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Water Rights, Water Quality & Water Solutions in the West

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WATERS OF THE UNITED STATES

DÉJÀ VU ALL OVER AGAIN: RE-REDEFINING WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT

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Introduction

On December 11, 2018, the Trump Administration's Environmental Protection Agency (EPA) and Department of the Army (DA) (together "Agencies") announced a new proposed rule, 83 Fed. Reg. 67,174 (December 28, 2018) ("Proposed Rule") modifying the definition of "waters of the United States." If promulgated as written, the new rule will significantly narrow the number of waterways and wetlands that fall within the jurisdictional scope of the federal Clean Water Act (CWA or "Act"), 33 U.S.C. 1251 et seq., and reverse the expansions adopted under the Obama Administration's waters of the United States rule. The practical implications of the Proposed Rule for project proponents are that ephemeral streams and many ponds and ditches used in agricultural, industrial, and construction activities would no longer be within the jurisdictional reach of the CWA, alleviating the requirement for and uncertainty surrounding permitting requirements and related mitigation measures. The next step in the Proposed Rule's process is the public comment period, and the Agencies will accept comments until February 26, 2019.

Background

The CWA prohibits the discharge of any pollutants, including dredged or fill material, into "navigable waters" without a permit. These "navigable waters" are defined as the **w**aters **o**f **t**he **U**nited **S**tates (WOTUS). Identifying which waters constitute WOTUS has long been the subject of contentious debate involoving US Supreme Court opinions and multiple federal circuit and district court challenges across the country. At stake is the jurisdictional reach of CWA: whether WOTUS encompasses not only perennial rivers, streams, lakes and ponds, but also extends to waterbodies such as seasonal tributaries that flow only as the result of rainfall or melting snowpack, ephemeral streams, or isolated wetlands not physically connected to larger rivers and streams.

In 2015, the Obama Administration's EPA promulgated an expansive new definition of WOTUS, Final Rule, 90 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule"). The 2015 Rule prompted extensive litigation that remains pending at the time of publication of this article. The 2015 Rule significantly increased the type and number of waters afforded CWA protection and regulation, providing coverage if a particular waterway or wetland had a "significant nexus" to traditionally jurisdictional waters, in line with Justice Kennedy's concurring opinion regarding the waters covered by the CWA in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the 2015 Rule, isolated waterbodies and features may be considered CWA jurisdictional if the regional hydrology supports the "significant connection" to the navigable water. If fully implemented, the 2015 Rule would envelop nearly 60 percent of the nation's waterbodies.

