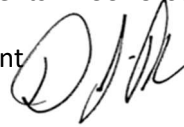


JANUARY 10, 2019

TO: Corporate Correspondents — CC 19-002

FROM: Dirk Krouskop, President



SUBJECT: Proposed Rule to Revise the Definition of “Waters of the United States”

On December 11, 2018, the Environmental Protection Agency and the Department of the Army Corps of Engineers (hereinafter, “the Agencies”) released a “Revised Definition of Waters of the United States” a revision of the 2015 Clean Water Rule (hereinafter, 2015 Rule) defining the scope of waters federally regulated under the Clean Water Act (CWA). The CWA describes its jurisdictional scope as “navigable waters,” defined in section 502(7) of the statute as “Waters of the United States” (WOTUS). The Act does not, however, clearly define which rivers, streams, and wetlands are WOTUS. The United States Supreme Court has addressed the extent of WOTUS subject to federal jurisdiction in *United States v. Riverside Bayside Homes* (1985); *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (2001); and the consolidated case *Rapanos v. United States* (2006). Once the proposed rule is published in the *Federal Register* (which will not occur until the government shut down is resolved), there will be a 60-day comment period. The Agencies also postponed a public hearing scheduled for January 29, 2019, due to the shutdown.

The decision in *Rapanos* confirmed that federal jurisdiction has limits but failed to establish clear criteria on defining these limits. Instead, the Court issued one opinion by four Justices (the plurality opinion) and a second with only one Justice (Kennedy) that agreed the Agencies had failed to recognize the limits in the cases before the Court but did not agree on how the Agencies should identify what waters are WOTUS. Simply stated, Justice Scalia’s plurality opinion read the CWA to mean that to be a WOTUS, a water or wetland should have a relatively permanent surface connection to a traditionally navigable water. By contrast, Justice Kennedy concluded that to be WOTUS, a water or wetland must have a significant nexus to a traditionally navigable water.

As a result, federal agencies have often evaluated the jurisdiction of WOTUS under the CWA on a case-specific basis. This proposed rule significantly revises the 2015

Rule. The Agencies' proposed rule is intended to increase CWA program predictability and consistency by clarifying the scope of federally regulated waters and wetlands under the CWA while respecting State and tribal authority over their own land and water resources. A prepublication version of the proposed rule is available at https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf.

This memo provides a summary of the proposed rule and describes differences between the proposed rule and 2015 Rule. A summary of comments that NCASI intends to submit is also provided.

Key Areas of the Proposed Rule

The Agencies state that the proposed rule will establish “categorical bright lines that provide clarity and predictability for regulators and the regulated community.” The proposed rule defines WOTUS to encompass, “relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific connection to traditional navigable waters, as well as wetlands abutting or having a direct hydrologic surface connection to those waters.” The Agencies believe this definition of WOTUS eliminates the need for case-by-case application of Justice Kennedy’s significant nexus test because the categories of jurisdictional waters adhere to, “the basic principles articulated in the *Riverside Bayview*, *SWANCC*, and *Rapanos* decisions while respecting the overall structure and function of the CWA.” Finally, the Agencies believe this definition of WOTUS “draws the boundary” between those waters subject to federal requirements under the CWA and those waters and wetlands that are subject to State and Tribal authority.

The 2018 proposed rule that redefines WOTUS identifies six categories of waters as jurisdictional by rule: (1) traditional navigable waters; (2) tributaries; (3) ditches; (4) lakes and ponds; (5) impoundments; and, (6) adjacent wetlands. The proposed rule does eliminate one entire category from the 2015 Rule, interstate waters, because it had no connection to navigable waters. While slightly re-configured and with new explanations, these are the same basic categories discussed in previous efforts to establish a WOTUS definition.

- Traditional Navigable Waters (TNW) are defined as, “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.” This definition is the same as the 2015 Rule except that it now includes the previously separate category of territorial seas.
- Tributaries are defined as a river, stream, or similar naturally occurring surface water channel that contributes perennial (flowing continuously year-round) or intermittent (flowing continuously during certain times of a typical year, more than in a response to precipitation) flow to a TNW in a typical year. A tributary maintains its status if it flows through natural or artificial break provided that the break conveys perennial or intermittent flow to a tributary or other jurisdictional water at the downstream end of the break. The term “typical year” refers to the, “normal range of precipitation over a rolling

thirty-year period for a particular geographic area.”

