

New Rules on the Clean Water Act (CWA) and Waters of the U.S. (WOTUS)

Background

The federal wetlands program under section 404 of the Clean Water Act (CWA) regulates the “discharge” of dredged or fill material into “navigable waters.” While this statutory language has not changed since the enactment of the CWA, the federal rule(s) that specifically defines “Waters of the United States” (WOTUS) has changed significantly over recent years. The Environmental Protection Agency (EPA) and Army Corps of Engineers share authority to implement this section of the CWA, the regulation of wetlands and WOTUS. The scope has sometimes extended beyond typical marshes and tributaries and been applied to roadside ditches, stormwater retention ponds, ephemeral streams (which are generally dry except during rain events) and isolated wetlands without a clear connection to other waters.

Regulatory Actions

In 2015, the EPA re-wrote the definition of WOTUS to clarify the existing regulations (from 1986) and meet the requirements that the U.S. Supreme Court laid out in earlier rulings. The result was an expanded definition of WOTUS that was overruled by a number of federal district court decisions. In 2020 the EPA and Corps withdrew the 2015 definition and enacted the Navigable Waters Protection Rule (NWPR), which clarified and narrowed the extent of the federal government’s jurisdiction. The NWPR was struck down by a district court in 2021; EPA and the Corps proceeded to formally withdraw the rule and begin development of a new WOTUS regulation. The federal government is now in the process of seeking comment and developing a new and broader definition of WOTUS, which may be finalized in 2022.

Court Review

A series of court decisions beginning in 2001 began to narrow the scope of the CWA’s application. The 2005 U.S. Supreme Court decision in *Rapanos v. United States* dealt with the question “Does the phrase ‘waters of the United States’ in the CWA include a wetland that at least occasionally empties into a tributary of a traditionally navigable water?” In this case the high court failed to reach a majority on most of the legal issues in the case and remanded it back to the Sixth Circuit for a new decision based on a different analysis. Subsequently, in June 2007 the Corps and the EPA issued guidance intended to provide consistency in federal jurisdictional questions. The guidance did not provide the clarity it sought, leading to additional rulemakings. More recently in 2022, the Supreme Court announced that it would hear another case (*U.S. v. Sackett*) that again addresses the scope of the CWA’s jurisdiction. It is anticipated that a narrower definition of WOTUS will likely result after the decision and may finally lead to an enduring wetlands rule. ICSC has been an active party in the history of WOTUS cases, submitting amicus briefs in both *Rapanos* and *Sackett* when they first came before the Supreme Court and will likely submit additional briefs in the future.

Position

ICSC supports a streamlined procedure for identifying environmentally important wetland areas and economically appropriate methods to mitigate adverse impacts to those areas. It also supports limiting the definition of WOTUS to navigable waters that meet the language and intent of the CWA and not expanding the reach beyond what the statute intended. Importantly, state environmental programs will still maintain regulatory oversight over many aspects of wetland permitting regardless of the scope of federal regulation, thus ensuring continued environmental safeguards.

ALERT: EPA & Army Corps Pause JD Permits

In response to the NWPR being struck down, the Army Corps announced it will not rely on any Approved Jurisdictional Determinations (AJDs) that were issued under the now vacated NWPR, and this will impact any pending permit applications that relied on an AJD under the old rule.

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For more information, contact Jennifer Platt at jplatt@ICSC.com.

