

Update on the Status of the Clean Water Act and
Definition of
“Waters of the United States”

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This update provides a summary regarding the status and potential implications of the two-step rulemaking process currently underway in response to President Trump’s Executive Order associated with the definition of “Waters of the United States” (“WOTUS”).

The scope of the regulatory burden associated with the Clean Water Act (“CWA”) is driven by the definition of WOTUS, and can have significant impacts on agriculture. The Obama Final Rule (defined below) was meant to provide certainty and clarification: while it did that, it greatly increased the scope of the CWA and the burden on the regulated stakeholders, including those in the agricultural community.¹ Specifically, under the Obama Final Rule, the definition of WOTUS was expanded and the exemptions contracted such that regulators or citizen plaintiffs could potentially assert that previously unregulated water features were within the scope, and thus regulation, of the Clean Water Act. The Obama Final Rule has been stayed in Federal Court and now has been targeted by the Executive Order and a two-step rulemaking process (described herein).

I. Timeline of the evolving definition WOTUS²

- a. April 21, 2014, the EPA and Army Corps of Engineers published a proposed rule for public comment.³
- b. June 29, 2015, the EPA and Army Corps of Engineers published the final rule defining WOTUS (the “Obama Final Rule”), expanding the scope of WOTUS and further narrowing the exemptions relative to the proposed rule.
- c. August 27, 2015, the District Court in North Dakota granted a preliminary injunction against the Obama Final Rule in 13 states one day before the Obama Final Rule becomes effective.
- d. October 9, 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the rule.

¹ For a summary of the issues associated with the Obama Final Rule, and a summary of the same, visit "Clean Water Act Final Rule: Definition of 'Waters of the United States,' Worse than Expected," Ryley Carlock & Applewhite Client Alert, by Samuel Lofland May 2015, online at <http://www.rcalaw.com/clean-water-act-final-rule-definition-of-waters-of-the-united-states-worse-than-expected> (last visited September 12, 2017).

² Much of this information was compiled from <https://www.fb.org/issues/regulatory-reform/clean-water-act/> (last visited September 12, 2017), and then independently verified for accuracy.

³ For a summary of some of the major issues related to the Obama Proposed Rule visit "3 (of Many) Shortcomings of the EPA and Army Corps' Proposed Rule to Define 'Waters of the U.S.'," Ryley Carlock & Applewhite Client Alert, by Sheryl Sweeney and Samuel Lofland, January 2015, available online at <http://www.rcalaw.com/3-of-many-shortcomings-of-the-epa-and-army-corps-proposed-rule-to-define-waters-of-the-us> (last visited September 12, 2017)

- e. February 28, 2017, President Trump signed an Executive Order entitled “RESTORING THE RULE OF LAW, FEDERALISM, AND ECONOMIC GROWTH BY REVIEWING THE ‘WATERS OF THE UNITED STATES’ RULE.”⁴
 - i. The Executive Order requires all agencies involved with enforcing the Obama Final Rule to rescind or revise enforcement related to the Obama Final Rule; directs the heads of the EPA and Army Corps to notify the Attorney General in charge of the ongoing Obama Final Rule litigation of the agencies’ pending review of the same; and orders that the EPA and Army Corp to consider interpreting the term “navigable waters” in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.
 - ii. To implement the Executive Order, the EPA and Army Corps of Engineers are engaging in a two-step rulemaking process.
 - 1. The first step (“Step One”) involves rescinding the Obama Final Rule and re-codifying the prior rule.
 - 2. The second step (“Step Two”) involves seeking stakeholder input and considering Justice Scalia’s plurality opinion in *Rapanos* in publishing a new rule defining the WOTUS.
- f. June 27, 2017, in Step One the EPA and Army Corps of Engineers proposed a rule to rescind the Obama Final Rule and recodify the identical regulatory text of the rule defining WOTUS in existence before the Obama Final Rule.⁵
- g. September 27, 2017, with respect to Step One, the deadline to comment on the current rulemaking to rescind the Obama Final Rule and recodify the prior rule.
- h. October 11, 2017, oral argument before the Supreme Court on whether the Sixth Circuit has jurisdiction to hear the case before it regarding the Obama Final Rule.
- i. October 17, 2017, meeting and webinar with agricultural community members for comments and recommendations for a new rule defining WOTUS as part of Step Two.⁶
- j. November 28, 2017, the deadline to provide recommendations associated with Step Two. Specifically, this is the docket and process for stakeholders to make recommendations with respect to how WOTUS should be defined in connection with Step Two.
- k. Mid-2018 it is expected the Supreme Court will issue a ruling as to the jurisdiction of the Sixth Court with respect to issuing its stay and hearing, generally, the appeal of the Obama Final Rule.

