

ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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EPA Issues New Rule on Definition of Waters of the United States

On May 27, 2015, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) released the long-awaited final rule redefining the extent of the agencies' jurisdiction over "waters of the United States" (WOTUS) under the Clean Water Act. The Final Rule, known as the "Clean Water Rule," abruptly changes (i.e., within 60 days of publication in the *Federal Register*) the types of waters that will be regulated under numerous federal programs, including NPDES permitting, wetland and watercourse (i.e., dredge and fill) permitting, spill response planning, and spill reporting. The Final Rule will affect all types of industries, real estate development, construction activities, and other entities by increasing the types and extent of waters that will be regulated under the Clean Water Act and introducing a new analysis for evaluating whether a water is jurisdictional.

Any entity that disturbs the earth, discharges water (including wastewater and stormwater), stores oil or petroleum products in significant quantities, or otherwise has operations or conducts activities that use or affect water needs to be aware of this significant regulatory change and evaluate how this change will affect its business.

In some instances, the Final Rule provides clarity and is less broad than the controversial rule that was proposed on April 14, 2014 (the "Proposed Rule") and was harshly criticized by industry groups, real estate developers, farmers, state governments and others as broadly expanding the scope of EPA and Corps jurisdiction to encompass many types of waters that were not previously regulated. However, it is a significant change from the very brief, existing definition of WOTUS, which (in most affected regulatory sections) does not define any terms used to describe WOTUS. To date, the interpretation of the WOTUS definition has largely relied on a series of United States Supreme Court cases and several EPA/Corps guidance documents.

The unpublished version of the Final Rule and its preamble is 297 pages in length, with an accompanying 423-page technical support document. While traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters continue to be jurisdictional, the Final Rule outlines a new set of parameters under which the jurisdiction of other types of waters must be evaluated. Some of the significant provisions include the following:

- **Definitions** – The Final Rule introduces a number of definitions that are not already included in all regulatory sections affected by the Final Rule. These include tributary, ordinary high water mark (OHWM), high tide line, adjacent, neighboring and significant nexus. Many have changed from the Proposed Rule.

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- **Significant Nexus** – The phrase “significant nexus” does not occur in the Existing Definition. The Final Rule’s definition has similarities to the Proposed Rule, but appears to put certain limits on the application of the significant nexus evaluation. For example, the Final Rule lists the functions relevant to a significant nexus evaluation and identifies five types of waters that are considered to be similarly situated and can be combined in the watershed of the nearest jurisdictional water, for the purposes of a significant nexus evaluation. In addition, it puts physical limits (for the first time) on the waters that can be considered to have a significant nexus, based on proximity to the 100-year floodplain, the high tide line or the OHWM of certain jurisdictional waters.
- **Tributaries** – Although not defined in the Existing Definition, “tributary” is defined in the Final Rule in much the same way as the Proposed Rule, including references that a tributary can continue even if the stream “flows underground,” so long as the bed, bank, and OHWM can be identified upstream of the break. This definition was extensively opposed by industry groups as being too expansive and introducing too much uncertainty into jurisdictional determinations.
- **Adjacent Waters** - The Final Rule expands jurisdiction based on adjacency to “waters,” rather than only wetlands, and introduces specific distances as a means of determining whether a water is adjacent to a jurisdictional water. Other waters can be determined to be adjacent based on a significant nexus evaluation.
- **Exclusions** –The Final Rule maintains the exclusions in the Existing Definition (e.g., waste treatment systems and prior converted cropland) and introduces more exclusions, including expansion of certain exclusions set forth in the Proposed Rule. For example, the following exclusions were not previously included in the Proposed Rule:
 - o Ditches with ephemeral or intermittent flow that are not a relocated tributary or excavated in a tributary; and
 - o Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

If you have questions regarding the final regulatory definition of “waters of the United States” or would like to discuss the application of the Final Rule to your activities or facilities, please contact Lisa M. Bruderly at (412) 394-6495 or lbruderly@babstcalland.com, Jean M. Mosites at (412) 394-6468 or jmosites@babstcalland.com, or Abigail Faulkner Jones at (412) 773-8758 or ajones@babstcalland.com.