Marathon "Ping-Pong" Game Continues at EPA/Army Corps

Latest "Waters of the U.S." Rule Confounds the Ability to Advise Clients Whether an Army Corps Permit is Required

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Unless it meets a short list of exemptions, a project requiring grading, filling, or culverting a waterbody to build a home; construct a shopping center or industrial complex; bury utility or pipelines; or plant crops will require a permit and some degree of mitigation under the Clean Water Act (CWA). Thus, understanding (1) whether, and if so how, such activities would impact a “water(s) of the U.S.” (WOTUS) and thus require a permit, and (2) the timing and expense needed to acquire such permit, is critical to hundreds of projects occurring across Ohio each year. While the cost to obtain a permit and provide mitigation for a large-scale project can be hundreds of thousands of dollars, when a project is driven by rapidly-changing market conditions, being able to timely make these decisions and obtain the needed permit is often more important to the client than the cost to obtain the permit.

To be sure, no client likes overly stringent rules or the added costs and delay they may impose. At the same time, however, if they are at least clear, understandable, and uniformly applied, clients often will tolerate them, as added costs can frequently be externalized in a development project by, for example, charging more for a lot, new home, or new lease, or charging more for the sale of crops or services/materials carried by utility or pipe lines. But when rules are vague, subjective, and applied inconsistently, and change significantly depending on which party occupies the White House, they deny clients the ability to say with any certainty how or when they apply, and arguably violate fundamental principles of due process and fair notice designed to protect the clients.[i]

Starting shortly after the Supreme Court’s SWANCC[ii] decision in 2001 and ending most recently with a revised WOTUS rule issued in January 2023,[iii] the number of rewrites of this important rule over the past 20+ years has crossed from the point of sublime to the realm of bizarre. At least seven rewrites have occurred during this time, resulting in clients having, on average, at most two years to operate under one version before a court struck it down, or the process to change it under a different administration began again. And during this time the rule has also been the subject of at least four separate Supreme Court appeals, including one that is still pending today.

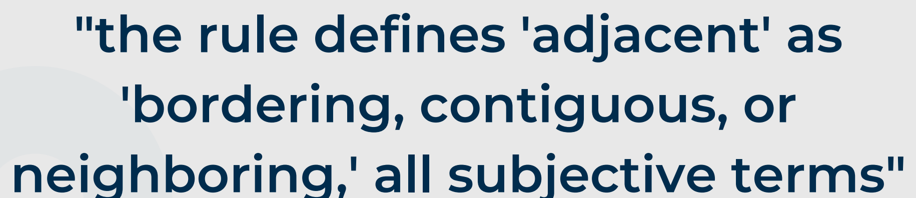
Because the average time to obtain an individual Corps permit for larger projects (as opposed to a nationwide permit for smaller ones) is close to a year or more, this means that a significant percentage of applicants had to submit a new or revised application because the definition of WOTUS changed while the first application was still pending. To say the least, navigating the CWA’s Section 404 permitting process under this “regulatory rollercoaster” has been difficult for clients, and even for experienced consultants and legal counsel. The lack of regulatory certainty, particularly when it is this longstanding, arguably causes a greater drain on economic resources and more lost opportunities than if an overly stringent, but clear and understandable, WOTUS rule had been in place the entire time.

Unfortunately, the latest rule does little to add the clarity needed to help clients know if a permit is required for most projects without having to request a visit from a Corps inspector to tell them one way or the other. While an inspector is not needed to confirm that, for example, a permit is required to build a dock overlooking the Ohio River, dredge the Olentangy River to bury a new sewer line, or grade wetlands in the Winous Marsh Preserve near Lake Erie, most projects impacting waterbodies in Ohio are not that situation. Instead, they involve small ephemeral[iv] streams, ponds, and wetlands, waterbodies often long distances, at times even miles, away from the nearest water that everyone agrees is a WOTUS that requires a permit for any proposed filling or grading.

