

Recommendations for Replacing the Clean Water Rule: Definitions of Waters of the United States

A white paper from the Cross-Cutting Issues Group, a project of the
Class of '85 Regulatory Response Group

The Cross-Cutting Issues Group is a group of electric generating companies with a diverse portfolio of generating assets located throughout the country (“CCIG” or “Group”).¹ CCIG members design, construct, permit, and operate fossil fuel-fired power plants and renewable energy projects, as well as electricity and natural gas transmission and distribution systems. Accordingly, Group members are subject to various Clean Water Act (“CWA” or “Act”) program requirements and would be directly impacted by any rule affecting the scope of federal CWA jurisdiction.

CCIG supports action to withdraw and replace the *Clean Water Rule: Definition of Waters of the United States* (“WOTUS Rule”), jointly issued by the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (together, the “Agencies”). The WOTUS Rule does not achieve its goal of providing additional clarity about CWA jurisdiction, and instead introduces additional uncertainty to the regulatory scheme. At the same time, the WOTUS Rule dramatically expands federal jurisdiction compared to recent agency jurisdictional practices. These changes create significant new costs, permitting requirements, and other burdens for Group members.

CCIG looks forward to engaging with the Agencies in the development of a replacement rule that would provide greater regulatory clarity and allow for efficient and effective implementation of CWA programs. The Group provides specific recommendations for a new rule below.

BACKGROUND

On June 29, 2015, the Agencies published the final WOTUS Rule.² The WOTUS Rule defines the scope of waters covered by the CWA by revising the regulatory definition of the statutory term “waters of the United States.”³ The rule was challenged by various parties in district and appellate courts across the country, and the appellate challenges were consolidated in the U.S. Court of Appeals for the Sixth Circuit (“Sixth Circuit”). On October 6, 2015, the Sixth Circuit issued a nationwide stay of the rule that remains in effect.⁴

¹ CCIG members who support these comments are Alliant Energy Corporation, Basic Electric, Entergy Services, Inc., Florida Power and Light, Louisville Gas & Electric/Kentucky Utilities, National Grid, NextEra Energy, Inc., Oklahoma Gas & Electric, Public Service Company of New Mexico, Talen Energy, and Salt River Project.

² 80 Fed. Reg. 37,054 (June 29, 2015).

³ The Act prohibits “any addition of any pollutant to *navigable waters* from any point source.” 33 U.S.C. § 1362(12) (emphasis added). The Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” § 1362(7). The Act does not define the phrase “waters of the United States.”

⁴ See *In re: Clean Water Rule: Definition of “Waters of the United States,”* No. 15-3751 (6th Cir. Oct. 9, 2015). In February 2016, the Sixth Circuit ruled that challenges to the WOTUS Rule belong in the appellate, not district, courts. That jurisdictional ruling is being appealed to the U.S. Supreme Court. See *National Association of Manufacturers v. U.S. Department of Defense*, No. 16-299 (U.S.).

On February 28, 2017, President Trump signed Executive Order (“EO”) 13778 directing the Agencies to review the WOTUS Rule and to publish a proposed rule rescinding or revising the rule, “as appropriate and consistent with law.”⁵ The Agencies subsequently announced their intention to review and rescind or revise the WOTUS Rule.⁶ As the first step in this process, on June 27, 2017, EPA Administrator Pruitt and a senior Corps official signed a proposed rule titled, “*Definition of ‘Waters of the United States’ -- Recodification of Preexisting Rules*,” that proposes to replace the stayed definition of “waters of the United States” and re-codify the “exact same regulatory text” that existed prior to the 2015 WOTUS Rule.⁷ For the second step in the process, EPA intends to develop an alternative rule consistent with EO 13778.

