

MUNICIPAL LAW

THE FIGHT OVER DEFINING WOTUS “BURN(S) ON”: PRACTICAL IMPLICATIONS OF THE 2019 PROPOSED RULE REVISING THE DEFINITION OF WOTUS FOR MUNICIPALITIES AND LOCAL UNITS OF GOVERNMENT

by Samuel L. Lofland

On February 14, 2019, the Army Corps of Engineers and Environmental Protection Agency issued a proposed rule entitled “Revised Definition of Waters of the United States,” (the “2019 Proposed Rule”). The Clean Water Act (“CWA”) regulates and has corresponding permitting and compliance obligations with respect to discharges into or modifications of the “Waters of the United States” (“WOTUS”). Consequently, the definition of WOTUS dictates the jurisdictional scope of the CWA.

This is the seventh time since the CWA’s enactment in 1972 that the definition of WOTUS has been revised, or attempted to be revised; more notably, this is the second time in four years that a revision has been attempted. In 2015, towards the end of the Obama administration, the EPA and Army Corps of Engineers promulgated a Final Rule redefining the definition of WOTUS (the “Obama WOTUS Rule”). The Obama WOTUS Rule was subject to several challenges in multiple Courts, the effect of which is such that in 22 states the Obama WOTUS Rule is in effect, whereas in 28 states the EPA’s 2008 Guidance and earlier decisions apply. In other words, the current regulatory regime for WOTUS, which dictates the applicability and enforcement of a Federal law, is applied inconsistently across the United States such that there is presently significant regulatory uncertainty.

The following will provide a brief highlight and overview of these issues and implications.

First, Municipal Separate Storm Sewer System (“MS4”) permits allow public entities to operate stormwater systems and discharge the same into WOTUS without liability provided certain requirements are met. Under the 2019 Proposed Rule “stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off” are exempt and by rule not considered WOTUS. The Obama [WOTUS Rule](#) had a similar exemption, with one key distinction: “Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land” are not considered WOTUS.

The distinction is subtle, but critical when one considers the definition of “upland” under the 2019 Proposed Rule:

The term upland means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (o)(3)(xv)¹ of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (o)(1)(i) through (vi)² of this section. Waters identified in paragraphs (o)(1)(i) through (vi) of this section are not upland.

Practically, this means a municipality with an MS4 permit has greater certainty under the 2019 Proposed Rule that its stormwater system is fully exempted under the CWA. This increased certainty lowers regulatory burdens of the CWA on these governmental entities.

Second, another issue facing municipalities under the Obama WOTUS Rule was the definition of the term “ditches.” Most of the four million plus miles of roads in the U.S. have roadside ditches, and in many instances maintenance and repair of such ditches falls to local units of government. If a roadside ditch is WOTUS, then the entity responsible for repair and maintenance of the same is saddled with the compliance and permitting obligations of the CWA, i.e. significant costs and regulatory burdens. The 2019 Proposed Rule addresses this issue by narrowing and simplifying the definition of ditches such that only ditches satisfying one of the following requirements will fall under the jurisdictional scope of the CWA:

- A ditch that historically been used in interstate commerce,
- A ditch constructed in or which relocates or adjusts a tributary and that contributes (directly or indirectly) perennial or seasonal flow in a “typical year” to a TNW³.
- A ditch constructed in an “adjacent wetland” that also contributes (directly or indirectly) perennial or seasonal flow in a “typical year” to a TNW.

So, a roadside ditch that only gets water in response to rain or snow is not, under the 2019 Proposed Rule, within the jurisdictional scope of the CWA. Practically speaking, the 2019 Proposed Rule improves certainty for municipalities with respect to roadside ditches, thereby avoiding a scenario where a local unit of government is burdened with the cost and complexity of being under the purview of the CWA for the maintenance and repair of a roadside ditch.

Finally, there is a more nuanced implication of the 2019 Proposed Rule facing municipalities and local units of government. Specifically, the CWA has regulated and protected water bodies and features for nearly 45 years through the compliance and enforcement regimes of both the federal government and state governments with concurrent jurisdictions. There is a lot of debate in the political and scientific spheres about whether, and to what extent, a discharge into an ephemeral stream which may reach a TNW can really impact the TNW. The purpose of this write-up is not to opine on such arenas, but only note the changes in and the practical implications of the 2019 Proposed Rule on the same.

The 2019 Proposed Rule, without a doubt, reduces the jurisdictional scope of the CWA. Some estimates are that through the elimination of ephemeral streams the scope of the CWA is reduced by potentially up to 39% in the arid west. So the practical implication is that a discharge of pollutants into an ephemeral stream that has a connection with a TNW would have been regulated under the Obama WOTUS Rule, but will not be regulated under the 2019 Proposed Rule.

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To frame the import of this, the EPA states that headwaters, which includes small streams “that don’t flow all of the time, make up the majority of the country’s waters. They could be a drizzle of snowmelt that runs down a mountainside crease, a small spring-fed pond, or a depression in the ground that fills with water after every rain and overflows into the creek below.” [The EPA also acknowledges that these “headwaters” \(which can include ephemeral streams at the uppermost part of a river network system\) and ephemeral streams play a critical role in providing safe drinking water.](#)

But let’s put that into context: in the continental [United States 58% of total stream miles that provide drinking water are intermittent, ephemeral, or headwater streams.](#) In a place like Arizona, it’s 79%, which means that over 3 million people are [dependent, in part, on ephemeral streams or water bodies for drinking water.](#) Whatever percent ephemeral streams or water bodies contribute to drinking water will no longer be protected from pollution, other discharges, modification, or even destruction under the CWA if the 2019 Proposed Rule is ultimately promulgated.

Now, let’s tie all this back to municipalities and local units of government. These governmental entities have an interest ensuring their citizens have clean drinking water. And it is the elected officials of these entities that face the public’s scrutiny first when there is inadequate water supply or quality.

Thus, one potential unintended consequence of the 2019 Proposed Rule, is that certain water bodies and features which contribute to drinking water will become vulnerable. If the 2019 Proposed Rule becomes law, municipalities and local units of government will be dependent on the state enacting appropriate protections for ephemeral water streams and features, or taking proactive measures (such as increasing water quality testing and treatment protocols) to ensure that the removal of federal protections from ephemeral streams and water bodies does not have a domino effect whereby drinking water supplies are diminished or the quality thereof impacted.

Summarily, the 2019 Proposed Rule presents a scenario where municipalities and local units of government have fewer regulatory burdens and permitting costs, but could lead to some aspect of drinking water supplies (ephemeral water bodies and features) being vulnerable.

¹ “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

² This includes TNW, tributaries, ditches that satisfy the criteria, lakes and ponds that are TNW or contributed perennial or intermittent flow to TNW, impoundments of the foregoing, and wetlands adjacent to the foregoing.

³ This means traditionally navigable waterways, water bodies used in interstates commerce, or territorial seas.

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