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A Feature Article from Babast Calland

U.S. EPA AND ARMY CORPS PROPOSE REDEFINING "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT

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**ALERT
ENVIRONMENTAL**



Last week, the U.S. Environmental Protection Agency and Army Corps of Engineers (collectively, the Agencies) released a long-awaited proposed rule that would redefine "waters of the United States" (WOTUS) under the Clean Water Act (CWA) and dramatically alter the federal government's jurisdiction over surface water, including wetlands, throughout the U.S. The proposed rule is part of the Trump administration's efforts to rescind a 2015 rule defining WOTUS, known as the "Clean Water Rule" (CWR), that was promulgated by the Agencies during the Obama administration and to provide clarity, predictability and consistency in identifying federally regulated waters. The public will have 60 days to comment once the new proposed definition of WOTUS is published in the Federal Register. This Alert provides an overview of the 253-page proposal, identifies some of the key proposed changes, and discusses opportunities to comment on the proposed new definition of WOTUS and other questions posed by the Agencies.

Relevant Background

Since taking office, President Donald Trump has prioritized rolling back the CWR's definition of WOTUS, which is widely regarded as expanding the scope of the federal government's jurisdiction under the CWA. In February 2017, the president signed Executive Order 13778 directing the Agencies to review the CWR's definition of WOTUS and to publish a proposed rule rescinding or revising the CWR. The Order also directs the Agencies to consider defining WOTUS in a manner consistent with the narrower interpretation of WOTUS adopted in Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Scalia's opinion limits WOTUS to include only relatively permanent, standing or flowing bodies of water. In contrast, the CWR relied heavily on Justice Anthony Kennedy's concurring opinion in *Rapanos*, which adopted a "significant nexus" test for jurisdiction under the CWA.

The Trump administration's CWR rollback efforts were intended to proceed in a two-step fashion, with Step One (not yet finalized) being the repeal of the CWR and the re-codification of the pre-2015 definitions and Agencies' interpretations of WOTUS. The Agencies also issued a separate rule delaying the applicability date of the CWR to 2020. These actions by the Trump administration and related judicial decisions[1] have resulted in the current, unique, and confusing situation in which the CWR currently is enjoined in 28 states but in effect in 22 others, including Pennsylvania.

The December 2018 proposed rule is the beginning of Step Two of the CWR rollback process, where the Agencies ultimately plan to finalize a revised definition of WOTUS.

Revised Definition Would Limit Federal Government's CWA Jurisdiction

The Agencies describe the proposed WOTUS definition as "straightforward" and cost-effective, while still protective of the nation's navigable waters and consistent with statutory authority. The proposed definition is intended to clarify and easily identify waters that are federally regulated. The proposed WOTUS definition is considerably scaled back as compared with the CWR and would mean less waters would be federally jurisdictional. However, the Agencies emphasize that states are free to regulate non-federal waters under their own programs.

The proposal focuses on waters that are "physically and meaningfully connected to traditional navigable waters." Unlike the CWR, which separates waters into those that are jurisdictional either by rule or on a case-by-case basis (i.e., by significant nexus), the proposed rule includes six categories of waters that are WOTUS and 11 categories of waters or features that are not WOTUS. A summary of the proposed categorically jurisdictional and non-jurisdictional waters is provided in the table below:

WOTUS includes:

- Traditional navigable waters, including territorial seas (TNWs)
- Tributaries that contribute perennial or intermittent flow to TNWs
- Ditches that (a) are TNWs, (b) are constructed in a tributary, (c) relocate or alter a tributary such that they are a tributary, or (d) are constructed in an adjacent wetland so long as they meet the definition of tributary
- Lakes and ponds that (a) are TNWs, (b) contribute perennial or intermittent flow to a TNW in a typical year directly or indirectly through a jurisdictional water, or (c) are flooded by jurisdictional waters in a typical year
- Impoundments of otherwise jurisdictional waters
- Wetlands adjacent to jurisdictional waters

WOTUS does NOT include:

- Any feature not identified in the proposal as jurisdictional
- Groundwater
- Ephemeral features and diffuse stormwater run-off (e.g., sheet flow)
- Ditches that are not defined as WOTUS
- Prior converted cropland
- Artificially irrigated areas that would revert to upland if irrigation stopped

- Artificial lakes and ponds constructed in upland that are not defined as WOTUS
- Water-filled depressions and pits created in upland incidental to mining or construction activity, and pits excavated in upland to obtain fill, sand or gravel
- Stormwater control features created in upland to convey, treat, infiltrate or store stormwater runoff
- Wastewater recycling structures constructed in upland (e.g., detention/retention basins)
- Waste treatment systems

The proposed definition of WOTUS includes several material changes to the definition of WOTUS under the CWR:

