

## Section 401 Certification: What Has Changed?

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## Cooperative Federalism and the CWA

- Delegation of section 402 NPDES permit program
- Delegation of section 404 dredge-and-fill permit program
- State & local sewage treatment facility grants (POTWs)
- Section 401 certification process
- Cf. Coastal Zone Management Act Sec. 306 “consistency” process

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*PUD No. 1 v. Washington Department  
of Ecology, 511 U.S. 700 (1994)*

“Petitioners also assert more generally that the Clean Water Act is only concerned with water ‘quality,’ and does not allow the regulation of water ‘quantity.’ This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery.”  
– Justice Sandra Day O’Connor

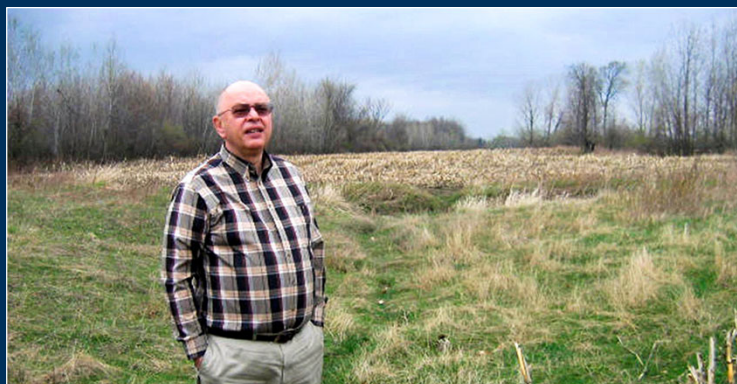
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*S.D. Warren v. Maine Board of Environmental  
Protection, 547 U.S. 370 (2006)*



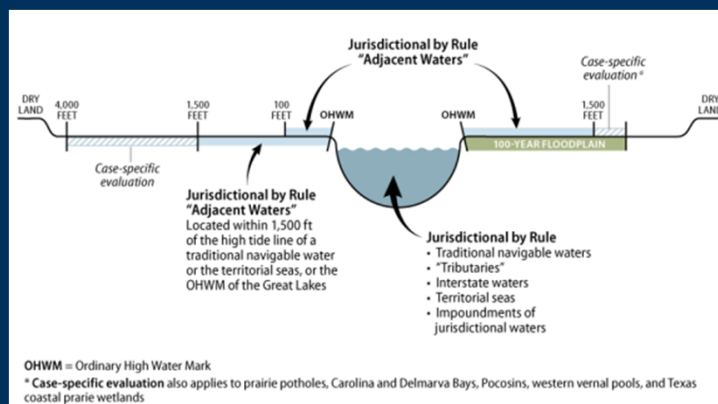
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## Rapanos v. United States, 547 U.S. 715 (2006)



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## 2015 "Waters of the United States" Rule



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**Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule**

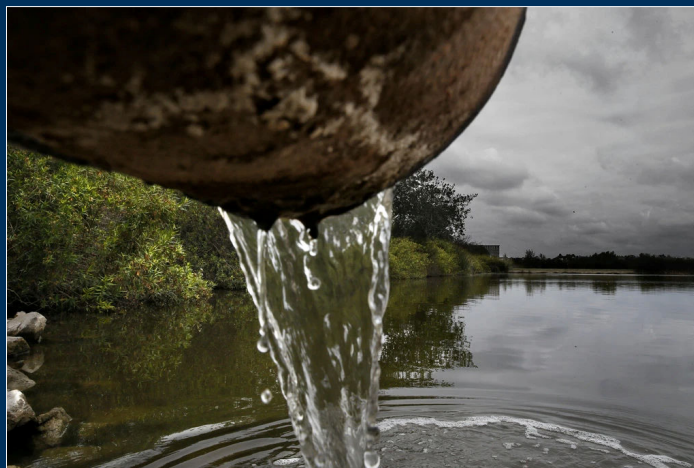
82 Fed. Reg. 12497 (Feb. 28, 2017)



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**EPA Proposed Rulemaking limiting types of waterways regulated under CWA**

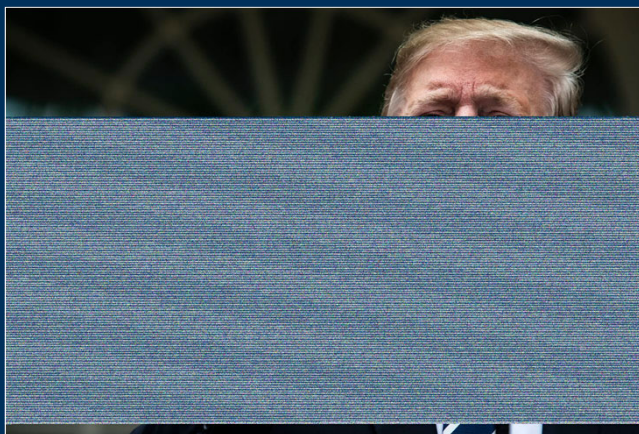
84 Fed. Reg. 4154 (Feb. 14, 2019)



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## Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth"

84 Fed. Reg. 15495 (April 10, 2019)



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## EPA's Revised Section 401 Guidance

ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER ACT SECTION 401 GUIDANCE FOR FEDERAL AGENCIES, STATES, AND AUTHORIZED TRIBES (2019)

### Stated Purposes:

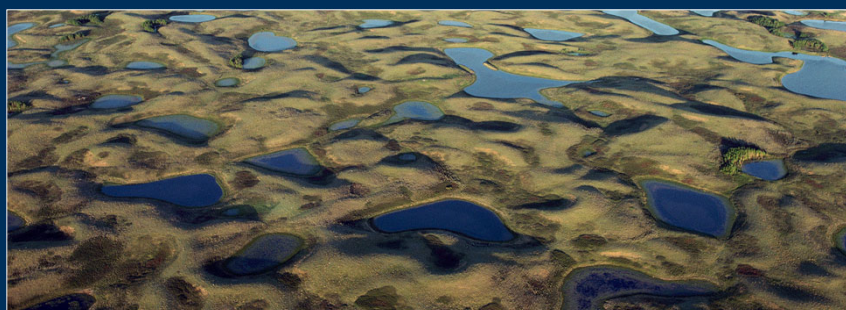
- Facilitate implementation of E.O. 13868
- Provide "clarification" and recommendations on CWA Section 401 and 40 C.F.R. Part 121
- Not legally binding, but provided in anticipation of formal EPA rulemaking

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## EPA's Revised Section 401 Guidance

### Four sections:

- (1) Statutory and regulatory timelines
- (2) Appropriate scope
- (3) Information within permitted scope
- (4) Additional guidance regarding communication and clarity



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## EPA's Revised Section 401 Guidance

- Certification process must adhere to a one-year timeline starting from the time certification request is submitted
- States and tribes may only request additional information related to water quality
- States and tribes may only deny or conditionally grant certification requests based on water quality concerns pursuant to CWA
- Agencies, states, and tribes must communicate early and clearly

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## Executive Order 13132

64 Fed. Reg. 43255 (August 4, 1999)

“National action limiting the policymaking discretion of the States shall be taken only where . . . the national activity is appropriate in light of the presence of a problem with national significance. . .

With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable.”

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## CWAG Federalism Resolution (adopted July 24, 2018)

“...Congress should require Executive Departments and federal agencies to consult with States on federal actions that have federalism implications...”

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## For Further Information:

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