



**Proposed Waters of the U.S. Rule Update.
May 2019**

EPA and the US Army Corps of Engineers published their long-awaited proposal to revise the Clean Water Act's (CWA) definition of "Waters of the United States" (WOTUS) in February. The highly-contentious WOTUS definition is used to determine if a stream or wetland is subject to federal jurisdiction and regulation under the CWA. Numerous CWA programs rely on this definition, including NPDES permitting under CWA § 402; dredge and fill permitting under CWA § 404; water quality standards and impaired waters listings under CWA § 303; and spill prevention, control, and countermeasure plans under CWA § 311. As expected, the newly proposed WOTUS rule would significantly limit the scope of CWA jurisdiction, particularly with respect to wetlands and ephemeral streams.

The rule retains/clarifies several *exclusions* from the WOTUS rule that may be relevant to Members. On April 15, the Maryland Municipal Stormwater Association (MAMSA), submitted brief comments supporting the following exclusions.

Stormwater Control Features. The 2015 rule introduced an exclusion for "stormwater control features," which has been retained in the proposed rule. This exclusion applies to any feature constructed in an upland area (i.e., not in a stream or wetland) that is used to "convey, treat, infiltrate, or store stormwater run-off." The proposal states that the exclusion is intended to be construed broadly to apply to various types of stormwater BMPs, including green infrastructure.

Ditches. The proposal also expands on the 2015 rule's exclusion for ditches. Under the proposal, ditches are presumed to not be jurisdictional waters. A ditch would be subject to CWA jurisdiction only in the follow circumstances: (1) it is a traditional navigable water (e.g., canals); (2) it is tidal; (3) it was constructed in or relocates a natural stream (e.g., channelized streams); or (4) it was constructed in a jurisdictional wetland and contains perennial or intermittent flow.

Diffuse Stormwater Runoff. Diffuse stormwater runoff (e.g., sheet flow) has never been considered WOTUS. The proposed rule would codify this longstanding interpretation.