The new terms defining whether these waters are jurisdictional are arguably less clear and more subjective than previous versions of the rule. For example, unless an activity meets certain limited exceptions,[v] the new rule defines all waters "adjacent" to a WOTUS as themselves WOTUS, just as are all waters that "significantly affect" a WOTUS. Rather than define these critically important terms in clear objective language, the rule defines "adjacent" as "bordering, contiguous, or neighboring," all subjective terms, with the only clarification being that if a water is a wetland separated from a WOTUS by a manmade barrier the wetland is an "adjacent" WOTUS.

The term "significantly affect" has even less clarity. It is defined as a water that "alone or in combination with similarly situated waters in the region" has a "material influence on the chemical, physical, or biological integrity of" a WOTUS. And to make this subjective, amorphous decision, the rule adds 10 factors to be evaluated, each adding its own subjective, undefined terms, none of which factors is to be considered more important than the others.[vi]

The latest WOTUS rule replaces the last administration's revised 2020 rule that sought to add clarity by (1) eliminating ephemeral streams as WOTUS, leaving it to states' discretion to require permits to grade/fill them; (2) requiring that an "adjacent" water have a continuous surface connection to a WOTUS to also be a WOTUS; and (3) eliminating the vague and subjective "significant nexus" test for waters that did not have a continuous surface connection to a WOTUS.[vii] And before that version was rescinded voluntarily by a new administration in mid-2020 was an earlier 2015 version from the previous administration that was itself struck down by the courts on procedural and substantive grounds, before the next administration began writing a new, substantially different version.



This marathon "ping pong" game owes its origin to the fact that Congress failed to define what is a "navigable water of the U.S." when it enacted the CWA in 1972. Each administration since then has struggled to define WOTUS in a manner that strikes a reasoned balance between three statutory mandates: (1) protect, preserve, and restore fishable, swimmable surface waters, (2) reserve land use decisions to the states, and (3) avoid regulating groundwater. Despite pleas over the past 10-15 years from several Supreme Court justices hearing appeals of different aspects of the rule that Congress should take action to clarify the statute, no action has been taken.[viii]

In the meantime, several appeals have already been filed against the latest version, most including a request for injunctive relief to stop the rule from going into effect on March 20, 2023. As of the date of this article, one court has stopped the rule from going into effect in Texas and Idaho, so it is currently in effect in other states. Until additional rulings emerge, there are four things counsel should consider when advising clients under the latest iteration:

1. Bring in experienced counsel to consult early in the process. As tough as it is for even experienced counsel to know with certainty whether a particular stream or wetland will require a permit, there are significant parts of the rule carried over from version to version, making experience vital to the process. Decisions such as creating and evaluating alternative plans/site drawings that minimize impacts on waterbodies can be the difference between obtaining a nationwide permit in 60-90 days at minimal cost, versus having to obtain an individual permit that may take up to a year or more and cost hundreds of thousands of dollars. Experienced counsel know the lines of demarcation that separate the two types of permit, and can work closely with a design engineer and wetland/stream consultant to configure the plans and wetland/stream delineation to meet the client's economic objective, while minimizing the costs and delays to obtain a permit.

2. Help the client find a wetland/stream consultant with broad experience under different versions of the rule, in particular experience evaluating whether a wetland or stream is "adjacent to" or "significantly affects/has significant nexus with" a nearby water that is a WOTUS. Consultants whose delineation concludes that a water "may be a WOTUS" and recommends "consultation with a Corps inspector" add little value. But a consultant known for issuing clear, well-documented delineations, one who the Corps knows and respects, is worth every penny, and more. In addition, a good consultant will not perform an official delineation without first working with the client, its design engineer, and legal counsel to minimize, as much as possible, potential waterbody impacts while still achieving the client's most important economic objectives. If possible, interview multiple firms or ask experienced counsel for recommendations.

"Bring in experienced counsel" & "find a wetland/stream consultant"

3. Ask the client up front whether the project is subject to market conditions that may determine its success or failure based on how quickly a permit is obtained. The answer to this question determines, among other things, how aggressive an evaluation of potentially-less-impactful alternatives should be; whether the added cost and delay of obtaining an individual permit is acceptable due to realizing a greater economic benefit; whether different types of available mitigation should be considered; and whether a large-scale project should be reduced in scope or phased to avoid a negative shift in market conditions.

4. Do not overlook the fact that in Ohio the filling of a small, isolated wetland that is not a WOTUS is still likely to require a permit from Ohio EPA and some level of mitigation, albeit at a cost and timing much less expensive and quicker than obtaining a Corps permit. Ohio EPA may also require under its primary headwater habitat program some degree of mitigation and/or BMP practices to grade or culvert a small ephemeral stream that is not a WOTUS.

The "rollercoaster ride" known as the federal WOTUS rule continues for the foreseeable future. In our view, the latest version fails to provide a rule that is clear and understandable; bereft of vague and subjective terms; capable of being applied with certainty and consistency; and durable enough to last regardless of what party sits at 1600 Pennsylvania Avenue. However, the courts will ultimately decide that question, as Congress presently appears unwilling or incapable of fixing a problem it created 50 years ago. Until the courts decide the fate of the January 2023 version, counsel should carefully consider the steps recommended above when advising clients involved in projects in Ohio where grading, filling, or culverting a waterbody is contemplated.

[i] See e.g. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws…trap the innocent by…delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc…subjective basis, with the attendant dangers of arbitrary and discriminatory application.")

[ii] Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).

[iii] 88 Fed. Reg. 3004 (January 18, 2023).

[iv] Ephemeral streams have a defined bed and bank, but carry water only in response to a precipitation event. Unlike seasonal or intermittent streams, they have no connection to groundwater and remain dry most of the year, and thus support limited aquatic populations. These streams are often subject to significant erosion and sedimentation, such that a well-thought-out storm water culvert/piping and retention system can work an environmental benefit for downgradient waters.

[v] E.g. prior-converted cropland;, roadside ditches excavated in dry land not carrying a relatively permanent flow; swales/erosional features lacking a defined bed/bank;, artificial ponds used exclusively for stock watering, irrigation, settling, or crop growing; and irrigated areas that would revert to dry land if irrigation ceased. Even within these exemptions a lack of clarity and several undefined terms make it risky to rely on them without seeking concurrence from the nearest Corps office.

[vi] These factors are contribution of flow; trapping, filtering or transport of nutrients, sediments or pollutants; retention/attenuation of runoff/floodwaters; modulation of temperature; provision of habitat or food for aquatic species; distance from a jurisdictional WOTUS; hydrologic connectivity; relationship to similarly-situated waters in the region; landscape position and geomorphology; and climate-related variables.

[vii] The new rule's definition of waters that "significantly affect" a WOTUS is the same definition as a water that had a "significant nexus" with a WOTUS under earlier versions of the rule. To see how controversial this vague and subjective test is, counsel may want to review Orchard Hill Building Company v. U.S. Army Corps, 2018 WL 3132797 (7th Cir. 2018); Hawkes Company, Inc. v. U.S. Army Corps, 2017 WL 359170 (D. Minn. 2017); and Precon Development Corporation v. U.S. Army Corps, 633 F. 3d 278 (4th Cir. 2011). Each case involved years of litigation over a WOTUS finding for a wetland 7 to 40 miles away from the nearest WOTUS, based on a "significant nexus" between the two waterbodies. Defining WOTUS so broadly that filling a small wetland miles away from a WOTUS requires a permit provides no regulatory certainty for clients.

[viii] To the contrary, on March 9, 2023, the House passed a joint resolution, basically along party lines, invalidating the new WOTUS rule under the Congressional Review Act.See https://www.congress.gov/bill/118th-congress/house-joint-resolution/27. This type of "symbolic gesture" suggests that Congress is unlikely to get together any time soon to discuss mutually-agreed amendments to the CWA.

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