



Missouri Water Seminar

REGFORM

WOTUS

Regulatory and Enforcement Update

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TOPICS

1. Clean Water Act Jurisdiction

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2. EPA Penalty Determinations

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2. EPA Penalty Determinations
3. Recent WOTUS Enforcement Cases in Region VII

Clean Water Act Jurisdiction

§ 301 – Unlawful to discharge a pollutant from a point source into navigable waters without a permit.

Clean Water Act Jurisdiction

§ 404 – Unlawful to discharge dredged or fill material into navigable waters without a permit from the Corps of Engineers.

Clean Water Act Jurisdiction

“**Pollutant**” includes, *inter alia*, dredged spoil, rock, and sand.

33 U.S.C. § 1362(6)

Clean Water Act Jurisdiction

“Point Source” is any discernible, confined and discrete conveyance from which pollutants are or may be discharged. 33 U.S.C. § 1362(14).

Clean Water Act Jurisdiction

“**Point Source**” - Bulldozers, backhoes, and other earth moving equipment can be “**point sources.**”

See Parker v Scrap Metal Processors, 386 F.3d 993 (11th Cir. 2004); *Avoyelles Sportsmens League v Marsh*, 715 F.2d 897 (5th Cir. 1983)

Clean Water Act Jurisdiction

“Navigable waters” – “The Clean Water Act does not define ‘waters of the United States;’ rather, it provides discretion for EPA and the U.S. Department of the Army to define ‘waters of the United States’ in regulations.”

<https://www.epa.gov/wotus/about-waters-united-states> (accessed June 18, 2022).

Clean Water Act Jurisdiction

“Navigable waters” means “waters of the United States,” which include “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;” tributaries of such waters; and “[w]etlands adjacent to [such] waters (other than waters that are themselves wetlands).”

40 C.F.R. § 232.2

Clean Water Act Jurisdiction

Rapanos v United States, 126 U.S. 2208 (2006)

A four-Justice plurality stated that “waters of the United States” “include[] only those **relatively permanent, standing or continuously flowing bodies of water** ‘forming **geographic features**’ that are described in ordinary parlance as ‘**streams[,] . . . oceans, rivers, [and] lakes,**’” and “**wetlands with a continuous surface connection**” to a “**relatively permanent body of water connected to traditional interstate navigable waters.**”

Clean Water Act Jurisdiction

In 2007 and 2008, EPA and USACE entered into Memorandum of Agreements to implement the definition of “waters of the United States” as set forth in *Rapanos*.

Clean Water Act Jurisdiction

In 2015, EPA and USACE amend regulations to implement the definition of “Waters of the United States.” **(2015 Rule)**

Clean Water Act Jurisdiction

In October 2019, EPA and USACE repeal the **2015 Rule** and reinstate the **pre-2015 Rule**.

Clean Water Act Jurisdiction

In December 2019, EPA and USACE repeal the **pre-2015 Rule** and adopt the **Navigable Waters Protection Rule**.

Clean Water Act Jurisdiction

In August 2021, in *Pascua Yaqui Tribe v EPA*, 557 F.Supp.3d 949 (D. Az. 2021), the Federal District Court vacated and remanded the **Navigable Waters Protection Rule**.

Clean Water Act Jurisdiction

In light of this Order, EPA and USACE halted implementation of the **Navigable Waters Protection Rule** nationwide and began interpreting “Waters of the United States” consistent with the **pre-2015 Rule**.

Clean Water Act Jurisdiction

On Nov. 18, 2021, EPA and USACE propose a new rule revising the definition of “waters of the United States.

Clean Water Act Jurisdiction

“This proposal marks a key milestone in the regulatory process announced in June, 2021. The agencies propose to put back into place the pre-2015 definition of ‘waters of the United States,’ updated to reflect consideration of Supreme Court decisions.”

<https://www.epa.gov/wotus/about-waters-united-states> (accessed June 18, 2022)

Clean Water Act Jurisdiction

“This familiar approach would support a stable implementation of ‘waters of the United States’ while the agencies continue to consult with states, tribes, local governments, and a broad array of stakeholders in both the current implementation and future regulatory actions.”

<https://www.epa.gov/wotus/about-waters-united-states> (accessed June 18, 2022)

Hypothetical Example:

Developer constructs a dam across a creek to create a lake. Project has 2,000 LF of stream impacts.

Neighbors call USACE, which conducts an investigation because Developer did not obtain required Permit prior to construction.

What happens?

