

Trump Administration's Clean Water Act Proposal Will Affect Many Developer and Public Agency Projects

"What are the 'waters of the United States'? As it turns out, defining that statutory phrase—a central component of the Clean Water Act—is a contentious and difficult task." This observation, recently made by Justice Sonia Sotomayor, understates the difficulty in answering what should otherwise be an anodyne question: Does my project require a Clean Water Act permit?

At this moment, answers to this question may be far from certain. Because of conflicting rulemakings by the Obama and Trump administrations and a variety of court-issued injunctions, the federal definition of "waters of the United States", or "WOTUS", now differs state-to-state. Amidst this confusion, the EPA and Army Corps of Engineers recently emerged with a [proposed sweeping rulemaking](#) to re-define WOTUS. As [we've previously reported](#), this proposal is the Trump Administration's second step to completely roll back the Obama Administration's expansion of the Clean Water Act's jurisdiction.

Is changing the definition of WOTUS significant?

Very. The Clean Water Act requires a permit for any activity that discharges pollutants—including chemical wastes, sewage, garbage, dredged spoils, and even rock, sand, or heat—from a point source to any WOTUS. Since the WOTUS definition determines the federal government's jurisdiction, whether it's narrowly or broadly interpreted affects the entire statute.

The proposed rule impacts projects involving residential and commercial developments, bridges, roads, pipelines, culverts, and levees. Whether a permit is required depends on the activity's scope, the activity's location, and, importantly, the Clean Water Act's jurisdiction. From developers to public agencies, re-defining WOTUS affects a wide range of entities and activities.

How would the proposed Trump Rule affect the Clean Water Act's jurisdiction?

The proposed 253-page Trump Rule would overhaul the Clean Water Act's jurisdiction in many respects. Of these changes, two are critically important in the arid west.

First, the Trump Rule regulates only "adjacent wetlands" that



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either abut or have a direct hydrological surface connection with traditionally navigable waters, like oceans, rivers, lakes, and streams. The Trump Rule would require that a wetland actually touch the navigable water, excluding wetlands that are physically separate.

Second, the Trump Rule would categorically exclude waterways that flow only in response to precipitation. These seasonal or temporary bodies of water are prevalent in the arid and semi-arid west and include vernal pools, arroyos, and dry washes that fill with water only after seasonal rains or snowmelt. As there are millions of acres of vernal pools and other ephemeral water features in California alone, developers, owners, contractors, and public agencies must pay close attention to the scope of the Trump Rule's exclusions.

The Obama Rule, on the other hand, requires that water features like wetlands and ephemeral waters merely be a certain distance from a traditionally navigable water or tributary. In the arid west, the Obama Rule considers many of these isolated or ephemeral water features as jurisdictional waters requiring permits. Since the Trump Rule aims to exclude these water features, the change in definition is very significant.

What is the current status of the Clean Water Act's jurisdiction?

Unfortunately, it depends on the state in which you're located. Due to myriad legal challenges and the Trump Administration's partial success in [rescinding the Obama Rule](#), the Obama Rule applies only in 22 states at the time of this alert.¹ Several district courts stayed the Obama Rule in the remaining 28 states, which in turn reinstated the pre-Obama Rule WOTUS definition.² This patchwork implementation continues to imbue the regulated community with incredible uncertainty. Amidst this chaos, the Trump Rule proposes yet another definition in an attempt to rollback what it views as federal expansion beyond what the Clean Water Act allows.

Will California respond to this proposed roll back?

Very likely. As the scope of the Clean Water Act's jurisdiction continues to change, California intends to fill the regulatory void.

Like most states, California leaves primary authority of wetlands regulations to the Army Corps and, thus, follows the federal WOTUS definition. Despite a no-net-loss policy and oversight through State basin plan requirements and water quality certification conditions, California continues to realize that it is losing wetlands at an increasing rate. In response, the California State Water Resources Control Board [proposed its own "wetlands" definition](#) in order to provide a predictable, statewide definition.

A decade in the making, California's proposed wetlands definition remains pending. But with the Trump Rule's federal retreat, incoming-Governor Gavin Newsom may take action to fill this regulatory void.

What should developers and public agencies do next?

These constant shifts in the Clean Water Act's jurisdiction create substantial confusion about whether a discharge, dredging, or fill activity requires a permit. California's regulated community, therefore, must monitor both the Trump Rule and California's response. Once published in the Federal Register, the public has 60-days to comment upon the Trump Rule.

Most stakeholders find uncertainty and unpredictability less desirable than regulation. When it comes to

Clean Water Act permitting, there may be too much of both for you to navigate alone. Should you have any questions or concerns regarding how the Clean Water Act changes affect you, [please contact our Water Law attorneys](#).

¹ The states in which the Obama Rule presently applies are California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington.

² The states in which the pre-2015 WOTUS definition presently applies are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

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