Summary: New EPA/USACE WOTUS Rule (Feb 2022)

Background on 'WOTUS'

The EPA and USACE have recently issued a Proposed Rule that would replace the recently vacated "Navigable Waters Protection Rule" definition under the federal Clean Water Act (CWA) finalized by the Trump administration on April 21, 2020 (the "NWPR") and the text of the Pre-2015 regulatory definitions that the vacaturs restored. Commonly referred to by the acronym WOTUS, 'waters of the United States' is the legal definition providing the scope of federal law protection against unlawful degradation of water resources across the United States.

It would be difficult to overstate the critical importance of the CWA regulatory definition of "waters of the United States" to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many threatened and endangered species that depend upon those resources. If a stream, river, lake, or wetland is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into those waters without meeting any of the CWA's permitting and treatment requirements.

When waters are excluded from the definition of "waters of the United States," all of the protections of the CWA the discharge standards and permitting requirements for pollution discharges, dredging and filling standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other CWA standards and programs become inapplicable and cannot prevent or even mitigate the harm.

Excluded waterways can be dredged, filled and polluted with impunity because the CWA's most fundamental human health and environmental safeguard the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a) would no longer apply. Unregulated pollution discharged into waterways that fall outside the agencies' definition will not only harm those receiving waters but will often travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, and, ultimately, human beings. Obviously, this pollution disproportionately impacts environmental justice communities both directly and downstream from newly non-jurisdictional waters.

While the CWA has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. For example, while water quality in a large percentage of our nation's waters has not been assessed, data from EPA shows water pollution in assessed waters has impaired 588,173

river/stream miles, 13,208,917 lake/reservoir acres, 44,625 square miles of bays/estuaries, 3,329 square miles of coastal waters, 672,924 wetland acres, and 39,230 square miles of the Great Lakes Open Water.

Clean water is important to nearly every aspect of our lives and livelihoods, but, most importantly, is essential to life itself. As a nation, we cannot have clean water unless we control pollution at its source wherever that source may be. This entails protecting waters throughout the entire watershed and all waters that form the hydrologic cycle without regard to whether the waters are connected to traditionally navigable waterways.

The breadth of the waters protected under the CWA, and the reasons therefore, were firmly established with the passage of the CWA in 1972 and are reflected in the agencies' Pre-2015 Regulatory Definition of "waters of the United States" in 1973 (EPA) and 1977 (Corps), which protected navigable-in-fact waters, interstate waters, the territorial seas, impoundments of waters of the United States, tributaries, wetlands adjacent to waters of the United States, and "[a]ll other waters ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce.

If we can ever hope to restore the "chemical, physical and biological integrity of our Nation's waters" - which was the sole bedrock "objective" of Congress when it passed the CWA - it is essential that the Pre-2015 Regulatory Definition be fully restored and that we protect traditional navigable waters; interstate waters; tributaries, rivers and streams (whether they are perennial, intermittent, or ephemeral); adjacent waters; wetlands, closed basins, playa lakes, vernal pools, coastal wetlands, Delmarva Bays, Carolina Bays, pocosins, prairie potholes; lakes and reservoirs; estuaries and bays; and other waters that either provide important functions protected by the CWA themselves or have an influence on downstream waters.

Protection of all of the Nation's waters has become even more important since passage of the CWA in 1972 as we face serious climate change challenges, including the need to protect the quality of diminishing water supplies and to preserve wetlands to help mitigate and adapt to a changing climate.

The New Proposed WOTUS Rule

Upper Missouri Waterkeeper objects to the agencies' proposal to transform the CWA from a statute requiring the protection and restoration of water quality in all of the Nation's waters, to a statute that merely seeks to protect and restore the water quality of "foundational waters," which the agencies narrowly and unreasonably define as encompassing only traditional navigable waters, interstate waters, and the territorial seas.

According to the Proposed Rule, "the object of federal protection is foundational waters" and the CWA only protects tributaries, wetlands, and open waters to the extent that they are "necessary to protect the foundational waters." This is quite obviously not the objective of the CWA and the agencies lack the discretion to reshape and weaken the CWA in this manner.