- **"Significant nexus" is absent** - First and foremost, the new proposed definition no longer references waters with a "significant nexus" to TNWs, a hallmark of the CWR. Instead, the proposed WOTUS definition would focus largely on whether the water has a "surface connection" or contributes perennial or intermittent flow (i.e., flow that is not the direct result of precipitation) to a TNW. In contrast to the CWR, ephemeral features would categorically be excluded from CWA jurisdiction.
- **"Tributary" is narrowed** - The proposed definition of a "tributary" is limited to naturally occurring surface water channels with intermittent or perennial flow to a WOTUS in a typical year either directly or indirectly through another WOTUS. Ephemeral streams and references to defined beds, banks and ordinary high water marks are absent from the proposed definition. Further, while the proposed definition extends the tributary definition to flows through artificial or natural breaks (e.g., dam, boulder field, etc.), it only does so if the "break" conveys intermittent or perennial flow to a tributary or other WOTUS downstream of the "break." The proposed definition also does not contemplate that the flow may go underground at any time.
- **"Adjacent Wetland" is narrowed** - In addition, "adjacent wetlands" (as defined in the proposed rule) would not be jurisdictional unless they either physically abut a WOTUS or have a direct hydrologic surface connection to another WOTUS other than a wetland. The proposed definition would also exclude wetlands that are both physically separated from a WOTUS by upland or a barrier and lacking a direct hydrologic surface connection. This jurisdictional guideline is much narrower than the CWR, which extends jurisdiction to wetlands that are physically separated from a WOTUS but within a certain distance from an ordinary high water mark or within the 100-year floodplain of a WOTUS.
- **"Typical year" defined** - Under the proposed definition of WOTUS, federal jurisdiction over tributaries, lakes, and adjacent wetlands would depend on conditions during a "typical year." The proposed definitions of intermittent and perennial streams also depend on flows during a typical year. "Typical year" is defined as the "normal range of precipitation over a rolling thirty-year period for a particular geographic area." Although not defined in the proposed rule, the preamble to the proposal indicates that the proposed definition of "typical year" is commonly understood in field applications, and the "particular geographic area" should be applied on a watershed-scale basis.

- **New definitions for "waste treatment systems" and "prior converted cropland"** - Finally, the proposed rule includes a new regulatory definition of "waste treatment systems" and new language to clarify the meaning of "prior converted cropland," both of which historically have been excluded from the definition of WOTUS. The proposed definition of "waste treatment systems" would include all components of such systems (e.g., lagoons, treatment ponds, and settling or cooling ponds) designed to actively or passively treat wastewater. The Agencies note in the proposal that waste treatment systems must be lawfully constructed to qualify for the exclusion. The proposed new definition of WOTUS also would clarify when "prior converted cropland," which generally means area that was drained or manipulated for agricultural purposes prior to December 23, 1985, would be abandoned and therefore no longer subject to the CWA exclusion.

Opportunities for Comment

If adopted as proposed, the proposed definition of WOTUS would fundamentally alter, and substantially narrow, the scope of the federal government's authority under the CWA. As discussed above, the public comment period will open upon publication of the proposal in the Federal Register. In addition, the Agencies have already scheduled a public webcast on January 10, 2019 and a public listening session in Kansas City, Kansas on January 23, 2019.

The Agencies are specifically soliciting comments on several key aspects of their proposal, including the following:

- Whether the "significant nexus" test must be a component of the proposed new definition of WOTUS.
- Whether the definition of "tributary" should be limited to perennial waters only and not those with intermittent flows.
- Whether "effluent-dependent streams" should be included in the definition of "tributary."
- Whether the jurisdictional cut-off for "adjacent wetlands" should be within the wetland or at the wetland's outer limits.
- Whether a ditch can be both a "point source" and a WOTUS under the CWA.
- Whether the Agencies should work with states to develop, and make publicly available, state-of-the-art geospatial data tools that could be used to identify the locations of WOTUS.
- The appropriate field methodologies for identifying perennial or intermittent flow and navigability.
- Interested parties are encouraged to provide feedback to the Agencies.

Continuing Uncertainty

It is important to highlight that the Agencies' proposal is a significant, but not final, step in what undoubtedly will be a lengthy process to re-define WOTUS. As with the CWR, litigation challenging

any final rule adopting all or part of the proposal is certain. For example, litigation regarding the CWR began almost immediately upon finalization of the CWR in 2015 and continues today. While this proposal works its way through the rulemaking process and the CWR challenges work their way through the courts, regulated parties are forced to contend with state-dependent differences in the scope of the federal government's authority under the CWA. These nuances can have significant permitting, compliance, and enforcement implications.

Babst Calland is actively monitoring this rulemaking and is analyzing how it could affect parties from across sectors and industries. If you have questions about the proposed rule or comment procedures, please contact Lisa M. Bruderly at (412) 394-6495 or lbruderly@babstcalland.com or Gary E. Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com.

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We thank Babst Calland, a leading and respected Law Firm for this important update.

- Gary R. Brown, P.E.



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