

Clean Water Act: Proposed Rule Clarifying Limits of Jurisdiction Related to Wetlands, Tributaries and Ditches

The U.S. Army Corps of Engineers (USACE) and USEPA have published on March 25, 2014 their 370 page proposed rule (including its preamble) altering/clarifying the limits of jurisdiction under the Clean Water Act as it relates to wetlands, tributaries, ditches. The proposed rule also clarifies issues related to the jurisdiction of farmland known as Prior Converted Cropland. The public has 90 days to comment on these proposed rules.

While the proposed rule itself is 48 pages, this section applies to a variety of laws overseen by the EPA all dealing with “waters of the United States” (WOUS). The meat of the changes appear to be found within about 5 pages of text that are then repeated approximately 8-9 times, generating the 48 page total.

The subject of these 5 pages is fundamental to the geographic scope of the WOUS. While the Corps and EPA have clearly defined in past iterations what they will regulate, it has been very hard to point to one written summary of what they do not regulate...until now. Under the definitions of WOUS, there is now a section on what the EPA and USACE will not regulate. Here are simply a few points that caught my interest, and will require closer reading in the weeks ahead, along with the balance of the proposed rule and preamble:

- Areas specifically noted as “not ‘Waters of the United States’”
 - Prior Converted Cropland – based upon the EPAs evaluation (and thus the Corps) regardless of definitions from other federal agencies under other federal laws
 - Ditches excavated from uplands, draining uplands and having less than perennial flow.
 - Ditches that do not contribute flow to other specific major groups of waters (navigable waters, interstate waters and all impoundments of jurisdictional waters)

- Areas now included as WOUS
 - On a case-specific basis, other waters including wetlands provided that they alone, or in combination with “other similarly situated waters including wetlands located in the same region, have a significant nexus to major waters (e.g. territorial seas, traditionally navigable waters and interstate waters). This concept comes from the *Rapanos* Supreme Court decision.
 - Ditches that are not of the excluded types are regulated.

- New Definitions
 - “Adjacent Wetlands” have always had a complex definition based in part on interpretations from court cases. The agencies have now including definitions to assist in clarifying the word “neighboring” a key term in the definition of Adjacent Wetlands. This has generated the need for three new definitions which all relate to this term:
 - Neighboring – now has its own definition which uses two new terms requiring their definition
 - Riparian area
 - Floodplain

Links to the proposed rule, can be found at: [lesshttp://lnkd.in/drmz5z9](http://www.regulations.gov); the formal version will be found on the federal register at <http://www.regulations.gov>.