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**Issues for Consideration Regarding Proposed Revised Definition of
"Waters of the United States" (WOTUS)
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EPA Proposed Rule on Waters of the United States

The United States Environmental Protection Agency ("EPA"), along with the United States Army Corps of Engineers ("USACE"), formally issued a proposed rule establishing a regulatory definition of "waters of the United States," on November 18, 2021. If adopted, the definition would set the limits of federal jurisdiction over surface waters in the United States.

Decisions by the United States Supreme Court on the standards used to determine what a "water of the United States" is have been less than transparent, and the proposed rule is a reflection of the EPA and USACE's attempt to define waters of the United States with a bright line rule consistent with the Court's decisions. While the agencies state that federal jurisdiction would not be unlimited under the proposed rule, it is apparent that if the proposed rule were to be adopted federal jurisdiction could potentially extend to surface waters that are not generally considered to be waters of the United States.

Under the proposed definition, there are categories of water that are jurisdictional by rule. The proposed definition incorporates waters that were considered jurisdictional under the previous rule, such as traditional navigable waters, interstate waters, territorial seas, and impoundments of the foregoing; while expanding the definition to include additional categories of jurisdictional waters, such as tributaries, ephemeral drainage, certain ditches, etc.

The proposal includes an additional catchall category, "other waters." Waters in this category are not considered jurisdictional by rule, but instead will be evaluated on a case-by-case basis. These "other waters" are evaluated by determining if those waters alone, or in combination with other similarly situated waters located in the same region, have a significant nexus to traditional navigable waters, interstate waters, and territorial seas. The significant

nexus test was adopted from United States Supreme Court Justice Anthony Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the proposed rule, a significant nexus would exist when "a water, including wetlands, either alone or in combination with other similarly situated waters in the region . . . significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas."

In summary, the proposed definition is as follows:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate for foreign commerce, including all waters which are subject to the ebb and flow of the tide:
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundment of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries¹ of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent² to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters³, including wetlands, provided that those waters also, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to traditional navigable water, interstate water or the territorial seas.

¹ A water with stream-like physical characteristics (i.e. a bed, banks, and ordinary high water mark) that contributes flow directly through another water to: navigable waters, interstate waters or territorial seas), an impoundment of a navigable water to include a tributary; or a wetland, lake, or pond that contributes flow directly or through another water to a navigable water, interstate water or territorial sea.

² Neighboring – within the riparian area or floodplain; with a shallow subsurface connection or confined surface connection to a navigable, interstate water or territorial sea. Riparian land is that which is within reasonable proximity. A floodplain is an area bordering inland or coastal waters that ... is inundated during periods of moderate to high water flows.

³ Waters that alone, or in combination with other similarly situated waters . . . in the same region, have a significant nexus to navigable, interstate water or the territorial seas. Significant nexus is that which affects the chemical, physical, or biological integrity of a navigable, interstate water or territorial sea. It must be more than speculative or insubstantial.

Certain waters are excluded from the proposed rule and will not be jurisdictional. The agencies propose to exclude specified waters from the definition of “waters of the United States” in section (b) of the proposed rule. The agencies propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA, no change to the exclusion for prior converted cropland, and no change to the regulatory status of water transfers. The agencies propose to exclude by regulation certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction.

The agency is seeking comment on several components of the rule including:

1. Comments, scientific and technical data, case law, and other information that would further clarify which “other waters” should be considered similarly situated for purposes of a case-specific nexus determination.
2. Comment on alternative approaches including: potentially determining waters in identified ecological regions (ecoregions) or hydrologic-landscape regions are similarly situated for purposes of evaluating a significant nexus, as well as the basis for determining which ecoregions or hydrologic-landscape regions should be so identified.
3. Comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.
4. Comment on determining which waters would be determined non-jurisdictional.
5. Comment on how inconclusiveness of the science relates to the use of case-specific determinations.
6. Information and data on the aquatic resource, implementation, and economic implications of a definition of “waters of the United States.”

To adequately assess the potential impact of the new proposed definition on the implementation of the federal regulations, it is essential to review these programs relative to operations, compliance strategies, etc. The following section is a list of those regulations that regularly affect typical E&P operations that will require assessment.

