

Clarifying “Muddy Waters:” EPA and Army Corps Propose Revisions to the Scope of CWA Jurisdiction

by Gage Hart Zobell

On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (together, “the agencies”) released their proposal for the controversial and highly litigated definition of “waters of the United States,” which defines the scope of federal jurisdiction under the Clean Water Act (CWA).¹ The definition of “waters of the United States” (WOTUS) provides the basis for the critical determination of whether industries such as mining, agriculture, and construction will be required to seek costly and potentially time consuming CWA permits. The current definition is the latest development in the decade long fight over the reach of the CWA. The Proposed Rule itself stands as the centerpiece of the current Administration’s efforts to repeal and replace the 2015 Clean Water Rule with a more limited definition of WOTUS, consistent with the Supreme Court plurality’s 2006 decision in *Rapanos v. United States*.²

The Proposed Rule would simplify the definition of WOTUS to include six categories of waters that would be subject to the CWA:

1. Traditional navigable waters, including the territorial seas;
2. Tributaries that contribute perennial or intermittent flow to such waters;
3. Ditches that are navigable or are constructed in a tributary or wetland;
4. Certain lakes and ponds;
5. Impoundments of otherwise jurisdictional waters; and
6. Wetlands adjacent to other jurisdictional waters that have a direct hydrologic surface connection to such waters.³

The Proposed Rule also specifically excludes certain waters such as streams that flow only in response to precipitation and artificially irrigated croplands even if they would otherwise fall within the six categories. The Proposed Rule represents a significant narrowing of Federal jurisdiction under the CWA from the 2015 Clean Water Rule. The agencies have stated the purpose of the new rule is “to define WOTUS in simple, understandable, and implementable terms to reflect the ordinary meaning of the statutory term” while adhering to statutory limitations and meeting regulatory needs.⁴

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If adopted, the Proposed Rule would mark a significant change in CWA regulation resulting in substantially more areas and activities being excluded from CWA discharge and wetland permitting requirements.

I. History of Proposed Rule

The CWA applies generally to any person or entity that discharges pollutants into “navigable waters,” which are broadly defined as “waters of the United States.”⁵ The Supreme Court has vacillated on how broadly the CWA reaches, holding that the CWA extends to “wetlands adjacent to but not regularly flooded” by navigable waters,⁶ but also that it does not apply to “a seasonably ponded, abandoned gravel mining depression” that provided habitat for migratory birds, because it was not navigable.⁷

The Supreme Court’s 4-1-4 split decision in *Rapanos v. United States*, further muddled the jurisdictional waters issue. In a plurality opinion, Justice Scalia wrote that the term “waters of the U.S.” includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’” which are commonly referred to as streams, oceans, rivers, and lakes.⁸ He went on to state that it “does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” Further, Justice Scalia held that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’” are subject to the CWA.⁹ Justice Kennedy concurred in the judgment, but in a separate opinion, proposed a different definition of navigable waters, arguing that any waters that have a “significant nexus” to navigable waters are covered by the CWA.¹⁰

With this complex and somewhat contradictory case law as a backdrop, in 2015 the Obama Administration sought to clarify the definition of “waters of the United States” with its “Clean Water Rule.”¹¹ In short, the Clean Water Rule attempted to distill Justice Kennedy’s significant nexus test into regulatory language. The Clean Water Rule was immediately challenged in both district and appellate courts, and its implementation was eventually stayed nationwide by the Sixth Circuit. In January 2018, the Supreme Court ruled that challenges to the Clean Water Rule were properly brought in the federal district courts, leading to the invalidation of the nationwide stay.¹²

In an attempt to prevent the Clean Water Rule from taking effect nationwide following the Supreme Court’s decision, the Trump Administration added an applicability date to the Clean Water Rule, postponing its effective date by two years.¹³ The federal district court in Charleston, South Carolina invalidated this two-year delay, finding that the agencies did not provide a “meaningful opportunity for public comment” before promulgating the rule.¹⁴ This decision placed the Clean Water Rule back into effect for 26 states, but four states (Texas, Louisiana, Mississippi and Iowa) later obtained preliminary injunctions preventing implementation of the rule. The result is that the Clean Water Rule is in effect for 22 states and the District of Columbia, while the remainder of the country is subject to pre-2015 regulatory language and guidance issued in 1986, 1988, and 2008.¹⁵

Shortly after his inauguration, President Trump issued an Executive Order directing the EPA and Army Corps to rescind or revise the Clean Water Rule and directing that any

future definition of “navigable waters” should be consistent with Justice Scalia’s plurality opinion in *Rapanos*.¹⁶ Following this Executive Order, the agencies initiated a two-step process to repeal and replace the Clean Water Rule.¹⁷ In 2018, the agencies issued a supplemental notice to clarify their intent to rescind the Clean Water Rule in its entirety and recodify the regulatory text that existed prior to 2015.¹⁸ The comment period has closed but repeal rule has not been finalized.

