

June 2015

EPA'S FINAL "WATERS OF THE UNITED STATES" RULE

SUMMARY AND COMPLIANCE ASSISTANCE GUIDE

Overview

On May 27, 2015, the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Corps") finalized a rule redefining which bodies of water are protected under the federal Clean Water Act ("CWA"). Under the CWA, so-called "Waters of the United States" receive heightened protection, and activities that could affect such waters may be subject to heightened permitting and environmental requirements. The final rule is intended to clarify which waters are – and are not – considered "Waters of the United States" ("WOTUS"). This is relevant for the oil and gas industry because many of the nation's energy resources, including natural gas and petroleum, as well as motor fuel retail outlets, are often located in or near water-based environments.

It will be important for NACS members to be aware of the final rule because their activities will be subject to heightened regulatory requirements. Specifically, by changing the definition of "Waters of the United States," this final rule may impact Spill Prevention, Control and Countermeasure ("SPCC") requirements, spill reporting obligations, construction permitting requirements, and effluent discharge monitoring and reporting requirements, among others. For example, this final rule may increase SPCC requirements as they relate to the creation or improvement of underground storage tanks.

Despite EPA's assurances that the final rule only expands CWA jurisdiction by approximately 3%, any expansion of federal water jurisdiction entails more costs and burdens on American businesses.

What's more, as a practical matter, even if no obligation is triggered for a particular retailer, that retailer may need to perform an analysis before building a new site or renovating an old site to ensure that such activities will not trigger regulatory obligations.

Compliance Deadline: The WOTUS rule will go into effect on August 28, 2015, at which point NACS members must ensure that they are in compliance with the rule.

This document provides a brief summary of the final rule that was released on May 27th and is intended to provide convenience store owners and operators with a general understanding of their potential obligations under the final rule. Nevertheless, compliance obligations must be assessed and developed on an individualized basis. If you would like to discuss the rule in further detail, please contact Eva Rigamonti, Steptoe & Johnson LLP (erigamonti@steptoe.com).

Who is Subject to the WOTUS Rule?

The WOTUS rule generally applies to any entity whose business operations or related business activities may impact a “water of the United States”. This could include, for example, any plans to renovate and/or develop a new facility.

In order to determine whether the WOTUS rule and accompanying regulations will apply to your activities, you should conduct an internal assessment to determine whether your business is impacting a WOTUS, which could be an environmental feature that does not actually contain water.

What is a “Water of the United States”?

The final rule defines WOTUS very broadly and vaguely. Because of this ambiguity, retailers may need to conduct individualized assessments to determine whether their activities impact a WOTUS.

Under the final rule, a WOTUS is any of the following:

1. All waters that are currently, have been in the past, or could in the future be utilized in interstate or foreign commerce;¹
2. All interstate waters – i.e. all waters that traverse state borders – as well as interstate wetlands;²
3. The territorial seas;³
4. Impoundments of any WOTUS;⁴
5. All tributaries (water that contributes directly or indirectly to the “flow”) of waters 1, 2, and 3 (“navigable waters”) above;⁵
6. Waters that are *adjacent* to waters 1, 2, and 3 above; and
7. Waters with a *significant nexus* to waters 1, 2, and 3 above.

¹ Examples of waters used in commerce are the Mississippi River and the St. Lawrence Seaway.

² Examples of interstate waters are the Missouri River or Lake Michigan.

³ An example of a territorial sea could be the area of the Atlantic Ocean that is adjacent to the U.S. coastline that is considered to be part of U.S. territory and thus under U.S. sovereignty.

⁴ An impoundment of a WOTUS refers to any facility that is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials, which is designed to hold an accumulation of liquid wastes. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons. *See generally* 40 C.F.R. §260.10.

⁵ A tributary can be natural, man-altered, or man-made, such as rivers, streams, canals, or ditches (not otherwise excluded under the rule) and must contain the following physical indicators: a bed and banks and an ordinary high water mark. 33 C.F.R. §328.3 (a)(5); (c)(3).

