

EPA Finalized Navigable Waters Protection Rule

Article

January 29, 2020

On January 23, 2020, the U.S. Environmental Protection Agency and the Department of the Army finalized the Navigable Waters Protection Rule (www.epa.gov/nwpr). This new rule replaces the 2015 Waters of the United States Rule, which was repealed in October, 2019. If implemented, this rule would significantly affect the regulation of bodies of water, specifically wetlands and streams.

The stated purpose of the Navigable Waters Protection Rule is to implement the objective of the Clean Water Act to restore and maintain the integrity of the nation's waters by maintaining federal authority over waters Congress has determined should be regulated by the federal government while preserving states' primary authority over land and water resources.

The new rule interprets the term "waters of the United States" to encompass the following four categories of waters that are federally regulated under the Clean Water Act:

1. Territorial seas and traditional navigable waters;
2. Perennial and intermittent tributaries to territorial seas and navigable waters;
3. Certain lakes, ponds and impoundments of jurisdictional waters; and
4. Wetlands adjacent to other jurisdictional waters.

The rule identifies 12 categories that are not "waters of the United States" and therefore, not federally regulated under the Clean Water Act, including ephemeral features that flow only in response to rainfall, groundwater, many farm and roadside ditches, artificial lakes and ponds, and waste treatment systems. The rule also provides clarifying definitions of terms including "typical year," "perennial," "intermittent," "ephemeral," and "adjacent wetlands."

The net effect of the new rule would substantially reduce the scope of federal jurisdiction over wetlands and streams if implemented.

The new rule is scheduled to go into effect 60 days after publication in the *Federal Register*. However, implementation of the rule may be delayed by anticipated legal challenges from opponents of the rule.

PROFESSIONALS

Elizabeth K. Miles
Partner

RELATED SERVICES

Business Litigation

Contaminants & Toxic
Materials