

TEXAS MUNICIPAL LAW Bulletin™

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NEW DEFINITION OF “WATERS OF THE US”?

On December 11, 2018 the EPA and the Department of the Army (Army) issued a proposal to revise the definition of “waters of the United States,” or “WOTUS,” which those agencies had promulgated in 2015 under the Clean Water Act (CWA). The EPA and Army stated the reason for revising and clarifying the definition of WOTUS is to simplify the process of determining if it is necessary to obtain a permit under Section 404 of the CWA to conduct “dredge and fill” activities on a property that may result in discharges of pollutants into WOTUS.

EPA and the Army recognize the potential for confusion over whether a proposed action may impact WOTUS, and if it might, whether, and which type, of CWA Section 404 permit may apply. They believe the proposed revision is the solution. In fact, at the press conference at which he announced the proposed revision, Acting EPA Administrator Andrew Wheeler said that American property owners should be able to stroll outside and “tell whether water on their property is a federal water without having to hire outside professionals.”

EPA will accept comments from all interested parties, including municipalities and governmental entities, for 60 days from the date of the announcement.

A number of U.S. Supreme Court decisions and EPA’s current policies concerning the question of what constitute WOTUS have created uncertainty among regulators, land use professionals, property owners and developers.

Playa lakes and streams typical of West Texas, which eventually flow into a larger body of water that constituted WOTUS, are considered WOTUS under EPA’s current policy. Under the proposed policy revision, EPA no longer would interpret them as such.

Wetlands, be they coastal, upland, or ephemeral, such as playa lakes, are important resources in this state and are probably the type of actual or potential WOTUS of greatest concern to most Texans. Under the proposal, “adjacent wetlands” that will remain federally-protected are those that physically touch waters of the U.S., are ones that are connected by traditional navigable water by a surface water connection, those that are subject to perennial or intermittent flows from a WOTUS, or from tidal influences, and are those that would have a surface connection due to inundation by WOTUS but for the separation by a berm, levee or upland from the adjacent jurisdictional water.

Under EPA’s proposal, the following, subject to the abbreviated conditions, would constitute WOTUS:

Tributaries: Rivers and streams that contribute perennial or intermittent flow to downstream traditionally navigable waters in a typical year;

Certain ditches: traditional navigable channels such as the Houston Ship Channel and/or one that is subject to tidal flow;

Certain lakes and ponds: traditional navigable waterbodies such as Lake Erie, or those that flow into traditional navigable waterbodies or are flooded by WOTUS; and,

Impoundments: An impoundment of a WOTUS would constitute a jurisdictional WOTUS. However, in the remaining clear-cut instances, EPA has stated that this proposed change in policy will not affect EPA or Army CWA Section 404 permitting requirements.

To view the EPA’s proposal, visit:

<https://www.epa.gov/wotus-rule/step-two-revise>

Please note that EPA’s December 11 announcement is notification of a proposal for future policy action and is not a notice of an intent to change current EPA policy. Should you care to discuss these proposed policy changes, please contact John Dugdale at (512) 250-0411.

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