WOTUS

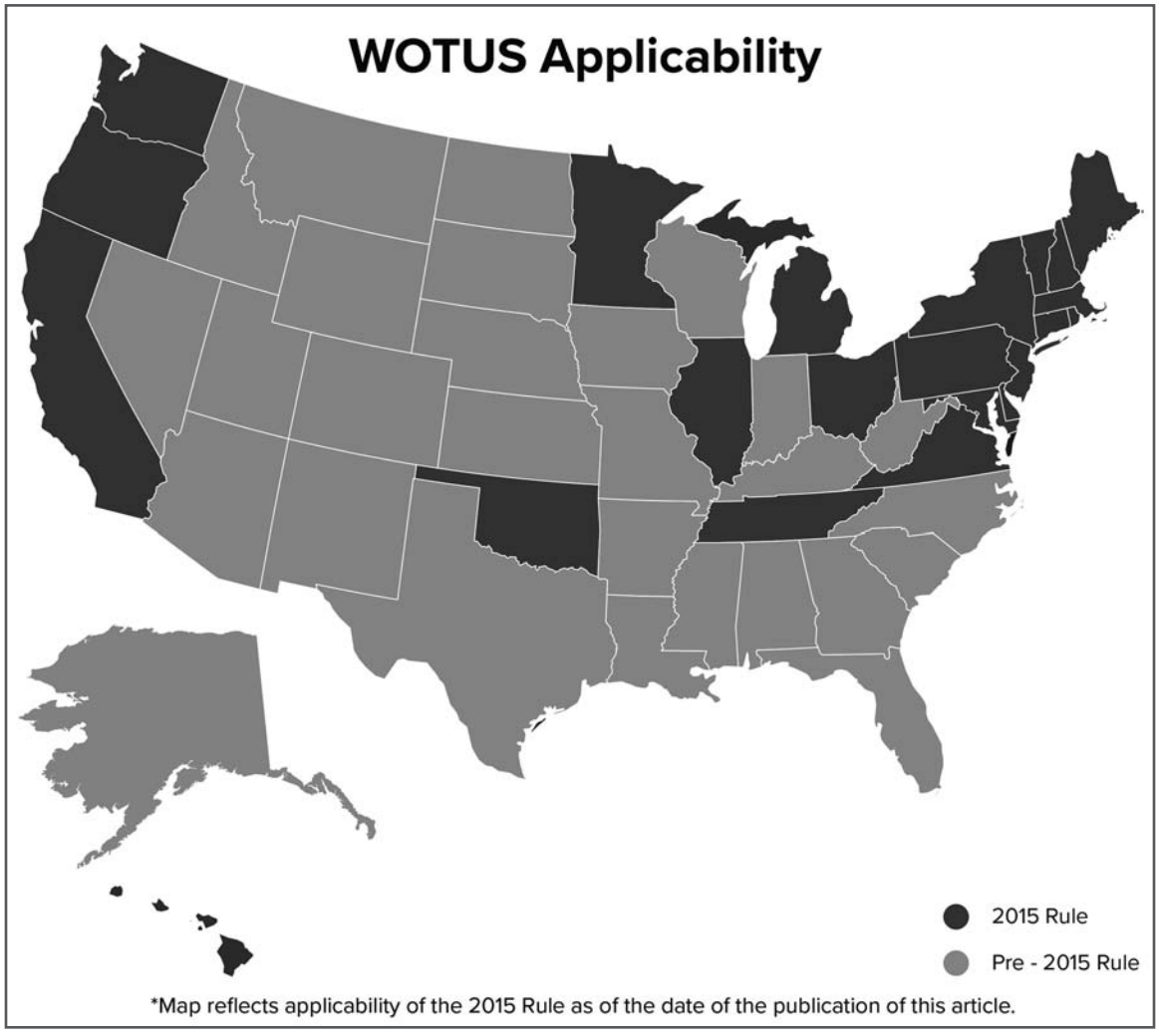
Attempted Roll Back

APA Violations

Rule Implementation

The Trump administration has taken the position that the 2015 Rule extends the CWA's reach beyond Congressional intent and has pursued several avenues to roll back the Obama-era rule. The first step in scaling back the 2015 Rule (referred to as "Step 1") was to delay the effectiveness of the 2015 Rule until February 6, 2020. On February 6, 2018, the Agencies finalized a rule suspending the effectiveness of the 2015 Rule ("Suspension Rule"), 83 Fed. Reg. 32,227 (July 12, 2018), and sought to reinstate the pre-2015 regulatory definition. However, the implementation of Step 1 has not avoided controversy. On August 17, 2018, a South Carolina Federal District Court in *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 961 (D.S.C. 2018), overturned the Suspension Rule and permitted the 2015 Rule to go into effect in roughly half the states. The District Court concluded that the Agencies violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, by limiting its consideration to comments on only delay, rather than the merits of the 2015 Rule. Further, the court determined that the Agencies improperly abbreviated the length of the public comment period for the Suspension Rule. In addition, a Washington State federal District Court, in *Puget Soundkeeper Alliance, et al., v. Wheeler, et al*., No. C15-1342-JCC (W.D. Wash., Order Nov. 26, 2018), recently followed the Sixth Circuit in vacating the Suspension Rule and also expressly ruled that the pre-2015 definition had been voided nationwide. *Puget Soundkeeper* seems to suggest that even if the 2015 Rule was repealed or vacated, there is no longer a clear, standing regulatory definition for the Agencies to rely upon if the Proposed Rule never becomes final.