⁴ For a summary of the Executive Order visit "Briefing Paper on President Trump's Executive Order and the Definition of ‘Waters of the United States’," Ryley Carlock & Applewhite Client Alert, by Samuel Lofland and Matthew Tieslau, March 2017, available online at <http://www.rcalaw.com/briefing-paper-on-president-trumps-executive-order-and-the-definition-of-waters-of-the-united-states> (last visited September 12, 2017)

⁵ <https://www.epa.gov/newsreleases/epa-us-army-move-rescind-2015-waters-us> (last visited September 12, 2017).

⁶ <https://www.epa.gov/wotus-rule/outreach-meetings> (last visited September 12, 2017)

II. The Proposed Rule associated with Step One and anticipated process associated with Step Two of the Rulemaking Process required by the Executive Order.

The Proposed Rule is the result of Step One.⁷ According to the executive summary of the Proposed Rule:

The agencies propose to replace the stayed 2015 definition of “waters of the United States,” and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit’s October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and re-codify the regulatory definitions (at 33 CFR part 328 and 40 CFR parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

The full text of the rule defining WOTUS, as framed in the Proposed Rule under Step One, can be found here: <https://www.epa.gov/sites/production/files/2017-07/documents/2017-13997.pdf> on pp. 34904-34909.

In connection with Step Two, the EPA and Army Corps of Engineers “will hold public meetings to hear from stakeholders their recommendations to revise the definition of ‘Waters of the United States’ under the Clean Water Act (CWA).”⁸ Thereafter, the agencies will propose a new definition of WOTUS based on stakeholder input and the plurality opinion authored by Justice Scalia in *Rapanos*.⁹ Presently, the stakeholder process under “Step Two” is anticipated to conclude by the end of 2017, with a proposed rule with a new definition of WOTUS to likely follow in 2018.

III. Defining WOTUS prior to Adoption of the Obama Final Rule

Because the purpose of the Proposed Rule is to define WOTUS in a manner that is identical to the definition of WOTUS in place prior to the Obama Final Rule, “consistent with Supreme Court decisions and longstanding agency practice” it is important to understand how WOTUS was defined and implemented prior to the Obama Final Rule. There have been several cases that have shaped the scope of the EPA and the Army Corps of Engineers jurisdiction over WOTUS under the CWA. Briefly, here are three seminal cases:

- *Riverside Bayview*, 474 U.S. 121 (1985): Upheld the agencies’ authority to regulate wetlands adjacent to navigable waters.

⁷ <https://www.epa.gov/wotus-rule/rulemaking-process> (last visited September 12, 2017)

⁸ *Id.*

⁹ See Federal Register Notice of the Proposed Rule at <https://www.epa.gov/sites/production/files/2017-07/documents/2017-13997.pdf> (last visited September 12, 2017)

- *SWANCC*, 531 U.S. 159 (2001): Rejected the agencies’ authority to regulate isolated ponds based upon the potential presence of migratory birds (the “Migratory Bird Rule”).
- *Rapanos*, 547 U.S. 715 (2006): The case raised the question as to what extent the CWA applies beyond traditional navigable and interstate waters. The Court voted 4-1-4, and the case was remanded for further proceedings.
 - Justice Stevens wrote a dissenting opinion (joined by Justices Souter, Bader Ginsburg, and Breyer) in which jurisdiction under the CWA was only limited, i.e., only did not extend, to truly isolated waters with no hydrological connection to traditionally navigable or interstate waters. He also noted that Justice Kennedy’s “Significant Nexus Test” would be controlling in most cases.
 - Justice Kennedy’s opinion effectively created the “Significant Nexus Test”: if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of “traditional navigable waters” or interstates waters, then there is jurisdiction under the CWA.
 - Justice Scalia authored a plurality opinion (joined by Justices Roberts, Thomas, and Alito) in which jurisdiction under the CWA only extends to (1) “relatively permanent bodies of water” connected to traditional navigable waters; and (2) wetlands with a continuous surface connection to these waters, such that it is difficult to determine where the “water” ends and the “wetland” begins.¹⁰

In 2008, to provide “clarification,” the EPA issued guidance stating its understanding of the significant nexus test to help “clarify” federal jurisdiction. The 2008 Guidance provided:

The Significant Nexus Test:¹¹

1. Assesses the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.
2. Includes consideration of hydrologic and ecologic factors.

