

WATERS OF THE UNITED STATES: RECENT CHANGES AND PERMITTING BASICS



IN FLUX—RECENT RULE CHANGES

If there is one thing that is guaranteed in life other than death and taxes, it has to be changes surrounding the definition of Waters of the United States (WOTUS). Since 2015, there have been 5 different definitions of WOTUS with 2 of those enacted in 2023. Most recently, on September 8, 2023, in conformance with *Sackett v. EPA*, the US EPA and USACE issued a final rule (Conforming Rule) to amend the WOTUS definition. Changes included eliminating the previous “significant nexus” standard; and revising the definition of “adjacent” as it applies to the proximity of a wetland to other waters. Under the Conforming Rule, some wetlands and streams that were considered WOTUS under previous rules may no longer be subject to federal jurisdiction. Projects that are still in design where WOTUS had been identified prior to the Conforming Rule may benefit from reconsideration.

AUTHORIZATION IS REQUIRED FOR ALL IMPACTS TO WOTUS

Under Section 404 of the Clean Water Act (CWA), the US EPA and US Army Corps of Engineers (USACE) require authorization for placement of dredge or fill material in WOTUS. Under Section 401 of the CWA, impacts to WOTUS also require water quality certification from the State where the project is located. State notification requirements may vary and can be more or less stringent than those of the USACE. Impacts resulting from specific types of projects can often receive automatic state authorization if certain criteria are met. Additional State-specific delineation guidance and permitting requirements may also apply and States may take jurisdiction over aquatic features (e.g. streams and wetlands) that are not WOTUS. Local jurisdictions may also implement permitting processes related to wetlands, streams, and other waters. Also, State and local stream and wetland buffers are often required.

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TYPES OF FEDERAL AUTHORIZATIONS

There are two common categories of USACE permits, Nationwide and Individual. Nationwide Permits (NWP) are designated by type of development activity and are the simplest to obtain. NWP can generally be used for non-tidal WOTUS impacts up to one-half acre. Each NWP and associated general and regional conditions provide additional criteria that must be met and may dictate more stringent impact thresholds. In some cases, where specific criteria are met, written notification may not need to be provided to USACE to obtain coverage under the NWP. Individual permits require more detailed submittals. Public notice may be required where NWP impact limits are exceeded.

COMPENSATORY MITIGATION FOR IMPACTS

Compensatory mitigation is generally required for wetland impacts that are over 1/10th of an acre or, in some cases, lower thresholds identified in the NWP, general, regional, or state-specific conditions. Mitigation may be conducted by purchasing credits from a wetlands mitigation bank in the same watershed as the project site or through one or more acceptable alternative mitigation measures.

SUMMARY

Frequent changes in the definition of WOTUS may create uncertainty for the regulated community and for the regulating agencies charged with enforcing those changes. When determining the potential for federal jurisdiction of aquatic features, one must consider recent rule changes and that states may recognize differing versions of the WOTUS rules and/or have their own regulations. Choosing the right professional consultant who understands the current technical criteria and regulatory landscape surrounding WOTUS is critical to saving both time and money. ECA can help!

ECA has performed/prepared hundreds of wetlands/stream assessments and delineations and permits throughout the Southeast, Mid-Atlantic, Midwest, and Gulf states. If you have questions regarding a specific project or wetlands/stream regulatory issue, please call Ben Salter of ECA at (828) 505-0755 or email ben.salter@eca-usa.com.

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