

## Opportunity now available to comment on proposed rule revising definition of ‘Waters of the United States’

On February 14, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers opened a 60-day public comment period on the proposed rule to revise the definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA) by publishing the proposed rule in the *Federal Register*.<sup>1</sup> The comment period is scheduled to end April 15, although this date may be extended. The publication comes more than two months after the agencies released the proposed revised definition of WOTUS to the public on December 11.

Comments provided on the proposed new WOTUS definition must be considered by the two agencies prior to promulgation of the new definition. Oil and gas companies as well as other regulated parties are encouraged to provide their input during the public comment process.

### Less WOTUS would reduce federal permitting and compliance requirements

The agencies proposed the revised WOTUS definition to provide more predictability and certainty in identifying federally regulated waters.<sup>2</sup> Overall, the proposed WOTUS definition is generally regarded as being less stringent than previously proposed definitions. For the oil and gas industry, the new proposed definition of WOTUS could reduce the federal CWA permitting and compliance obligations associated with the construction and maintenance of well sites and pipelines.

Under the proposed new definition of WOTUS, only those waters or features with a “continuous surface connection” to an otherwise traditionally navigable water (i.e., river, lake, or other waterbody that supports or has supported navigation) would be subject to federal jurisdiction. The proposed definition of “tributary” would be limited to streams with perennial or intermittent flow during a “typical year,” and would exclude ephemeral streams and

features that flow only in direct response to precipitation. In addition, wetlands would be federally jurisdictional only if they touch or have a direct hydrological surface connection to another federally jurisdictional water in a typical year. Finally, ditches would not be considered WOTUS unless they function as a traditionally navigable water (e.g., the Erie Canal), are constructed within and meet the newly proposed definition of “tributary,” or are constructed in a newly defined “adjacent wetland” and also meet the definition of “tributary.”

The approach taken with the newly proposed definition of WOTUS stands in stark contrast to that taken when WOTUS was last defined in 2015. The 2015 definition identified WOTUS as including waterbodies with a “significant nexus” to a downstream water, and defined tributaries as including channelized waterbodies with defined beds and banks and ordinary high-water marks, even if their flow only was in direct response to precipitation. Under the 2015 WOTUS definition, certain wetlands are subject to federal jurisdiction even though they may not directly abut an otherwise federally jurisdictional water.

The more expansive 2015 WOTUS definition is in effect in Pennsylvania and 21 other states, as a result of various ongoing lawsuits challenging the 2015 definition and the Trump administration’s initial unsuccessful efforts to temporarily suspend the 2015 definition. Unless and until the 2015 definition is enjoined in Pennsylvania or otherwise suspended, Pennsylvania’s oil and gas industry will remain subject to broader CWA permitting and compliance obligations and requirements.

### Comments being accepted on all aspects of proposed new WOTUS definition

The agencies are seeking comments on all aspects of their proposal, including the six categories of waters that categorically would be considered to be WOTUS, the 11 categories of waters or features that would not be considered to

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<sup>1</sup> 84 Fed. Reg. 4154 (Feb. 14, 2019).

<sup>2</sup> For a detailed description of the proposed revised definition of WOTUS and other issues, please see our article in the January 2019 edition of The PIOGA Press.

be WOTUS, and the newly proposed definitions of the terminology referenced in the proposal, such as “tributary” and “adjacent wetland.” Each of these terms will define the CWA permitting and compliance obligations and requirements for well sites, pipelines, and other construction activities by the oil and gas sector. Comments in the form of support for the proposed definitions, questions about their meaning and application, or first-hand, on-the-ground observations or experiences can all be submitted to the agencies.

Some of the issues on which the agencies request comment deal with policy choices underlying the proposed narrower scope of federal jurisdiction under the CWA. For example, the agencies request comment on whether the “significant nexus” test must be a component of the proposed WOTUS definition. The agencies also seek input on whether the definition of “tributary” should include waters contributing either perennial or intermittent flow to a traditionally navigable water, or whether the definition should be limited to perennial waters.

In addition to the more fundamental and policy-based aspects of the rule, the agencies have specifically requested comments on a slew of issues related to implementation of the proposed new WOTUS definition. As an example, the proposed rule requests comment on tools that can be used to identify and distinguish perennial and intermittent flow regimes from ephemeral flow regimes. These tools include, in addition to visual field observations, desktop tools such as hydrologic modeling and other publicly available resources. Similarly, the agencies request comment on how they can establish an approach whereby states, tribes and federal agencies could establish a geospatial data set of WOTUS that would be readily accessible to regulated parties for use in identifying jurisdictional waters under the CWA. The use of these tools and other means of identifying and distinguishing between jurisdictional and non-jurisdictional waters will be critical if and when the proposed new WOTUS definition becomes final.

### **Public comment period another step in the long road to revising definition of WOTUS**

As previously noted, the proposed new definition of WOTUS does not bring any immediate changes to the CWA regulatory landscape and instead is the next step in what could be a long road to redefine WOTUS. The public comment period affords oil and gas companies the opportunity to shape what ultimately could be included in the WOTUS definition.

Babst Calland is actively monitoring this rulemaking and evaluating its potential effect on oil and gas activities in Pennsylvania. The proposed new definition and issues on which the agencies request feedback are included in 66 pages of the *Federal Register*. The notice covers a wide array of topics, only some of which are set forth above and in our prior articles in *The PIOGA Press*.

*If you have questions about the proposed rule and how it may impact your operators or public comment process, please contact Lisa M. Bruderly at 412-394-6495 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com) or Gary E. Steinbauer at 412-394- 6590 or <mailto:gsteinbauer@babstcalland.com>.*