Consistent with the President’s Executive Order, the Proposed Rule attempts to translate Justice Scalia’s *Rapanos* plurality opinion into regulatory language.

II. Proposed Rule – Highlights

The Proposed Rule “revise[s] previous regulatory definitions of ‘waters of the United States’ to distinguish between water that is a ‘water of the United States’ subject to Federal regulation under the CWA and water or land that is subject to exclusive State or tribal jurisdiction.”¹⁹ The proposed revisions narrow the reach of federal authority by specifically enumerating the six categories of water that are jurisdictional, identified above, and delineating the following eleven categories of water that are excluded from federal authority under the CWA:

1. All waters not previously enumerated as belonging to WOTUS;
2. Groundwater, including groundwater drained through subsurface drainage systems;
3. Ephemeral features that diffuse stormwater run-off;
4. The majority of ditches;
5. Prior converted cropland;
6. Artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water cease;
7. Artificial lakes and ponds, including water storage reservoirs for farm and stock watering;
8. Water-filled depressions created incidental to mining or construction and pits excavated for obtaining fill, sand, and gravel;
9. Stormwater control features excavated or constructed to convey, treat, infiltrate, or store stormwater run-off;
10. Wastewater recycling structures; and
11. Waste treatment systems.²⁰

The specific exclusion of these categories of waters in the Proposed Rule is designed to ensure that the reach of the CWA better “reflect[s] the ordinary meaning of the term waters.”²¹

Key to the Proposed Rule are new definitions for the terms “*adjacent wetlands*” and “*tributary*.” These definitions are where the Proposed Rule starkly departs from the Clean Water Rule and the “significant nexus” test from Justice Kennedy’s *Rapanos* concurrence.

Under the Proposed Rule, “*tributary*” is now defined as a “river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [water of the United States] in a typical year either directly or indirectly.”²² The new

definition deviates from the Clean Water Rule in limiting a tributary to a surface water channel that contributes perennial or intermittent flow to a water of the United States. This new limited definition is a direct outgrowth of Justice Scalia's *Rapanos* plurality opinion in requiring a surface connection, albeit not a continuous one.

Further, the Proposed Rule more narrowly defines "*adjacent wetland*" as "wetlands [that] abut or have a direct hydrologic surface connection to a water of the United States."²³ The definition also specifically lists categories of wetlands that are **not** adjacent wetlands. These categories include wetlands that are separated from WOTUS "by upland or by dikes, barriers, or similar structures and also [lack] a direct hydrologic surface connection." The new "*adjacent wetland*" definition is an almost verbatim replication of the plurality opinion in *Rapanos*.

Under the new "*tributary*," "*adjacent wetland*," and other definitions, many of the waters brought under federal jurisdiction by the Clean Water Rule will be left to regulation by the states and tribes. As part of the new rule, the agencies are requesting comments be provided as to a potential dataset being established and shared between the tribes, states, and federal agencies to streamline the classification of waters that fall under the new WOTUS definition. Critics of the Proposed Rule claim that over 60 percent of the nation's streams and wetlands will fall outside the jurisdiction of the CWA, while proponents claim that percentage is grossly exaggerated. What is clear, however, is that adoption of the Proposed Rule, with its narrowed definitions, will result in less federal authority over large swaths of previously contested waters.

III. Key Points for Industry

If adopted, the Proposed Rule would mark a significant change in CWA regulation resulting in substantially more areas and activities being excluded from CWA discharge and wetland permitting requirements. For example, under the 2015 Clean Water Rule, the agricultural industry appeared likely to face increased permitting requirements as many agricultural ditches, ephemeral tributaries, and flood-irrigated fields arguably fell under the purview of the CWA. Under the Proposed Rule, most ditches as well as "*artificially irrigated areas*"²⁴ and "*prior converted cropland*"²⁵ are categorically excluded from CWA permitting requirements. Similarly, under the 2015 Clean Water Rule both the mining and construction industries faced potentially costly permitting delays as water filled excavation pits, mining pits, and gravel pits arguably could be considered wetlands and subject to the CWA. The Proposed Rule categorically excludes from federal jurisdiction all "*water-filled depressions created in upland incidental to mining or construction activity*."²⁶

The Proposed Rule is also particularly significant for stakeholders in the arid west, where many "waters" are dry for several months of the year. Under the Proposed Rule, the CWA would not reach these ephemeral streams and other features that only flow in response to precipitation, even if they drain into traditionally navigable waters. This is a significant change from the Clean Water Rule, which applies to any feature having an identifiable bed, banks, and high-water mark that contributes flow directly or indirectly to

a traditional navigable water.