EPA Penalty Determinations

EPA/USACE investigation

“State of Missouri Stream Mitigation Method”

-- **“Adverse Impact Factors”**

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**U.S. Army Corps
of Engineers**



**Regulatory
Program**

State of Missouri Stream Mitigation Method

Last Revised April 2013

This document was jointly created and amended with input from the following Federal and State agencies:

**U.S. Army Corps of Engineers (Corps)
U.S. Environmental Protection Agency (USEPA)
U.S. Fish and Wildlife Service (USFWS)
USDA-Natural Resources Conservation Service (NRCS)
Missouri Department of Natural Resources (MDNR)
Missouri Department of Conservation (MDC)
Missouri Department of Transportation (MoDOT)**

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EPA Penalty Determinations

ADVERSE IMPACT FACTORS: The items discussed in this section assist the Regulatory agencies and permit applicants in determining the adverse impacts of a project and the amount of mitigation required to offset stream losses within the permit area. Adverse impacts are totaled by column based on the following factors: stream type, priority water, existing condition, impact duration, impact activity, and linear impact calculation. . . .

“State of Missouri Stream Mitigation Method,” p. 5.

EPA Penalty Determinations

Factor 1. **Stream Types**

- Ephemeral
- Intermittent
- Perennial

“State of Missouri Stream Mitigation Method,” p. 6.

EPA Penalty Determinations

Factor 2. **Priority Waters**

-- **Primary:** These streams provide important contributions to biodiversity on an ecosystem scale or high levels of function contributing to landscape or human values. Impacts to these streams should be rigorously avoided or minimized. . . .

- Waters listed in 10 CSR 20-7.031, Tables
- Designated Wilderness and Wild Areas
- Waters with Endangered or Threatened Species

“State of Missouri Stream Mitigation Method,” p. 6.

EPA Penalty Determinations

Factor 2. **Priority Waters**

Secondary: Secondary priority waters include:

- Abutting an approved mitigation site (bank, in-lieu fee, or permittee-responsible)
- Rivers and streams of the same or lower order within 1.0 mile upstream or downstream of primary priority waters.
- Rivers, streams, or identified segments that are not ranked as a primary priority waters but are designated by the Corps District (see Appendix C).

Tertiary: These areas include all other freshwater systems not ranked as primary or secondary priority waters.

“State of Missouri Stream Mitigation Method,” p. 7.

EPA Penalty Determinations

Factor 3. **Existing Condition:** Describes the condition of each stream segment where an impact activity is proposed and its ability to support normal hydraulic and geomorphic functions. Streams are assumed to be moderately functional

“State of Missouri Stream Mitigation Method,” p. 7.

EPA Penalty Determinations

Factor 3. **Existing Condition**

-- ***Fully Functional*** describes those stream segments that have been shown to or are likely to support healthy aquatic communities. These stream segments also have natural hydrologic variability and responses to precipitation events.

“State of Missouri Stream Mitigation Method,” p. 7.

EPA Penalty Determinations

Factor 3. **Existing Condition**

-- ***Moderately Functional*** streams have been altered; however, system recovery has a moderate probability of occurring naturally. These streams support many, but not all, of the hydraulic and geomorphic functions characteristic of fully functioning streams of similar order in the watershed. . . .

“State of Missouri Stream Mitigation Method,” p. 8.

EPA Penalty Determinations

Factor 3. **Existing Condition**

-- ***Functionally Impaired*** describes those streams that have been degraded in one or more parameters and lacks resilience characterized by loss of one or more integrity functions. Recovery is unlikely to occur naturally unless a substantial rehabilitation project is undertaken.

“State of Missouri Stream Mitigation Method,” p. 8.

EPA Penalty Determinations

Factor 4. **Impact Duration:** is the amount of time the impact activity is expected to last.

-- **Temporary** means the impact activity will remain for a period of less than 6 months with system integrity recovering after cessation of the permitted activity or restoration to pre-construction contours and elevations.

“State of Missouri Stream Mitigation Method,” p. 8.

EPA Penalty Determinations

Factor 4. **Impact Duration:** is the amount of time the impact activity is expected to last.

-- **Permanent** means the impact activity will result in the permanent loss of some or all aquatic resource function and/or services. Examples: armoring, culverting, detention facilities, morphological changes, impounding, and piping.

“State of Missouri Stream Mitigation Method,” p. 8.