Spill Prevention, Control and Countermeasure Planning - 40 C.F.R. § 112 provides regulations for oil pollution prevention. Organizations and facilities that must follow these regulations may be affected by EPA’s proposed rule defining “waters of the United States.” The following outlines sections of 40 C.F.R. § 112 that may be affected by the proposed rule and discusses potential impacts on oil and gas operators as a result.

1. **SPCC Plan Regulation:** This section details procedures, methods, equipment and other requirements to prevent the discharge of oil from non-transportation related

onshore and offshore facilities into or upon the navigable waters of the United States .
.. 40 C.F.R. § 112.1 – SPCC Plan

Effect: With the addition of new jurisdictional waters and case-by-case analysis of “other waters,” organizations and facilities not previously subject to these regulations may now fall within the purview of the Clean Water Act (“CWA”).

Considerations: How many operations/facilities do you currently have that do not require SPCC plans or operations/facilities that will require a revised plan because a previous assessment of surface water that could be impacted must be expanded? If the proposed rule were to be adopted, would those operations/facilities now require new or revised SPCC plans?

2. Design of Facility Drainage Systems: The owner or operator of an onshore or offshore facility subject to this section must prepare a Spill Prevention, Control, and Countermeasure Plan (hereafter “SPCC Plan” or “Plan”), in writing, and in accordance with § 112.7, and any other applicable section of this part. 40 C.F.R. § 112.3. – Design of facility Drainage Systems.

Effect: Under the new proposed rule, owners and operators and facilities who were not previously subject to these regulations may find that they must now implement SPCC plans.

Considerations: How many new or revised SPCC plans would need to be implemented at your operation/facility under the new proposed rule?

3. Ponds, Lagoons, Catchment Basins: If you are the owner or operator of an onshore facility you must design facility drainage systems from undiked areas with a potential for a discharge (such as where piping is located outside containment walls or where tank truck discharges may occur outside the loading area) to flow into ponds, lagoons, or catchment basins designed to retain oil or return it to the facility. You must not locate catchment basins in areas subject to periodic flooding.” (A question may be whether periodic flooding has new meaning since some drainage areas that fill with water during rain events is now a “Water of the United States” as a protected ephemeral stream/tributary.) 40 C.F.R. § 112.8. Ponds, Lagoons, Catchment Basins.

Effect: Under the proposed rule, ponds, lagoons, or catchment basins may now be considered waters of the United States, and not appropriate for use as drainage systems. It is well to keep in mind, however, that the current definition has two specific exclusions from “water of the United States” Waste treatment systems including treatment ponds or lagoons designed to meet the requirements of the CWA are not “waters of the United States.”

Considerations: Can you identify any ponds, lagoons, or catchment basins that may now be improper and require their own SPCC plan? Are there any diversion structures that would now fall within the WOTUS definition? Keep in mind the exclusion language provides exclusions for: “ditches that are excavated wholly in uplands, drain only uplands, and have

less than perennial flow”; “ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.”

4. Catchment Basin or Diversion Structure: If you are the owner or operator of an onshore oil drilling and workover facility, you must provide catchment basins or diversion structures to intercept and contain discharges of fuel, crude oil, or oily drilling fluids. *40 C.F.R. § 112.10. Catchment Basin or Diversion Structure.*

Effect: The catchment basins and diversion structures may no longer be appropriate to contain the discharges under the proposed rule.

Considerations: Do you currently use catchment basins or diversion structures? Would these structures now be subject to regulations under the proposed rule? (See discussion above).

Permitting for the Discharge of Dredge or Fill Materials - 40 C.F.R. § 230 governs the issuance of permits for the discharge of dredged or fill material into waters of the United States. The proposed definition expands what is included in the definition of “waters of the United States.” The following identifies sections of 40 C.F.R. § 230 that may be affected by the proposed rule and discusses potential impacts on oil and gas operators as a result. Both individual permits and general nationwide permits may warrant review and revision. In addition, regional special conditions may also warrant revision under the new rule. The term “wetland” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marches, bogs and similar areas. The term “significant nexus” means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest jurisdictional water (navigable, interstate or territorial sea), significantly affects the chemical, physical, or biological integrity of a jurisdictional water. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a jurisdictional water.

