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EPA Repeals WOTUS Rule

On Tuesday, October 22, 2019, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers published a final rule repealing the Obama Administration's 2015 "WOTUS" rule, which set new and more expansive standards for determining which waters are subject to the federal Clean Water Act. See 84 Fed. Reg. 56626 (Oct. 22, 2019). This is the latest step in the current administration's effort to repeal the 2015 WOTUS rule and to replace it with a less stringent jurisdictional standard.

Once effective, the repeal rule will restore the regulatory definitions and guidance that were used to make jurisdictional determinations prior to the 2015 WOTUS rule. This will eliminate the patchwork regulatory system that resulted from widespread litigation over the 2015 WOTUS rule and court decisions enjoining the rule in certain states but not others. While this is an important step in reestablishing a national regulatory standard, it will not end the uncertainty that has plagued the regulated community. Indeed, the previous regulations and guidance—which the rule will restore—have themselves led to countless lawsuits and controversy over the scope of federal regulation. And, with both the repeal rule and the promised replacement rule certain to be challenged in court, it will be years before the controversy over the Clean Water Act's reach is settled.

The 2015 WOTUS rule broadly defined the bodies of water regulated under federal law. See 80 Fed. Reg. 37054 (June 29, 2015). It was intended to provide greater clarity in identifying the geographic scope of the Clean Water Act, but also expanded federal authority over bodies of water that previously were excluded from regulation. The 2015 WOTUS rule has been heavily litigated and enjoined in 28 states, resulting in a patchwork regulatory scheme.

In February 2017, President Trump issued an Executive Order directing the agencies to review and rescind or revise the 2015 WOTUS rule. See Executive Order 13778. This was to be done in a two-step rulemaking process to first repeal, and then replace, the Obama-era rule. Consistent with this directive, the rule published Tuesday formally repeals the 2015 WOTUS rule.



The agencies identified four reasons for this action. First, they concluded that the 2015 rule misinterpreted and misapplied the “significant nexus” standard developed by Justice Kennedy’s concurring, and controlling, opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), despite identifying that standard as its touchstone. The agencies concluded this error expanded federal jurisdiction beyond what Congress intended.

Second, the agencies concluded that the 2015 rule encroached State authority, violating the Clean Water Act’s express policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the develop and use ... of land and water resources.” 33 U.S.C. 1251(b).

Third, based on the first two flaws, the agencies concluded that the 2015 rule raised serious constitutional questions in the absence of an express Congressional directive to push the envelope of the federal government’s regulatory power.

Finally, they also noted that 2015 rule had been remanded by the Southern District of Texas for procedural deficiencies under the Administrative Procedure Act.

The repeal rule becomes effective on December 23, 2019. At that point, jurisdictional determinations will be made on a case-by-case basis using guidance developed following the *Rapanos* decision, as they were prior to the 2015 WOTUS rule. While this may reduce overall the number of waters subject to the Clean Water Act, it is unlikely to resolve the controversy over the reach of federal regulation, both because the prior regulations and guidance were themselves the source of much confusion and uncertainty, and because continued litigation of these issues—including challenges to the repeal rule itself—is virtually certain.

In the longer term, the repeal provides a path to promulgating a new and less stringent jurisdictional rule. The administration published a draft of the rule in February 2019, and the public comment period closed in April 2019. 84 Fed. Reg. 4154 (Feb. 14, 2019). Work on this rule continues and the timeline for its publication is not clear. Regardless, litigation over any replacement rule is also expected, meaning that it will likely be years before regulated entities are provided the certain and stable regulatory framework they need.

Clients interested in learning more, in evaluating and commenting on the proposed redefinition, or in determining how existing compliance should be revised after adoption of a final rule, are invited to contact any of the attorneys on the first page of this alert, who have extensive experience with the Clean Water Act from a litigation, project planning, and permitting perspective, and who also assist clients in the legislative and rulemaking process.

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