What's In a Name – WOTUS Transition to Navigable Waters Protection Rule: EPA Moves to Finalize Rule:

By Nathan E. Vassar

The "Waters of the United States" definition has been the subject of more press and controversy than just about any regulatory action over the last five years. There have been mileposts, lawsuits, stays of the 2015 rule in some states (but not others), public information campaigns, and lots of hand-wringing across the regulated community. Early 2020 has brought yet another milepost, as the EPA has unveiled the proposed final rule, this time to be called, the "Navigable Waters Protection Rule." The rule will become final as of 60 days following its publication in the *Federal Register*.

The repeal-and-replace effort by the Trump Administration has taken longer than its initial goals, although by mid-spring 2020, barring any unexpected developments by courts or the EPA, the rule is expected to become effective across the United States. Among the first of many observations on the rule is the name itself, as it focuses upon the statutory reference to "navigable" waters. Contrast the "Navigable Waters Protection Rule" nomenclature to the 2015 rule name, styled as the "Clean Water Rule." The contents of each rule are also considerably different. Gone is the jurisdictional inclusion of areas within certain distance requirements of other traditionally navigable waters. No longer is there a "significant nexus" test incorporated for certain waters. Instead, the new rule carves out ephemeral streams, and attempts to incorporate much of the 1980s regulatory language that excluded man-made ditches used for drainage/irrigation into navigable waters.

Among the most important provisions for discharge permittees include exemptions, many of which have been maintained from prior versions (including several exemptions that were included in the 2015 rule). Among others, groundwater, stormwater control features, wastewater

recycling structures, and waste treatment systems are categorically excluded from jurisdiction. The agricultural community advocated and succeeded in securing exemptions for certain artificial impoundments, prior converted cropland, and man-made ditches, as noted above.

The most significant impacts across Texas and much of the Southwest, however, will involve U.S. Corps of Engineers dredge-and-fill/404 permitting. It is highly unlikely that discharge permit holders will see any difference with respect to their regulatory interface with state agencies as well as EPA, as even effluent-dependent ephemeral streams are considered jurisdictional. By contrast, depending upon the facts of particular projects, those entities performing projects that could require a 404 permit under prior rules may no longer require a permit at all, or if a permit is required, may not face the same mitigation requirements in light of a the shrinking jurisdictional map (for example, if jurisdictional wetlands are impacted, an entity would no longer *also* need to perform certain mitigation on surrounding dry land).

More litigation and evolution is anticipated, however, the adoption of a final rule will complete the procedural requirements to implement the new definition. Affected stakeholders should continue to engage and track the developments under any court challenges, but while recognizing the protections for POTWs (in the form of exemptions) have remained in place.

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