E&P operations often use Nationwide Permits (NWP) 12 (utility line activities) and 39 (commercial and institutional developments) to authorize certain activities. There may be other Nationwide Permits that are used and should be assessed. The underlying assumption of NWP 12 is that it authorizes activities that do not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

The underlying assumption of NWP 39 is that it authorizes the discharge of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures, but this discharge must not cause the loss of greater than ½ acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. An assessment of the nationwide permitting program will need to be conducted in light of the proposed rulemaking.

- 1. Permitting Dredge and Fill Disposal Sites:** The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.” *40 C.F.R. § 230.2. Permitted Dredge and Fill Disposal Sites*

Effect: Current and future sites that are being appropriately permitted for use as disposal sites for dredge and fill material may no longer be appropriate for disposal.

Considerations: Assess the sites for which you have or are pursuing 404 permits to test against the new proposed definition to determine whether a different regulatory result would be implemented.

- 2. Disposal in a Water of the United States:** The term disposal site means that portion of the ‘waters of the United States’ where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water.” *40 C.F.R. § 230.3(i). – Disposal in a Water of the United States.*

Effect: A “water of the United States” where disposal is currently permitted may become an area where disposal is prohibited under the proposed rule. (See discussion above.)

Considerations: Consider generating a list of disposal sites currently being used in your operations, along with an assessment or map that may be useful in determining the impact of the new proposed rule. Graphic demonstrations of the expansion of the program would be useful in communicating impacts.

- 3. Practicable Alternatives:** Except as provided under Section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact. Practicable alternatives include, but are not limited to: (i) activities which do not involve a discharge of dredged or fill material into the WOTUS. *40 C.F.R. § 230.10(a). Practicable Alternatives.*

Effect: As the proposed rule expands the definition of “waters of the United States,” the practicable alternatives list will become more restrictive and disposal, which was previously not allowed because a practicable alternative existed, could potentially be permitted under the proposed rule.

Considerations: Can you identify any disposal sites that were denied because there were practicable alternatives that included disposal in an area not considered a “water of the United States”? Will the proposed rule eliminate that practicable alternative thus allowing disposal at the proposed area?

- 4. EPA Advance Identification:** Consistent with these Guidelines, EPA and the permitting authority, on their own initiative or at the request of any other party and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as: (1) possible future disposal sites. *40 C.F.R. § 230.80.* EPA Advance Identification.

Effect: This rule is in place to shorten the permit processing time. An operator may be relying on the EPA’s advance identification of a future disposal site, which would not be a proper disposal site under the proposed rule.

Considerations: Are you currently relying on EPA’s advance identification of any disposal sites to plan future operations?

NPDES Permitting - NPDES permitting regulates point source discharges of pollutants into waters of the United States. Operations/facilities discharging pollutants into waters of the United States must obtain an NPDES permit before discharging can occur. The following identifies sections of 40 C.F.R. § 122 that may be affected by the proposed rule and discusses potential impacts on oil and gas operators as a result. Both individual permits and general permits maybe impacted.

- 1. Discharges to the Waters of the United States: Regulation:** The NPDES program requires permits for the discharge of “pollutants” from any point source into “waters of the United States. *40 C.F.R. § 122.1.* Discharges to Waters of the United States.

Effect: Operations/facilities that were previously discharging without an NPDES permit may have to obtain a permit under the proposed rule as areas in which they are discharging may be considered “waters of the United States” under the proposed rule.

Considerations: Can you identify any active or future discharge sites that would require a permit under the proposed rule that currently do not? Are you currently discharging into any locations for which a permit has not been obtained? Consider for example: Is there a rain dependent stream that was originally exempt because it was ephemeral that receives a discharge that warrants a permit? Is there a ditch that because of perennial flow now becomes a water of the United States? Are there a series of “other waters”, including wetlands, that are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a water of the United States so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a jurisdictional water?