REPEAL AND REPLACEMENT OF THE WOTUS RULE IS NEEDED

A. The WOTUS Rule Does Not Resolve Uncertainty.

The Agencies promulgated the WOTUS Rule to “increase CWA program predictability and consistency,” including by “limit[ing] the need for case-specific analysis” in jurisdictional determinations.⁸ As the Agencies recognized, there is a “compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act.”⁹ Under the 1986 regulations and recent agency practices, many waters are subject to case-by-case analysis, “and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies.”¹⁰ As a result of this ambiguity, “almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination.”¹¹

Despite the Agencies’ goal of providing additional clarity, the WOTUS Rule only introduces additional regulatory uncertainty about what waters qualify as “waters of the United States.” For example, the rule introduces broad definitions for terms, such as “tributary,” “adjacent,” “significant nexus,” and “neighboring,” and includes vague terms, such as “floodplain” and “similarly situated waters,”¹² that create ambiguity for agencies and regulated parties alike. The new definitions also appear to expand CWA jurisdiction over waters, including ephemeral and geographically isolated features, that generally are considered non-jurisdictional under the 1986 regulations as recently interpreted by the Agencies in light of U.S. Supreme Court precedent.

The new regulatory uncertainty and expansion of federal jurisdiction under the WOTUS Rule have significant impacts for power infrastructure projects; for instance, by impeding permitting for power infrastructure projects (*e.g.*, transmission lines, pipelines); requiring more time for necessary permitting; requiring more permits (potentially including more individual permits, as

⁵ EO 13778, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

⁶ 82 Fed. Reg. 12,532 (Mar. 6, 2017).

⁷ Available at https://www.epa.gov/sites/production/files/2017-06/documents/wotus_prepublication_version.pdf. As of the date of this white paper, the proposed rule has not been published in the *Federal Register*.

⁸ 80 Fed. Reg. at 37,054, 37,055.

⁹ *Id.* at 37,057.

¹⁰ *Id.* at 37,056.

¹¹ *Id.*

¹² See 80 Fed. Reg. at 37,105-37,127; 33 C.F.R. § 328.3 (2015); 40 C.F.R. § 110.1 (2015); 40 C.F.R. § 112.2 (2015); 40 C.F.R. § 116.3 (2015); 40 C.F.R. § 117.1 (2015); 40 C.F.R. § 122.2 (2015); 40 C.F.R. § 230.3 (2015); 40 C.F.R. § 232.2 (2015); 40 C.F.R. § 300.5 (2015); 40 C.F.R. § 302.3 (2015); 40 C.F.R. § 401.11 (2015).

opposed to nationwide permits); creating financing delays and increasing financing costs; and increasing compliance and mitigation costs under all CWA programs. These increased costs and burdens do not result in corresponding environmental benefits, and could even have negative environmental consequences.¹³

Further, the WOTUS Rule encroaches upon the states' traditional and primary jurisdiction over land and water use. Regulating land and water use within a State's borders is a "quintessential" state and local function.¹⁴ In enacting the CWA, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources."¹⁵

For these reasons, the Group supports the Agencies' proposal to withdraw the WOTUS Rule.

B. Independent Exercise of Agency Authority Should be the Foundation for the Replacement Rule.

The Agencies must ensure the replacement rule is developed within a defensible legal framework. CCIG encourages the Agencies to base the replacement rule on their authority to make an independent interpretation of the ambiguous statutory term "waters of the United States."

As Chief Justice Roberts noted in *Rapanos*, "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer."¹⁶ In promulgating a replacement rule, the Agencies should exercise their policy discretion to consider factors such as administrability, the need to provide clarity and regulatory certainty to the public, and principles of federalism and deference to state authority.

The replacement rule also must take seriously the limits on federal CWA authority set forth by the U.S. Supreme Court. The Group urges the Agencies to adopt a rule that reflects these limits in a way that promotes clarity and respects state authority.

RECOMMENDATIONS FOR A REPLACEMENT RULE

CCIG looks forward to engaging with the Agencies on the rulemaking process for the replacement rule. While the framework for the new rule may still be evolving, it is clear that certain areas of uncertainty will need to be addressed no matter what form the new rule takes. The Group makes the following targeted recommendations to address such areas.

