



To: RCRC Board of Directors
From: Staci Heaton, Regulatory Affairs Advocate
Date: March 11, 2019
Re: Waters of the United States

Summary

The Trump Administration has begun the process of redrafting the Waters of the United States (WOTUS) rule, while the State Water Resources Control Board (State Water Board) has released a final draft of its Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures) regulations that incorporate some of the restrictions of the 2015 federal rule altering the definition of what constitutes a “water of the United States.” This memo provides an overview of both regulatory actions.

Background

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) finalized the joint rule amending the definition of “Waters of the United States,” also known as WOTUS, in August 2015. The rule closely followed the changes proposed by the EPA in their 2011 “*Guidance to Identify Waters Protected by the Clean Water Act*,” greatly expanding federal jurisdiction to include some wetlands, waters that are adjacent to traditional navigable water, and other marginal waters. The rule was highly controversial, drawing broad criticism from stakeholders, and bipartisan opposition from Congress citing a jurisdictional overreach by EPA and the Corps, leading to a lengthy legal challenge. In February 2017, President Trump issued an Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule*, which orders the EPA and the Corps to revisit and rewrite the rule. Subsequently, the agencies jointly began a rulemaking to first repeal the rule, reinstating the pre-2015 WOTUS rules in the process, and then to redraft WOTUS.

During this same time period, the State Water Board has been developing the Procedures. Previous versions of the Procedures placed new requirements on permit applicants that would have overlapped existing requirements, while resulting in substantial uncertainty for applicants, increasing the potential for litigation over proposed projects, and imposing significant costs without notable environmental benefit. RCRC has been opposed to the implementation of the Procedures, which have yet to be finalized.

Issue

EPA and the Corps recently began the second step of the Executive Order, releasing a pre-publication version of the proposed, redrafted WOTUS rule in December 2018. The revised version of the rule makes drastic changes to the rule that was finalized in 2015, eliminating interstate waters as a standalone category of WOTUS and no longer regulating wetlands that cross state lines but are not connected to traditional navigable waters. The revised rule also abandons the 2015 rule's "significant nexus" test for jurisdictional waters in favor of clear definitions of which ditches, tributaries, and wetlands are jurisdictional, and those definitions include only waters that are interstate or have a distinct flow to a jurisdictional water. A few questions that remain, such as the need for a clear definition of an "intermittent stream." The revised WOTUS rule was officially noticed on February 14, 2019, and EPA held a public hearing on the rule on February 27 and 28, 2019 in Kansas City. The 60-day public comment window is open, with comments due by April 15, 2019. RCRC will be filing comments by the deadline. The rule, along with instructions on filing comments, can be found on EPA's website: <https://www.epa.gov/wotus-rule/step-two-revise>

In the meantime, RCRC staff, along with several other organizations, has continued to work with State Water Board staff on changes to the Final Draft of the Procedures. The initial draft maintained some of the key components of the 2015 "Waters of the United States" rule, most notably expanding the State's jurisdiction over small streams, creeks, and a greater share of California's vernal pools. State Water Board staff initially intended to request Board adoption on February 5, 2019; however, due to the overwhelming pushback from stakeholders and the dire need for more clarity in the language and intent of the final draft, members of the State Water Board directed staff to continue working with stakeholders on amendments to the final draft and to update them on their progress instead.

As a result, staff proposed a number of changes to the final draft to address stakeholder concerns (Attachment 1), and took public comment again at a Board workshop on March 5, 2019. Staff has also delayed Board adoption of the Procedures to the April 2, 2019 meeting at the request of the Board, and could incorporate additional policy changes before that time. While the proposed changes do not address all local agency concerns, they do ease requirements for maintenance on vital public works projects that impact public safety, as well as clarify requirements for watershed health projects and other vital restoration programs.

Staff Recommendation

RCRC staff will continue to update the RCRC Board of Directors on the progress of both regulatory proposals.

Attachment

- Proposed State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State - Stakeholder Requested Policy Changes, February 22, 2019