

EPA and U.S. Army Corps of Engineers Approve New Definition of "Waters of the United States"

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The U.S. **EPA** and the **U.S. Army Corps of Engineers** announced today that they have jointly approved a new definition of the key term "waters of the United States," a term that defines the limits of federal jurisdiction over surface waters under the **Clean Water Act** and several other federal laws. The rule containing the new definition will become effective 60 days after its publication in the Federal Register, which typically occurs within a week or so of the agencies' public announcement of a new rule.

The agencies announced the new rule after several years of wrestling with this regulatory definition, which establishes the scope of federal wetlands permitting authority, federal discharge limitations, and other important programs. EPA and the Corps assert in the preamble to the rule that this new definition is "narrower" than the existing regulatory definition, and that "fewer waters will be defined as 'waters of the United States'" than under existing regulations. In the debate leading up to today's announcement, however, a variety of affected parties – landowners, developers, farmers, manufacturers and others – have argued that the agencies' effort to redefine "waters of the United States" will lead to a broadening of federal jurisdiction.

Several features of the new rule are of particular importance to interested parties in California and other western arid states:

- All "tributaries" are jurisdictional (i.e., subject to federal regulation) "by rule" if they have an ordinary high water mark and a "bed and bank" and if those features can be shown to be hydrologically linked to navigable waters or interstate waters. The "by rule" designation means that it will no longer be necessary for the agencies to establish that a tributary has a significant link to a navigable water, regardless of how attenuated that connection might be. There are no threshold requirements for volume of water nor for frequency of flow. By way of example, it appears that a "tributary" that is miles removed from the closest river, lake or ocean, with only a trickle of flow that occurs once every 10 years or more, will nevertheless be deemed jurisdictional as long as there is physical evidence of a "bed and bank" and an ordinary high water mark.
- Certain "adjacent wetlands" are now also jurisdictional "by rule" if, for example, they are located in a 100-year floodplain and are within 1,500 feet of a "traditional navigable water"

(e.g., a river, lake, or ocean) or of a tributary.

- Case-by-case determinations of whether an aquatic feature has a "significant nexus" to a navigable water – thereby rendering it jurisdictional – will continue to be made for a variety of different waterbody types, including "western vernal pools in California" and any surface water feature within the 100-year floodplain or within 4,000 feet of a navigable water or covered tributary that is not already defined as jurisdictional by the "by rule" standard. The term "significant nexus" is given some definition in the final rule by reference to a familiar list of functional ecosystem values served by wetlands and other water bodies.

The final rule does call out a narrow class of "waters" that are determined **not** to be jurisdictional as "waters of the United States," including, but not limited to,

- certain types of ditches;
- artificially irrigated areas that would revert to dry land should the irrigation cease;
- erosional features, including gullies, rills, non-wetland swales;
- groundwater, including groundwater drained through subsurface drainage systems;
- stormwater control features
- swimming pools, ornamental waters created in dry land, "puddles."

Added to this list is a statement in the preamble to the final rule that it does not "regulate shallow subsurface connections nor any type of groundwater."

Importantly, this rule applies only to new jurisdictional determinations that are required *after* the rule's "effective date." The agencies will not reopen existing approved jurisdictional determinations unless the usual conditions apply for a revision of the determination.

Implementation of this rule will be far more complicated and detail-driven than what can possibly be captured here in this very brief synopsis. It is hard to calculate its impact on the regulated community, especially in places like California where the Corps and EPA have traditionally taken a very aggressive approach to their claims of jurisdiction. At the very least, this rule will bolster those claims by giving the agencies a formal regulation to rely upon. Litigation challenging this rule has been threatened for months, and certain Members of Congress have vowed to do what they can to take legislative action.

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