



San Joaquin Council of Governments

CLEAN WATER ACT & WOTUS

On May 27, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) finalized their Definition of Waters of the U.S. under the Clean Water Act. On August 28, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) began to implement the "Waters of the U.S." (WOTUS) rule.

Under the final rule, the following types of ditches are jurisdictional:

- Roadside and other ditches that have flow year-round (perennial flow)
- Roadside and other ditches with intermittent flow (not continuous, irregular) that are a relocated tributary, or are excavated in a tributary, or drain wetlands
- Ditches, regardless of flow, that are excavated in or relocate a tributary

The final rule also newly defines the term "tributary," and in doing so states that "a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches." Since ditches can now be classified as tributaries, and the new definition of tributaries includes ditches, it remains unclear what ditches will be exempt under the new rule.

Lawsuits were filed almost immediately after the rule was finalized and Congress has made multiple attempts to overturn the rule. Petitioners filed 18 lawsuits in district courts and 22 petitions for review in federal appeals courts over the rule. In February 2016, the 6th U.S. Circuit Court of Appeals found that it had jurisdiction to hear challenges. The Supreme Court decided to take up the case in January 2017 shortly before Inauguration Day, while at the same time, President Trump issued an Executive Order compelling U.S. EPA and the Army Corps of Engineers to take another look at the joint rule. Regardless, the rule remains stayed nationwide.

President Trump has stated one of his top priorities in his presidency is to repeal many controversial regulations that were finalized during Obama's Administration including the WOTUS rule. To reverse the new rule, the Trump Administration has three options: use the existing regulatory process, let the courts decide, or ask Congress to address WOTUS.

As stated above, President Trump issued an Executive Order directing the EPA Administrator and the Army Assistant Secretary for Civil Works to review the Clean Water Rule and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law. EPA and the Army have stated they intend to immediately implement the Executive Order and publish a Notice of Proposed Rulemaking to rescind or revise the rule. However, no action has occurred to date.

It remains to be seen if the new administration and Congress can come together on a revised rule that meets the goals of the Clean Water Act while respecting the limits of federal power.

The San Joaquin Council of Governments supports rescinding the final rule.