On the other hand, and regardless of the validity of the Suspension Rule, federal District Courts in Georgia (*Georgia v. Pruitt*, Case No. 2:15-cv-79) and North Dakota (*North Dakota, et. al v. Environmental Protection Agency*, Case No. 3:15-cv-59-DLH-ARS) have issued preliminary injunction orders prohibiting the implementation of the 2015 Rule in a total of twenty-four states while the courts consider the legality of the 2015 Rule in full trials. Thus, the current jurisdictional reach of the CWA is essentially a state-by-state analysis. As of the publication of this article, the breakdown of the states and which rule applies are depicted in the map below.



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WOTUS

New Definition

Scalia Opinion

Categorical Exclusions

Proposed Rule Issues

Ephemeral Streams

Impoundments

Interstate

Tributaries

Lakes & Ponds

The Proposed Rule

The second step employed by the Trump Administration to scale back the jurisdictional reach of the CWA under the 2015 Rule ("Step 2") was to promulgate a new rule (the Proposed Rule) that seeks to change the 2015 Rule by adopting a new definition of WOTUS that tracks the reasoning of the late Justice Scalia's plurality opinion in *Rapanos*. In *Rapanos*, Justice Scalia described the reach of the CWA as limited to those waters with a "continuous surface connection" with a traditional navigable water that makes it "difficult to determine where the 'water' ends."

Adopting Scalia's plurality opinion in *Rapanos*, the Proposed Rule would continue to extend the jurisdictional reach of the CWA to traditional navigable waters, essentially meaning waterbodies that could be traveled by boat either naturally or with some improvement (territorial seas, rivers, large streams and large lakes). However, the Proposed Rule would redefine the jurisdictional reach of the CWA for waters connected to traditionally navigable bodies. While the 2015 Rule requires a case-by-case analysis for each stream, lake, pond, and wetland utilizing the "significant nexus test," the Proposed Rule describes narrowly defined categories of connected surface waters and categorically excludes other flows. Thus, the Proposed Rule seeks to eliminate the bespoke analysis applied to each waterbody articulated by the 2015 Rule. Commenters are asked under the Proposed Rule whether jurisdictional waters are only those that are predictable and continuous, including perennial waters ("water flowing continuously year-round during a typical year") or can include intermittent waters ("surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts"). Further, the Proposed Rule does not provide insight into how to measure "predictable" or "continuous" flow.

The 2015 Rule protected areas that had features of water flow, including waterbeds, high-water marks, and features that indicate two-banks and connection to a larger water. While the 2015 Rule provides coverage for ephemeral streams ("surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall") based upon these features, the Proposed Rule would categorically exclude these flows. A study referenced by the Obama Administration's EPA found that nearly 60 percent of all waterways, and 81 percent in the arid Southwest are intermittent or ephemeral.

Proposed Rule Categories

The Proposed Rule, if adopted, affects the jurisdictional status of the CWA for the following categories:

