

# **Executive Order on Clean Water Rule: Implications for Permitting under Section 404 of the Clean Water Act**

## **A White Paper**

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### **Introduction**

On February 28, 2016, President Donald Trump signed an Executive Order (EO) titled “**Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule**”. This EO referred to the **Clean Water Rule: Definition of “Waters of the United States”**; **Final Rule** which was published in the Federal Register on June 29, 2015, and which was intended to take effect on August 28, 2015. The intention of the Clean Water Rule (herein referred to as the “Rule”) was to assist the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA) in determining which waters and wetlands are “jurisdictional” (i.e., Waters of the United States, or WOTUS), and thereby regulated under Section 404 of the Clean Water Act (CWA), and which are not jurisdictional (i.e., Waters of the State).

The Rule was intended to clarify some of the uncertainty that has surrounded jurisdictional determinations since Supreme Court rulings in 2001 and 2006 excluded some waters and wetlands from being regulated under the CWA. This uncertainty has led to inconsistency in jurisdictional determinations between USACE districts, and in some instances, also within each district. However, the Rule has been tied up in lawsuits and is not currently in effect. This EO directs EPA and USACE to reevaluate the Rule.

### **Problem Statement**

There has been some confusion between the Clean Water Rule and the Clean Water Act, and how a review of the Rule could affect CWA permits, particularly permits issued under Section 404 of the CWA, which regulates the discharge of dredged or fill materials into WOTUS.

The CWA was enacted in 1972 in response to the polluted condition of many of the nation’s rivers and lakes. The law established regulations to protect water quality in WOTUS, and it included regulations on discharges of liquid or solid materials. Section 404 of the CWA specifically regulates discharges of dredged or fill material into WOTUS. The ability of the federal government to regulate impacts within states comes from the Commerce Clause in the U.S. Constitution, which gives Congress the ability to regulate interstate commerce. It was recognized that because waters flow across state boundaries, pollution of waters within a state would hinder interstate commerce activities such as navigation, fishing, and other commercial activities.

The law, however, did not specifically define WOTUS. Instead, in order to control pollution into waters that were important for interstate commerce, such as navigable rivers or large lakes, regulations were subsequently developed by the two agencies responsible for administration of the CWA (EPA and USACE) for waters that reached upstream to tributaries, ponds, swamps, bogs, marshes, and other non-navigable water bodies.

Prior to 2001, the USACE and EPA took jurisdiction over almost all surface water features across the country, requiring Section 404 permits for fill activities in these water bodies.

In 2001, the U.S. Supreme Court ruled that the USACE could not deny a Section 404 permit to the Solid Waste Agency of Northern Cook County in Illinois (SWANCC). SWANCC wanted to use an abandoned, water-filled quarry as a landfill. However, the USACE attempted to regulate the site, which was clearly isolated and not draining to any waters, under their jurisdiction because migratory birds (which could be hunted across state borders) nested in it. The USACE would not issue the permit to SWANCC. The Supreme Court ruled that the use of a site by migratory birds alone could not be used to pull isolated waters in as WOTUS. Furthermore, they directed EPA and USACE to define which waters were considered WOTUS and which were not.

In 2006, the Supreme Court agreed to hear two other cases, *Rapanos v. United States* and *Carabell v. USACE*, dealing with impacts to isolated waters. A severely divided Supreme Court could not reach a majority decision on whether the water bodies in question were jurisdictional or not. The decision by Justice Scalia, which is referenced in the EO, referred to “relatively permanent waters.” Justice Kennedy fell in the middle, proposing to use the “significant nexus” (or “connection”) test.

In addition, the Supreme Court criticized the EPA and USACE for not clarifying the definition of WOTUS, as was directed following the SWANCC decision. In response, the agencies developed guidance in 2008 on determining WOTUS. However, to a great extent, the guidance was on a “case-by-case” basis with few firm rules to go by. The case-by-case decisions have led to some confusion on the part of project proponents as to what specifically would be considered WOTUS.