EPA Penalty Determinations

Factor 5. **Impact Activity:**

- Armor
- Culvert
- Clearing
- Detention Facility
- Fill
- Impoundment
- Morphologic Change
- Utility Crossing

“State of Missouri Stream Mitigation Method,” pp. 9 - 10.

EPA Penalty Determinations

Factor 6. **Linear Impact Calculation:** a mathematical calculation that addresses the scope of linear impact for each individual column recorded on the Adverse Impact Factor Worksheet.

“State of Missouri Stream Mitigation Method,” p. 10.

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ADVERSE IMPACT FACTORS WORKSHEET									
Stream Type Impacted	Ephemeral 0.3			Intermittent 0.4			Perennial 0.8		
Priority Waters	Tertiary 0.1			Secondary 0.4			Primary 0.8		
Existing Condition	Functionally Impaired 0.1			Moderately Functional 0.8			Fully Functional 1.6		
Impact Duration	Temporary 0.05			Permanent 0.3					
Impact Activity	Clearing 0.05	Utility Crossing/Bridge Footing 0.15	Below Grade Culvert 0.3	Armor 0.5	Detention facility 0.75	Morpho-logic Change 1.5	Impound-ment 2.0	Pipe 2.2	Fill 2.5
Linear Impact Calculation	0.0002 multiplied by linear feet of stream impact recorded in each column below								
Factor	Impact 1	Impact 2	Impact 3	Impact 4	Impact 5				
Stream Type Impacted									
Priority Waters									
Existing Condition									
Impact Duration									
Impact Activity									
Linear Impact Calculation									
Sum of Factors (M)									
Linear Feet of Stream Impact (LF)									
Credits (C) = M X LF									
*Compensation Ratio X (C)									

Total Credits Required from all Columns= _____

USACE completes Adverse Impact Factors Worksheet:

<u>Factor</u>	<u>Scenario 1</u>	<u>Scenario 2</u>
Stream type	Perennial (0.8)	Ephemeral (0.3)
Priority Water	Primary (0.8)	Tertiary (0.1)
Existing Condition	Fully Func (1.6)	Func Impair (0.1)
Impact Duration	Permanent (0.3)	Permanent (0.3)
Impact Activity	Impoundment (2.0)	Impoundment (2.0)
Linear Imp Calc	<u>LF x .0002 = 0.4</u>	<u>LF x .0002 = 0.4</u>
Sum of Factors	5.9	3.2

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Sum of Factors	5.9	3.2
Linear Feet	<u>x 2,000</u>	<u>x 2,000</u>
Compensation Credits Required	11,800	6,400
Current Mitigation Bank Cost per Credit	x <u>\$38.00</u>	x <u>\$38.00</u>
Mitigation Costs	\$448,400.00	\$243,200.00

EPA Administrative Enforcement

EPA generally relies on Adverse Impact Factors calculations in § 301/404 administrative enforcement actions.

EPA will require Respondent to conduct and/or pay all Mitigation Costs as if Permit had been properly obtained, plus any additional Penalty.

EPA Administrative Enforcement

The classification of Adverse Impact Factors during EPA/USACE investigation is critical in determining the regulatory and potential enforcement costs of any project.

EPA Administrative Enforcement

If an inaccurate or incorrect Adverse Impact Factor classification occurs, regulatory and enforcement costs for a project can increase significantly.

EPA Administrative Enforcement

There is financial incentive to resolve §301/404 case at the EPA administrative enforcement level.

EPA Administrative Enforcement

Clean Water Act Civil Penalties

EPA Civil Monetary Penalty Inflation Adjustment
40 CFR Part 19, 87 Fed. Reg. 1676 (Jan. 12, 2022)

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TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code citation	Environmental statute	Statutory civil monetary penalties for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after 1/12/2022	Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after December 23, 2020, but before 1/12/2022	Statutory civil monetary penalties, as enacted
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	59,973	56,460	25,000
33 U.S.C. 1319(g)(2)(A)	CWA	23,989/59,973	22,584/56,460	10,000/25,000
33 U.S.C. 1319(g)(2)(B)	CWA	23,989/299,857	22,584/282,293	10,000/125,000

Daily Civil Penalty - §1319(d) \$59,973.00

Daily Administrative Penalty - §1319(g) \$23,989.00

Recent WOTUS Enforcement Cases in Region VII

Jayhawk Club, Lawrence, Kansas



Jayhawk Club, Lawrence, Kansas (2021)

EPA alleged that the developers discharged pollutants into approximately 7,000 feet of streams by placing fill material into the streams and graded over 256 acres of land as part of a renovation of a former country club.