¹³ For example, expanded federal CWA jurisdiction could discourage clean energy projects, including linear projects (e.g., natural gas pipelines) and large land area renewable projects, which often are sited near ephemeral streams, isolated depressions, and erosional features that currently are considered non-jurisdictional.

¹⁴ *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

¹⁵ 33 U.S.C. § 1251(b).

¹⁶ 547 U.S. at 758 (Roberts, J., concurring) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984)) (emphasis omitted).

A. Exemptions From Federal Clean Water Act Jurisdiction.

1. The Replacement Rule Should Retain the Waste Treatment System Exemption.

Regardless of how the Agencies define the term “waters of the United States,” the replacement rule should retain the waste treatment system exemption. Under the exemption, waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA, are not waters of the United States.¹⁷

The waste treatment system exemption is critical for utility operations. Utilities depend on this long-standing exemption to provide for cooling impoundments to address thermal discharges and to facilitate the management of stormwater at their generating facilities. Without the exemption, and its application to features built in otherwise jurisdictional waters, these activities could potentially become subject to new points of compliance for their longstanding discharges and change the point of compliance for some cooling water intake structures under CWA Section 316(b). Further, new construction of such systems could require individual CWA Section 404 permitting. Thus, such a regulatory change would create significant new compliance obligations and costs for utilities. Eliminating the exemption also would be a drastic deviation from past agency practice that could undermine CWA program goals.¹⁸

2. The Replacement Rule Should Include Additional Exemptions.

In addition to retaining the waste treatment system exemption, the replacement rule should expressly exempt from federal CWA jurisdiction the following features and activities:

- *Any man-made features that are not created from jurisdictional waters.* This exemption should include reserve cooling water ponds and canals and water conveyances, including but not limited to canals and conveyances used for: water transmission and distribution; water intake and supply; and water discharge.
- *Regular right-of-way maintenance activities for existing linear infrastructure, such as electric and natural gas transmission and distribution infrastructure.* These activities (e.g., vegetation trimming, erosion maintenance) are similar to the agricultural maintenance activities that are exempt from regulation under Section 404(f) of the Act.¹⁹

¹⁷ See, e.g., 40 C.F.R. § 122.2 (1986). While there is text in some provisions that implement the waste treatment system exemption that states, “[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section].” Note 1 provides that: “[t]he sentence beginning with ‘This exclusion applies . . .’ appearing in §122.2 within the definition of ‘Waters of the United States’ was stayed by the Environmental Protection Agency at 45 FR 48620, July 21, 1980 and continued at 48 FR 14153, April 1, 1983.”

¹⁸ For example, many power plants use large reservoirs for cooling water as part of a closed-cycle recirculating system (“CCRS”) to allow water heated by generation equipment to cool off before being reused. These ponds traditionally are not considered to be “waters of the United States” under the waste treatment system exemption. If these ponds are designated as “waters of the United States,” they could be subject to additional restrictions that might interfere with their long-standing use as part of a CCRS, undermining the intent of the recently-finalized standards for cooling water intake structures under CWA Section 316(b). See 79 Fed. Reg. 48,299 (Aug. 15, 2014).

¹⁹ See 33 U.S.C. § 1344(f)(1).

3. The Replacement Rule Should Avoid Terms Like “Dry Land” or “Upland” in Defining the Scope of Exemptions.

In general, in defining the scope of exemptions for man-made features, such as cooling ponds, the Agencies should avoid using terms like “dry land” or “upland.” Instead, the Agencies should describe the scope of exemptions in terms of whether the man-made features are built in jurisdictional or non-jurisdictional waters. For example, if a water supply pond is constructed in a non-jurisdictional water, it should be exempt from federal CWA jurisdiction, regardless of the reason the water is non-jurisdictional.

