



EPA Proposes to Amend Effective Date of WOTUS Rule

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On November 16, 2017, the U.S. Environmental Protection Agency and U.S. Department of the Army (“Agencies”) unveiled a proposed rule to amend the effective date of the 2015 rule defining “waters of the United States,” commonly referred to as the “WOTUS Rule.” The WOTUS Rule, which defines the scope of federal jurisdiction under the CWA, was adopted by the Agencies under the Obama Administration in a 2015 Rule titled “Clean Water Rule: Definition of ‘Waters of the United States’” (80 Fed. Reg. 27054, June 29, 2015). As explained in previous alerts circulated in [March 2014](#), [June 2015](#), [May 2016](#), [March 2017](#), and [July 2017](#), the WOTUS Rule has far-reaching implications for project developers across energy, water, agricultural, construction, and transportation sectors.

This rule proposes to amend the effective date of the WOTUS Rule until two years after this proposed action is finalized and published in the Federal Register. According to the Agencies, the proposal to amend the effective date will provide clarity and predictability to the regulated public during the Agencies’ two-step rulemaking process intended to review and revise the definition of “waters of the United States.”

Background

The WOTUS Rule, as finalized in 2015, had an effective date of August 28, 2015. Implementation of the WOTUS Rule is currently on hold as a result of the Sixth Circuit’s nationwide stay of the rule on October 9, 2015 and the Supreme Court’s pending decision on the question of whether the court of appeals has original jurisdiction to review challenges to the rule. *In re E.P.A.*, 803 F. 3d 804, 807(6th Cir. 2015). The Supreme Court held oral arguments Oct. 11, 2017 and could issue a decision resolving the question of the court of appeal’s jurisdiction anytime.

Concurrently with pending court review, the Agencies are engaged in a two-step rulemaking process to reconsider the WOTUS Rule. The first step proposes to rescind the definition of “waters of the United States” and re-codify the previous definition. In Step 2, the Agencies are working to substantively reconsider the definition of “waters of the United States.”

Agency Rationale

The Agencies note that if the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the WOTUS Rule, the Sixth Circuit case would be dismissed and its nationwide stay of the 2015 WOTUS Rule would expire, leading to possible inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending a final substantive Step 2 rulemaking.

The Agencies suggest that the proposed rule could establish a clear regulatory framework that would avoid the possible inconsistencies, uncertainty and confusion that could result from the issuance of a Supreme Court ruling while the Agencies are simultaneously engaged in the process of reconsidering the rule under the 2 Step rulemaking process. The Agencies suggest that a two-year extension of the effective date of the WOTUS Rule would ensure that, during such potential interim period, the scope of CWA jurisdiction will be administered exactly the way it is now and would ensure that there is sufficient time for the regulatory process for reconsidering the definition of “waters of the United States” to be fully completed.

Next Steps

The Agencies will be accepting public comment on this proposal for 21 days after publication in the Federal Register.

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 [Duncan Greene](#), [Joseph Nelson](#), [Brent Carson](#), [Sheri Spang](#), [Jenna Mandell-Rice](#), 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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