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WOTUS Proposal Would Reduce Waters Subject to Federal Regulation

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The newly proposed definition of the Waters of the United States ("WOTUS") may clarify what water features are federally regulated under the Clean Water Act, but, if adopted, it is sure to spark further litigation. On December 11, 2018, the United States Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Army Corps") proposed the much-anticipated revised definition of WOTUS, which establishes the jurisdictional reach of the Clean Water Act. The current definition of WOTUS, adopted during the Obama Administration, is far-reaching and includes areas such as mudflats, sandflats, isolated wetlands and ephemeral and intermittent streams. To the satisfaction of many in the commercial, industrial and farming communities, the new proposal limits the extent of WOTUS to six identified categories of water features. But environmental groups believe these limitations will result in less protection for the Country's wetlands and water resources and, in fact, have referred to the revised definition as the "dirty water rule."

According to the EPA and the Army Corps, the proposed WOTUS definition is "simple, understandable and implementable" and was drafted to provide clarity to the regulators and the regulated community. Much of the uncertainty in the current WOTUS rule results from the "significant nexus" provision that allows federal regulators to determine, on a fact specific basis, whether a particular water feature is a WOTUS. This provision provides the EPA and Army Corps with the ability to use a "know it when they see it" inquiry to determine whether a water feature is subject to federal regulation. It also encompasses nebulous areas such as ponds that are only filled during rainfall events and isolated wetlands. The new proposal eliminates the "significant nexus" provision and encompasses only relatively permanent flowing waterbodies that are either traditionally navigable or have a connection to a traditionally navigable waterway. It also limits federal protection to those wetlands that either abut or have a direct hydrologic surface connection to navigable waters. The reach of the Clean Water Act under the

revised definition is unquestionably reduced.

The proposed WOTUS definition sets forth six exclusive categories of waters that fall within the jurisdiction of the federal Clean Water Act. The revised definition initially identifies WOTUS as waters that are used, or were used in the past, or may be susceptible to use, in interstate or foreign commerce ("navigable waters"). The remaining WOTUS categories are contingent upon this first enumerated category. For example, tributaries are included if they are tributaries of navigable waters. Most importantly wetlands and impoundments are federally regulated only if they are adjacent or connected to navigable waters. To add clarity, the EPA and Army Corps specifically set forth waters that are not WOTUS, including certain ditches, prior converted cropland, artificially irrigated areas, artificial lakes and ponds and groundwater. The newly proposed WOTUS rule attempts to reduce the uncertainty of the current rule by identifying specific categories of WOTUS. Although certain language in the proposal, such as waters that "were used in the past or may be susceptible to use" in commerce, continues to create some ambiguity, the regulated community appears pleased with the increased clarity the proposed definition provides. Environmentalists, however, are concerned that the lack of a "significant nexus" test and the elimination of certain categories of water features in the proposed rule will reduce protection for important US waters as required by the Clean Water Act. As such, it is anticipated that the adoption of the proposed WOTUS rule will spark additional litigation. Moreover, the ability of the rule to provide clarity and increased certainty to regulators and the regulated community will only be known with the passage of time. For now, the WOTUS saga continues.

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