

39. Clean Water Act: EPA Rule Making, Navigable Waters

Legislative Issues

Board Strategic Priority:

Stay Informed and Proactive in Dealing with Water Issues

Issue:

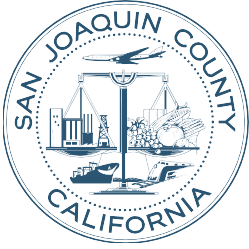
The current Administration has completed a rulemaking process to repeal the Previous Administration's Clean Water Rule regarding the definition of "Waters of the United States" (WOTUS Rule) and reinstate the 1986 Clean Water Act (CWA) rule in place prior to the final WOTUS Rule, which would have redefined lands and waters subject to regulation by the Federal government under the CWA. The current Administration is also finalizing a new WOTUS rule, due out soon. As currently proposed, this new WOTUS Rule would limit the definition of WOTUS to streams and rivers that flow during most of the year, as opposed to the repealed WOTUS that would have expanded Federal jurisdiction over all activities on public and private lands by private individuals or local and State government in and around waterways and tributaries including canals, culverts, and ditches. The repealed WOTUS Rule has been legally challenged in the Federal courts and is awaiting judgment as to whether the expansion of Federal jurisdiction is within the scope of the CWA. Prior to its repeal, the implementation of the 2015 WOTUS Rule was stayed in 27-states, and in effect in 22- states (with New Mexico only partially covered by the old Rule), mostly based on varying district court rulings. It is anticipated that the current Administration's repeal of the previous WOTUS Rule (as well as their new WOTUS Rule once issued) will also be challenged in the courts. Some in Congress have tried to block the WOTUS Rule legislatively from being implemented, but have not been successful. This legislative issue is directly related to Board Strategic priority 5.) Stay Informed and Proactive in Dealing with Water Issues.

Legislative Platform:

1. Oppose legislative and/or administrative efforts, including the issuance of guidance or a formal rulemaking, to broaden the application of the Clean Water Act to include small isolated wetlands, ephemeral and intermittent streams, and other marginal waters that are not directly adjacent to "navigable waters".
2. Support legislative efforts to bar the Environmental Protection Agency and the U. S. Army Corps of Engineers from exceeding the jurisdiction of the Federal Government under the Clean Water Act.
3. Support administrative efforts to repeal the Previous Administration's Clean Water Rule over WOTUS and reinstate the 1986 rule under the Clean Water Act. Review, and if appropriate, support the current Administration's new WOTUS rule one finalized.

Background:

The current administration's U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (EPA and USACE) have jointly proposed and completed a rulemaking to repeal the previous Administration's Clean Water Rule over WOTUS Rule that was supposed to clarify protection under the CWA for streams and wetlands that form the foundation of the Nation's water resources. Determining CWA protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006. The WOTUS Rule described how the EPA and USACE would have identified waters subject to jurisdiction under the CWA and implement the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* and *Rapanos v. United States* concerning the extent of waters covered by the CWA. The current Administration has proposed and is the process of finalizing a



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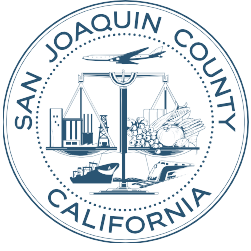
replacement WOTUS Rule that is due out soon. The final version of the previous Administration's WOTUS Rule showed that the EPA and USACE would have expanded Federal CWA jurisdiction over tributaries, including canals, culverts and ditches. Specifically, the WOTUS Rule advanced a broad interpretation of Justice Anthony Kennedy's opinion in *Rapanos, et al. v. United States*, which held that waters sharing a "significant nexus" with jurisdictional waters can also be subject to CWA regulation. In contrast, the current Administration used a combination of Justice Kennedy's and the late Justice Antonin Scalia's opinions in defining WOTUS in their new proposed replacement rule, leaning more towards Scalia's "relatively permanent" flow analysis in determining jurisdiction under the CWA.

On August 28, 2015, the previous Administration's Final WOTUS Rule took effect and was immediately challenged in several Federal district courts nationwide. The 6th Circuit Court of Appeals initially took jurisdiction over all legal challenges nationwide and issued a nationwide stay of the WOTUS Rule, but the Supreme Court overturned the appellate court and gave jurisdiction back to the district courts. Prior to its appeal, the implementation of the previous Administration's WOTUS Rule had been stayed in 27 states and in effect in 22 states (including California, with New Mexico only partially stayed) based on rulings from various district courts. Plaintiffs challenging the WOTUS Rule continued to call for a nationwide stay of the rule until either the courts act or the WOTUS Rule is withdrawn and/or replaced administratively. With the repeal of the previous Administration's WOTUS Rule, and once the replacement WOTUS Rule is finalized by the current Administration, it is expected that challenged in the courts will continue to play a major role in how the CWA will be administered in the future.

In drafting the original CWA, Congress clearly recognized that not all waters should be subject to Clean Water Act jurisdiction. Congress distinguished between water bodies that are "jurisdictional" and those that are not by limiting the CWA's authority to "navigable waters." By definition, any move away from "navigable waters" to some broader definition could include virtually any wetlands, irrigation canals, roadside ditches, ephemeral pools, and other non-navigable waterways.

The potential implications of the previous administration's WOTUS Rule are significant as the CWA affects many public and private activities in San Joaquin County. Farming practices could be significantly impacted in attempting to improve marginal range land to irrigated pasture. Roadside or private irrigation ditches (some are jurisdictional, but many are not) could all become jurisdictional under the now-repealed WOTUS Rule. Many routine but vital maintenance operations in small stream channels, dry washes and man-made water conveyances could be subjected to costly and time-consuming permitting processes, even though such operations have no real effect on water quality. As a consequence, residents could see their water and power rates increase with no improvement in reliability and little or no enhancement of the environment.

In addition, California faces a major challenge in meeting the water and power needs of a growing population, while ensuring the vitality of its environmental resources. Adoption and implementation of the now-repealed WOTUS Rule could make that task much more difficult. Other potential impacts include the County's operations and maintenance of critical infrastructure such as roads, bridges, and utilities which are often located in close proximity and/or drain in to



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ditches or channels. Any expansion of the WOTUS definition could add significant time and expense to these maintenance efforts.