Waters of the United States/Clean Water Act: Association of Clean Water Administrators Comments Addressing Potential Revisions

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The Association of Clean Water Administrators ("ACWA") submitted May 15th comments to the Untied States Environmental Protection Agency and U.S. Army Corps of Engineers (collectively, "EPA") regarding potential revisions to the Clean Water Act definition of Waters of the United States ("WOTUS").

ACWA was responding to EPA's Consultation and Coordination on Upcoming Efforts to Revise the Definition of WOTUS. See E.O. 13132.

ACWA describes itself as the:

…independent, nonpartisan national organization of state, interstate, and territorial program managers who serve as co-regulators of the federal Clean Water Act.

The definition of WOTUS is arguably one of the most critical jurisdictional terms of the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland permits.
- Section 311 –oil/hazardous substance release requirements.
- Clean Water Act Spill Prevention Control and Countermeasure Regulations.

As a result, the scope of the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings, and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

ACWA notes in its comments that its member are the primary entities responsible for carrying out most of the Clean Water Act projects. Therefore, they note that:

…the states are very interested in any national regulatory updates or policy positions that define terms under the CWA, including the definition of "waters of the United States" (WOTUS).

ACWA suggests the following for any potential rulemaking or agency action intended to revise the definition of WOTUS:

- Recognize states' delegated CWA authority and role as co-regulators in CWA program implementation.

- Provide states with early, continuous, and meaningful opportunities for dialogue and input as any new rule is developed.
- Recognize the geographic, geologic, climatic, hydrologic, and leadership diversity among states and craft a definition that provides clarity but also flexibility for state implementers.
- Respect and follow binding legal precedent, Congressional intent, and peer-reviewed science in establishing any new rules, regulations, policies, or guidance that may define or affect the scope of WOTUS and CWA authorities.
- Prepare to provide the states, well in advance, with technical assistance, tools, and trainings to assist with implementation of any revised definition.
- Consider a delayed effective date, dependent on the significance and scope of the final rule, to give state partners adequate time to revise state regulations and/or to develop new state policy to cover any changes in coverage as a result of the revised jurisdictional definition.
- Ensure that federal funding to states reflects necessary levels to continue states' ability to effectively and efficiently administer CWA programs and protect our Nation's water resources.

A copy of the ACWA comments can be downloaded here.