- Ditches are defined as artificial channels used to convey water. Ditches that meet the definition of tributary are WOTUS when they are: (1) TNW; (2) constructed in a tributary or that relocate/alter a tributary; or, (3) are constructed in an adjacent wetland.
- Lakes and ponds are WOTUS when they are: (1) TNW; (2) contribute perennial or intermittent flow to a TNW in a typical year directly or indirectly through either a WOTUS or excluded feature (i.e., excluded ditch or waste treatment system) that conveys perennial or intermittent flow downstream; (3) are flooded in a typical year by a TNW or by a jurisdictional tributary, ditch, lake or pond, or impoundment.
- Impoundments are WOTUS when they impound any other jurisdictional water, that are: (1) TNW; (2) tributaries; (3) ditches; (4) lakes and ponds; or (5) adjacent wetlands.
- Wetlands that are “adjacent” to TNW, or to jurisdictional tributaries, ditches, lakes and ponds, and impoundments are WOTUS. Adjacent wetlands “abut” or have a “direct hydrological surface connection” with a WOTUS. Abut means to touch at least one point or side. A direct hydrological connection occurs due to either inundation from a WOTUS to a wetland or via perennial or intermittent flow between a wetland and a WOTUS. Wetlands physically separated from a WOTUS by upland (defined below), dikes, barriers, or similar structures that lack a direct hydrologic surface connection are not adjacent.

The 2018 proposed rule also identifies 11 categories of waters that are not WOTUS:

- For the first time, the Agencies propose to add a definition of “upland” in the WOTUS definition. Several features are excluded when they occur in “uplands” and if an area is an “upland” it cannot be classified as a “wetland.” The proposal defines upland as “any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils)” and “does not lie below the ordinary high-water mark (OHM) or the high tide line” of a WOTUS. This presumably would put some sideboards on how the Agencies delineate wetlands, however, the Agencies fail to define “normal circumstances” in the proposed rule.
- Water features that are not identified as WOTUS.
- Groundwater, including groundwater drained through subsurface drainage systems.
- Ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland. Ephemeral is defined as, “surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).”

- All ditches are excluded except for those that are WOTUS as defined above.
- Prior converted cropland, defined as, “any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible.”
- Artificially irrigated areas that would revert to upland should application of irrigation water cease.
- Artificial lakes and ponds (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) constructed in upland that are not jurisdictional lakes and ponds or impoundments.
- Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel.
- Stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store run-off. The Agencies explain in the preamble that ditches used for stormwater management are addressed in the ditch exclusion, not here.
- Wastewater recycling structures constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins.
- Wastewater treatment systems, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

The 2015 Rule

After years of compliance with the *SWANCC* and *Rapanos* decision through guidance, the Agencies adopted the 2015 Rule to define “the scope of waters protected under the CWA.” The 2015 Rule is summarized and interpreted in [NCASI Corporate Correspondent Memorandum No. 15-007](#). The Agencies indicated that the 2015 Rule defining WOTUS clarified their jurisdiction to implement the CWA in the context of the statute, science, the aforementioned US Supreme Court decisions, and their experience. The 2015 Rule created three classifications of waters: (1) waters that are jurisdictional in all instances by rule (categorical WOTUS); (2) waters that are subject to case-specific analysis to determine jurisdiction; and, (3) waters that are excluded from jurisdiction by rule.

Jurisdictional waters by rule included: (1) TNW; (2) interstate waters and wetlands; (3) territorial seas; (4) impoundments of any jurisdictional waters; (5) perennial, intermittent *and* ephemeral tributaries of categories (1) through (3) waters; and (6) adjacent waters (including wetlands, ponds, lakes, oxbows, impoundments and similar waters and “defined as bordering, contiguous, or neighboring”) of categories (1) through (5) waters. The first four categories of jurisdictional waters in the 2015 Rule are jurisdictional by rule

in all cases. The Agencies indicated that two additional categories, “tributaries” and certain “adjacent waters,” were jurisdictional by rule based on the findings in the “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” (hereinafter, Connectivity Report) and the EPA Science Advisory Board (SAB) that reviewed the Connectivity Report and concluded that “the science confirms that they have a significant nexus to TNW, interstate waters, or territorial seas.” The EPA Connectivity Report is summarized and interpreted in [NCASI Corporate Correspondent Memorandum No. 13-024](#).

The 2015 Rule considered waters and wetlands jurisdictional if they, either alone or in combination with other similarly situated waters in the region, significantly affected the chemical, physical, or biological integrity of TNW. The 2015 Rule defined a “tributary” or “tributaries” as, “a water that contributes flow, either directly or through another water (including an impoundment), to a [navigable water] that is characterized by the presence of the physical indicators of a bed and banks and OHM. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded [by this rule].” Therefore, under the 2015 Rule, all features meeting the “tributary” definition, including ordinarily dry channels, are categorically jurisdictional no matter how small, remote, or frequently flowing.

Under the 2015 Rule, all “adjacent” waters, including wetlands, are categorically jurisdictional if located within the 100-year floodplain of categorical water and not more than 1,500 feet from the OHM of such water. In addition, these waters could be designated adjacent if they were found to have a significant nexus to a WOTUS and were within the 100-year flood plain (beyond 1500 feet) or within 4000 feet of the WOTUS OHM.

