



Richmond-Crater Planning District Commission Environmental Meeting

Brenda Winn

Office of Wetland and Stream Protection

Virginia Department of Environmental Quality

December 12, 2019

Waters of the United States (WOTUS)

- Step one:
 - Oct. 22, 2019 - EPA and USACE Repealed 2015 Clean Water rule
 - Takes effect Dec. 23, 2019
- Step two:
 - Estimated Jan. 2020 – New WOTUS Rule to replace former rule
 - Takes effect ?
- DEQ water quality programs submitted comments to EPA docket on the proposed rule in April 2019:
 - State law and authority in place
 - Possible need for regional procedures and training, Corps and DEQ personnel
 - Changes to the categories of ‘waters’
 - Narrowing scope of waters re: Section 402 (NPDES)
 - Costs associated with protection of headwater streams for water quality purposes

From EPA Clean Water Rule Fact Sheet

Subject	Old Rule (pre-2015)	Proposed Rule (2015)	Final Rule (2015)	Final Rule eff. 12/23/2019
Navigable Waters	Jurisdictional	Same	Same	
Interstate Waters	Jurisdictional	Same	Same	
Territorial Seas	Jurisdictional	Same	Same	
Impoundments	Jurisdictional	Same	Same	
Tributaries to the Traditionally Navigable Waters	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.	
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.	
Isolated or “Other” Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included “other waters” where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.	
Exclusions to the definition of “Waters of the U.S.”	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.	

“As of the effective date of this final rule, the [federal] agencies will administer *the regulations promulgated in 1986 and 1988 in portions of*

- 33 CFR part 328... and
- 40 CFR parts 110..., 112, 116, 117, 122, 230, 232, 300, 302, and **401**, and
- will continue to interpret the statutory term “waters of the United States” to mean the *waters covered by those regulations consistent with Supreme Court decisions and longstanding practice, as informed by applicable agency guidance documents, training, and experience.*”

Federal Clean Water Act Section 401 [Water Quality Certification] Proposed Rule

- Published Aug. 22, 2019
<https://www.govinfo.gov/content/pkg/FR-2019-08-22/pdf/2019-17810.pdf>
- DEQ submitted comments to EPA docket on the proposed rule in October 2019:
 - State law and authority in place
 - Time limits for Section 401 water quality certification
 - Information needed to make state decisions
 - Permitting efficiencies affected

Moving forward...

- Continue to exercise authorities provided under State Water Control Law, and VWP Permit Program Regulations

<https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/>

<https://law.lis.virginia.gov/admincode/title9/agency25/chapter210/> [also 9VAC25-660, -670, -680, -690]

- Continue communication and coordination
- Monitor legal challenges
- Possible increase in DEQ participation in jurisdictional determinations
- Possible need
 - to deny applications under certain circumstances
 - for regional training
 - for guidance or agreements

Further Reading

Fall 2019 Regulatory Agenda Published [Federal Government]

- On November 20, 2019, the Administration published the [Fall 2019 regulatory agenda](#).

<https://www.reginfo.gov/public/do/eAgendaMain>

Each Spring and Fall, all agencies must prepare a regulatory agenda that lists each regulatory action the agency expects to work on within the next 12 months. The agencies' regulatory agendas are then published in the Unified Agenda of Regulatory and Deregulatory Actions. Below are some target dates of interest:

- Waters of the U.S. (WOTUS) Step 1 Final Rule (Repeal) effective date is December 23, 2019
- WOTUS Step 2 Final Rule (Replacement) expected in January 2020
- Mitigation Rule Notice of Proposed Rule Making expected February 2020
- Clean Water Act (CWA) Section 404(c) Notice of Proposed Rule Making expected in December 2019
- CWA Section 401 Final Rule expected in May 2020
- CWA Section 404(g) Notice of Proposed Rule Making expected April 2020

Further Reading

- The National Law Review article *“EPA and Corps of Engineers Issue Repeal of 2015 WOTUS Rule”*

<https://www.natlawreview.com/article/epa-and-corps-engineers-issue-repeal-2015-wotus-rule>

- EPA WOTUS web site:

<https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>

- Proposed Revised Definition of WOTUS - Factsheets

<https://www.epa.gov/wotus-rule/proposed-revised-definition-wotus-factsheets>

- EPA Water Quality Certification Docket EPA-HQ-OW-2019-0405

<https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0405>

- Senate Committee on Environment and Public Works *“Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives.”*

<https://www.epw.senate.gov/public/index.cfm/hearings?ID=2C5DAB96-D66E-4D96-8886-D1D841AA6F6B>