

## Section 404 Permitting/Today & Tomorrow: Jimmy Rogers (FTN Associates) Arkansas Environmental Federation Webinar Presentation



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Mr. Jimmy Rogers undertook a webinar presentation for the Arkansas Environmental Federation titled: *Section 404 Permitting – Today & Tomorrow (“Presentation”)*

Mr. Rogers is an environmental scientist with FTN Associates in its Little Rock, Arkansas, office.

The *Presentation* included an overview of the Section 404 Clean Water Act referencing the following:

- Section 404 of the Clean Water Act
- Regulates impacts to Wetlands and Other Waters of the United States
- 404 Program administered by the United States Army Corps of Engineers (authority delegated by EPA)
- No Net Loss

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into waters of the United States. Waters of the United States can include wetlands. The authority is provided by Section 404 of the Clean Water Act for activities in jurisdictional waters that can include:

- Fill for development
- Water resource projects (such as dams and levees)
- Infrastructure development (such as highways and airports)
- Mining projects

A Section 404 permit is required before dredged or fill material may be discharged into a water of the United States. However, exemptions are provided for certain farming and forestry activities. To constitute a wetland it must have three specific criteria:

- Hydric soils
- Hydrophytic vegetation
- Certain hydrology

The *Presentation* elaborated on the required characteristics for wetlands noting that vegetation must have cover dominated by hydrophytic species and that the wetlands must show positive indicators of hydrology such as:

- Surface water

- Drift deposits
- Soil saturation
- High-water table
- Water stained leaves
- Drainage patterns, etc.

Stream channel types were described, which included:

- Ephemeral – surface water flowing or pooling only in direct response to precipitation
- Intermittent – surface water flowing continuously during times of typical year, more than in direct response to precipitation (e.g., elevated groundwater)
- Perennial – surface water flowing continuously during a typical year

The 404 permitting process was described, including the concepts of when a permit is needed and how to get one. The process was noted to include:

- Delineation (i.e., presence or absence of Section 404 required features)
- Types of potential permits, which include:
  - Nationwide Permits
  - Regional General Permits
  - Individual Permits

Nationwide permits were described as providing for projects with minor impacts and referenced as examples were:

- Linear Transportation Projects
- Utility Lines
- Commercial/Residential Developments
- Maintenance Activities

Mr. Rogers described individual permits as:

- For projects with “significant” impacts to 404 features
- Projects that do not fall under specific NWP categories
- High level of review
- Subject to public notice/comments
- Commonly take 6-12+ months for issuance
- Mitigation nearly always required

The process of wetland mitigation was described with topics being:

- What is Mitigation?
- In-Kind
- Mitigation Vehicles

Key regulatory developments were noted which include:

- Nationwide Permit 12 (Utility Line Activities) – Vacated

A post providing a detailed discussion of the United States District Court for the Western District of Texas decision can be found [here](#).

Further, changes to the definition of Waters of the United States were addressed. A post of the detailed discussion of the recently promulgated final rule can be found [here](#).

Mr. Rogers’ slides and Presentation included a detailed discussion of both the Nationwide Permit 12 issue along with the changes to the definition of Waters of the United States.

As to changes of the Waters of the United States, the slides in this Presentation discussed key concepts involving ephemeral channels and noted potential issues with streams:

- Classifying a channel as Ephemeral
- More evidence may be required
- Acceptable Methods not defined
- Does not have groundwater influence – Groundwater influence can be difficult to determine with a single field visit or at certain times of the year

Observations regarding the rule include:

- Rule is less stringent
- Definition of wetland does not change
- Change is in the connectivity needed to make a wetland jurisdictional
- May be able to exclude from Jurisdiction without an “Isolation Determination”
- Prior Converted cropland can undergo use change, with no 404 Permitting

The effect on Lakes/Ponds was also addressed noting they are in a separate category under waters of the United States and that currently regulated ponds that are located on Ephemeral channels will no longer be regulated. He also noted that regulation of off-channel ponds (possibly oxbows) are addressed.

Other non-regulated waters were identified as:

- Groundwater
- Certain ditches
- Prior converted cropland
- Artificially irrigated areas (that would otherwise be uplands)
- Water-filled depressions created in uplands associated with mining or construction
- Wastewater recycling structures
- Wastewater treatment plants

Mr. Rogers stated that individual states still have the authority to regulate waters (which includes Arkansas).

As to the summary, Mr. Rogers referenced Arkansas and noted:

- Significantly fewer channels in Arkansas would be regulated, i.e., our many Ephemeral Streams
- Many wetlands would no longer be regulated, i.e., those lacking a direct connection (by abutment or direct flow) to a “tributary” (as newly defined)
- Some ponds would no longer be regulated, i.e., those in uplands or built on ephemeral channels.

Finally, in the category of “What’s Next?” he stated:

- STAY TUNED
- WOTUS Step 2 Rule – NOT YET EFFECTIVE
- Scheduled to be Effective June 22, 2020
- Challenges
- Will this Rule really be “Consistent and Predictable” ?

A copy of the slides can be downloaded [here](#).