



Federal Agencies Issue Long-Awaited “Waters of the United States” Notice of Proposed Rulemaking for Clean Water Act Jurisdiction

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The long-awaited [Notice of Proposed Rulemaking \(NOPR\) redefining the term “waters of the United States”](#) under the federal Clean Water Act (CWA) was released on March 25, 2014, by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) (collectively referred to as “the agencies”). The proposed rule seeks to clarify which streams, wetlands and other waters are considered “waters of the United States” and, thus, subject to permitting requirements under the CWA. The joint proposed rule will affect project development and operations across the energy, water, construction, building, agricultural and transportation sectors. Supporters of the NOPR have [estimated](#) that it would extend the jurisdictional scope of the CWA to an additional “20 million acres of wetlands and more than half our nation’s streams.” The agencies’ proposal expands the types of waters that will be considered jurisdictional and subject to CWA permitting requirements to include:

- All “tributaries” of jurisdictional waters, and all waters located within a riparian area or a floodplain, which have historically been subject to case-by-case determinations;
- Certain “isolated” wetlands and ditches dug in uplands, which were categorically excluded from jurisdiction under prior agency guidelines and case law; and
- Certain “other” waters that are deemed to have a “significant nexus” to jurisdictional waters.

Concurrent with the NOPR, the agencies also announced the issuance of an [“Interpretive Rule.”](#) The Interpretive Rule addresses certain agricultural permitting exemptions under CWA section 404(f)(1)(A) and, according to the agencies, is intended to incentivize conservation practices.

Structure of the Proposed Rule

Under both the current and proposed regulations, there are multiple categories of “waters” that comprise the universe of what may be considered “waters of the United States.” (Please see our [December 2013 Alert](#) for a lengthy background on these dynamic issues). While the regulations provide for seven categories of “waters,” the definition for “waters of the United States” proposed in the NOPR can more helpfully be grouped into four categories: (1) waters that are jurisdictional by rule; (2) so-called “adjacent” waters, which may require a case-specific analysis; (3) “other waters” that would require a case-specific “significant nexus” analysis; and (4) excluded waters, which are never jurisdictional.

Jurisdictional “by rule.” Waters considered jurisdictional “by rule” means that EPA and the Army Corps have determined that the scientific and legal literature supports a finding, without the need for case-specific analysis, that such waters are “waters of the United States” for purposes of triggering CWA permitting requirements. Under the NOPR, this category would include waters used in interstate or foreign commerce, interstate waters, territorial seas, all impoundments of defined waters, and tributaries of each of these waterbody types. The agencies’ proposed treatment of tributaries as jurisdictional “by rule” represents a significant change from current regulations.

Adjacent Waters. EPA and the Army Corps also characterize “adjacent” waters to be “by rule” jurisdictional waters of the United States. However, the determination of whether a water is adjacent

for purposes of meeting the definition of “waters of the United States” may require a case-specific analysis regarding its hydrologic connection and contiguous relationship to jurisdictional streams, riparian areas, floodplains, and other waters. Importantly, the agencies have proposed a broader “adjacent” inquiry under the NOPR by treating waters located “within the riparian area or floodplain” as “adjacent” waters and by treating all adjacent “waters,” not just adjacent “wetlands,” as being jurisdictional if they are adjacent to another jurisdictional water.

Waters Subject to Significant Nexus Analysis. A key element of the “waters of the United States” definition is the “other waters” category for which a jurisdictional determination will require a “*significant nexus*” analysis. This category primarily covers wetlands, intermittent and ephemeral streams, and other similar waters. As proposed in the NOPR, a significant nexus exists where:

- the water “either alone or in combination with other similarly situated waters in the region” significantly affects the chemical, physical, or biological integrity of a water that is; (i) used in interstate or foreign commerce; (ii) is an interstate water or wetlands; or (iii) a territorial sea; and
- the identified effect is “more than speculative or insubstantial.”

The NOPR further explains that the determination of a significant nexus will be based on a record that documents the scientific basis for concluding which functions are provided by the waters and why their effects on a traditional navigable water, interstate water, or the territorial seas are significant, including that they are more than speculative or insubstantial.

Excluded Waters. The NOPR also proposes to establish a category of *excluded waters*. Under the NOPR, certain waters are categorically excluded from the definition of “waters of the United States” (even if they would otherwise be classified under the above-described categories). Among the types of waters that are excluded by rule are: (i) ponds and lagoons used in waste treatment systems; (ii) prior converted cropland; (iii) upland ditches; (iv) ditches that do not contribute flow to traditional navigable waters, interstate waters, territorial seas or jurisdictional impoundments; (v) groundwater; (vi) artificially irrigated areas, lakes and ponds; (vii) ornamental waters, artificial pools or swimming pools; (viii) collected water from construction activity; and (ix) gullies, rills and non-wetland swales. The exclusion of such categories of water oftentimes is based on a specific use (e.g., ponds used exclusively for stock watering, irrigation, settling basins or rice growing) or the precipitating cause (e.g., “water-filled depressions created incidental to construction activity”).

Key Definitions in the Proposed Rule

As part of revisions to the definition of “waters of the United States,” the agencies also propose to define a number of new terms for the first time, including: “significant nexus”; “tributary”; and “neighboring”; as well as a revised definition for the term “adjacent.” These new and revised definitions, quoted verbatim below, will be important elements in the implementation of the “waters of the United States” proposal:

- **Significant nexus:** The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.
- **Tributary:** The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.

- **Adjacent:** The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”
- **Neighboring:** The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

Next Steps

Specific Requests for Comments. Once the NOPR is published in the *Federal Register*, commenters will have 90 days to submit their comments. In addition to comments on the proposed regulatory text, the agencies also have requested comments on a number of matters. The primary focus of the agencies’ request for comments is over the alternative approaches available to determine which “other waters” are jurisdictional. According to the NOPR, these alternative approaches “could rely less, or not at all, on case-specific analysis of whether waters are similarly situated for conducting a significant nexus analysis.”

The agencies are also requesting comments on:

- all aspects of the proposed definition of “tributaries”;
- whether there are other reasonable options for determining adjacency of waters in certain situations;
- whether the proposed rule should provide greater clarity on how to determine if a water is located in the floodplain of a jurisdictional water;
- providing greater clarity in the definition of “neighboring”;
- whether “other waters” can be aggregated in some areas for purposes of a significant nexus analysis and, specifically, whether certain EPA-designated Level III ecoregions are appropriate for such an analysis;
- whether there should be any additional categories of “other waters” that are not jurisdictional; and
- how to distinguish between gullies and swales (which are excluded from jurisdiction) and ephemeral tributaries (which are categorically jurisdictional).

Interpretive Rule. The Interpretive Rule was developed in coordination with the U.S. Department of Agriculture, and while it has already been approved and signed by the agencies, they are requesting separate comments. According to the Interpretive Rule, the agencies have determined that it is reasonable to find that the section 404(f)(1)(A) exemption covers specific Natural Resources Conservation Service (NRCS) conservation practices because these conservation practices are similar enough to also be exempt from the CWA section 404 permitting requirements.

Keeping Informed

Van Ness Feldman will be developing further analysis of this NOPR and tracking developments related to this proposal. If you would like to receive further updates on this NOPR, please send an email to: waters@vnf.com.

For More Information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about the implementation of the Clean Water Act, please contact [Brent Carson](#), [Joseph Nelson](#), [Duncan Greene](#), or any member of the firm's [Environmental](#) Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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