Adjacent Waters:

With regard to adjacent waters, the final rule states that waters that are “bordering, contiguous, or neighboring” a WOTUS, essentially become WOTUS by association, meaning those waters are under CWA jurisdiction and subject to heightened regulatory requirements. Specifically, the rule defines a “neighboring” water as all waters located: (1) within 100 feet of the ordinary high water mark of a WOTUS, (2) all waters located within the 100-year floodplain of a WOTUS and up to 1,500 feet from the ordinary high water mark of that WOTUS, (3) all waters within 1,500 feet of a high tide line of a navigable water,⁶ and (4) all bodies of water within 1,500 feet of the ordinary high water mark of the Great Lakes. For example, the Colorado River, an interstate water, is a WOTUS. Thus, any body of water that is adjacent to the Colorado River, *i.e.* any body of water that is located within the 100-year flood plain of the Colorado River and not more than 1,500 feet from the ordinary high tide mark of that river will be considered a WOTUS and thus subject to CWA regulatory requirements.

Waters with a Significant Nexus to WOTUS:

There will also be instances that require a case-by-case determination to determine whether a body of water is under CWA jurisdiction. For example, five types of regional specific waters – prairie potholes, Carolina and Delmarva bays, pocosins (wetlands found in Central Atlantic coastal plain), western vernal pools found in parts of California,⁷ and Texas coastal prairie wetlands – will be subject to case-specific “significant nexus” evaluations to determine whether water features in those areas are considered WOTUS. In addition, any body of water located within the 100-year floodplain of a navigable water or located within 4,000 feet of the high tide line or ordinary high water mark of a WOTUS will also be subject to a case-specific “significant nexus” evaluation to determine whether that body of water is a WOTUS. Significant nexus evaluations require a determination that the other water has a “more than speculative or insubstantial effect” on the chemical, physical, or biological integrity of the WOTUS.

It is important to note that the definitions of what counts as “adjacent” or as having a “significant nexus” to a WOTUS are nebulous. Therefore, to determine whether a body of water is either “adjacent” or has a “significant nexus” to a WOTUS may require a topographic and scientific analysis. It is likely that these terms will continue to be defined via litigation in the future.

For assistance with topographic and scientific analysis questions, you may contact your local U.S. Army Corps of Engineers [District Field Office](#).

You may also wish to use the following helpful websites:

- The U.S. Department of the Interior’s Geological Survey [online database](#).
- The U.S. Fish & Wildlife’s [National Wetlands inventory](#).

⁶ “Navigable waters” refers to all waters used in interstate or foreign commerce (# 1 in the WOTUS list on p. 2), all interstate waters and wetlands (# 2), and the territorial seas (# 3).

⁷ A vernal pool is a seasonal depressional wetland occurring in the West Coast and in glaciated areas of northeastern and mid-western states. *For more information:* <http://water.epa.gov/type/wetlands/vernal.cfm>.

Bodies of Water that are NOT WOTUS:

The final rule stipulates that the following waters are not WOTUS:

1. Waste treatment systems;
2. Certain ditches that do not behave as tributaries;
3. Water filled depressions created in dry-land incidental to construction activity, including pits excavated for fill;
4. Groundwater, including groundwater drained through subsurface drainage systems;
5. Stormwater control features; and
6. Wastewater recycling structures.

What Does it Mean if Your Business is Subject to the WOTUS Rule?

Under the CWA, the federal government has the ability to impose permitting and other regulatory requirements on U.S. businesses in order to protect the nation's waters from contamination. Because the final rule expands federal CWA jurisdiction, your business may now be subject to new regulatory requirements.

Of particular relevance to NACS members, these include permitting and associated regulatory requirements relating to:

- oil spill liability;
- oil spill prevention, control and countermeasure ("SPCC");
- effluent/stormwater discharge requirements; and
- dredge and fill permits.

The above requirements are generally triggered when a retailer chooses to build a new retail outlet or renovate an existing outlet by, for example, investing in new underground storage tanks. With these possible additional permitting requirements, retailers may also face greater compliance costs and lengthier timelines for project development.

As a practical matter, even if a particular project will not subject a retailer to any new obligations under the final WOTUS rule, the retailer may have to expend time and resources to analyze whether new obligations may apply. Thus, prior to engaging in certain activities, retailers should complete an internal assessment to determine whether the activities will trigger regulatory obligations. Retailers should also ensure that any construction company or third-party vendor that retailers hire will undertake these types of assessments so that a retailer does not become liable for a third party failing to comply with necessary regulatory requirements. This is particularly important in light of the potential increase in enforcement risk from the EPA and the likelihood of private rights of actions being brought by citizen activist groups.