



# The WOTUS Rule The More Things Change, The More They Stay the Same

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# The WOTUS Rule: The More Things Change, The More They Stay the Same

By Ashley Peck, Timothy Bagshaw, and Eric Waeckerlin

On June 27, 2017, the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) issued a proposed rulemaking (“Rescission Rule”) to begin rescission of the Obama Administration’s controversial rulemaking that defined and clarified “Waters of the United States” (“WOTUS”) for purposes of determining federal jurisdiction under the Clean Water Act (“CWA”) (the “WOTUS Rule”). Comments on the proposed rescission are due by August 28, 2017. The rulemaking follows a February 28, 2017 Executive Order that directed the two agencies to reexamine the Clean Water Rule and make any necessary revisions consistent with Justice Antonin Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (the “Scalia Test”).

The Rescission Rule marks the “first step,” according to the agencies, in undoing the WOTUS Rule, and if finalized, it would recodify the regulations and guidance that existed prior to 2015. The agencies’ “second step” would entail another notice-and-comment rulemaking to conduct a broad and substantive re-evaluation of the jurisdictional definition, including evaluation of the Scalia Test. For now, the Rescission Rule does nothing to change the status quo because the Sixth Circuit Court of Appeals stayed the WOTUS Rule pending the outcome of a legal challenge, and the prior regulations and 2003 and 2008 guidance have governed jurisdictional determinations during that stay.<sup>[1]</sup> The substantive re-evaluation of the definition of WOTUS, however, will present numerous important legal and

policy issues affecting the regulated community and will warrant close attention in the months to come. If you have questions about the impact of the most recent proposed Rescission Rule or the upcoming substantive re-evaluation of the definition of WOTUS, please contact any of the attorneys on our water quality team.

### The WOTUS Rule

On June 29, 2015, EPA and the Corps published the WOTUS Rule, which defined the scope of jurisdiction under the CWA. It sought to add clarity by deeming certain waters “by rule” jurisdictional, and other waters “by rule” non-jurisdictional. For waters fitting into these categories, no further analysis was required. The Rule contained a third category of waters that required further analysis to determine jurisdictional status. The Rule’s definitions for “tributaries” and “adjacent waters” proved to be some of its most controversial aspects. For instance, the Rule defined “tributary,” in part, as including ephemeral and intermittent drainages even where they may be interrupted “for any length” by one or more constructed breaks or one or more natural breaks. This expansive definition, which strayed from past agency practice, posed potentially significant issues for extractive industries operating in the arid western United States where such breaks are common. The Rule also defined “adjacent waters” by establishing fixed distances for certain types of waters where, if within those distances, the water would qualify as jurisdictional. These and other provisions of the rule engendered considerable debate, controversy, and litigation.[2]

### Prior Agency Guidance (2003 and 2008)

Prior to the WOTUS Rule, EPA and the Corps developed and relied on guidance, in combination with more general regulations, to determine whether waters were jurisdictional. The Rescission Rule seeks to revert back to these prior regulations and guidance documents pending the agencies’ substantive re-evaluation of the

jurisdiction of the CWA. The 2003 guidance followed the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. 531 U.S. 159 (2001) ("SWANNC") addressing isolated wetlands. The 2008 guidance further clarified the scope of jurisdiction following the Supreme Court's plurality opinion in *Rapanos* and the emergence of Justice Kennedy's "significant-nexus" test.

Under both guidance documents, the agencies assert jurisdiction over: (1) traditional navigable waters and interstate waters (plus adjacent wetlands) and (2) non-navigable tributaries to traditional navigable waters that are, themselves, relatively permanent waters (plus adjacent wetlands). For the latter category, the agencies determine jurisdiction based on a fact-specific analysis of whether there is a "significant nexus"—which, under *Rapanos*, means a water that has a significant nexus to downstream traditional navigable waters such that the water is important to protecting the chemical, physical, or biological integrity of the navigable water. This site-specific significant-nexus analysis has created uncertainty and inconsistency in the past, prompting the development of the WOTUS Rule. Notably, the February Executive Order appears to disfavor this test.

### Implications

The Trump Administration's re-examination of the WOTUS Rule presents several important considerations for the regulated community:

- First, the regulated community appears no closer to regulatory certainty than it has been since *Rapanos*. The full WOTUS Rule re-examination process will be lengthy and will undoubtedly be the subject of much more litigation to come. In the meantime, the same uncertainty in application of the "significant nexus" test under the 2003 and 2008 guidance will persist.
- Second, changing course from the WOTUS Rule will require that the agencies provide a reasoned basis in order to withstand judicial review and may prove

challenging —both for the Rescission Rule and the substantive re-evaluation of the WOTUS definition. For example, as rationale for the Rescission Rule, the agencies cite section 101(b) of the CWA as a “command” to “preserve the States’ primary responsibility and right to prevent, reduce, and eliminate pollution.” Yet, the CWA 404 program, which arguably is the CWA program most affected by the definition of WOTUS, is almost exclusively federal. This stated basis could raise issues regarding whether the Rescission Rule is adequately justified and lawful. Similarly, the agencies will need to develop a substantial new or supplemental administrative record to supply a reasoned basis for a material change to, or wholesale rescission of, the WOTUS Rule. In short, the agencies could potentially face an uphill battle in their efforts to respond to the February Executive Order, making input from the regulated community all the more important.

- Finally, the United States Supreme Court has accepted certiorari to decide the narrow issue of whether the federal district or circuit courts are the proper forum to hear merits challenges to the WOTUS Rule. The Court could ultimately decide that the federal district courts—and not the circuit courts including the Sixth Circuit Court of Appeals where the rule was stayed effective nationally—are the proper forum. If the Court made such a ruling, and the Rescission Rule is successfully challenged, the WOTUS Rule could potentially spring into effect for some period of time.

For these and other reasons, it will be important for the regulated community to keep a close eye on both legal and administrative developments related to the re-evaluation of the WOTUS Rule. At a minimum, the regulated community should stay involved and engaged in the substantive re-evaluation of the definition of WOTUS through participation in the public notice-and-comment process.

Please contact any member of our water quality team if you have any questions about this Rule or its implications, or if we can assist in drafting comments during any of the notice-and-comment periods.

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[1] See *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

[2] See, e.g., *In re U.S. Dep't of Defense & EPA Final Rule*, 803 F.3d 804 (6th Cir. 2016) (staying implementation of the WOTUS Rule).

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