

WATERS OF THE U.S. WETLANDS JURISDICTION

Oppose Expansion of Federal Clean Water Act Jurisdiction

Action Needed:

Tell Congress that the Administration needs to halt its effort to create yet another WOTUS Rule until the U.S. Supreme Court weighs in on the underlying test for federal jurisdiction over waters.

Background:

The Clean Water Act grants the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over “navigable waters,” defined in the act as “Waters of the United States” (WOTUS) without further clarification. Both the federal agencies and the courts have long struggled to define WOTUS: establishing which waters are regulated by the federal government and which fall under the jurisdiction of state and local governments for protection. Federal jurisdiction affects all CWA programs (not just dredge and fill/wetlands permits) and determines when a construction site must obtain a federal permit.

In 2017, EPA and Corps began efforts to replace the 2015 rule that was legally flawed and never fully implemented nationwide—culminating in the 2020 Navigable Waters Protection Rule. The following year, a district court vacated the 2020 rule without issuing judgement on its merits. Currently, the long-standing rules from the 1980s and existing guidance are in effect. The agencies are now in the process of redefining the scope of federal waters yet again and released an expansive proposal that relies heavily on the significant nexus test for determining federal jurisdiction over waters. At the same time, the U.S. Supreme Court is hearing a case that features the significant nexus test—and could offer needed clarity.

AGC Message:

- **Support Congressional efforts to pause regulatory changes while the U.S. Supreme Court deliberates.** EPA and the Corps continue efforts to put in place an interim rule while they work on more comprehensive changes to come later. Like the now defunct 2015 rule, the proposed interim rule relies on a key concept called “significant nexus” to determine federal jurisdiction of a waterbody. If finalized, the agencies will likely need to make changes following the Supreme Court decision in the case mentioned above (however the Justices decide the case). It causes unnecessary confusion and is a waste of resources to advance a rulemaking that will likely need revision shortly after finalizing.
- **The proposed interim rule expands federal jurisdiction.** The agencies assert the proposed interim rule simply returns to the status quo (1980s regulations and associated guidance). However, the proposal instead reflects the current administration’s interpretations of controversial legal rulings over the years—a marked departure from the status quo. The proposal incorporates approaches the agencies used in the flawed 2015 rule and solicits feedback on a number of changes that could push the proposal beyond any prior interpretations. The agencies also are intending a future comprehensive revision. The interim rule, if finalized, would be the fifth change in regulation since 2015.