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Sent: Tuesday, October 22, 2019 8:11 AM
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Cc: Crane, Juli
Subject: Waters of the U.S. Definition UPDATE -- STEP 1 PUBLISHED
Attachments: WOTUS Step 1 Rule Federal Register Oct 22, 2019.pdf

There is a significant development on the USEPA's "2-Step" process to revise the definition of *waters of the U.S.* (WOTUS):

On October 22, 2019, the Army Corps of Engineers (Corps) and USEPA published a new rule (Step 1) which repeals the current Clean Water Rule (CWR) enacted under the Obama Administration in 2015 and re-codifies the pre-existing regulations for the time being until a new revised WOTUS definition (Step 2) is completed by the agencies next year. The Step 1 rule will take effect on December 23, 2019. The Step 1 rule restores a consistent set of WOTUS regulations for all 50 States (the CWR had been in effect since August 2018 for only 22 of the States, *including Illinois*).

What does the revision of the WOTUS definition mean for Lake County and SMC's isolated wetlands program?

- We expect an increase in our isolated wetland workload, including preliminary wetland jurisdictional determinations (PJDs) and isolated wetland permit reviews, as a significant number of wetlands in the County (estimate 40-50% by Lake County GIS) will not meet the WOTUS definition and will therefore be classified as *Isolated Waters of Lake County* (IWLC), subject to regulation under the WDO. For comparison, we estimate that only 5-10% of the wetlands in the County would be considered IWLC under the current CWR definition of WOTUS.
- We will perform PJDs with the Corps using the previous regulatory guidance we used consistently for many years – it's based primarily on hydrologic connectivity of wetlands to navigable waterways and is understandable to the public. The distance thresholds, *significant nexus*, and other complex and controversial provisions in the current expansive CWR definition of WOTUS will no longer apply.

Our principal wetland specialists – Glenn Westman gwestman@lakecountyil.gov and Juli Crane jcrane@lakecountyil.gov are closely tracking this important issue. Feel free to contact them if you have any questions.

Waters of the United States (WOTUS) Rulemaking

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Definition of "Waters of the United States" - Recodification of Pre-Existing Rules

On October 22, 2019, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") [published](#) a final rule to repeal the 2015 Clean Water Rule: Definition of "Waters of the United States" ("2015 Rule"), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. The final rule will become effective on December 23, 2019. The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachments of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.

With this final rule, the regulations defining the scope of federal CWA jurisdiction will be those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule.