

In the fall of 2015, the U.S. Environmental Protection Agency (EPA) posted a statement on its website concerning the litigation over the new “Waters of the U.S.” (WOTUS) rule, acknowledging that the U.S. Court of Appeals for the Sixth Circuit has temporarily blocked EPA and the U.S. Army Corps of Engineers (Corps) from implementing the new rule, pending further action of the court. The statement confirms that the agencies are back to using the prior regulatory definition of WOTUS and applicable guidance (status quo as it existed before the new rule) in making jurisdictional determinations or taking other actions based on the definition of WOTUS. Despite this holding pattern, EPA and the Corps have directed their staff to move ahead with measures to “improve” implementation of the national Clean Water Act (CWA) Section 404 permit program, as promised when they released the new rule.

Compliance with the Stay

On Nov. 16, 2015, EPA Administrator Gina McCarthy and Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy issued a [**joint memorandum**](#) to their staff, affirming “the agencies are fully complying with the [nationwide] stay” [**granted by the Sixth Circuit in October**](#) – but adding that they “look forward to vigorously defending the merits of the Clean Water Rule, which [they] continue to believe is fully consistent with the law and based on the best available peer-reviewed science.”

Much uncertainty remains as to how and when the many legal challenges will be resolved, and thus, whether contractors should rely on the WOTUS rule’s new jurisdictional analysis in their planning. The Sixth Circuit has to decide whether it has jurisdiction over the multi-district litigation, and if the court concludes it does not have jurisdiction, the stay will dissolve. That decision is expected in the near term. However, numerous other challenges against the WOTUS rule are pending in courts around the country, including a lawsuit in the [**federal district court in North Dakota**](#), where the presiding judge also halted implementation of the WOTUS rule – but only in the 13 states that are involved in that particular



Waters of the United States (WOTUS)

Environmental Services Fact Sheet

case. There is also the possibility that Congress will weigh in.

AGC is closely monitoring judicial, administrative, and legislative developments relating to the WOTUS rule and will continue to report frequently on this evolving issue on its [website](#).

What Rules Apply Today?

In states where the block on the new WOTUS rule remains in effect, the agencies are using [**the regulations codified in 1986**](#) [33 C.F.R. §328.3 (Corps); 40 C.F.R. §122.2 (EPA)] and the [**2008 Rapanos Guidance**](#) to make jurisdictional determinations or take other actions based on the definition of WOTUS. The agencies’ field staff has been directed to follow the [**2007 Corps-EPA joint memorandum**](#) on coordination, as modified by [**the January 2008 Corps memorandum**](#).

JD's Posted Online; Other 'Improvements' in the Works

In the November 2015 memo, the federal agencies promise to “capitalize on the momentum... to improve transparency... coordination processes... public participation... [and] significant nexus determinations... ” that underpin the CWA Section 404 permit program. Notably, EPA and the Corps are collaborating to develop a website where

approved Jurisdictional Determinations (JD), used by the agencies to implement the Section 404 permit program, are publicly accessible. Right now, you can access Corps approved JD's by following [**this link to the Corps JD public interface**](#) (including JD's being made under the 1986 regulations during the pendency of the stay). In the near term, users will be able to access both Corps and EPA approved JDs on a single integrated site. [**Click here**](#) for the Corps' Regulatory Guidance Letter on when an approved JD is required and when a permit applicant can elect to use a preliminary JD instead.

The agencies also reiterated their commitment to reduce permit delays and to make the program more understandable, consistent, effective and accessible; but it remains unclear what steps they will take to actually accomplish that. A separate [**interagency memo from July 2015**](#) reports that EPA and the Corps will convene a workgroup to evaluate existing permitting tools and procedures and develop streamlining recommendations for the agencies' heads to consider.

High Court To Resolve 'JD' Issue

The U.S. Supreme Court has agreed to decide whether an applicant for a CWA Section 404 permit can immediately challenge in court a JD issued by a federal regulator. The justices took up the question because federal appeals courts could not agree on whether a JD is a "final agency action" that can be challenged in federal courts under the Administrative Procedure Act.

The case (*U.S. Army Corps of Eng'r's v. Hawkes Co. Inc.*, U.S., No. 15-290, cert granted 12/11/15) will be heard in early 2016 with a decision expected by the end of June 2016.

Although the CWA does not require JDs, if the Corps (or EPA) deems water, wetlands or any wet area on a property jurisdictional (meaning it is a WOTUS), then it is subject to all of the protections and permitting provisions of the CWA. For example, the owner/operator of a construction site is required to obtain a Section 404 permit prior to discharging dredged material (e.g., excavation) or discharging fill material (e.g., placement of dirt to make dry land) in jurisdictional WOTUS.

If the Supreme Court extends immediate judicial review to JDs, it could provide the construction and development industries with a way to respond, at the outset of the project, to unacceptable delineations that can unilaterally halt or dramatically affect project configurations and the cost, extent and timing of permits.

The *Hawkes* case may also allow the Court to clarify or potentially revise the precedent it set in the landmark unanimous 2012 decision *Sackett v. EPA*, which granted pre-enforcement review of some environmental compliance orders on the basis that recipients faced enhanced fines when enforcement would eventually begin.

Mitigation Developments

A November 2015 [**Presidential Memorandum**](#) and [**Department of the Interior guidance**](#) speak to how federal agencies should, in their environmental reviews and permitting, address the impacts on natural resources that occur from development – a process called "mitigation." Specifically, President Obama has directed the Corps, EPA and other federal agencies "to encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful [environmental] impacts occur" and to promote "private investment" and "public-private partnerships" to achieve restoration and conservation goals. The directives appear to encourage financial-incentive-based tools that would, for example, generate "credits" that developers could use to offset adverse impacts of *proposed* construction projects. This calls into question how agencies will evaluate a construction project's potential impacts and set expectations for how those impacts should be addressed – and to what extent.

In implementing mitigation policies and programs, the Memorandum also states "agencies should take action to increase public transparency ... set measurable performance standards ... and clearly identify the party responsible for all aspects of required mitigation measures."

EPA and the Corps, through a joint rulemaking, [**finalized mitigation requirements**](#) back in 2008, applicable to compensatory mitigation,

including the use of mitigation banks to offset impacts to WOTUS (i.e., aquatic resources) authorized pursuant to CWA Section 404 discharge permits. The rules, codified at 40 C.F.R. §§ 230.91 - 230.98, could serve as a model for future rules/guidelines that may be promulgated by other federal agencies (e.g., U.S. Fish and Wildlife Service, Bureau of Land Management) and federal trustees pursuant to President Obama's Memorandum.

More recently, in November 2015, EPA and the Corps released a report summarizing the progress made in implementing their [**2008 mitigation rule**](#), including analysis of trends in aquatic resource impacts and compensation from 2010 through 2014 and trends in mitigation banking and in-lieu-fee programs from the mid-1990's through 2014. The full report, as well as a four-page overview, is on the Corps' website – [click here](#). The review found that permittees have increasingly relied on mitigation banks and in-lieu fees for compensation since 2008, and that permit processing time decreases when these forms of compensation are used.

AGC Efforts

AGC published [**an in-depth look**](#) at the 2015 WOTUS rule when it was finalized. AGC's environmental leadership already has had several in-depth discussions with EPA and Corps staff about the new rule's application to waters/features; exclusions for certain ditches, stormwater control features and water-filled depressions created by construction; and exemptions from CWA Section 404 permitting for certain activities like ditch maintenance. The two groups also discussed working together to develop general permits, simplified procedures and additional guidance that is needed to allow necessary projects to proceed without delay. Notably, there currently are 50 nationwide permits (NWPs) set to expire on March 2017. AGC will closely review and comment on the proposal to reissue, and likely amend, those NWPs – due out in early 2016.

In addition, AGC has joined its industry allies in questioning whether "guidance" on

interpreting/applying the WOTUS definition will clear up the confusion and potential problems that stakeholders, and the courts, have pointed out since the new rule was published. Indeed, AGC communicated similar concerns to EPA and the Corps when learning the agencies had no plans to issue a formal implementation guide on WOTUS, in part because the final regulation "provide[s] clear and comprehensive direction regarding the process for conducting jurisdictional determinations," per the July 2015 interagency memo. The memo further states that "a comprehensive [**Questions and Answers document**](#)... negat[es] the need for any new manual or guidance document." That Q&A document has not been updated since the wave of lawsuits hit.

AGC remains vigilant in its efforts to make sure construction will proceed without delay and excessive permitting reviews and related costs. AGC continues to work with its Congressional allies to enact legislation requiring the agencies to restart the rulemaking process.

Background

In the CWA, Congress granted the Corps and EPA jurisdiction over "navigable waters," defined in the Act as "Waters of the United States" without further clarification. Both the federal agencies and the courts have long struggled to find a workable definition of WOTUS. The precise scope of federal CWA jurisdiction is of fundamental importance to AGC members. Many construction activities on land and water rely on an approved JD from the Corps before proceeding. Construction work that involves the discharge of dredged material or the discharge/placement of fill material in a WOTUS cannot legally commence without authorization from the federal government, which takes the form of a CWA Section 404 permit.

For More Information

Visit [**EPA's "Clean Water Rule" Web page**](#) and the [**Army Corps' Regulatory Program and Permits Web page**](#). To view an EPA Q&A document that compares waters subject to jurisdiction under the 1986 WOTUS regulations to those waters covered by the 2015 rule, [click here](#).



This fact sheet should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, AGC urges you to consult your own lawyer on any specific legal questions you may have concerning your situation.

All photographs are courtesy of the U.S. Environmental Protection Agency unless otherwise indicated.

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