

NAR Issue Brief

Waters of the U.S.: NAR Concerns on the Proposed Rule

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) (“the agencies”) published a proposed rule on 3/25/14 that seeks to clarify which streams, wetlands and other waters are considered “waters of the United States” (WOTUS) and subject to regulation under the Clean Water Act (CWA).

Proposed Rule Is Substantially Flawed

Despite agencies’ assertions, the proposed rule raises many concerns for regulated stakeholders:

Broader in Scope: *The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than under the existing regulations, and that the proposed rule does not assert jurisdiction over any new types of waters.*

But the proposed rule provides essentially no limit to CWA federal jurisdiction. It establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

Inconsistent With Supreme Court Precedent: *The agencies state that the proposed rule is consistent with earlier Supreme Court’s decisions and is narrower than the existing regulations.*

The Supreme Court has made clear that there is a limit to federal jurisdiction under the CWA. The proposed rule will extend coverage to many features that are remote and/or carry only minor volumes, and its provisions provide no meaningful limit to federal jurisdiction.

Adversely Affects Jobs and Economic Growth: *The agencies state that the proposed rule will benefit businesses by increasing efficiency in determining coverage of the CWA.*

In reality, the proposed rule will subject more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen suits challenging the applications of new terms and provisions. The potential adverse impacts on economic activity have been largely dismissed by the agencies and are not reflected in EPA’s flawed economic analysis for the proposed rule.

NAR Concerns

This proposed rule will drastically expand federal jurisdiction of more waters under the CWA at the expense of the states. This rule continues the agencies’ efforts to expand the scope of the CWA and read the term “navigable” out of the rule.

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NAR is concerned that the agencies moved forward with this rule before EPA's Science Advisory Board (SAB) completed its review of EPA's scientific evidence, especially considering the scientific deficiencies that were identified by the SAB panel.

NAR is also disappointed that the agencies did not conduct a more comprehensive cost-benefit analysis, particularly impacts to small business, nor addressed the other significant data gaps.

Structure of the Proposed Rule

Under both the current and proposed regulations, there are multiple categories of "waters" that comprise "waters of the United States." The definition for "waters of the United States" in the proposed rule can be grouped into four categories:

- 1. Jurisdictional "by rule":** Waters considered jurisdictional "by rule" means that the agencies have determined that such waters are "waters of the United States" under the CWA. The agencies' proposed treatment of tributaries as jurisdictional "by rule" represents a significant change from current regulations.
- 2. Adjacent Waters:** EPA and the Army Corps also broaden what is considered "adjacent" waters to include waters in a riparian area or floodplain. These waters could be considered jurisdictional, but an "adjacency" determination may require a case-specific analysis regarding its relationship to jurisdictional waters for these areas.
- 3. Waters Subject to "Significant Nexus" Analysis:** A key element of the "waters of the United States" definition is the "other waters" category for which a jurisdictional determination will require a "significant nexus" analysis. As proposed in the rule, a significant nexus exists where:
 - a. the water "either alone or in combination with other similarly situated waters in the region" significantly affects the chemical, physical, or biological integrity of a water that is; (i) used in interstate or foreign commerce; (ii) is an interstate water or wetlands; or (iii) a territorial sea; and
 - b. the identified effect is "more than speculative or insubstantial."

A significant nexus determination will be based on the scientific evidence for concluding which functions are provided by the waters and why their effects are significant.

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4. Excluded Waters: The proposed rule establishes a category of waters that are excluded from “waters of the United States”. Excluded waters include: (i) ponds and lagoons used in waste treatment systems; (ii) prior converted cropland; (iii) upland ditches; (iv) ditches that do not contribute flow to traditional navigable waters, interstate waters, territorial seas or jurisdictional impoundments; (v) groundwater; (vi) artificially irrigated areas, lakes and ponds; (vii) ornamental waters, artificial pools or swimming pools; (viii) collected water from construction activity; and (ix) gullies, rills and non-wetland swales.

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