- Impoundments: The Proposed Rule does not change the current reach of the CWA concerning impoundments — which dates back to regulations adopted in 1986 (except where jurisdiction is affirmatively relinquished as noted below). If a particular waterbody is considered WOTUS under the Proposed Rule, impoundments within the waterbody (i.e., a dam that impounds water on a major river) will continue to have no bearing on whether the waterbody qualifies as WOTUS, despite the impoundment causing a break in the water flow.
- Interstate Waters: The 2015 Rule interpreted WOTUS as including waterbodies that span state lines. The Proposed Rule provides that the interstate nature of a waterbody will not automatically provide for the classification of that water as WOTUS. Instead, interstate waters must qualify as "navigable waters" or possess the requisite surface connection under the Proposed Rule to be considered WOTUS.
- Tributaries: Under the Proposed Rule, tributaries that are navigable or influence traditionally navigable waters remain a category of jurisdictional waters subject to the CWA. However, the Proposed Rule seeks to narrow the definition of tributaries to mean a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters, such as other tributaries, impoundments, and adjacent wetlands or through water features...so long as those water features convey perennial or intermittent flow downstream." The Proposed Rule seeks comments on whether tributaries should be limited to perennial flows, or whether intermittent flows would also be covered by the rule.
- Lakes and Ponds: The Proposed Rule seeks to clarify which lakes and ponds should be considered jurisdictional. The Proposed Rule announces that certain lakes and ponds will continue to be considered WOTUS; however, these waterbodies will no longer be evaluated on a case-by-case basis to analyze the relationship between, for example, a particular lake or pond with downstream waters. Instead, the Proposed Rule identifies a category of certain lakes and ponds that are afforded CWA coverage due to their contribution of perennial or intermittent flow to navigable waters. The categories of lakes or ponds that, under the Proposed Rule, would be considered WOTUS are: (i) traditionally navigable waters; and (ii) lakes and ponds "that can contribute flow to [a traditionally navigable water] either directly or through a tributary, jurisdictional ditch, another jurisdictional lake or pond, an impoundment, an adjacent wetland, or through a combination of these waters."

WOTUS

Wetlands

"Adjacent"

"Abut"

Uplands

Proposed Exclusions

Groundwater

Irrigation

Stormwater

Ditches Distinction

Converted Cropland

Constructed Lakes & Ponds

Excavated Pits

Recycling Structures

Water Treatment Components

• Wetlands: The Agencies are not proposing to change the 2015 Rule's definition of "Wetlands." However, the Proposed Rule seeks to refine the reach of jurisdictional wetlands. Under the Proposed Rule, jurisdictional wetlands will only be those wetlands that are adjacent to "traditional navigable waters" or other WOTUS categories. The key feature of the Proposed Rule is that to qualify as jurisdictional under the CWA, a wetland must be "adjacent," meaning that the wetland must either abut or have a "direct hydrologic surface connection" to a WOTUS category. The term "abut" is proposed to mean "when a wetland touches a water of the United States at either a point or side." A direct hydrologic surface connection as proposed "occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water." This definition would exclude from CWA jurisdiction wetlands that have an indirect hydrological connection and separated from a WOTUS category by dikes, barriers and similar structures, or by upland (any land area above the ordinary high-water mark or high tide line that does not satisfy all three wetland delineation factors, hydrology, hydrophytic vegetation, and hydric soils). Features that were once wetlands but have been naturally transformed or been lawfully converted to upland (e.g., in compliance with a CWA section 404 permit) would be considered upland.

Proposed Rule Exclusions

The Proposed Rule also announces several exclusions from the definition of WOTUS that, if adopted, would eliminate (or continue to eliminate) certain waters and infrastructure from CWA jurisdiction — and therefore the statutory permitting and certification requirements under the Act (e.g., section 401 water quality certification, section 402 National Pollutant Discharge Elimination System (NPDES) permitting, and section 404 dredge and fill permitting).

The following categories are proposed to be excluded from WOTUS under the Proposed Rule:

• Groundwater: The Proposed Rule excludes groundwater, including groundwater drained through a subsurface drainage system.

• Artificially Irrigated Areas: The Proposed Rule excludes areas that are artificially irrigated primarily for agriculture, including fields flooded for rice or cranberry growing, that would revert to upland if irrigation of that area were to cease.

• Stormwater Control Features and Diffuse Stormwater Runoff: The Proposed Rule excludes "stormwater control features excavated or constructed in upland [defined above] to convey, treat, infiltrate, or store stormwater run-off" as well as "diffuse stormwater run-off such as directional sheet flow over upland."

• Ditches: The Agencies propose to define "ditches" as "artificial channels used to convey water." "Ditches" is a broad category that encompasses even canals used for navigation, and thus some ditches would be jurisdictional. The Proposed Rule seeks to distinguish between jurisdictional and non-jurisdictional ditches. Jurisdictional ditches are channels that are traditionally navigable, constructed in a jurisdictional tributary, constructed in a jurisdictional wetland, or satisfy the definition of a tributary. Non-jurisdictional ditches are all other ditches.

