

WHAT YOU NEED TO KNOW ABOUT THE CLEAN WATER RULE

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After holding over 400 meetings and hearing over a million public comments, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers announced last Wednesday the finalization of the Clean Water Rule—the culmination of an effort by both agencies to provide direction on the scope of Clean Water Act jurisdiction following Supreme Court decisions in 2001 and 2006.

While the new Rule has been billed as a way to ensure that waters protected under the Clean Water Act are more precisely defined and easier to understand, with over 300 pages of backup material, the new Rule comes with its own complexities. “The changes will affect industry, local governments, and private developers on a project by project basis,” says Lauren Kalisek, water attorney at Austin law firm, Lloyd Gosselink. Kalisek notes the following as major tenants of the new rule to keep in mind:

- The new regulatory definition establishes three categories of waters: those that are jurisdictional by rule, those that will be subject to a case by case “significant nexus” analysis, and those that are excluded by rule.
- Of particular interest in the rule are new definitions for “tributaries” and “adjacent” waters and bright-line distance parameters defining when “adjacent” waters are subject to the act, including waters located within 100 feet of the ordinary high water mark or waters located in the 100 year floodplain and within 1,500 feet of the ordinary high water mark.
- The rule also requires a case by case analysis of Texas coastal prairie wetlands.
- The rule categorically excludes certain types of ditches, artificial impoundments, erosional features, groundwater, stormwater control features, and wastewater structures.

The Clean Water Rule will become effective later this fall, 60 days from publication in the Federal Register. Whether the benefits of predictability and more focused regulation are achieved remains to be seen as the agencies move forward in implementing the new framework. Kalisek notes that “the regulated community should take a careful look at the rule’s language and the agencies’ supporting documents because they may establish a more reliable regulatory foundation for determining whether future projects fall within the scope of the Clean Water Act.”

Lauren Kalisek, attorney at Lloyd Gosselink Law Firm, has 20 years of experience with water utility and water quality law. Kalisek is available to provide professional and legal insight on The Clean Water Rule and what is to come in the future as a result. For more information, you may contact Lauren Kalisek at 512-322-5847 or lkalisek@lglawfirm.com.

SOURCE: Lloyd Gosselink Rochelle and Townsend, P.C.