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Colorado Looking to Issue Comprehensive Guidance for Waters of the United States (WOTUS)

How is Colorado Dealing with "Gap" Waters?

The scope of federal jurisdiction under the Clean Water Act remains perplexing, particularly now that Colorado is the only state in the nation where the Navigable Water Protection Rule did not take effect June 22, 2020. In the context of a lengthy "stakeholder" process, on November 20, 2020, the Colorado Department of Public Health and Environment (CDPHE) issued a White Paper addressing its regulatory options in light of the new federal WOTUS rule. Construction companies, developers, and other businesses seeking to permit activities around wetlands, ephemeral waters, and intermittent streams in Colorado would benefit from reviewing this comprehensive discussion of the multitude of dilemmas Colorado and others states face in light of the new rule.

See White Paper **here.**

The state's White Paper includes background on these topics –

- Federal permitting including Section 402 and 404 permits.
- State waters and the state's regulation of discharges to state waters.
- The Supreme Court's Rapanos decision and subsequent guidance.
- The 2020 Navigable Waters Protection Rule.
- Litigation of the 2020 Navigable Waters Protection Rule.

And perhaps most importantly –

- Potential impacts of the 2020 Navigable Waters Protection Rule if it were to go into effect in Colorado.

Of most significance in terms of the impacts to state regulatory programs, the White Paper states:

> The rule includes several definitions that further limit how the EPA and the Corps will define WOTUS in contrast to the existing regulatory framework. First, it restricts the definition of protected "adjacent wetlands" to those that "abut" or have a direct hydrological surface connection to another jurisdictional water "in a typical year." 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 120.3(3)(i). Wetlands are not considered adjacent if they are physically separated from jurisdictional waters by an artificial structure and do not have a direct hydrologic surface connection. The 2020 Rule also limits protections for tributaries to those that contribute perennial or uncertain levels of "intermittent" flow to traditional navigable waters in a "typical year," a term whose definition leads to additional uncertainty. 33 C.F.R. § 328.3(c)(12); 40 C.F.R. § 120.2(3)(xii); 33 C.F.R. § 328.3(c)(13); 40 C.F.R. § 120.2(3)(xiii).
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> **Collectively, these new definitions in the 2020 Rule will reduce the scope of waters subject to federal jurisdiction in Colorado far below that of the 2008 Guidance.** The state waters that would no longer be considered "waters of the United States" under the 2020 Rule have been referred to as "gap waters" and are further described in Section II below. Historically, not all of Colorado's state waters have been considered WOTUS. However, the [CDPHE] has maintained that the number of state waters considered WOTUS under the 2008 Guidance is far more than would be considered WOTUS under the 2020 Rule. [Emphasis added.]

The Biden administration's approach is likely to be substantially different. But, without a new rulemaking process (which would take many months), the 2020 rule controls the day.

And those in the regulated community that face the need for a "jurisdictional determination" for the "gap waters" pay the price of uncertainty.

Stay tuned.

This post was drafted by John Watson, an attorney in the Denver, CO office of Spencer Fane LLP. For more information, visit www.spencerfane.com.

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