The Navigable Waters Protection Rule
Highlights and Initial Take-aways

Agriculture applauds new WOTUS rule
By CAROL RYAN DUMAS Capital Press Jan 23, 2020

The Trump administration has announced a new Waters of the United States rule.

Trump’s Dirty Water Rule: Another Gift to Oil and Gas
WATER, OIL, AND GAS National
JANUARY 23, 2020
By Andrew Grinberg - Special Projects Manager

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In Iowa this week, Trump told a story about how homebuilders, farmers and ranchers were crying as they stood behind him when he signed his executive order on the Waters of the United States rule.

He signed the order on camera. Nobody cried at any point.

youtube.com/watch?v=dgbhcJ...
Outline

➢ WOTUS rulemaking recap
➢ Key changes in the NWPR
➢ Likely impacts of the NWPR
➢ WOTUS litigation landscape
WOTUS rulemaking recap

- Suspension of Clean Water Rule (2018)
- Navigable Waters Protection Rule (2020)
WOTUS rulemaking recap


➢ Suspension of Clean Water Rule (2018)

➢ Repeal of Clean Water Rule (2019)

➢ Navigable Waters Protection Rule (2020)
Key changes in the NWPR

➢ No jurisdiction over ephemeral waters

➢ More restrictive definition of adjacent waters

➢ Elimination of the significant nexus approach
Key changes in the NWPR

“To assess the potential effect of the proposed rule on the CWA jurisdiction of wetlands adjacent to TNWs under Rapanos Guidance practice, 25 of the 38 Corps Districts examined specific AJD ORM2 data from FY13-FY17 for wetlands adjacent to TNWs . . . .

The Corps Districts found that 55 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were abutting (i.e., touching) and 45 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were not abutting. To be clear, such non-abutting wetlands may remain jurisdictional under the final rule. About 10 percent of wetlands adjacent to TNWs in the desktop assessment that do not abut the TNW have a surface connection to the TNW via a culvert or tide gate. Such wetlands would likely meet the agencies’ definition of adjacent in the final rule.”
Likely impacts of the NWPR

- No need for CWA permit to fill non-jurisdictional wetlands or streams (even if they were subject of previous denial)

- Magnitude of environmental impacts will depend on status of state laws, some of which are tethered to the CWA: as federal jurisdiction contracts, so may state jurisdiction
Likely impacts of the NWPR

➢ If a water is non-jurisdictional, no need for a CWA section 401 state water quality certification

➢ It’s uncertain to what extent NPDES permits would be required for discharges into non-jurisdictional waters, where the pollutants reach jurisdictional waters
Likely impacts of the NWPR

➢ No need for CWA permit means no need for projects to provide offsets, and thus there would be no need to obtain mitigation credits

➢ No need for CWA permit means no need for ESA section 7 consultation and ITS (but ESA section 10 ITP may be required)
WOTUS litigation landscape

  • Challenges to CWR rendered moot (for now)

➢ Repeal of Clean Water Rule (2019)

➢ Navigable Waters Protection Rule (2020)
WOTUS litigation landscape

  - State of NY v. Wheeler
  - SC Coastal Conservation League v. Wheeler
  - NM Cattle Growers’ Ass’n v. EPA
- Navigable Waters Protection Rule (2020)
WOTUS litigation landscape


➢ Repeal of Clean Water Rule (2019)

➢ Navigable Waters Protection Rule (2020)
  • CBD et al. 60-day notice of intent to sue
  • Others in the pipeline …
Thank you for your attention!