



Issue Overview

- The Clean Water Act makes it unlawful for a person to add pollutants to a “water of the United States” from a point source without a permit.
- Since 1972, determining which water bodies are and are not “waters of the United States” has been the subject of numerous court cases both at the U.S. Supreme Court, and at the lower federal courts.
- On June 29, 2015, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly finalized a regulation titled “Clean Water Rule: Definition of ‘Waters of the United States’” (WOTUS Rule), providing a new definition of the term “waters of the United States.”
- Industry groups (including NAHB), and 32 states have filed litigation challenging the WOTUS Rule, and the regulation was placed under a nationwide stay by the 6th Circuit Court of Appeals soon after it went into effect.
- The industry and state challengers claim that the new definition is so broad that the EPA/Corps has exceeded its geographic jurisdiction under the Clean Water Act by regulating man-made ditches, channels that flow only when it rains, and isolated ponds.
- The challenges also argue that the EPA/Corps has not followed the procedures required by the National Environmental Policy Act, the Administrative Procedure Act and the Regulatory Flexibility Act.
- Home builders need a clear definition of the term “waters of the United States” that does not encompass man-made systems or features far from any navigable water, and that is not beyond congressional intent of the Clean Water Act.

Impact on Housing and the Economy

- Home builders must obtain federal permits for activities that impact “waters of the United States.”
- If builders need to add fill material into a water of the United States, they generally obtain a CWA Section 404 permit from the Corps.
- When builders need to discharge stormwater into a “water of the United States,” they obtain a CWA Section 402 permit from EPA or a state that is federally approved to issue such permits.
- As the EPA/Corps expands the definition of “waters of the United States,” builders must obtain more permits and spend more resources to avoid features identified in the expanded definition.
- Obtaining permits is costly and time consuming. For example, one study found that it costs on average \$270,000 and takes 788 days to obtain an individual CWA Section 404 fill permit.

Solutions

- On February 28th, President Trump signed an executive order to begin the process of fixing the flawed WOTUS rule. While the order doesn’t unilaterally revoke the rule, it calls upon EPA and the Corps to review and rescind or revise this federal land grab.
- The Trump Administration will use a “two-step” approach to fix the rule:
 - Step 1 – Repeal – EPA and the Corps have already initiated the rulemaking process by proposing to repeal the Obama Administration’s WOTUS rule. The proposal is currently open for public comment.
 - Step 2 – Replace – After the flawed WOTUS rule is withdrawn, the agencies will propose a new rule to replace it.
- NAHB commends the Trump Administration for moving quickly to craft a clear, legally defensible rule that limits jurisdiction of the Clean Water Act consistent with Congressional intent and Supreme Court rulings.