¹⁰ See also Federal Register Notice of the Proposed Rule at <https://www.epa.gov/sites/production/files/2017-07/documents/2017-13997.pdf> (last visited September 12, 2017), providing:

“[I]n *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), a four Justice plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water . . .,” id. at 739, that are connected to traditional navigable waters, id. at 742, as well as wetlands with a “continuous surface connection . . .” to such water bodies, id. (Scalia, J., plurality opinion).”

¹¹ The “significant nexus test” stands for the proposition that wetlands and riparian areas with a “significant nexus” to traditionally navigable or interstate waters are jurisdictional waters under the CWA.

Thereafter, in 2011, the EPA proffered additional guidance regarding the agency's interpretation and implementation of *Rapanos*, in which EPA applied the "significant nexus test" to "other waters," and "similarly situated waters," such that the CWA would apply to all waters of the same resource type with a hydrological connection which constituted a "significant nexus" to a traditional navigable or interstate water.

IV. Friction of the two-step rulemaking process

It is important to understand the potential friction being created by this two-step rulemaking process. In Step One, the currently Proposed Rule, the definition of WOTUS will return to the version in place prior to the Obama Final Rule, taking into consideration agency guidance and Supreme Court precedent. Effectively, this means that the EPA and Army Corps of Engineers will have to go back to a system where, other than interstate and navigable waters, there is a case-by-case determination of whether a particular water body is jurisdictional, taking into consideration the "significant nexus test" as outlined in *Rapanos* and implemented in agency guidance.

In Step Two, the agencies are going to propose a yet-to-be released revised rule defining WOTUS, taking into consideration stakeholder input and Justice Scalia's plurality opinion in *Rapanos*. Justice Scalia's plurality opinion limited the application of the CWA to (1) "relatively permanent bodies of water" connected to traditional navigable waters; and (2) wetlands with a continuous surface connection to these waters, such that it is difficult to determine where the "water" ends and the "wetland" begins. This would essentially deviate from the application of the "significant nexus test," as reflected in Kennedy's opinion in *Rapanos* and adopted by agency guidance implementing the rule defining WOTUS in place before the Obama Final Rule, i.e. what will be in place upon finalization of the rule proposed by Step One.

V. Going Forward and Practical Implications

As former Defense Secretary Donald Rumsfeld said, "there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know."

The "known knowns" are as follows:

- The proposed rule from Step One is currently going through a public comment process.
- The proposed rule from Step One will be published as a final rule for comment sometime in 2018, and thereafter become effective.
- The Supreme Court will rule on the appropriate Court to review rules defining WOTUS sometime in 2018.
- The final rule from Step One will be appealed by environmental organizations and states which support the Obama Final Rule.
- A proposed rule with a new definition of WOTUS, Step Two, will be published in 2018.

- When a final rule for Step Two is published for comment and after it becomes effective, it will be appealed by environmental organizations and states which support the Obama Final Rule.
- In the meantime, the EPA and Army Corps of Engineers will administer the CWA utilizing the pre-Obama Final Rule defining WOTUS, which leads to a case-by-case jurisdictional determination in most cases (other than navigable and interstate waters and their direct tributaries with relatively permanent water flows).

The “known unknowns” are as follows:

- When the currently Proposed Rule from Step One will be published as a final rule for comment in 2018.
- How or when the Supreme Court will rule on the appropriate Court to review rules defining WOTUS sometime in 2018.
- How or when an appeal of the final rule from Step One will be resolved by the Courts.
- What a proposed rule with a new definition of WOTUS under Step Two will contain after the EPA and Army Corps of Engineers take into consideration stakeholder input and Justice Scalia’s plurality opinion in *Rapanos*.
- When a final rule with a new definition of WOTUS under Step Two will become effective, and when or how a subsequent appeal of the same will be resolved by the Courts.
- What definition of WOTUS will be in place during the appeal of a final rule under Step One and/or Step Two.
- Whether Congress will intervene with legislation aimed at defining WOTUS.

The likely scenario, and thus practical implication, is that during the pendency of the inevitable appeals of the final rules under Step One and Step Two and the ongoing appeal of the Obama Final Rule, the definition of WOTUS in place prior to the Obama Final Rule, as interpreted and implemented by agency guidance, will control. This effectively means that unless and until a new rule under Step 2 makes it through the various legal challenges, then:

- A traditionally navigable water or interstate water will be jurisdictional under the CWA.
- A seasonal/intermittent¹² creek or stream which flows into a traditionally navigable water or interstate water will probably be considered jurisdictional under the CWA.
- An ephemeral¹³ wash, arroyo, ditch, canal, or other feature (or combination thereof) which flows into a traditionally navigable water, interstate water, or a tributary to either, may be, on a case-by-case determination with the application of the “significant nexus test,” considered jurisdictional under the CWA.