EPA also alleged that the companies did the work without obtaining required Clean Water Act permits.

Jayhawk Club, Lawrence, Kansas (2021)

In 9/2021 CA/FO, Respondents agreed to:

- restore streams at the site
- conserve restored portions of the site
- purchase “mitigation bank” credits at a local stream and wetland preserve at a cost of approximately \$300,000
- pay civil penalties totaling over \$84,000.

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United States v. Russell Kirk, Breaking Gate, LLC, and Northshore, LLC, Case No. 4:18-cv-00371 (S. D. Iowa).

DOJ alleged Defendants “discharged fill material from a point source into approximately 1,304 linear feet and seven (7) acres of waters of the United States on the Site without a permit or authorization under Section 404 of the CWA.” *Complaint, ¶ 41.*

United States v. Kirk et al.

In 2/2021 settlement, Defendants agreed to:

- pay \$15,000 civil penalty
- purchase nearly \$230,000 in “mitigation bank” credits at a local wetland preserve
- remove unauthorized materials in wetlands and along the impacted riverbank
- protect approximately 17 acres of wetlands

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

Respondent installed a tile drainage system in an unnamed tributary of the English and Iowa Rivers by filling 1,871 linear feet of the stream and 1.3 acres of adjacent wetlands.

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

After 3 day hearing, ALJ found:

“Here, Respondent caused actual harm to the environment when it discharged fill material into the unnamed tributary and 1.3 acres of associated wetland.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

“Because the tile system empties into Deep Creek, the velocity of the water is much higher than it would have been were the channel still present... This leads to increased water flow and erosion downstream.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

“Filling and tiling the unnamed tributary also destroyed the habitat for aquatic fauna that would have otherwise used it and eliminated the ability of microorganisms within the tributary to break down nutrients and make nutrients available to other fauna.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

“Beyond harming the environment, Respondent harmed the regulatory scheme by discharging fill material without a permit.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

ALJ found:

“Here, Respondent obtained an economic benefit by violating the law. Respondent avoided the costs of seeking and abiding by a permit from the Corps. Presumably, this would include the cost of the permit itself, the potential cost of hiring consultants or professionals to complete the permit application process, the cost of any mitigation efforts needed to obtain a permit, and the cost of complying with the permit.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

EPA requested civil penalty of \$40,500.

But, “the evidence at hearing suggests Respondent’s violation may have generated an economic benefit of up to **\$160,000**, not including generally increased land value and money saved by not completing the permitting process.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

“Given the rough estimates of Respondent’s economic benefit, it would be justifiable to assess a much larger penalty had the Agency requested one on that basis and produced further evidence in support of the specific economic benefit alleged.”

C & S Enterprise, LLC, Docket No. CWA-07-2018-0095

ALJ assessed civil penalty of \$40,500, the penalty requested by EPA.

Conclusion

While the definition of WOTUS has been confusing at best, the waters have now become even muddier.

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(Slip Opinion)

OCTOBER TERM, 2021

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. *v.* ENVIRONMENTAL
PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 20–1530. Argued February 28, 2022—Decided June 30, 2022*

Establishes “Major Questions” Doctrine

“The decision ... firmly established the ‘major questions doctrine,’ setting the precedent that agencies have little leeway in setting new regulations with major economic impact or political salience that rely on powers not clearly laid out in statutory text.”

Source: <https://www.govexec.com/management/2022/06/supreme-court-major-blow-epa-agencies/368821/> (accessed July 5, 2022).

“Applying the doctrine to this case, legal scholars and the court’s liberal minority said, will limit the powers of agencies across government and may have a chilling effect on whether to issue certain regulations at all. ”

Source: <https://www.govexec.com/management/2022/06/supreme-court-major-blow-epa-agencies/368821/> (accessed July 5, 2022).

“Basically, it’s the Court’s belief that Congress will be clear when it assigns major policymaking authority to regulatory agencies.”

Source: <https://www.cato.org/blog/supreme-court-makes-major-improvement-administrative-law-west-virginia-v-epa> (Accessed July 5, 2022).

“In practice, this means that ‘major’ domestic policy must emanate from the votes of elected lawmakers rather than from expansive legal interpretations devised by unelected bureaucrats.”

Source: <https://www.cato.org/blog/supreme-court-makes-major-improvement-administrative-law-west-virginia-v-epa> (Accessed July 5, 2022).

QUESTIONS