

On April 21, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published the final Navigable Waters Protection Rule in the Federal Register (85 FR 22250) (formerly known as the Waters of the United States or WOTUS or Clean Water Rule). The rule is slated to go into effect on June 22, 60-days after publication. The summary of the rule states: “The Navigable Waters Protection Rule is the second step in a comprehensive, two-step process intended to review and revise the definition of ‘waters of the United States’ consistent with the Executive Order signed on February 28, 2017, ‘Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States Rule.’”

Once effective, it will replace the rule published on October 22, 2019. This final rule implements the overall objective of the Clean Water Act to restore and maintain the integrity of the Nation’s waters by maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress’ policy directive to preserve States’ primary authority over land and water resources. This final definition increases the predictability and consistency of Clean Water Act programs by clarifying the scope of ‘waters of the United States’ federally regulated under the Act.”

The agencies interpret the term “waters of the United States” to encompass: (1) The territorial seas and traditional navigable waters; (2) perennial and intermittent tributaries that contribute surface water flow to such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters.

The rule explicitly excludes twelve categories of waters: (1) waters and water features not identified above; (2) groundwater, including groundwater drained through subsurface drainage systems; (3) ephemeral features, including ephemeral streams, swales, gullies, rills, and pools; (4) diffuse stormwater run-off and directional sheet flow over upland; (5) ditches that are not traditional navigable waters or jurisdictional tributaries, and those portions of ditches constructed in adjacent wetlands that themselves are not an adjacent wetland; (6) prior converted cropland; (7) artificially irrigated areas, included fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease; (8) artificial lakes and ponds, including water storage reservoirs and farm irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds do not meet the conditions of defined “lakes and ponds, and impoundments of jurisdictional waters;” (9) water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel; (10) stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off; (11) groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and (12) waste treatment systems.

The rule includes sixteen defined terms to help better clarify jurisdiction. These terms are: adjacent wetlands, ditch, ephemeral, high tide line, intermittent, lakes and ponds and impoundments of jurisdictional waters, ordinary high water mark, perennial, prior converted cropland, snowpack, tidal waters, tributary, typical year, upland, waste treatment system, and wetlands.

The decision to review the definition of “waters of the United States,” in light of past Supreme Court decision, has been controversial. Some states and environmental groups have criticized the Trump Administration for “rolling back” protections for waters that will no longer be under federal jurisdiction. This is especially a concern for States that do not currently have equivalent protections for state waters, given their longstanding regulatory authority delegated under the federal Clean Water Act. In addition, the EPA Science Advisory Board (SAB) criticized the rule in a memo sent to EPA Administrator Andrew Wheeler on February 27 stating, “The proposed Rule does not present new science to support this definition, thus the SAB finds that the proposed Rule lacks a scientific justification, while potentially introducing new risks to human and environmental health.... [The rule] offers no comparable body of peer reviewed evidence, and no scientific justification for disregarding the connectivity of waters accepted by current hydrological science.” The SAB pointed out that as scientists their advice is not limited by the law and legal precedent (WSW #2381).

Other States have highlighted their inherent authority to protect all waters of the State, whether or not they also fall under federal jurisdiction. Some stakeholders, particularly those in the agricultural sector, have praised the Administration's development for a new rule, stating that it helps create regulatory certainty for farmers and clarifies which waters are jurisdictional, and subject to federal protection, and which are not. Previous iterations of the rule have been cited as ambiguous, often requiring consultants and a lengthy case-by-case review by the Corps to determine whether waters were jurisdictional.

Several WSWC states have issued statements in response to the final rule.

The Arizona Department of Environmental Quality (ADEQ): "The State supports the narrower definition in the Navigable Waters Protection Rule. The waters of the state are unique, and ADEQ believes it is best for Arizona to address Arizona waters locally in practical and pragmatic ways. ADEQ is currently reviewing the new definition in detail to ensure we fully understand how it impacts Arizona" (WSW # 2385)

New Mexico Governor Michelle Lujan-Grisham: "Trump's new rule is an absolute disaster for the state's water resources. No other natural resource in New Mexico has greater significance to our people than our water: environmentally, culturally, economically, recreationally. Stripping federal protections from our rivers and streams is an affront to all who call New Mexico home. My administration is committed to protecting New Mexico's precious waters and will consider all legal options to prevent this rule from going into effect. This is far from over" (WSW #2386).

North Dakota Governor Doug Burgum: "In stark contrast to the confusing 2015 WOTUS rule, this new definition provides clarity and common sense for landowners and state agencies on what constitutes jurisdictional waters. We believe this rule can work in concert with our state regulations, which already protect both our surface waters and groundwater. We appreciate the Trump administration's considerable efforts to consult with governors and other stakeholders on this rule, recognizing our ability as states to manage our own waters effectively, because no one cares more deeply about clean water than the people who live here."

Oklahoma Governor Kevin Stitt: "The new definition for 'Waters of the United States' will provide the much needed regulatory certainty and predictability necessary for protecting waters and keeping our economy growing strong. The new rule restores the proper balance between the federal government and the states as originally envisioned by Congress. We greatly welcome this rule as it will have many positive impacts for the Great State of Oklahoma."

Washington Department of Ecology: "With federal agencies retreating, the responsibility for protecting the environmental health of these waters falls to states.... While these waters are protected under Washington law, the federal rollbacks will adversely affect the state.... The new federal rule means thousands of Washington wetlands no longer qualify for federal protection; therefore, those projects will no longer be able to be authorized under the Corps' nationwide permits. The federal government's retreat from Clean Water Act permitting shifts an unprecedented burden to Washington, creating uncertainty by putting the development community at risk of violating state water quality protections without state authorization."