



**To:** RCRC Board of Directors  
**From:** Staci Heaton, Regulatory Affairs Advocate  
**Date:** January 14, 2019  
**Re:** Waters of the United States

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### **Summary**

The Trump Administration has begun the process of redrafting the Waters of the United States (WOTUS) rule, while the State Water Resources Control Board (State Water Board) has released a final draft of its Procedures for Discharges of Dredged or Fill Materials to Waters of the State (Procedures) regulations that incorporate some of the restrictions of the 2015 federal rule altering the definition of what constitutes a “water of the United States.” This memo provides an overview of both regulatory actions.

### **Background**

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) finalized the joint rule amending the definition of “Waters of the United States,” also known as WOTUS, in August 2015. The rule closely followed the changes proposed by the EPA in their 2011 *“Guidance to Identify Waters Protected by the Clean Water Act,”* greatly expanding federal jurisdiction to include some wetlands, waters that are adjacent to traditional navigable water, and other marginal waters. The rule was highly controversial, drawing broad criticism from stakeholders, and bipartisan opposition from Congress as a jurisdictional overreach by EPA and the Corps, and subject to a lengthy legal challenge. In February 2017, President Trump issued an Executive Order on *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule*, which orders the EPA and Corps to revisit and rewrite the rule. Subsequently, the agencies jointly began a rulemaking to first repeal the rule, reinstating the pre-2015 WOTUS rules in the process, and then to redraft WOTUS.

During this same time period, the State Water Board has been developing the Procedures. Previous versions of the Procedures placed new requirements on permit applicants that would have overlapped existing requirements, while resulting in substantial uncertainty for applicants, increasing the potential for litigation over proposed projects, and imposing significant costs without notable environmental benefit. RCRC has been opposed to the implementation of the Procedures, which have yet to be finalized.

## **Issue**

EPA and the Corps recently began the second step of the Executive Order, releasing a pre-publication version of the proposed, redrafted WOTUS rule in December 2018, which can be accessed at:

[http://www.rcrcnet.org/sites/default/files/useruploads/Meetings/Board\\_of\\_Directors/2019/January\\_16\\_2019/WOTUS\\_Pre\\_Publication\\_Version.pdf](http://www.rcrcnet.org/sites/default/files/useruploads/Meetings/Board_of_Directors/2019/January_16_2019/WOTUS_Pre_Publication_Version.pdf). The revised version of the rule makes drastic changes to the rule that was finalized in 2015, eliminating interstate waters as a standalone category of WOTUS, and no longer regulating wetlands that cross state lines but are not connected to traditional navigable waters. The revised rule also abandons the 2015 rule's "significant nexus" test for jurisdictional waters in favor of clear definitions of which ditches, tributaries, and wetlands are jurisdictional, and those definitions include only waters that are interstate or have a distinct flow to a jurisdictional water. The revised WOTUS rule has not been officially noticed in the Federal Register due to the partial federal government shutdown, but will be open for public comment 60 days after its official release.

In the meantime, the State Water Board has released a Final Draft of the Procedures (Attachment 1) that maintains some of the key components of WOTUS, most notably expanding the state's jurisdiction over small streams, creeks, and a greater share of California's vernal pools. Notwithstanding the State Water Board staff's initial stated intent to simply harmonize their state definition with the federal Clean Water Act definition of "Waters of the United States," the recent WOTUS repeal and proposed redraft had little impact on the recently-released Final Draft. In fact, the final draft includes language to apply the repealed version of WOTUS to the Procedures despite the drastic changes to federal policy. The State Water Board has scheduled a staff workshop for January 10, 2019, and a Board workshop for January 22, 2019, but is not accepting written comments on the final draft.

RCRC continues to work with a broad coalition of stakeholders, including the California Farm Bureau Federation, the Association of California Water Agencies, and the California Building Industry Association, to illustrate the problems with the final draft to members of the State Water Board. The coalition also sent a letter to then Governor-elect Gavin Newsom (Attachment 2) outlining the issues with the proposed Procedures, and requesting the new Administration intervene in the regulatory process. The coalition is currently conducting a series of meetings with State Water Board members to discuss the final draft before the Board adoption hearing scheduled for February 5, 2019.

## **Staff Recommendation**

RCRC staff will continue to update the RCRC Board of Directors on the progress of both regulatory proposals.

## **Attachments**

- Final Draft State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State
- Coalition Letter on Final Draft Procedures to Governor-Elect Gavin Newsom, December 4, 2018