



Wetland Permitting in Virginia Made Murky by New Federal Rules and Corps District Staffing Shortages

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A combination of federal wetland regulatory actions presents substantial uncertainty for regulated parties as they navigate wetland delineation and permitting processes for their projects. These concerns are compounded in Virginia by a substantial wetland regulatory staffing shortage at the U.S. Corps of Engineers (Corps) Norfolk District Office. That shortage is causing significant delays in the administrative review process as the pace of wetland permit applications has increased with renewed economic activity that is expected to grow even more. Any of these items, on its own, creates significant concerns for developers and industries needing consistent regulatory parameters and timely administrative actions by the Corps, but, collectively, they exacerbate uncertainty and, in Virginia, create additional headaches.

1. Ever-Evolving WOTUS.

Perhaps the most significant recent move by federal regulators is the proposed revised definition of "Waters of the United States" (WOTUS), which describes the types of surface waters that are regulated for purposes of permitting under the Clean Water Act for a variety of program purposes, including wetland and stream impacts associated with dredge and fill activities. On December 7, 2021, the Corps and EPA issued a proposed rulemaking to redefine WOTUS yet again, and in a manner that unwinds key elements of the Trump Administration's definitional rulemaking of this term under the Navigable Waters Protection Rule (NWPR), which itself substantially amended the previous definition under the Obama era Clean Water Rule. (For more background on these evolving rules, related litigation and resulting differences across the nation as to which definition applied where, see our October 2021 newsletter and May 2020 newsletter.)

Seeking to find a relatively moderate and traditional regulatory safe harbor in the midst of still pending litigation over both the Clean Water Rule and the NWPR, the Corps and EPA state that their proposed new definition reflects "the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by

Supreme Court precedent. In doing so, EPA and the Corps propose that "waters of the United States" would include the following: "[t]raditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of "waters of the United States;" tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and "other waters" that meet either the relatively permanent standard or the significant nexus standard. Key to the proposed definition are the so-called relatively permanent standard and the significant nexus standard, both borrowed from *Rapanos v. United States*, the most recent U.S. Supreme Court case addressing the scope of "waters of the United States." This case, however, yielded very muddled results. (See previously cited articles.)

The agencies argue in the preamble of the proposed rulemaking that "the relatively permanent and significant nexus limitations appropriately draw" the distinction between federally regulated waters and those left to be regulated by the states "by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, interstate waters, and territorial seas, Clean Water Act programs will apply to ensure that those downstream waters are protected, and where they do not, the agencies will leave regulation to the states and tribes." The result is somewhat of a blend of differing approaches taken by the agencies over the years, though the net approach is that it will include more water features within the definition than under the NWPR and that many of the categorical exclusions from "WOTUS" coverage found in the NWPR are abandoned. Comments on the proposed rulemaking are due by February 7, 2021.

2. Second Batch of NWP's Finally Hatches.

In the midst of the evolving definition of WOTUS, on December 27, 2021, the Corps just reissued and modified 40 nationwide permits (NWP's) and issued one new NWP for specific wetland impacts. This action built on the Corps final rule published January 13, 2021 reissuing 12 NWP's and issuing four new NWP's, as well as promulgating the general conditions and definitions for all NWP's. NWP's are a form of general permit for specifically authorized activities impacting WOTUS and allow for a much more streamlined permitting process as compared to individual permits for impacts to WOTUS. (See our March 2021 newsletter for an article with background on the earlier actions.) The 41 NWP's just promulgated take effect February 25, 2022 and cover a range of activities and projects. The reissued NWP's pertain to various development, infrastructure, energy, agricultural, mining, habitat restoration and living shorelines, waste cleanup, marinas and boat ramps, navigation, minor discharges and dredging, and other activities. The new NWP-59 addresses water reclamation and reuse projects. Some of these as issued in the final rule were revised from the versions as proposed based on substantial comments received during the public comment period, so careful review of each NWP as finally issued is recommended. As is more often the case, litigation over certain of these final NWP's can be expected.

3. Norfolk District, Norfolk District, Wherefor Art Thou?

In addition to these two major regulatory actions occurring in December, but building to a head well before that, is the now major concern about staffing shortages in the Corps' Norfolk District Office

among permit writers. These civilian professional staff members in the Regulatory Branch do the day-to-day work of confirming wetland and stream delineations and issuing jurisdictional determinations needed for project planning and permitting, and they process permit applications and prepare and process permits issued by the Corps pursuant to its authority under the Clean Water Act and attendant regulations. This problem results mainly from budgetary issues for the Norfolk District, so additional appropriations are likely needed for a sustainable fix.

Indeed, the staffing shortage has been building for several years, now reaching an acute level in many local offices serving specific regions of the Commonwealth. The situation is also compounded by the departures of more experienced permit writers due to retirement and other attrition, as well as periodic reassignments of permit writers to Corps headquarters or other locations. The workforce shortage could not come at a worse time, though, as economic and development activity in Virginia has been surging generally and also due to specific drivers such as solar farm development and renewed focus on infrastructure planning and investments. All of this activity has accelerated the number of applications for jurisdictional determinations and permits submitted to the Norfolk District. This personnel shortage is also adversely affecting the Norfolk District's ability to review and process applications for new or expanded wetland and stream mitigation banks that provide the mitigation credits needed to offset impacts to wetlands and streams from the projects for which applications are filed. These delays and the high demand for credits due to the increased number of projects have resulted in shortages of available credits in certain areas of Virginia. So, applicants are facing longer delays in getting permits reviewed and approved while scrambling to locate available credits and then paying much more for them. These delays and increased credit prices are raising the costs of development and infrastructure projects, in addition to the effects of recent inflation on construction expenses generally.

The Norfolk District itself has recently acknowledged that delays in getting jurisdictional determinations reviewed and permit applications processed will be significant. In a CENAO-WRR public notice issued on November 16, 2021, the Norfolk District stated that "[d]ue to increased workload and reduced staffing levels, we are experiencing a backlog of projects, resulting in extended processing delays." The notice provides suggestions for minimizing such delays, which are fairly standard practices even in normal times. It seems that the regulated community and other stakeholders will need to find some new tactics to solve this problem quickly and sustainably. If so, that may at least remove some of the day-to-day uncertainty in getting projects completed. If not, otherwise valuable projects will linger too long and will either wither and be abandoned or be relocated, which is not good for Virginia's economy.

4. Closing Thoughts (Hopes).

One hopes that regulatory uncertainty stemming from the recent rulemakings for the definition of WOTUS and the NWP's can be quelled soon, but recent history suggests litigation of these rulemakings is likely, keeping most parties in limbo. In the meantime, regulated parties both in Virginia generally and in the Norfolk District will have to find ways to muddle through the current staffing shortage at the Norfolk District and, perhaps, find new ways to fund staffing positions that have been squeezed out of existence due to budgetary limitations for that office.

Revised Definition of "Waters of the United States," **86 Fed. Reg. 69372-69450 (December 7, 2021)**

Reissuance and Modification of Nationwide Permits, **86 Fed. Reg. 73522-73583 (December 27, 2021)**

CENAO-WRR Public Notice (November 16, 2021)

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