Topic of Interest	Clean Water Rule Update
January 25, 2016	**WSFR Branch of Policy – Lisa Van Alstyne**

The definition of "waters of the United States" under the Clean Water Act (specifically Section 404) affects projects funded by WSFR grants. A new Final Rule published in June 2015 expands/clarifies the definition. This Update provides WSFR staff with some current information as to the status of the Clean Water Rule and invites conversations as to how the new definition will affect WSFR grants.

On June 29, 2015 the Department of Defense (specifically the Department of the Army, Corps of Engineers (USACE)) and the Environmental Protection Agency (EPA) jointly published in the Federal Register the Clean Water Rule (Final rule, 80 FR 37054). The rule redefines "waters of the United States" and is intended to clarify the scope of the Clean Water Act (section 404).

Some States reacted to the Rule, stating that not enough scientific evidence was presented to support the Rule and suggesting the Rule is "arbitrary and capricious" under the Administrative Procedures Act (APA, 5 U.S.C. § 706(2)). Other States have fully supported the Rule. The decision of the U.S. Court details which States oppose and which support. On October 9, 2015 the U.S. Court of Appeals (6th Circuit – KY, MI, OH, TN) stayed the Clean Water Rule, stating "respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered. Respondents maintain that the notice requirements were met by their having invited recommendations of "geographical limits" and "distance limitations."" There is a question as to whether the 6th Circuit Court has subject-matter jurisdiction to make a decision. The Court recognizes the position of the EPA/USACE and issued the stay to reduce potential harm to the States, pending judicial review. There was one dissent, stating that "if we lack jurisdiction to review the Rule, then we lack jurisdiction to grant a stay. "

On November 16, 2015 the EPA and USACE issued a joint memorandum stating compliance with the stay, but are still working toward adoption of the Rule.

On January 4, 2016 Congress approved and presented to the President a Joint Resolution to disapprove the Clean Water Rule. On January 19, 2016, the President vetoed the resolution. The Senate voted to override the veto, but was unable to get enough votes to do so.

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The following description is provided by GovTrack:

GovTrack's Bill Summary (January 22, 2016)

The President vetoed S.J.Res. 22, a joint resolution that would have voided a rule extending EPA regulatory authority over certain bodies of water. The Senate voted to override the veto, but only managed 52 of the 60 necessary votes to avoid a filibuster.

On June 29, 2015 the EPA and Department of Defense published a rule called the Clean Water Rule. The rule elaborated the definition of the term "waters of the United States" to include certain bodies of water under the regulatory authority of the EPA through the 1972 Clean Water Act. It was put into effect two months later on August 28, but states petitioned in court. On October 9 the United States Court of Appeals for the Sixth Circuit suspended the rule until further notice.

The EPA wrote that the Clean Water Rule was introduced to "improve implementation of the national Clean Water Act section 404 program." The section grants the EPA and US Army Corps with authority to regulate waste introduced to "waters of the United States." In their litigation statement they explained:

"The Clean Water Rule was developed by the agencies to respond to an urgent need to improve and simplify the process for identifying waters that are and are not protected under the Clean Water Act, and is based on the latest science and the law."

There was backlash to the increased regulation. 18 states petitioned federal court that the rule would "dramatically alter the existing balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters." Sen. Joni Ernst (R-IO), who sponsored S.J.Res. 22, denounced the rule as "overregulation" in several press releases.

The rule itself is a six page list of types of waters sorted by their inclusion in "waters of the United States." The list excludes man-made features such as artificial irrigation and small features that will not drain into larger natural waters such as puddles.

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EPA has a website dedicated to the Clean Water Rule that contains further details. You may visit: http://www.epa.gov/cleanwaterrule

The site contains Fact Sheets, one of which relates specifically to recreation and is pertinent to WSFR programs.

Attached to this email are:

- Federal Register Clean Water Final Rule
- 40 CFR 230.3
- Decision of U.S. District Court on October 9, 2015
- Joint Memorandum, EPA/USACE
- S.J. Res. 22
- Presidential Veto of S.J. Res. 22
- Fact Sheet – Summary of Clean Water Rule
- Fact Sheet on the Clean Water Rule and Recreation

Please contact the WSFR Branch of Policy (Lisa_Van_Alstyne@fws.gov) if you wish to discuss how the Clean Water Rule will affect WSFR grants.