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Final "Waters of the U.S." Rule: No, No, No!
No Clarity, No Certainty, No Limits on Agency Power
[Condensed Version]

On May 27, 2015, EPA and the U.S. Army Corps of Engineers released a pre-publication version of their final rule defining "waters of the U.S." (WOTUS) that are subject to federal regulation under the Clean Water Act (CWA). The rule will go into effect 60 days after it is published in the Federal Register. Below is an abbreviated summary of some of the major concerns with the rule.

The final WOTUS rule is even broader than the proposed rule. The definition of "tributary" has been broadened to include landscape features that may not even be visible to the human eye, or that existed historically but are no longer present.

The rule's definition of tributaries—which may be the most common WOTUS feature on the landscape under the rule—is even more expansive than in the proposed rule. The agencies rejected requests from commenters to exclude features that carry water only when it rains and to require more than just the presence of the highly subjective bed, bank and ordinary high water mark (OHWM). Instead, the final rule *broadened* the definition and made so-called tributaries even more difficult for landowners to identify. The rule allows the agencies to identify a tributary regardless of whether there is anything *visible* on the ground for the landowner to recognize as a "tributary."

- The proposed rule required "**the presence of a bed and banks and ordinary high water mark**" (OHWM)—plus some flow, sometimes, that eventually reaches a navigable water.
- In the final rule, there is no need for the presence of an *actual* bed, bank and OHWM, but only the "**presence of physical indicators of a bed and banks and ordinary high water mark**." (Final Rule at 204) The agencies can utilize "remote sensing or mapping information" and other "desktop tools" (*e.g.*, LIDAR, aerial photography and NRCS Soil Surveys) to establish the presence of a tributary. (Final Rule at 91-92)
- Contrary to the proposed rule, the final rule also allows the agencies to identify tributaries based entirely on *past conditions* rather than current conditions. The rule allows the agencies to regulate land areas where these "desktop tools" indicate ephemeral tributaries *used to be* present. (Final Rule at 94-95)

Thus, land features may be deemed to be tributaries (regulated immediately under the rule) even if they are *invisible* to the landowner and even if they *no longer exist* on the landscape. So much for clarity!

Ditches are defined as tributaries (Final Rule at 204) and the agencies say they "*in many instances* can meet the definition of tributary." (Final Rule at 97) **Ephemeral ditches (that flow only when it rains) are excluded only if they were not "excavated in" a tributary and are not "relocated tributaries."** Because the exclusion is tied to determining the existence of historic ephemeral tributaries, it will be impossible for landowners to know *which* ditches are excluded.

All waters "adjacent" to other WOTUS—including those invisible tributaries—are *automatically* regulated. Adjacent/neighboring is defined based on several possible distance

thresholds, but there are many steps and layers in determining whether a feature is within these distances. The trickiest part will be determining whether "any water" on your lands is within the 100-year floodplain of, and not more than 1,500 feet from, *any tributary*—especially since tributaries might not be visible on the land.

Erosional features are excluded *unless* they meet the definition of a tributary. Again because of the expansive and unknowable scope of "tributaries," it will be impossible for landowners to distinguish a jurisdictional tributary from a non-jurisdictional erosional feature.

The rule regulates isolated features that should not be regulated under Supreme Court precedent. The rule asserts jurisdiction over non-navigable, remote features, such as isolated wetlands and ponds based on even the most tenuous connection to navigable waters—such as "maturation for stream insects." (Final Rule at 38) Five specific types of waters are deemed "similarly situated" and must be aggregated across an entire watershed to determine whether they collectively have a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas. (Final Rule at 129-31) Because they must always be considered in the aggregate, it's a virtual certainty that each and every Prairie pothole, Carolina bay and Delmarva bay, Pocosin, Western vernal pool and Texas coastal prairie wetland *will be regulated*.

The rule provides "bright line" distance thresholds that in fact provide no clarity or certainty at all. The only waters conceivably excluded from jurisdiction under the rule are waters more than 4,000 feet (about ¾ mile) from *any* other WOTUS, including any tributary. Landowners would have to map the locations of all (possibly invisible or historical) ephemeral "tributaries" within ¾ mile to determine whether any waters on their lands are beyond the scope of the Clean Water Act. If they did that, they would probably find that *no waters* are beyond the agencies' reach. According to the agencies' economic analysis (at 11): "The agencies have determined that the *vast majority of the nation's water features* are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea."

Exclusions - The rule sets forth a number of exclusions (like farm ponds), but most apply only to features "created in dry land." But "dry land" doesn't actually mean land that looks dry. Instead, only the agencies will have the power to decide what is "water" and what is "dry land." Here's why…

Is it "water" or "dry land"? Each and every feature that is WOTUS must *first* be "water." And many exclusions apply only to features "created in dry land." But the rule doesn't define either of these terms, and the agencies only offer vague and circular explanations of what they mean. Regarding the key term **water**, the agencies say "waters" are *"natural or man-made aquatic systems, identifiable by the water contained in these aquatic systems **or** by their chemical, physical, and biological indicators*. (Final Rule at 7, fn.1) This vague concept makes it easy for the agencies to find "waters" with very little evidence of the actual presence of H_2O. Tricky! "Dry land" is just something that isn't "water" (according to the agencies). (Final Rule at 173)

The refusal to clearly define these key terms means that the agencies will have broad discretion to identify "waters"—and to limit the scope of most of the exclusions. As with any ambiguous regulation, the agencies will hold the trump card later in interpreting what's arguably the most important word in this rule: WATER.