



CLEAN WATER ACT WATERS OF THE U.S. (WOTUS)

ISSUE: Jurisdiction of Clean Water Act (“CWA”) under the Waters of the U.S. (“WOTUS”)

Background: The CWA generally prohibits the discharge of pollutants into navigable waters (i.e., waters of the U.S.), except in accordance with a permit issued by the U.S. Environmental Protection Agency (EPA), the Army Corps of Engineers (“Corps”) or a delegated state. The statute protects “navigable waters,” which it defines as “the waters of the United States, including the territorial seas.” The scope of WOTUS is not defined in the CWA. Thus, the Corps and EPA have defined the term in regulations several times as part of their implementation of the CWA.

Two Supreme Court rulings, issued in 2001 and 2006 interpreted the scope of the CWA more narrowly than EPA and the Corps had done previously in regulations and guidance. However, the rulings also created uncertainty about the intended scope of waters that are protected by the CWA. In 2014, the Corps and EPA proposed and in 2015 finalized revisions to the existing 1980 based regulations in light of the Court’s rulings. On February 28, 2017, the President issued an Executive Order directing EPA and the Department of the Army to review and rescind or revise the 2015 Rule.

On December 11, 2018, the EPA and the Corps proposed a revised definition for WOTUS aimed at establishing the scope of federal regulatory authority under the CWA in a more clear and understandable way. The proposed definition is the latest attempt to bring clarity to jurisdictional issues commonly disputed among the agencies and regulated community, including questions over whether discharges to wetlands, ditches and tributaries require permits. Prior definitions have been heavily influenced by numerous court decisions.

CURRENT STATUS: On February 14, 2019, the EPA and the Corps published for public comment a proposed rule defining the scope of waters subject to federal regulation under the CWA in light of the U.S. Supreme Court decisions and consistent with Executive Order 13778, signed on February 28, 2017, entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The agencies propose to interpret the WOTUS to encompass: traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters.

If finalized as proposed, the revised definition may benefit impacted stakeholders, including mosquito control districts by providing greater certainty as to which projects are subject to EPA and Corps jurisdiction and require permits.

