable period of time” which an agency may take to review an application before their authority to provide a certification lapses, are going to change according to the proposed rule.²⁸ The public comment period for the proposed rule ended on August 8, 2022, and the EPA intends to finalize the rule in Spring 2023.²⁹ So, throughout the Spring of 2023 keep an eye out for the final rule on §401 certification that aims to create an “efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles.”³⁰

Edited by Allison Frisella

²⁷ *Id.*

²⁸ *Id.*

²⁹ EPA, *CWA Section 401 Certification*, <https://www.epa.gov/cwa-401/proposed-clean-water-act-section-401-water-quality-certification-improvement-rule> (Aug. 10, 2022).

³⁰ 2023 Rule, *supra* note 25, at 35318.