

HOW DOES WOTUS AFFECT YOUR CLIENTS' WETLANDS?

Environmental & Land Use Law

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On August 28, a new rule promulgated by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers took effect in Florida. 80 Fed. Reg. 37054 (June 29, 2015). The rule, called WOTUS, seeks to clarify the definition of “waters of the United States,” which is critical to those agencies’ regulatory jurisdiction under the Clean Water Act (CWA).

The CWA prohibits the discharge of pollutants into waters of the United States without a permit. The outer boundaries of what qualifies as a jurisdiction water have been unclear for decades. A series of U.S. Supreme Court cases have indicated that, while the agencies’ jurisdiction is broad, it does not extend to the outer reaches of the Commerce Clause. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985).

One of these cases, *Rapanos*, created a great deal of confusion because the plurality, a concurrence by Justice Kennedy, and the dissent all developed different jurisdictional tests. The agencies have focused on

Justice Kennedy’s “significant nexus” test. Under that test, if a water has some appreciable impact on a traditionally regulated water under the CWA (like a navigable water), then that water is also jurisdictional. This has meant that many small waters and most

wetlands have been subject to the “significant nexus” analysis on a case-by-case basis. This led to a great deal of informal agency guidance, including wetland delineation manuals that attempted to use scientific methods to aid decision making.

According to the EPA and the Corps, WOTUS increases regulatory certainty by reconciling past practices, science, and case law. It does so by expanding the scope of waters and wetlands that are categorically classified as jurisdictional, rather than subject to a case-by-case review. Tributaries, waters, and wetlands “adjacent” to or “neighboring” jurisdictional waters are now categorically jurisdictional. In some cases, waters and wetlands 1,500 feet from a jurisdictional water are considered “neighboring,” even if there is no



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hydrologic connection. *See* 33 C.F.R. § 328.3(c)(2). WOTUS also codifies some exclusions that are based on agency practice, including for minor ditches and small artificial ponds. *See* 33 C.F.R. § 328.3(b).

WOTUS has provoked fierce opposition. Legislation to block it is progressing, but it would likely face a presidential veto. At least 10 federal lawsuits are challenging the

rule (with at least half the states as plaintiffs), alleging that WOTUS expands federal jurisdiction beyond the CWA’s limits. A federal judge recently enjoined the rule’s implementation in 13 states, but this did not include Florida. Therefore, while the ultimate fate of WOTUS remains unclear, what is certain is that Florida landowners will be required to comply with it in the short term. What is also certain is that this new rule will result in more Florida wetlands being categorically defined as jurisdictional rather than being subject to case-by-case analysis.



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