In wetter areas, the Rule's limitation of wetlands to those features with a "direct hydrologic surface connection" to jurisdictional waters could drastically reduce the number of wetlands requiring a CWA Section 404 permit to dredge and fill. This is perhaps the most significant impact of the Proposed Rule, but Acting Administrator Wheeler acknowledged at the signing ceremony that the full scope of wetland areas exempted is not known. However, it is clear that the Proposed Rule's definition of jurisdictional wetlands is narrower than that of the Clean Water Rule, which includes all wetlands within 4,000 feet of a navigable water or tributary as well as those wetlands that meet the "significant nexus" test by trapping sediment, pollutants, or flood waters from jurisdictional waters, or by contributing flow, habitat, or food resources to a jurisdictional water or a species within a jurisdictional water.²⁷

The Proposed Rule will be open for public comment for 60 days once it is published in the Federal Register. After the comment period closes, the agencies will develop a final rule and respond to all substantive comments. The Rule will almost certainly face litigation by environmental NGOs and some State Attorneys General once it is finalized. Ultimately, the Supreme Court may be asked to clarify its *Rapanos* decision and the scope of the CWA. As it has for several years, this issue will continue to be an important one to watch for the agricultural and mining industries along with the energy, natural resources, construction, and transportation sectors.

Dorsey's regulatory attorneys are available to answer questions regarding the Proposed Rule and opportunities to participate in the rulemaking process.

¹ Revised Definition of "Waters of the United States," prepublication version, (to be codified at 33 CFR Part 328, 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401), https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf.

² *Rapanos v. United States*, 547 U.S. 715 (2006).

³ Revised Definition of "Waters of the United States," Page 186 (to be codified as 33 CFR 328.3 (a)).

⁴ Revised Definition of "Waters of the United States," Page 153.

⁵ 33 U.S.C. § 1362(7).

⁶ *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

⁷ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 531 U.S. 159, 171.

⁸ *Rapanos v. United States*, 547 U.S. 715, 739 (2006).

⁹ *Id.* at 742 (emphasis in original).

¹⁰ *Id.* at 759.

¹¹ 80 Fed. Reg. 37,054 (June 29, 2015), codified at 40 C.F.R. § 230.3(o).

¹² *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617 (2018).

¹³ 83 Fed. Reg. 5,200 (February 6, 2018).

¹⁴ *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D. S.C. 2018).

¹⁵ See U.S. EPA, "About Waters of the United States," *available at* <https://www.epa.gov/wotus-rule/about-waters-united-states>.

¹⁶ Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (March 3, 2017).

¹⁷ 82 Fed. Reg. 34,899 (July 27, 2017).

¹⁸ 83 Fed. Reg. 32,227 (July 12, 2018).

¹⁹ Revised Definition of "Waters of the United States," Page 154.

²⁰ Revised Definition of "Waters of the United States," Page 186-7, (to be codified as 33 CFR 328.3 (b)).

²¹ Revised Definition of "Waters of the United States," Page 155.

²² Revised Definition of "Waters of the United States," Page 189, (to be codified as 33 CFR 328.3(c)(11)).

²³ Revised Definition of "Waters of the United States," Page 187, (to be codified as 33 CFR 328.3(c)(1)). The word "abut" has been given the following definition: "to touch at least at one point or side of a [WOTUS]."

²⁴ Revised Definition of "Waters of the United States," Page 187, (to be codified as 33 CFR 328.3(b)(6)).

²⁵ Revised Definition of "Waters of the United States," Page 187, (to be codified as 33 CFR 328.3(b)(5)).

²⁶ Revised Definition of "Waters of the United States," Page 187, (to be codified as 33 CFR 328.3(b)(8)).

²⁷ 40 C.F.R. §§ 230.3(o)(1)(viii), 230.3(o)(3)(v).