Legal Sidebar

Wading Into the "Waters of the United States"

December 28, 2018

The Trump Administration recently unveiled a proposed rule that would redefine the jurisdictional reach of the Clean Water Act. The principal federal law restricting pollution of the nation's surface waters, the Clean Water Act prohibits discharging certain pollutants into "the waters of the United States, including the territorial seas" without a permit. But what constitutes "waters of the United States"—or WOTUS—has been the subject of political debate and litigation for more than four decades. The Trump Administration's proposed regulations are intended to provide clarity on what waters and wetlands the Clean Water Act governs, but observers expect legal challenges once the rule is finalized. While the regulations are in proposed form, a string of court decisions related to previous WOTUS interpretations have created a fragmented legal landscape in which "waters of the United States" means different things in different parts of the nation.

A Recent History of WOTUS

For more than forty years, all three branches of government have struggled with how to interpret the meaning of "waters of the United States" in the Clean Water Act (as detailed in this CRS Report). In the Supreme Court's most recent case on the issue from 2006, *Rapanos v. United States*, the High Court issued a fractured 4-1-4 decision with no majority opinion providing a rationale on how to determine whether a particular waterbody is a water of the United States. Writing for a four-justice plurality, Justice Scalia advocated a bright-line rule whereby the phrase would cover only "relatively permanent, standing or continuously flowing bodies of water," such as streams, rivers, or lakes; and wetlands that have a "continuous surface connection" to other waters subject to the Clean Water Act. Justice Kennedy, by contrast, wrote in a concurring opinion that WOTUS may include waterbodies that possess a "significant nexus" to traditionally navigable waters.

Since *Rapanos*, courts and commentators have not always agreed on how to apply the Court's fractured opinion in practice. Hoping to provide a "simpler, clearer, and more consistent approaches for identifying the geographic scope of the Clean Water Act," the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps)—the agencies responsible for administering the Clean Water Act—promulgated new regulations in 2015, titled the "Clean Water Rule," which redefines WOTUS and incorporates Justice Kennedy's "significant nexus" test in his *Rapanos* concurrence. The Obama Administration intended the Clean Water Rule to take effect in August 2015, but numerous plaintiffs, including 31 states, filed suit challenging its legality. The plaintiffs argued, among other things, that the new rule exceeded the agencies' statutory and constitutional authority and did not comply with the Administrative Procedure Act's rulemaking requirements. As this litigation wove its way through the

Congressional Research Service

https://crsreports.congress.gov

LSB10236

courts, President Trump—a vocal critic of the Clean Water Rule—took office and announced a change in executive branch policy toward WOTUS.

The Trump Administration Charts a New Course

In February 2017, President Trump issued an executive order (examined here) directing EPA and the Corps to review and revise or rescind the Clean Water Rule. Whereas the Clean Water Rule invoked Justice Kennedy's "significant nexus" test, the executive order directs the agencies to consider interpreting the meaning of WOTUS in a manner consistent with Justice Scalia's *Rapanos* plurality opinion.

EPA and the Corps plan to carry out the executive order through a two-step process to (1) repeal the Clean Water Rule and (2) engage in a separate rulemaking process to develop new regulations that will define the jurisdictional reach of the Clean Water Act. In July 2017, the agencies issued proposed regulations (Step One Proposal) that would carry out the first step of repealing the Clean Water Rule. Their most recent proposed rule (Step Two Proposal), announced on December 11, 2018, would complete step two by substantively redefining the meaning of WOTUS. Both rules are still in proposed form, and have not been finalized.

How Does the Trump Administration's Proposal Differ from the Clean Water Rule?

The definition of WOTUS in the Clean Water Rule differs significantly from the Step Two Proposal. The Clean Water Rule deconstructs the jurisdictional analysis into three categories: (1) waters that are categorically WOTUS; (2) waters subject to a case-specific analysis to determine if they satisfy the "significant nexus" test; and (3) waters that are categorically excluded from WOTUS. The Trump Administration's Step Two Proposal retains the first and third categories. For the second category, the proposal eliminates the "significant nexus" analysis for case-specific determinations, and seeks to replace it with revised definitions of certain terms such as "tributary" and "adjacent wetlands."

Other key changes in the Step Two Proposal include:

- Removing Clean Water Act coverage of "ephemeral waters" that flow or pool only in response to precipitation and certain ditches that contain ephemeral flows or are "upland" from other jurisdictional waters.
- Requiring water to flow continuously year-round ("perennial waters") or during certain times of the year ("intermittent waters") for Clean Water Act coverage.
- Including only lakes and ponds that are traditionally navigable waters subject to federal jurisdiction or that are connected to such waters through tributaries.
- Removing interstate waters—or waters which form part of state's boundary—as an independent category of waters subject to the Clean Water Act.
- Narrowing wetlands coverage to include only wetlands that abut jurisdictional waters or that have a direct hydrological connection to such waters, and excluding wetlands separated by a berm, dike, or other barrier.

