



SUMMARY OF MAJOR CHANGES TO PREVIOUS “WOTUS” DEFINITION

- **Narrows CWA Jurisdiction over Waters:** Although the existing definition of “waters of the United States” (WOTUS) and the regulatory bases for jurisdiction under the existing rule have not been invalidated by any court, the new definition proposed by EPA and the USCAE will narrow jurisdiction over waters that have been protected under the CWA for nearly four decades with the result that “fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations.” 79 Fed. Reg. 22188, at 22189, 22220.
- **Removes Categorical CWA Protections for “Other Waters,” including intrastate lakes, rivers, streams, and wetlands and Removes Longstanding Commerce Clause Factors as a Basis for Jurisdiction.** Waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas would not be “waters of the United States.” The existing rule protects “other waters” whenever the use, degradation or destruction of which could affect interstate or foreign commerce, such as waters used for recreational, fishing and industrial purposes. The Bush Administration considered a similar revision to the definition of “waters of the United States” in 2003 but the agencies withdrew it after significant opposition from 39 states, most of the national environmental organizations and roughly 99% of the 133,000 public comments received.
- **Adopts the “Significant Nexus” Test for as the Sole Jurisdictional Basis for all Waters Besides Traditional Navigable-in-Fact Waters, Interstate Waters and Territorial Seas and Creates New Category of “Other Waters” that may be Jurisdictional Depending on the Results of a Case-by-Case Significant Nexus Inquiry.** CWA jurisdiction for these waters would be premised solely on whether water, either alone or in combination with other similarly situated waters in the region significantly affects the chemical, physical, or biological integrity of a TNW, Interstate Waters or the Territorial Sea. This could reduce protections for wetlands, tributaries and other waters, as well as remove alternative jurisdictional bases for these waters, in a manner not required by SWANCC and *Rapanos* and contrary to current agency practice and guidance.
- **Reduces Categorical Protection for Tributaries by Adding a New Definition of the Term, Categorically Excluding Certain “Ditches” and Removing Language Protecting Tributaries to Other Waters.** Adds requirements for presence of bed, banks and ordinary high water mark and the water must contribute flow, either directly or through another water, to a TNW, Interstate Water, Territorial Seas or Impoundment of these waters. Wetlands, lakes, and ponds can also be 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 TNW, Interstate Water, or Territorial Sea.

- **Adds Revised Categorical Protection for All Waters, including Wetlands, Adjacent to Other Defined Waters (Unless they are Otherwise Excluded).** The existing rule categorically protects wetlands adjacent to a broader category of waters.
- **Creates a New Category of Waters that are Explicitly Excluded from CWA Protections even if the waters would otherwise be Covered by the Definition.** Examples include Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water; and groundwater, including groundwater drained through subsurface drainage systems.
- **Formally Codifies the Waste Treatment System Exclusion without Requesting Public Comment.** The proposed revision would allow polluters to impound "waters of the United States" and discharge pollution into the impoundment as long as to use as the new impoundment could be described as a "waste treatment system designed to meet the requirements of the Clean Water Act." Rather than requiring a NPDES permit for the pollution discharges *into* the impoundment, a permit would only be required for discharges *from* the impoundment to another WOTUS. In 1980, EPA added this "exclusion" to the existing definition by inserting a footnote into the regulation— after the regulation had already been finalized. The public was never given an opportunity to comment on it. Instead, when EPA unilaterally inserted this exclusion into the current rule, it explained, "EPA intends promptly to develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension." Now, over 30 years later, the agencies finally propose to formalize the exclusion for waste treatment systems, however they also declare in the current rule proposal: "Because the agencies do not address the exclusions from the definition of 'waters of the United States' for waste treatment systems ... in this proposed rule, the agencies do not seek comment on these existing regulatory provisions."
- **Adds New Definitions of Important Terms, including Adjacent, Neighboring, Riparian Area, Floodplain, Significant Nexus, Wetlands, and Tributary.** These definitions will have a substantial impact on jurisdictional determinations.