Challenges to the 2015 Rule

Following publication of the 2015 Rule, 31 states and 53 non-state parties, including environmental groups and groups representing agriculture, forestry, homebuilders, and other interests, filed petitions for review in multiple federal district and appellate courts challenging the 2015 Rule. On January 22, 2018, the Supreme Court found that the 2015 Rule is subject to direct review in the U.S. District Courts. Since the Supreme Court’s jurisdictional ruling, district court litigation regarding the 2015 Rule resumed. The 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota (14 States), District Court for the Southern District of Georgia (11 States), and the District Court for the Southern District of Texas (3 States). All three courts have pending fully-briefed motions for a ruling that the 2015 Rule is invalid, but the courts are also affected by the shutdown so predicting the timing of any decision is difficult. The 2015 Rule is now in effect in 22 States.

On February 28, 2017, the President issued Executive Order entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” (EO 13778). The Executive Order was the first step of a two-step process to rescind and replace the 2015 Rule. The Executive Order directed the Agencies to review the 2015 Rule for consistency with the policy outlined in the Executive Order and to

issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law. The Agencies adopted a rule in February 2018 to extend the compliance date for the 2015 Rule, but this has been overturned by two different federal courts. The Agencies also have proposed to rescind the 2015 Rule, which would restore pre-2015 regulations. To date, the Agencies have not issued a final rule on rescission.

Implications of the Proposed Rule

Overall, the proposed rule would significantly limit the expanded federal authority over WOTUS as was defined in the 2015 Rule. The proposed changes to the 2015 Rule are particularly important for forest management activities involving ephemeral stream beds and wetlands and construction of ditches for minor drainage around mill sites and forest roads.

The proposed rule limits the meaning of “navigable waters” to tributaries and wetlands that have a continuous physical connection, during some part of a typical year, to TNW or the territorial seas. The Agencies consider the proposed definition of “tributary” to be more consistent with the Supreme Court’s interpretation of the Agencies’ authority than in the 2015 Rule. Under the proposed rule, only wetlands are within the “adjacent” WOTUS category. To be adjacent, they must “abut” a TNW or jurisdictional tributaries, ditches, lakes and ponds, and impoundments or have a “direct hydrological surface connection.” The Agencies state this interpretation more accurately reflects the Supreme Court’s longstanding views on the scope of jurisdictional wetlands.

The Agencies state that the proposed definitions of tributary and adjacent wetlands eliminates the need for a case-specific significant nexus test that was required for many features after Justice Kennedy’s concurring opinion in *Rapanos* and according to the Agencies’ *Rapanos* Guidance. The Agencies also state that the categorical treatment of all tributaries and adjacent wetlands, as defined by the proposed rule, “will provide clarity to the regulated public regarding the jurisdictional status of such features and ease the administrative burden the Agencies face in conducting a case-specific significant nexus analysis to complete many jurisdictional determinations under previous regulations and guidance.”

The proposed rule adds detail regarding wastewater treatment systems. Wastewater treatment systems have been excluded under all versions of prior WOTUS rules and are excluded in the proposed rule. For the first time, however, wastewater treatment systems are defined to “include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).” This definition would appear to strengthen the intended scope of the exemption. The proposed rule also notes that the definition of a tributary, as proposed, would include effluent-dependent streams (e.g., streams that flow year-round based on wastewater treatment plant discharges) as long as they contribute perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year. EPA is requesting comment on this specific portion of the tributary definition.

Potential Themes for NCASI Comments

NCASI intends to submit comments on the proposed rule that focus primarily on three areas. First, findings in the Connectivity Report formed the scientific rationale for the 2015 Rule, especially the Agencies decision to include tributaries and adjacent waters as jurisdictional by rule. In the proposed rule, the Agencies state that the Connectivity Report informed, “certain aspects of the proposed definition of WOTUS,” noting that, “science cannot be used to draw the line between Federal and State waters.” Opponents of the proposed rule will likely focus their criticism on the rules lack of a “scientific foundation” particularly since ephemeral streams and isolated wetlands are no longer jurisdictional by rule. Therefore, NCASI’s comments will note that connectivity among streams, wetlands, and downstream TNW depicts a decreased probability of impact as flow regimes become less than intermittent. In other words, ephemeral streams have little probability of affecting the physical, chemical, and biological properties of downstream waters. Second, the current state of the science regarding hydrologic connectivity cannot be used to draw the line between Federal and State waters. As the Agencies noted in the preamble to the 2015 Rule, the current state of the science on connectivity, “does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters”. Third, current forestry best management practices, coupled with state regulations and forest certification programs, provide significant protection to water and wetlands during forest management. Finally, the reference to “log cleaning ponds” under the section of artificial lakes and ponds was added to the final 2015 Rule then retained in this proposed rule. Given the lack of clarity regarding this term to the forest products industry, it may be worthwhile to suggest to the Agencies in our comments that a broader reference, such as “log ponds,” that would include log storage ponds, is warranted.

Questions on the Agencies’ proposed definition of WOTUS may be directed to Erik Schilling (eschilling@ncasi.org), Ashley Coble (acoble@ncasi.org), or Paul Wiegand, (pwiegand@ncasi.org).