The agencies' unfounded view of the CWA's objective underpins major portions of this new rulemaking, resulting in unreasonable limitations on jurisdictional categories that undermine the purpose of the law, such as the elimination of categorical protection of tributaries and the interstate commerce factors for protection of "other waters."

The agencies are inexplicably asserting that "foundational waters" encompass only traditional navigable waters, interstate waters, and territorial seas (but not their tributaries) - rendering "foundational waters" dramatically more constrained than the scope of waters protected prior to even the 1972 Amendments of the CWA (i.e., a very limited scope of protection).

Even worse, the agencies' new rule is proposing to actually exclude certain tributaries to navigable waters and interstate waters from the CWA protections altogether by eliminating categorical protections and mandating certain types of connections, e.g. a significant nexus to this narrow construction of "foundational waters." The new restrictive interpretation of the scope of federal protections for waters across the nation is unscientific and will lead to more, not less pollution and degradation of local water quality, especially in those intermountain west regions like Montana with thousands of miles of intermittent or ephemeral waters that would be prospectively precluded from protection under the new proposed rule.

For example, under this approach and contrary to the plain text of the CWA, the destruction of aquatic fishery habitat in a non-navigable lake, or the pollution of a recreational tributary, is not addressed by the CWA unless the destruction and pollution impairs water quality in a downstream "foundational" water and all of the CWA's programs would no longer apply to protect the lake, it's fishery, or the tributaries' recreational uses. This is an outrageous and fundamentally new approach that terribly constrains pollution control and completely ignores well-established science showing that water quality protection is achieved by protecting the sum total of the hydrologic cycle, not just the largest downstream aspects.

Based on a legally and factually unsound analysis, the agencies propose to dramatically reframe the entire CWA to only protect traditional navigable waters, interstate waters, the territorial seas, and a unidentified subset of upstream waters to the extent that they 'impact the integrity' of those waters, as determined by the 'relatively permanent' and 'significant nexus' requirements the agencies are placing on tributaries, wetlands, and other waters.

Regulatory authority over the rest of the Nation's waters would be left exclusively to the protection of the states, which have a lengthy and dismal record in protecting the Nation's waters in the absence of federal CWA authorities and requirements. Doing so is plainly contrary to the text, structure and objective of the Act, as well as decades of case law and agency construction to the contrary.

A Better, Scientifically-Defensible and Practical Path Forward

The Proposed Rule represents the fourth time since 2014 that the EPA and USACE have proposed a novel interpretation of the CWA that constrains Congress' intended breadth of the law and vision for full restoration of water quality for the nation's waters. These agency proposed rules found new ways to interpret the objective of the CWA and, in so doing, reduced

the breadth of protections, and all of these attempts have been wholly unsuccessful to date. The nation needs a durable definition of "waters of the United States," and we recognize that is the agencies' goal with this rulemaking, but redefining the objective of the CWA, ignoring best available science, and eliminating protections for waters that have historically been protected is not the way to get there.

EPA and USACE should fully restore the Pre-2015 Regulatory Definition of "waters of the United States" *without* the new limitations proposed by the agencies for impoundments, tributaries, wetlands, and other waters.

That pre-2015 definition protects:

(1) traditional navigable waters,

(2) interstate waters,

(3) other waters, including intrastate waters, where their use, degradation, or destruction could affect interstate or foreign commerce,

(4) impoundments of any other jurisdictional water,

(5) all tributaries to the preceding categories of waters,

(6) the territorial sea, and

(7) wetlands adjacent to the preceding categories of waters.

We further urge the agencies to limit the waste treatment exclusion "only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States" as originally intended.

Any definition of "waters of the United States" must ensure broad jurisdiction to control pollution in the Nation's waters consistent with the intent of Congress when it enacted the CWA. Adoption of the Pre-2015 Regulatory Definitions without amendment will restore longstanding protections for the Nation's waters, and will immediately begin to address the significant, ongoing harms to the Nation's waters and the people, ecosystems, businesses, and endangered and threatened species that depend upon them.