



October 23, 2019

## Waters of the United States (WOTUS): Repealing and Revising the 2015 Clean Water Rule

### Background: What Is WOTUS?

Congress passed the Clean Water Act (CWA) to restore and protect the quality of the nation's surface waters (33 U.S.C. §1251 *et seq.*). The statute protects “navigable waters,” which it defines as “the waters of the United States, including the territorial seas.” The CWA does not further define the term *waters of the United States* (WOTUS). Thus, the Army Corps of Engineers and U.S.

Environmental Protection Agency (EPA) have defined WOTUS in their regulations. However, Congress's intent as to the meaning of WOTUS has been debated and litigated for more than four decades.

### WOTUS Regulations and *Rapanos*

In the 1980s, EPA and the Corps defined WOTUS to include, among other things, all waters and wetlands the use, degradation, or destruction of which could affect interstate or foreign commerce. While the Supreme Court never struck down this regulation, it held twice that the agencies exceeded their CWA authority in interpreting and applying the regulation.

The Supreme Court has disagreed on WOTUS's scope. In a 2006 decision, *Rapanos v. United States*, a four-Justice plurality (written by Justice Scalia) argued that WOTUS encompasses “relatively permanent, standing or continuously flowing bodies of water,” such as streams, rivers, or lakes and wetlands that have a “continuous surface connection” to waters subject to the CWA. Justice Kennedy, by contrast, wrote a concurring opinion arguing that WOTUS includes wetlands that have a “significant nexus” to traditionally navigable waters. Justice Kennedy elaborated that a significant nexus exists when the wetland, either alone or in connection with similarly situated properties, significantly impacts the chemical, physical, and biological integrity of a traditionally navigable water.

After *Rapanos*, EPA and the Corps issued interpretive guidance in 2008 in which they organized the CWA jurisdictional analysis into three categories:

1. **Waters and wetlands that are categorically WOTUS**, including traditionally navigable waters, relatively permanent tributaries, wetlands adjacent to traditionally navigable waters, and wetlands that abut tributaries to such waters.
2. **Waters and wetlands that may be deemed WOTUS on a case-by-case basis upon a finding of a “significant nexus”** with traditionally navigable waters. This category includes wetlands adjacent to certain tributaries as well as tributaries that are not *relatively permanent*—defined in the guidance as intermittent streams that lack a continuous flow at least seasonally and ephemeral streams that flow only in response to precipitation.
3. **Waters and wetlands that are categorically excluded from WOTUS**, including swales and certain ditches.

The 2008 guidance elaborated on the criteria for wetlands to be considered *adjacent* to traditionally navigable waters and therefore fall into category one. Under the 2008 guidance, adjacency is established by (1) an unbroken surface or shallow subsurface connection to regulated waters; (2) physical separation from regulated waters by man-made dikes or barriers, natural river berms, beach dunes, and similar features; or (3) proximity to regulated waters that supports an inference of ecological interconnection.

EPA and the Corps acknowledged that their written guidance did not provide the public or agency staff with the information needed to ensure timely, predictable, and consistent jurisdictional determinations. The agencies further acknowledged that case-by-case significant nexus determinations were resource and time-intensive. Diverse stakeholders—including Members of Congress, states, the regulated community, and non-governmental organizations—requested a formal rulemaking to revise the existing rules.

### The 2015 Clean Water Rule

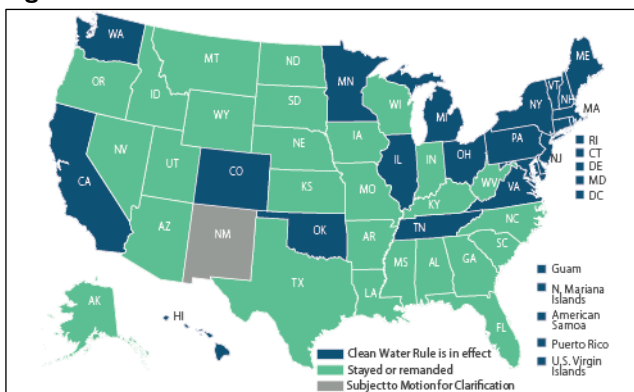
In 2015, EPA and the Corps issued the Clean Water Rule (2015 Rule), which redefined WOTUS in the agencies' regulations for the first time since the 1980s. (The 2008 changes following *Rapanos* came in agency guidance.) In publishing the 2015 Rule, the agencies sought to reduce the universe of waters subject to case-by-case significant nexus analysis. The 2015 Rule retained aspects of the agencies' 2008 guidance, including a three-tiered jurisdictional analysis, but it also incorporated new features. Among other things, EPA and the Corps expanded waters that are categorically WOTUS by broadening the definition of *tributaries* to include intermittent and ephemeral waters that contribute flow to certain other regulated waters and show physical indicators of a bed, bank, and ordinary high water mark. The agencies adopted numerical distance-based criteria to determine when waters and wetlands are part of WOTUS because they are adjacent to certain regulated waters. For example, the 2015 Rule provides that waters and wetlands within 100 feet of the ordinary high water mark of certain other regulated waters are considered WOTUS. While the Corps and EPA contended that their primary intent of the 2015 Rule was to clarify (rather than enlarge) regulatory jurisdiction, some stakeholders and observers viewed it as an expansion of CWA jurisdiction.

