



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Waters of the United States/Clean Water Act: Jimmy Rogers (FTN Associates, Ltd.)/Jordan Wimpy (Mitchell Williams Law Firm) Arkansas Environmental Federation Water Seminar Presentations

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Jimmy Rogers of FNT Associates, Ltd. ("FTN") and Jordan Wimpy of Mitchell Williams Law Firm undertook sequential presentations addressing Clean Water Act Waters of the United States ("WOTUS") issues at the June 16th Arkansas Environmental Federation Water Seminar.

Jimmy serves as an Environmental Scientist at FTN and Jordan is a partner at Mitchell Williams Law Firm.

A Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit must be obtained if five jurisdictional elements are met:

- A person
- adds a
- pollutant
- to navigable waters (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

The definition of WOTUS is arguably one of the most critical jurisdictional terms of the Clean Water Act. Its importance is magnified since it is relevant to both NPDES permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 – Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, the scope of the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

Jordan's presentation addressed the history of WOTUS from the 1980s through 2020, noting:

- 1980s – WOTUS Defined by the United States Environmental Protection Agency (“EPA”) and Corps of Engineers (“Corps”)
- 2001-2006 – Judicial Review
- SWANCC
- *Rapanos*
- *Post-Rapanos*
- 2008 – Corps Guidance
- 2015 – Obama WOTUS Rule
- 2020 – Trump WOTUS Rule

The presentation also noted recent litigation such as *Pascua Yaqui Tribe v. U.S. EPA* granting EPA/Corp’s voluntary remand of the Trump WOTUS (Navigable Waters Protection Rule [“NWPR”])

Also referenced is the EPA/Corp’s halting of implementation of the Trump NWPR WOTUS Rule.

The Biden Administration WOTUS activities were addressed, including:

- Executive Order 13390
- Proposed WOTUS Rule, 68 Fed. Reg. 69372 reinstating the 1986 Rule
- Scheduling roundtables to discuss WOTUS changes

The potential for the United States Supreme Court to address WOTUS prior to a new rule promulgation was noted, referencing the pending Sackett United States Supreme Court appeal. Especially important was the United States Supreme Court’s granting of a Petition for Certiorari asking whether *Rapanos* should be revisited.

Jimmy’s presentation initially gave an overview of the Section 404 Clean Water Act Wetland Permitting Program, noting its regulation of the impacts to wetlands and other WOTUS and its administration by the Corps with authority delegated by EPA. Superimposed upon this program is the overarching requirement that there be no net loss of jurisdictional wetlands.

The discussion addressed:

- Lakes/Ponds
- Wetlands
- Stream Channels

The presentation included a reminder of features that were not regulated a year ago, such as:

- Ephemeral channels
- Ponds/Wetlands not abutting a tributary

Features that were regulated a year ago were noted to include:

- Territorial seas and Traditionally Navigable Waters
- Tributaries (Intermittent/Perennial channels)
- Lakes/Ponds/Impoundments of jurisdictional waters
- Adjacent wetlands

The presentation states that basically everything is regulated today, noting:

. . . With the court decisions and EPA electing to no longer implement the NWPR, most aquatic features are regulated, including, but not limited to, all features regulated under NRWP.

The presentation also noted issues associated with the implementation of NWPR, discussing the following scenarios:

- Applications submitted prior to NWPR
- Applications issued under NWPR
- Applications submitted during NWPR

- Applications issued under NWPR
- Applications issued after NWPR

The presentation provided news on how that process has gone forward and included examples.

Jimmy also discussed 404 Nationwide Permit changes, noting:

- In January 2021, sixteen of the former Nationwide Permits (NWP) were issued, reissued, or modified while in February 2022, forty-one other NWPs were issued, reissued, or modified

Three NWP changes were highlighted, which included 12 (formerly for utility line activities), 57 and 58. In particular, the “300-foot rule” was highlighted which is stated to have been removed and has been very important in numerous projects being able to proceed under a NWP rather than requiring an individual permit.

View Jimmy’s slides [here](#) and Jordan’s slides are available [here](#).