In 2015, the Clean Water Rule was developed to reduce confusion and inconsistency within the USACE in determining jurisdiction. The Rule included lists of what is and what is not considered jurisdictional; however, case-by-case determinations would have still been made for many sites. Many in the regulated community felt the “lines drawn in the sand” for WOTUS were too expansive and included many waters and wetlands that should be considered Waters of the State, not WOTUS. In response, a number of lawsuits were filed to determine whether the Rule was legal, and the courts imposed a nationwide stay of the Rule. The nationwide stay continues, preventing implementation of the Rule.

### **Potential Solutions**

The EO does not refer to the Clean Water Act, which is a federal law that continues to be in effect. Section 404 permits are still required for impacts to WOTUS. However, it is important to be aware of potential changes to the definition of WOTUS, in other words, what is regulated under the CWA and what is not.

The EPA and USACE have already published a Notice of Intention to Review and Rescind or Revise the Clean Water Rule. Thus, one way or the other, either through court decisions or through review under the EO, it appears the Rule as finalized in 2015 will not be implemented. In this case, the current situation, of reliance upon the 2008 regulatory guidance for determining jurisdiction, will continue. *Note that there is a slight chance the courts could find the Rule valid, in which case it would take effect until a new rule is finalized. However, the court review process has become very complicated (a topic for another white paper) and the Rule is likely to never take effect.*

In the future, it is likely that the definition of WOTUS will change. This change could come in three ways:

1. The agencies could rescind the existing rule and promulgate a revised or new rule that clarifies the definition of WOTUS. This would be the preferred way of redefining what is and what is not jurisdictional, but the process of rule-making is complex, requires a lengthy period of public input on a draft rule, and could be open to court challenges, as was the 2015 Rule. Thus, it could be a number of years before a revision takes effect.
2. The agencies could revise the 2008 jurisdictional determination guidance to minimize the number of case-by-case situations. This could be done much more quickly than developing a new rule, but guidance is usually not as clear-cut as a rule is. Agencies would still likely rely on many case-by-case interpretations and it would still result in a lot of confusion for project proponents. Thus, it appears as though the administration would prefer a clear-cut rule.
3. The federal government could propose changes to the CWA to include a definition of WOTUS within the CWA. However, changes to the CWA would require legislative action by both houses of Congress. This option is extremely unlikely, but it is a possibility.

The EO specifically mentioned Justice Scalia's definition of "navigable waters" in the Rapanos ruling, where he referenced "relatively permanent waters":

And, most relevant here, the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."

...

The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Changes that come about from review of the Rule thus are likely to reduce the extent of wetlands and other waters that are considered WOTUS. In particular, it is possible that ephemeral and some intermittent tributaries that might not be considered "relatively permanent waters" and their associated wetlands would no longer be considered WOTUS. Currently, regulatory guidance considers anything that has water in it seasonally to be "relatively permanent," but that definition could change as well.

However, any changes in the limits of what is regulated are likely to require a learning curve on the part of regulators for interpreting the changes, and it is possible, as is the case for the Clean Water Rule, that lawsuits may delay implementation indefinitely. In addition, many states have laws regulating impacts to Waters of the State, and a number are likely to increase their regulatory oversight of isolated wetlands and other waters.

## **Summary**

In the immediate future, there will be no change in the definition of WOTUS. Thus, if a Section 404 permit was required prior to the signing of the EO, it will still be required.

However, changes are likely to occur as the Clean Water Rule is reviewed and a new rule or regulatory guidance is developed. The new rule or guidance is likely to exclude some waters and wetlands that are currently considered WOTUS.

## **References**

Clean Water Act: <https://www.epa.gov/cwa-404/clean-water-laws-regulations-executive-orders>

Clean Water Rule: <https://www.epa.gov/cleanwaterrule/definition-waters-united-states-under-clean-water-act>

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Jurisdictional Guidance after Rapanos and Carabell Rulings: [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_12\\_3\\_wetlands\\_CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf)

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