# Taking Notice of WOTUS: A Home Building Industry Perspective

*On June 29, 2015, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers published a final rule that changes the regulatory definition of "waters of the United States" for the first time in nearly 30 years. The new rule expands federal jurisdiction under the Clean Water Act and introduces new concepts and definitions that will be burdensome to home builders, decrease housing affordability, and do little to protect the environment.*

By Owen McDonough

The Clean Water Act of 1972 (CWA) gives the federal government authority to regulate "navigable waters," which are defined by the statute as simply "waters of the United States" (WOTUS). Unfortunately, determining what constitutes WOTUS and in turn the scope of federal jurisdiction has not been easy or predictable. And while two U.S. Supreme Court cases, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[1] and *Rapanos v. United States*,[2] have made it clear that there are limits to federal authority under the CWA, perhaps the only thing all parties agree on is that the 1986 regulatory definition of WOTUS is too vague. The result has been confusion, inconsistent application, questionable jurisdictional calls, and delayed decisionmaking.

Since these Supreme Court decisions, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps)—the federal agencies with joint authority to administer the CWA—have made several attempts to address the confusion by issuing interim guidance and agency directives. Unfortunately, the implementation of these interpretive tools has proven burdensome and unpredictable. At the same time, the underlying uncertainty persists, leaving home builders, developers, and other stakeholders at a loss for knowing whether or not their land contains federally protected areas.

After publishing a proposed rule to redefine WOTUS in April 2014 and receiving over one million comments, the agencies published a final rule on June 29, 2015. The agencies claim the rule provides clarity and does not expand federal jurisdiction. Regrettably, the rule misses the mark.

Under the new rule, all "tributaries" are categorically jurisdictional. The agencies have defined tributary broadly to include any feature that contributes flow, either directly or through another water, to a downstream water and is characterized by the presence of the physical indicators of a bed and banks and an ordinary high watermark (OHWM). Importantly, the new regulatory definition of tributary does not consider when a feature flows, how often it flows, or what volume of water it contributes downstream. Rather, the rule regulates all features meeting the tributary definition—even those that might flow as a trickle or only after a heavy rainfall—as jurisdictional by rule. What's more, in the Supreme Court's *Rapanos* decision, Justice Anthony Kennedy rejected the use of an OHWM to determine jurisdiction.[3] And, like the former WOTUS definition, there are no assurances that Corps regulators will interpret OHWM consistently.

To make matters worse, the rule asserts categorical jurisdiction over all "adjacent waters," which are defined based upon their distance to other jurisdictional waters, including tributaries. With an expansive tributary definition that extends to many ditches and well beyond headwaters to countless miles of ephemeral streams and conveyances, it becomes increasingly more difficult to identify an otherwise isolated water feature that falls outside of the arbitrary "bright-line" distances established in the rule.

And, even if a water is located beyond the established distance from an OHWM or high-tide line to meet the "adjacency" requirements, if it is within 4,000 feet of a jurisdictional water, the agencies could perform a significant nexus analysis on it, either alone or in combination with other similarly situated waters, to determine if it is subject to federal law. In its own economic analysis of the final rule, EPA acknowledges the meaninglessness of this 4,000-foot "bright line," stating:

> The agencies have determined that the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or

territorial sea. We believe, therefore, that very few waters will be located outside 4,000 feet [of a jurisdictional water].[4]

Equally problematic, the threshold to satisfy the significant nexus test is set so low that a water could be found to have a significant nexus if it either stores runoff or contributes flow to a downstream water. When asked to name a water that does not either store water or contribute water downstream during a recent Environmental Law Institute seminar, EPA and the Corps officials could not—showing just how easy it will be for the agencies to determine that a water has a significant nexus to another water and is thereby jurisdictional.

In the end, many landscape features that exhibit few attributes of "waters" or that would historically have been considered "isolated" will be swept into the federal regulatory net unnecessarily. Indeed, the rule only creates clarity and certainty by illegally asserting jurisdiction over nearly every possible wet feature.

The sheer scope of these new definitions and the vast acreage they will bring under federal scrutiny raise significant concerns for the home building industry. By their very nature, land development and home building involve substantial earth-moving activities. Because CWA §404 requires a permit for the discharge of dredged or fill material into WOTUS, builders and developers must often obtain CWA permits to complete their projects. As the definition of WOTUS expands, more activities will trigger CWA §404. Under the new rule, activities discharging into features such as isolated wetlands, man-made ditches and conveyances, and channels that only flow when it rains will require a federal permit.

Obtaining these permits is no small task, as the process causes delays, additional scrutiny, possible project redesign, and increased costs. A 2002 study, for example, found that it takes an average of 788 days and $271,596 to obtain an individual CWA §404 permit and 313 days and $28,915 for a "streamlined" nationwide permit.[5] Importantly, these values do not take into account the cost of mitigation, which can add up quickly. Perhaps even more costly, however, can be discharging into a WOTUS without a CWA permit—a violation that can cost $37,500 per day.

Ultimately, these costs will be passed on to the home buyer, decreasing housing affordability. A 2011 study by the National Association of Home Builders (NAHB) Economics and Housing Policy Group estimated the impact of regulations on the price of a new home and found that, on average, regulations imposed by all levels of government account for 25% of the final price of a new single-family home.[6] Nearly two-thirds of this—6.4% of the final home price—is attributed to the higher price for finished lots resulting from regulations imposed during the lot's development. While these regulations are largely invisible to the home buyer, the public, and even the regulators themselves, the compounding of the myriad local, state, and federal requirements has a profound impact on housing affordability and homeownership.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low- to moderate-income home buyers who are more susceptible to being priced out of the market. As the price of a home increases, those who are on the verge of qualifying for that new home will no longer be able to afford its purchase. An analysis done by NAHB illustrates the number of households priced out of the market for a median-priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $275,000 to $276,000, over 200,000 households can no longer afford that home.[7] This is not a good outcome for anyone. As our nation slowly recovers following the Great Recession, regulatory burdens placed on home builders should be reduced, not increased.

Finally, the added costs of this regulation will come at little to no benefit to the environment. Indeed, many of the newly minted WOTUS are already regulated at the state and/or local levels. And, if they are not regulated by the states, in many cases, this is because the states have determined that certain features simply do not warrant regulation. Clearly, EPA and the Corps have disregarded that notion, not to mention the intent of the U.S. Congress and the opinion of the Supreme Court. And with a rule so expansive and unwarranted, it is likely only a matter of time until the courts weigh in on WOTUS again. ■

## Endnotes

1. Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers, 531 U.S. 159 (2001).
2. Rapanos v. United States, 547 U.S. 715 (2006).
3. *Id.* at 781 (Justice Kennedy noted that the reliance on OHWM to determine jurisdiction of the Clean Water Act "leaves wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carry only minor water-volumes towards it" and "precludes its adoption. . .").
4. Economic Analysis of the EPA-Army Clean Water Rule 11 (2015), *available at* http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.
5. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42(1) Nat. Resources J. 60 (2002).
6. Paul Emrath, *How Government Regulations Affect the Price of a New Home*, National Association of Home Builders Economics and Housing Policy Group Special Study (2011), *available at* http://www.nahb.org/en/research/nahb-priorities/code-development/ICC-codes/~/media/AFBB688D7FEE44E9A221F49B9B0E23E8.ashx.
7. Natalia Siniavskaia, *State and Metro Area House Prices: The 'Priced Out' Effect*, National Association of Home Builders Economics and Housing Policy Group Special Study (2014), *available at* http://www.nahb.org/en/research/housing-economics/special-studies/state-and-metro-area-house-prices-the-priced-out-effect-2014.aspx.