



► What is a Water of the U.S.?

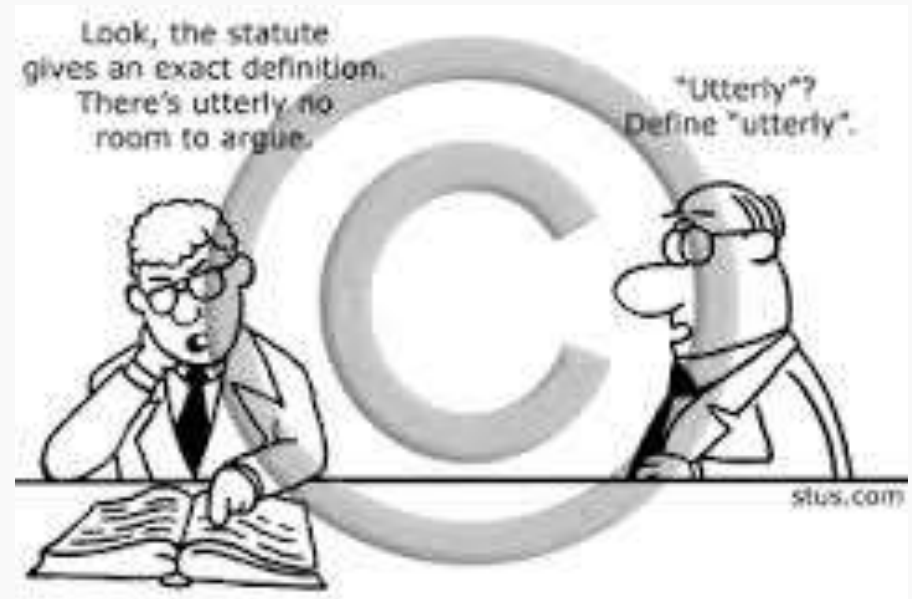
SPEAKER
Kori Andrews

DATE
July 27, 2014



WOTUS – Why should you care?

- ▶ • The Clean Water Act applies to discharges to “navigable waters” or “Waters of the U.S.”.
- Clarification of the term “WOTUS” has been needed because of prior guidance and competing court cases.
- The proposed rule applies to ALL parts of the Clean Water Act – not just 404 permits.



Recent Timeline



- ▶ 2001 – SWANCC
- 2003 – Guidance issued
- 2006 – Rapanos v. U.S. (a 4-1-4 decision)
- 2008 – Guidance issued
- 2011 – Guidance issued
- 2014 – Proposed rule



What does the proposed rule say?

- ▶ The proposed rule *expands the definition of WOTUS*
 - Revises the definition of **tributary** to include all natural or manmade features (pipes, ditches, culverts), including wetlands that have evidence of flow (surface or subsurface) to another water.
 - Expands the scope of **adjacent**, to include riparian areas and floodplains
 - Includes a “catch-all” provision for undefined **other waters** and makes them subject to a case-by-case analysis at the agencies’ discretion.

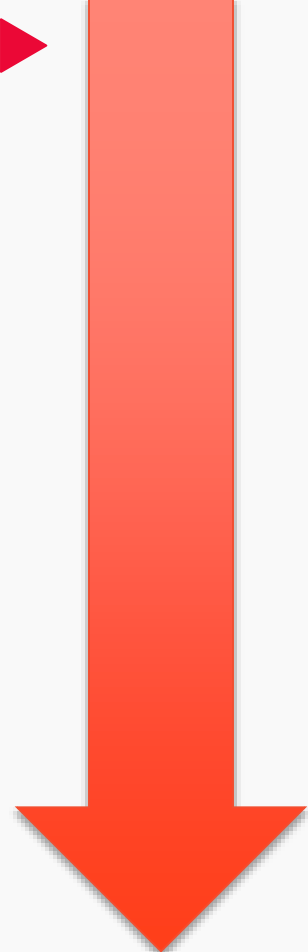
What does the proposed rule say?

- ▶ The proposed rule **changes the process to determine a WOTUS:**
 - **Jurisdiction by rule:** the agencies automatically take jurisdiction over the water
 - **Case by Case Jurisdiction:** the agencies can determine jurisdiction over isolated wetlands, non-connected ephemeral streams, ditches, etc., that are not a tributary or adjacent water. BUT the agencies will be able to issue blanket jurisdictional determinations on similarly situated waters in the same watershed.

- ▶ The agencies automatically take jurisdiction over:
 - (1) All waters currently used, used in the past, or susceptible to use in interstate or foreign commerce;
 - (2) All interstate waters, including wetlands;
 - (3) Territorial seas;
 - (4) Impoundments;
 - (5) All tributaries of (1) through (4);
 - (6) All waters, including wetlands adjacent to (1) through (5).

WOTUS – When will it be effective?

Mar. 25th

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- A pre-publication copy of the rule was released.
 - Published in the *Federal Register* on April 21.
 - **Public comment has been extended to Oct. 20.**
 - The agencies will review public comments and (1) terminate the rulemaking; Or, (2) continue the rulemaking but change aspects of the rule to reflect new issues; Or (3) proceed with a final rule.
 - The agencies' response will be published in the *Federal Register*.
 - Final rules are generally effective no less than 30 days after date of publication.

Final Rule

Why should you care?

- ▶ • More waters will be protected.
- More permits will be required.
- Increased permitting times will increase project lead time.
- Project costs will increase.
- Additional analysis for projects will be necessary.
- Higher mitigation costs will be incurred.
- Stormwater management practices may need modification.
- There will be more state requirements to meet TMDLs, WQS, etc.

What should you do?



- ▶ Make comments
- ▶ Ask the state to submit comments
- ▶ Learn what will be expected from you and your program.





▶ **THANK YOU**
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A decorative banner at the bottom of the slide. It features a red background with a white silhouette of the state of Kentucky. The text "STATE OF" is in white, and "Kentucky" is written in a red, cursive script. To the right of the state outline, there are silhouettes of bridge structures against a light background.