To the extent the Agencies do use such terminology, the term “upland” is preferable to the term “dry land.” The WOTUS Rule uses the term “dry land,” which is problematic because it implies that many areas within the larger landscape, including floodplains, that experience inundation but which currently are considered non-jurisdictional uplands due to physical characteristics may no longer be excluded. Further, as the Agencies note in the WOTUS Rule preamble, the term “dry land” has “no agreed upon definition given geographic and regional variability.”²⁰ It would be preferable for the Agencies to use the term “upland,” and/or “nonwetland,” as defined by the U.S. Army Corps of Engineers in the 1987 Wetlands Delineation Manual.²¹

B. Defining the Scope of Federal Clean Water Act Jurisdiction.

1. The Replacement Rule Should Clarify that Isolated Waters are Non-Jurisdictional.

The replacement rule should clarify that federal CWA jurisdiction does not extend to isolated waters. The 1986 regulatory definition of “waters of the United States” is problematic because it provides for federal jurisdiction over isolated, intrastate waters “which would affect or could affect interstate or foreign commerce,” including waters which “are used or could be used for industrial purposes by industries in interstate commerce.”²²

This broad inclusion of isolated waters within the definition of “waters of the United States” is inconsistent with U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*²³ and *Rapanos*. In *SWANCC*, the court held that the use of “nonnavigable, isolated, intrastate waters” by migratory birds was not a sufficient basis for federal CWA jurisdiction.²⁴ In *Rapanos*, both Justice Scalia and Justice Kennedy characterized *SWANCC* as broadly holding that “nonnavigable, isolated, intrastate waters” are

²⁰ 80 Fed. Reg. at 37,099.

²¹ See *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987), available at <http://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf>. The manual defines upland as “any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of vegetation, soils, and/or hydrologic characteristics associated with wetlands. Such areas occurring within floodplains are more appropriately terms nonwetlands.” *Id.* at A13. The manual defines nonwetland as “any area that has sufficiently dry conditions that indicators of hydrophytic vegetation, hydric soils, and/or wetland hydrology are lacking.” *Id.* at A8. As used in the manual, nonwetland would include “any area that is neither a wetland, a deepwater aquatic habitat, nor other special aquatic site.” *Id.*

²² See 40 C.F.R. § 122.2 (1986) (definition of “waters of the United States,” Part (c)(3)).

²³ 531 U.S. 159 (2001).

²⁴ *Id.* at 171-73.

not “waters of the United States.”²⁵ In light of *SWANCC* and *Rapanos*, the replacement rule should expressly recognize that the federal government does not have jurisdiction over isolated waters.

2. Other Recommendations.

The Group makes the following additional recommendations for the replacement rule:

- *Definition of “tributary.”* If the replacement rule provides a definition of “tributary” in either the regulatory text or the preamble, it should define this term carefully. The definition should include science-based metrics related to the presence of a bed and banks, an ordinary high water mark, and the significance of the flow regime. The definition also should expressly exclude man-made structures with engineered bed, banks, and top of banks that are not created from jurisdictional waters, or whose construction predates the CWA.
- *National Wetlands Inventory (“NWI”).* The replacement rule preamble should clarify that a water body’s status in the NWI has no bearing on a jurisdictional determination. NWI maps often are not cross-checked with records of historical or local jurisdictional determinations. For example, there are many instances where the NWI designates entirely man-made features located in uplands, such as cooling ponds, as jurisdictional waters, regardless of historical or local determinations.

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CCIG appreciates the Agencies’ careful consideration of this white paper. The Group looks forward to continuing to engage with the Agencies in the process of developing a replacement to the WOTUS Rule that would provide needed clarity about the scope of federal CWA jurisdiction.

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²⁵ See 547 U.S. at 726 (describing *SWANCC* as holding that “nonnavigable, isolated, intrastate waters, which . . . d[o] not actually abut on a navigable waterway [are] not included as waters of the United States.”) (Scalia, J., plurality) (internal citations and quotations omitted); see also *id.* at 774 (describing *SWANCC* as “holding that nonnavigable, isolated, intrastate waters are not navigable waters”) (Kennedy, J., concurring) (internal citations and quotations omitted).