Waters of the United States/Clean Water Act: Associated General Contractors of America Comments Addressing Potential Revisions



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The Association of General Contractors of America ("AGC") submitted April 23rd comments to the United States Environmental Protection Agency and U.S. Army Corps of Engineers ("collectively, "EPA") regarding potential revisions to the Clean Water Act definition of "Waters of the United States" ("WOTUS").

AGC was responding to EPA's consultation and coordination on upcoming efforts to revise the definition of WOTUS. See E.O. 13132.

AGC describes itself as:

…the nation's leading construction trade association dating to 1918, and today represents more than 28,000 member firms representing construction contractor firms, suppliers and service providers across the nation, and has members involve in all aspects of non-residential construction.

The definition of WOTUS is arguably one of the most critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination System ("NPDES") permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits.
- Section 311 oil/hazardous substance 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.

By way of introduction, the AGC comments provide its perspective on the evolving interpretation of WOTUS through both litigation and regulation. Prior United States Supreme Court cases such as Riverside Bayview and Sackett are reviewed. Concern is expressed that a conforming rule that followed the Sackett decision during the Biden Administration imposed:

…an overly broad interpretation of federally regulated waters under the CWA and, in its implementation, relies heavily on case-by-case determinations, creating widespread confusion.

The comments also discuss why the definition of WOTUS is important to the construction industry noting:

- AGC members perform many construction activities on land and water that often require judicial jurisdictional determination before proceeding.
- Construction work involving the discharge of the dredge material or placement of fill in a WOTUS cannot commence without authorization from the federal government.

AGC's "general recommendations" include:

- Contractors need a simple definition for WOTUS that allows for rapid jurisdictional determinations.
- Longstanding exclusions should be strengthened because the regulated community depends on them to reign in federal overreach on all wet areas.
- Steps should be taken to simplify and streamline the permitting process.

"Key" recommendations include:

- Address Deficiencies Raised in Litigation Over the Conforming Rule.
- The conforming rule's categorical inclusion of all interstate waters regardless of navigability violates the CWA.
- The conforming rule's relatively permanent test cannot be squared with Sackett.
- The conforming rule's definition of jurisdictional wetlands contradicts Sackett.
- The conforming rule's coverage of impoundments is impermissibly broad.
- The tributary rule is vague and ignores Sackett's requirements.
- The exclusion for ditches provides inadequate guidance.
- The conforming rule is rooted in a misunderstanding of the CWA's protection of traditional state authority over land and water use.
- Safeguard Exclusions.
- Stormwater Controls.
- Water-Filled Depressions.
- Ditches.
- Why the Ditch Exclusion Is Important.
- Clarify Exemption for Work in Roadside Ditches.
- Other Considerations.
- Embrace Streamlining Opportunities.
- Provide a Clear, Predictable and Enduring Definition of WOTUS.
- Addressing vagueness concerns in the definition.
- Limiting the case-by-case analysis and guesswork that exposes contractors to regulatory ambiguity.
- Facilitate the Issuance of Approved Jurisdictional Determinations (AJDs).
- Constrain Excessive Mitigation Requirements.
- Rescind the 2025 Ordinary High Water Mark Manual and Reinstate RGL 05-05.
- Confirm Grandfathering of Permits.

A copy of the AGC comments can be downloaded here.