Future of the Step Two Proposal

Once published in the Federal Register, the Step Two Proposal will be open for comment for 60 days. While many industry interest groups praised the proposal, some environmental groups criticized the approach and stated they will bring legal challenges when the rule is finalized. The focus of future lawsuits, if filed, is likely to depend on the rulemaking process and content of the final rule. But observers expect critics to challenge whether EPA and the Corps articulated sufficient rationale to depart from Justice Kennedy's "significant nexus" test. Critics of that test argue that it is overbroad and too

unpredictable for the average property owner to determine whether a waterbody constitutes part of WOTUS.

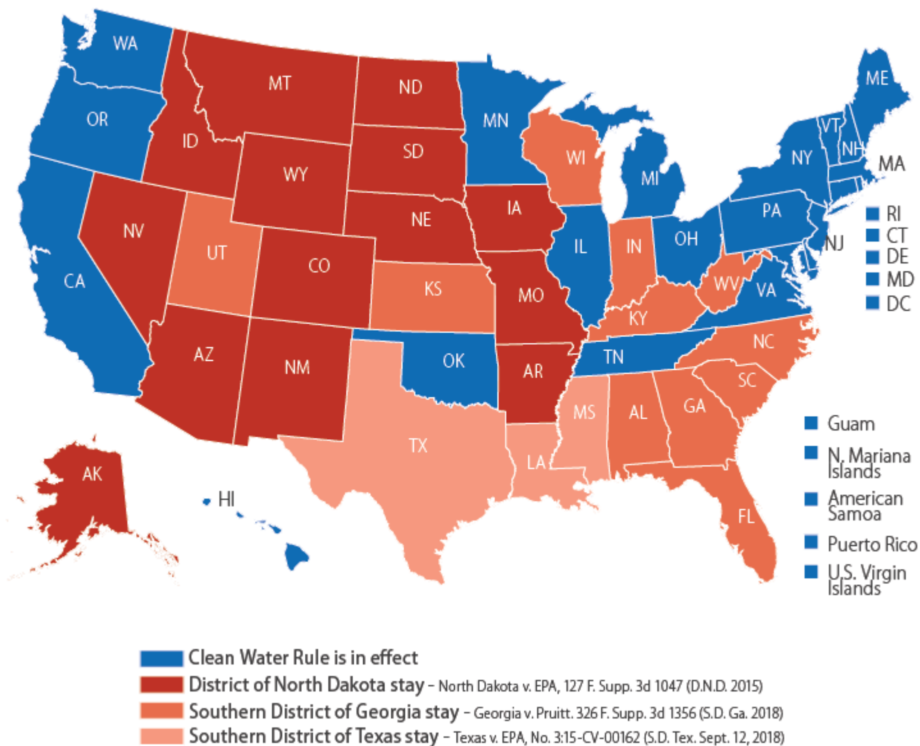
What Constitutes WOTUS While the Trump Administration's Rules are in Proposed Form?

The current legal landscape defining WOTUS is fragmented and complex. Because both rules in the Trump Administration's rescind-and-replace process are still in proposed form, the Obama Administration's Clean Water Rule remains the current regulation defining WOTUS. The United States Courts of Appeals for the Sixth Circuit (Sixth Circuit) had entered a nationwide stay of the Clean Water Rule in 2015. In January 2018, however, the Supreme Court held in *National Association of Manufacturers (NAM) v. Department of Defense* (discussed here) that the Sixth Circuit lacked jurisdiction, and that the challenges to the Clean Water Rule must begin in multiple federal district courts across the country.

Faced with the potential reinstatement of the Clean Water Rule as a result of the *NAM* decision, the Trump Administration engaged in another rulemaking process designed to suspend the Clean Water Rule until February 2020. While the Clean Water Rule states that it is effective as of August 28, 2015, EPA and the Corps issued a final rule (Applicability Date Rule), which adds a new "applicability date" of February 6, 2020 to the Clean Water Rule. Although the Applicability Date Rule is a final rule, in late 2018, two federal district courts determined that the agencies did not comply with administrative rulemaking requirements and issued orders vacating the Applicability Date Rule nationwide.

While there currently is no instrument that suspends the Clean Water Rule on a nationwide basis, litigants have successfully enjoined it in some parts of the country. After *NAM*, challenges to the Clean Water Rule at the district court-level resumed. Three federal district courts have entered preliminary injunctions, temporarily barring application of the Clean Water Rule in some, but not all, states. As a result, the Clean Water Rule currently is enjoined in 28 states, but it is the current enforceable regulation in 22 states, the District of Columbia, and U.S. territories.

Figure 1. Status of the Clean Water Rule



Source: North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015); Georgia v. Pruitt. 326 F. Supp. 3d 1356 (S.D. Ga. 2018); Texas v. EPA, No. 3:15-CV-00162 (S.D. Tex. Sept. 12, 2018)

Congressional Interest in WOTUS

Because the WOTUS debate hinges on the meaning of a statutory term, Congress could enact legislation that seeks to more clearly define the jurisdictional reach of the Clean Water Act. During the 114th Congress, the Senate and House passed a resolution of disapproval seeking to nullify the Clean Water Rule under the Congressional Review Act, but President Obama vetoed the resolution. As discussed in more detail in this CRS Report, some Members of the 115th Congress introduced legislation that would repeal the Clean Water Rule or redefine the Clean Water Act's jurisdictional terms.

Author Information

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.