



# Stormwater: Nationwide Legal Update

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# WOTUS Rule

- 2015 Rule
- Adopts Justice Kennedy’s “significant nexus” test
- Exemption for facilities constructed in dry land
- “Tributaries” or “covered adjacent waters” have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are “waters of the United States.’



# Summary of 2015 Rule

- Waters that are jurisdictional by rule
- Subject to case-specific analysis
- Categorically excluded
- “Tributary” – contributes flow to jurisdictional water, bed and bank and OHWM
- “Adjacent” – bordering, contiguous or neighboring
- “Neighboring” – all waters located w/i 100 feet of OHWM



# Summary of 2015 Rule

- “Significant nexus test”
- A water, including wetlands, along or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity of a jurisdictional water
- One of 9 functions to consider





# Steps to Repeal and Replace

- EO 13778 directs reconsideration and repeal (2017)
- Step 1: Repeal. Agencies sought comment on notice of intent to repeal
- Step 2: Revise. Proposed revised definition of WOTUS.



# Reasons for Repeal

- Rule didn't limit federal gov't authority
- Failed to consider States' rights
- Prevent over-reaching into land use planning
- Distance-based limitations lacked support



# Specific Reasons for Repeal

- Misapplied sig nexus test
- Difficult to determine where water ends and dry land begins but Corps must define
- 2015 rule did not use established scientific meanings for ephemeral, intermittent, and perennial
- Tributaries no specification of volume, frequency, flow duration or time period.





# Tributaries

- Under the 2015 Rule’s definition of “tributary,” the agencies determined that the mere contribution of flow to primary waters—however minimal, infrequent, or indirect—and the presence of “physical indicators” of a bed and banks and an ordinary high water mark were sufficient to support the categorical assertion of jurisdiction over features (including individual features) meeting the definition of “tributary” because the agencies determined that such features, in the aggregate, would possess a significant nexus to navigable waters



# New Rule

- Repeals 2015 rule
- Recodify the pre-existing regulatory text
- Adopts 1986 and 1988 regulations
- Must consider the connection of the wetland to the tributary
- Will consider new definition of WOTUS in Step 2



# Replace

- Relatively permanent and flowing standing waters, or specific connection to navigable waters
- Does not include areas that are dry most of the year, and which may occasionally contain 'transitory puddles or ephemeral flows of water



# Replace specifically means . . .

- Traditional navigable waters
- Removes interstate waters, and interstate wetlands as a separate category
- Impoundments
- Tributary – naturally occurring stream or river that contributes perennial or intermittent flow in a typical year



# Tributary & Ditches

- Does not include surface features that flow in direct response to precipitation, ephemeral flows, dry washes, arroyos, etc.
- Artificial channels used to convey water
- Does not include man-made, non-tidal drainage and irrigation ditches



# CWA 401 Certifications

- EPA released proposed rule
- Disallow states from objecting to 401 certs for reasons other than water quality
- Impose 1-year approval process from time application submitted
- Designed to ease energy and gas approvals



# “Point Sources” – Indirect Hydrological Connections

- *Hawaii Wildlife Fund v. County of Maui* (9<sup>th</sup> Cir 2018)
- County needs NPDES permit for non-point source discharges when the pollutants were fairly traceable to the point source to a navigable water such that the discharge was the functional equivalent of a discharge to navigable waters and was more than *de minimis*
- Wastewater wells conveyed pollutants through underground lava channels to protected reefs. Tracer study confirmed discharges. County argued CWA defined point source as direct discharge to receiving water



# *County of Maui*

- US Supreme Court (Feb. 2019)
- Oral argument (Nov. 2019)
- *Maui* – Conflicts with prior decisions and affects 650,000 wells
- EPA Interpretive Statement (April 2019)
- City Council voted to settle
- Would vacate 9<sup>th</sup> Circuit decision





# Center for Regulatory Reasonableness v. EPA

- CRR challenges water quality criteria for nutrients by Minnesota Pollution Control Agency
- Testing method not widely accepted, not toxic, not scientifically accepted
- District court upholds criteria on APA grounds giving discretion to the agency



# Supplemental Environmental Projects

- CWA lawsuits
- Projects mitigate environmental impacts in community
- Use of SEPs being reviewed by DOJ
- Limited in state and local government settlements

