

Water Supply Planning: Jurisdictional Determination – When is Federal Jurisdiction Triggered?

By Nathan E. Vassar

As outlined in our last article, our ongoing Water Supply Planning series will pivot from its earlier focus on technical and state-centric considerations to the broader federal overlay that can impact various water supply projects significantly. A logical starting point for any project is to ask whether federal resources are impacted at all? Put another way – will the project’s activities require some federal authorization (in addition to state regulatory requirements)? While later articles will examine impacts to federally-listed species and their habitats, a foundational question for many water supply projects is whether impacted waters (or areas nearby) fall within the federal purview. To that end, a jurisdictional determination may be necessary in order to know whether a project will require federal authorizations to proceed, such as a Clean Water Act Section 404 permit that authorizes the dredge and fill of federal waters (a “404 permit”).

Whether a project impacts jurisdictional waters—commonly referred to as “Waters of the United States”—is not as straightforward a question as some might expect. For decades, courts, Congress, and agencies have grappled with the extent and distance of “Waters of the United States.” Since two U.S. Supreme Court decisions in 2001 and 2005, the analysis has been even less certain, which drove a controversial (and heavily litigated) “clarification” rule in 2015, which is still winding its way through the courts. In short, the jurisdictional question is not an easy one, but yet it is often that a project’s costs, permits, and, of course, timelines, depends upon the answer.

For larger projects, such as reservoirs and certain dredging efforts, the impacts to jurisdictional waters are obvious, and the resulting mandates follow: either an individual 404 permit from the U.S. Army Corps of Engineers (the “Corps”), or (as applicable) a nationwide permit relevant to the types of activities undertaken.

For other projects, however, a more searching technical and legal analysis is warranted. Seeking a formal jurisdictional determination from the Corps is an effort that should be undertaken with scrutiny as to past practices of the agency, applicable case law, and the facts on the ground for a particular project. Framing the determination request appropriately can be the difference between a decision of no impact to jurisdictional waters on the one hand, and a lengthy individual permitting process at the opposite end of the spectrum. Several considerations should be evaluated. What is the proximity of the project area to nearby streams? What is the nature of such water bodies (intermittent? ephemeral? constant flow)? Is there a man-made impact to the

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waters (such as a ditch or canal), or is the project affecting natural systems? Are wetlands involved or nearby? Is there a hydrological connection between waters impacted and other, more permanent waterbodies? These are the types of questions that should be considered prior to seeking the analysis of the Corps.

At this stage, we know that the regulatory definition of “Waters of the United States” will likely remain uncertain for years into the future. Water suppliers, however, rarely have the luxury of time or resources to await a final rule. As such, before embarking upon a project that questionably impacts jurisdictional waters, it is important to give a thorough evaluation to possible impacts on federal waters, as the framing of the issue for the Corps may ultimately determine whether a project proceeds on a schedule and budget that manages the entity’s plans and expectations.

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