

Advocacy Comments on EPA and the Department of the Army’s Proposed Definition of “the Waters of the United States”

On February 7, 2022, the Office of Advocacy submitted comments to the U.S. Environmental Protection Agency (EPA) and the Department of Army (Army) (collectively, the Agencies) on their proposed rule defining “the waters of the United States” under the Clean Water Act (CWA). The regulation expands the definition of “the waters of the United States” from both the Navigable Waters Protection Rule as well as the 1986/1988 regulations currently being implemented by the agencies.

- Under the CWA, a discharge into a “navigable water” must be authorized by EPA and, for certain dredge and fill activities, by Army Corps of Engineers. “Navigable waters” is defined by the CWA as “the waters of the United States, including the territorial seas.” EPA is authorized to define “the waters of the United States, including the territorial seas” in accordance with the statutory text of the CWA as well as congressional intent. EPA and Army have attempted to clarify what a “water of the United States” is multiple times in the last decade alone. The two most recent attempts have been either enjoined or vacated by courts.

Currently, EPA and Army believe that the 1986/1988 regulations are the current regulations in effect (the Primary Baseline). However, there is legal support to believe that the Navigable Waters Protection Rule (the Secondary Baseline) is in effect in every circuit excluding the 9th Circuit where it has been vacated by the United States District Court for the District of Arizona. As a result, EPA and Army have compared the proposed rule to the Secondary Baseline as well.

- On December 7, 2021, EPA and Army published its proposed rule defining “the waters of the United States.” The proposed rule expands a “water of the United States” to include those waters that by itself or with other waters in the region significantly affect the chemical or the physical or biological integrity of a traditional navigable water. The proposed rule also expands a “water of the United States” by excluding long-accepted exclusions such as stormwater control features, farm and stock watering ponds, ponds, and certain ditches. The agencies’ proposed rule fails to account for all differences between the proposed rule and both the Primary and Secondary Baseline.
- The rule will have a direct and potentially costly impact on small entities. Because of the limited economic analysis which the Agencies submitted with the proposed rule and the lack of data on the impacts to small entities, Advocacy advises the Agencies to hold the

proposed rule in abeyance for the purpose of convening a SBAR panel prior to promulgating any further rule on this issue.

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