¹² “Seasonal” or “intermittent” means those water features that have both precipitation and groundwater providing part of the stream’s flow, and flow continuously only during certain times of the year (*e.g.*, during certain seasons such as the rainy season). *See* Preamble to the Obama Final Rule at p.89, available online at <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states> (last visited September 15, 2017).

¹³ “Ephemeral” means water features that have flowing water only in response to precipitation events in a typical year and are always above the water table. Precipitation can include rainfall as well as snowmelt. *See Id.*

- Ditches that are excavated wholly in dry land, drain only dry land, and have less than perennial flow would likely not be considered jurisdictional under the CWA.
- Dry land or artificially irrigated areas that would revert to dry land if not irrigated would not be considered jurisdictional under the CWA.
- A perennial¹⁴ creek or stream which flows into a traditionally navigable water or interstate water will be jurisdictional under the CWA.
- An ephemeral creek or stream which flows into a traditionally navigable water or interstate water will probably be considered jurisdictional under the CWA.
- An ephemeral wash discharging into dry area below impoundment of a traditionally navigable water or interstate water, or a tributary directly connected with either, would likely not be considered jurisdictional under the CWA; however, they may be considered jurisdictional on a case-by-case determination with the application of the “significant nexus test.”
- Isolated ponds, streams, or creeks which do not flow into a traditionally navigable water or interstate water, or a tributary directly connected with either would not be considered jurisdictional under the CWA.
- Wetlands or riparian areas adjacent to a traditionally navigable water or interstate water will be jurisdictional under the CWA.
- An ephemeral or seasonal/intermittent creek which flows into a wetland or riparian area adjacent to a traditionally navigable water or interstate water, or a tributary directly connected with either will probably be considered jurisdictional under the CWA.
- An ephemeral wash, arroyo, ditch, canal or other feature which flows into a wetland or riparian area adjacent to a traditionally navigable water or interstate water, or a tributary directly connected with either may be considered jurisdictional on a case-by-case determination with the application of the “significant nexus test.”
- Ditches with ephemeral or intermittent flow that are not a relocated tributary, excavated in a tributary or drain wetlands would likely not be considered jurisdictional under the CWA; however, they may be considered jurisdictional on a case-by-case determination with the application of the “significant nexus test.”
- Dry land ditches that do not flow into a traditionally navigable water or interstate water, or a tributary directly connected with either would not be considered jurisdictional under the CWA.

The current scope of the CWA is ambiguous, as WOTUS is not well defined under *Rapanos* (as implemented by the Army Corps and EPA) particularly because the question of whether a water body is “jurisdictional” (other than a navigable or interstate water body, which is always jurisdictional), is subject to a case-by-case determination of the agencies that is not applied consistently across regions. Consequently, a revised definition of WOTUS is needed, as is being directed by the Executive Order and implemented in this two-step rulemaking process. But what remains to be seen is how the new Administration will replace the Obama Final Rule with a WOTUS definition that provides clarity, certainty, and predictability to the agricultural community, which can likewise survive subsequent legal challenges.

¹⁴ “Perennial” means those water features with flowing water year-round during a typical year, with groundwater or contributions of flow from higher in the stream or river network as primary sources of water for stream flow. *See Id.*

For those in the agricultural community that want their voices heard, here are the opportunities to participate:

1. Written comments can be submitted on the Proposed Rule from Step One at <https://www.regulations.gov/comment?D=EPA-HQ-OW-2017-0203-0001> (last visited September 15, 2017). The comment period closes on September 27, 2017.
2. Written comments can be submitted as part of the stakeholder input process associated with Step Two at <https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480> (last visited September 15, 2017). The comment period closes on November 28, 2017.
3. Attend and participate in the public meetings associated with the stakeholder input process associated with Step Two. Registration for the agriculture meeting, which is scheduled for October 17, 2017, is available at <https://register.gotowebinar.com/register/9049915666340028674> (last visited September 15, 2017).

Participation is important, both by submitting written comments and through public meetings. Participation can be accomplished through a stakeholders own efforts, through a trade group, or through coordination with a lobbyist or attorney. Participation ensures your voice is heard and helps create a record that will be utilized, relied upon, and referenced to during the rulemaking process and subsequent appeals.

If you have additional questions or want additional information, please feel to contact me at slofland@rcalaw.com or (602)440-4899.