## Legal Challenges to the 2015 Rule

In 2015, a group of 31 states and other plaintiffs challenged the 2015 Rule in federal courts across the country, asserting, among other things, that the rule was unconstitutional, that it exceeded the CWA's statutory grant of authority, and that the agencies had violated the Administrative Procedure Act (APA) in promulgating it. Between 2015 and 2019, several federal district courts entered preliminary injunctions preventing the 2015 Rule from going into effect in parts of the country. In 2019, two federal district courts held that the agencies violated the APA, and one of those courts held that the rule exceeded the agencies' CWA authority.

Other courts ruled against 2015 Rule challenges. In 2019, two different federal district courts denied motions for preliminary injunctions, allowing the 2015 Rule to go into effect in some parts of the country. As a result of the litigation, the 2015 Rule is enjoined in 27 states (shown in teal), in effect in 22 states (blue), and subject to a motion for clarification in one state (New Mexico), as **Figure 1** shows.

**Figure 1. Status of the 2015 Clean Water Rule**



**Sources:** *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Order, North Dakota v. EPA*, No. 3:14-cv-59 (D.N.D. Sep. 9, 2018); *Motion for Clarification, North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. May 24, 2019); *Georgia v. Wheeler*, No. 2:15-cv-079 (S.D. Ga. Aug. 21, 2019); *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. May 28, 2019).

## Executive Order 13778

Describing the 2015 Rule as an example of federal overreach, President Trump issued Executive Order 13778 on February 28, 2017, directing the agencies to review and rescind or revise the rule and consider interpreting the term *navigable waters* in a manner consistent with Justice Scalia's opinion in *Rapanos* (which described a "continuous surface connection" test). The agencies are complying with the executive order by (1) repealing the 2015 Rule and (2) redefining WOTUS in a separate rulemaking. The proposed rules garnered significant public comment, with each receiving over 600,000 comments.

## Step One Rule: Repealing the 2015 Rule

On October 22, 2019, the agencies published a final Step One Rule to rescind the 2015 Rule. The effective date of the rule is 60 days from its publication in the *Federal Register*. Once the final Step One Rule is effective, the agencies will implement the pre-2015 regulations consistent with prior agency guidance. (In states where courts have enjoined the

2015 Rule, the agencies are already applying the pre-2015 regulatory regime.)

The agencies gave several reasons for rescinding the 2015 Rule: (1) The rule misapplied prior Supreme Court precedent; (2) the agencies failed to consider adequately and to weigh appropriately the congressional policy cited in CWA Section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use ... of land and water resources;" (3) the rule improperly pressed the "outer limits" of Congress's constitutional power without a "clear indication" of congressional intent to do so; and (4) the agencies did not comply with the APA's notice-and-comment requirements in promulgating the rule.

Commentators debate the impact of repealing the 2015 Rule. EPA and the Corps assert that, while the pre-2015 regulations and guidance pose certain implementation challenges, repealing the 2015 Rule will provide greater regulatory certainty. However, critics of the repeal—including environmental groups and several states—assert that repealing the 2015 rule removes important environmental protections and plan to file legal challenges. Some observers believe these challenges could lead to renewed uncertainty and a patchwork of different regulations in different states.

## Step Two Proposed Rule: Revising the Definition of WOTUS

On February 14, 2019, the agencies published a proposed Step Two Rule, which would substantively redefine WOTUS. The agencies have not finalized the Step Two Proposed Rule. EPA and the Corps stated that the Step Two Proposed Rule is intended to implement the CWA's objectives of protecting and restoring the nation's waters while respecting state and tribal authority.

In the Step Two Proposed Rule, the agencies departed from earlier WOTUS approaches. Among other changes, the Step Two Proposed Rule would eliminate the category two, case-by-case "significant nexus" standard, define WOTUS to include six categories of waterbodies, and modify the *tributary* and *adjacent wetlands* definitions. Overall, fewer waters and wetlands would be subject to the CWA under the Step Two Proposed Rule. For more information on the Step Two Proposed Rule, see CRS Report R44585, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act*, by Stephen P. Mulligan.

## Legislation in the 116<sup>th</sup> Congress

Debate over the CWA has largely stemmed from confusion over the meaning Congress intended WOTUS to have. Some Members have introduced legislation (H.R. 667, H.R. 2287, S. 376, and S. 2356) to repeal or nullify the 2015 Rule and amend the CWA to change the definition of *navigable waters*. The language, as proposed in these bills, would narrow the scope of waters protected by the CWA.

**Laura Gatz**, Analyst in Environmental Policy  
**Stephen P. Mulligan**, Legislative Attorney

## Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.