

## SHOPPING CENTERS

By Jonathan H. Spergel and Bridget L. Dorfman

# EPA water rules may directly impact planned development projects

In March 2014, the U.S. Environmental Protection Agency (“EPA”) released two new rules – one final and the other proposed – under the federal Clean Water Act (“CWA”) that may have



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significant impact for future development projects. On March 6, 2014, EPA published a final rule withdrawing its previously proposed, and controversial, stormwater permit numeric turbidity discharge limits applicable to larger development sites. As originally drafted, the withdrawn rule would have incorporated turbidity limits into NPDES permits, and permit holders would have had to collect and analyze samples of the stormwater discharged from the site after a rainfall event to demonstrate permit compliance. Although EPA’s withdrawal of the numeric turbidity limit was a big relief to developers, EPA signaled in its announcement that it may revisit the

notion of stormwater effluent limitation guidelines and monitoring requirements in a future rule-making.



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On March 25, 2014, EPA and the Army Corps of Engineers (“Corps”) released their proposed definitions of “waters of the United States” and related terms contained in the CWA. According to EPA and the Corps, these proposed regulations were developed to clarify confusion created by U.S. Supreme Court decisions about wetlands in 2001 and 2006, in which the Court provided a difficult-to-apply analysis of fact-specific disputes concerning federal jurisdiction over water bodies. Information released by EPA in connection with the proposed rule indicates that numerous members of the regulated community, including nonprofit organizations, trade groups and governmental entities, requested that a rule be issued to clarify the meaning of “waters of

the United States.” Although the request for clarification stems from confusion about wetlands jurisdiction, EPA and the Corps have stated that the proposed definition of “waters of the United States” would apply to “all sections” of the CWA, meaning that the proposed rule may impact not only CWA Section 404 wetlands permit issues, but also individuals and facilities needing NPDES permits.

In addition to proposing a modified definition of the phrase “waters of the United States,” the 370-page proposal also provides proposed definitions of the terms “neighboring,” “riparian area,” “floodplain,” “tributary” and “significant nexus,” which to date have not been defined by EPA or the Corps. EPA’s and the Corps’ stated purpose in proposing these definitions is to “enhance protection for the nation’s public health and aquatic resources” while also providing the regulated community “predictability and consistency by increasing clarity as to the scope of ‘waters of

the United States’ protected” under the CWA. While EPA and the Corps claim that the proposed rule will not expand federal jurisdiction under the CWA, many in the regulated community fear otherwise and believe that the proposed rule would subject to federal jurisdiction smaller head water streams, as well as intermittent and ephemeral streams that flow only part of the year or only after a heavy rain.

As of April 18, 2014, the proposed rule has not yet been published in the Federal Register, so the ninety-day public comment period has not yet begun. When it begins, EPA and the Corps will probably receive numerous comments that will have to be reviewed and addressed, so we may not see a final rule from the agencies until the end of 2014 or beginning of 2015.

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