



Legal Insights

**“Waters of the U.S.” –  
Rising Waters of the State and  
Receding Waters of the U.S.**

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While you may have heard about the Trump administration's attempts to narrow the scope of Waters of the United States (WOTUS), California is expanding its regulations, including broadening the definition of wetlands subject to permitting requirements.

The specific timeline for these changes to take effect is still uncertain, but if you are planning projects that will need approvals in the next year, sooner will be better than later. For projects that happen after the regulations take effect, you will want to plan for additional cost, time, and possibly legal uncertainty in your approval process.

*Read on to gain insight into what is happening on this shifting front.*

Projects impacting California surface waters and wetlands that are outside federal jurisdiction will now need state authorization under new and more expansive rules. On April 2, 2019, the California State Water Resources Control Board (State Water Board) adopted rules that impose new requirements on activities that involve discharge of dredged or fill material into "Waters of the State," including wetlands under a revised – and broader -- definition.

The US Army Corps of Engineers and EPA have regulated the discharge of dredged and fill material to "Waters of the U.S." under the Federal Clean Water Act, ("CWA") for decades. The scope of federal jurisdiction, determined by the definition of "Waters of the U.S." or "WOTUS," has long been controversial. When the U.S. Supreme Court narrowed



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the WOTUS definition in 2001 and 2006, state regulators decided to step in to protect waters it saw as excluded from federal jurisdiction, namely isolated and ephemeral waters more common in the arid West.

Over a decade later, California has now adopted a new program requiring state authorization to fill Waters of the State, which is more broadly defined than Waters of the U.S., and includes a broader definition for wetlands. The new rule inventories the requirements for a “complete” application, which includes a Corps-verified WOTUS delineation and a delineation of Waters of the State; an Alternatives Analysis; a draft compensatory mitigation plan; and other information and documentation depending on the details of the project and the significance of impacts to Waters of the State. The rule also specifies the process for delineating wetland boundaries largely following the Corps’ wetland delineation manual, but incorporating a new wetland definition, which allows for a wetland determination when vegetation is absent (such as desert playas). Many project proponents are concerned with the complexity of the requirements, complications from the presence of both federal and state waters and wetlands, and naturally the time and cost required to develop and process the application.

Meanwhile, confusion and uncertainty continue to plague federal jurisdiction and an understanding of WOTUS. Agency guidance in 2008 and 2011 failed to bring clarity to the Supreme Court WOTUS rulings, one of which (*Rapanos v. US.*, 126 S.Ct. 2208 (2006)) offered five separate opinions and no clear majority opinion. Federal agency attempts to codify judicial WOTUS interpretations by adopting the “Clean Water Rule” in 2015, have been frustrated by litigation. In 2017, President Trump issued an executive order directing the Corps and EPA to withdraw the 2015 rule and replace it with an interpretation more in line with Justice Scalia’s narrow interpretation expressed in *Rapanos*. That proposed rule, released in December 2018 and published February 14, 2018 (84 Fed Reg 4154), is likely to generate hundreds of thousands of comments from

the public. Whether and when the Trump WOTUS rule is adopted is anyone's guess, and if it is, it will most certainly be challenged in court.

While certainty on the federal front continues to be elusive, permitting at the state level will, without question, require a significantly greater investment of time and resources. The State's new regulations are set to take effect nine months after they are approved by the State Office of Administrative Law, which could take several months.

Follow developments at:

[https://www.waterboards.ca.gov/water\\_issues/programs/cwa401/wrapp.html](https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html)



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