• Prior Converted Cropland: This category has been excluded from WOTUS since 1993 and would continue to be excluded by the Proposed Rule. However, the Agencies propose to clarify that when cropland has been abandoned and wetlands have returned, then any prior converted cropland designation for that site would no longer be valid for purposes of the CWA.

• Artificial Lakes and Ponds: Unless otherwise covered by a WOTUS category or maintaining the necessary direct surface connection, artificial lakes and ponds constructed in upland (e.g., water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds) are excluded by the Proposed Rule.

• Water-Filled Depressions: The Proposed Rule excludes water-filled depressions created in upland and "incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel."

• Wastewater Recycling Structures: The Proposed Rule would exclude wastewater recycling structures constructed in upland (e.g., detention, retention and infiltration basins and ponds, and groundwater recharge basins).

• Waste Treatment Systems: Waste treatment systems have been excluded from the WOTUS definition since 1979, and they would continue to be excluded under the Proposed Rule; however, waste treatment systems are now expressly defined by regulation for the first time in the Proposed Rule. Waste treatment systems include all components of the system, "including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." The preamble to the Proposed Rule notes that waste treatment systems can be constructed in existing WOTUS

— "when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system, the agencies are affirmatively relinquishing jurisdiction over the resulting waste treatment system as long as it is used for this permitted purpose, consistent with longstanding practice."

Comment Period and Looming Judicial Challenges

Continuous Surface Connection

States' Role

Criticisms

Groundwater Overreach?

Precedent Authority

For non-traditional navigable waters to be jurisdictional under the CWA, the Proposed Rule requires a continuous surface connection that is relatively permanent in nature: a "mere hydrological connection" will not establish jurisdiction. These features of the proposal will have far-reaching but varying implications throughout the country. For example, in the arid West many seasonal waters (e.g., arroyos and gullies) may fall outside of the "continuous" requirement to be considered "intermittent" and might fall within the exclusion of "ephemeral." While in coastal and lowland areas of Florida and Louisiana, some wetland areas may not "abut" a navigable water and therefore may not qualify as WOTUS under the Proposed Rule — even if such waters would satisfy the hydrologic connection required by the 2015 Rule's significant nexus test. Thus, some waters currently classified as WOTUS may lose this characterization. If so, the individual states may be authorized to regulate waters falling outside of WOTUS.

Even before the comment period formally started, the Proposed Rule had already drawn both praise and sharp criticism from interested participants. Critics claim that the Proposed Rule is grounded in legal argument and not science. Further, critics argue that the proposal weakens federal management of water resources and plant and animal habitat. Proponents believe the Proposed Rule would reduce regulatory burdens and clarify permitting for projects in and near waterways.

Supporters also believe that the Proposed Rule would curb the perceived "overreach" of the NPDES program articulated in recent circuit court decisions: *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), cert. granted (No. 18-260), and *Kinder Morgan Energy Partners LP v. Upstate Forever*, 887 F.3d 637 (4th Cir. 2018), cert. granted (No. 18-268). *See* Robb, *TWR*s #170, #171 & #177. The NPDES is a permitting program within the purview of the CWA that prohibits the discharge of pollutants to navigable waters from a point source (an artificial conveyance such as a pipe into a stream) without a permit. The Ninth and Fourth Circuits have recently applied the NPDES standards to dischargers who released pollutants from a point source when their pollutants indirectly traveled into a navigable water — via ground water, a nonpoint source — due to a hydrological connection. Under the Proposed Rule, it is likely that the groundwater intermediary would not satisfy the continuous surface connection required for CWA jurisdiction to attach.

As such, the comment period may prove an opportunity to clarify the rule and preview the various future legal challenges to and defenses of the Proposed Rule. Challengers will have to wait until the rule is finalized before turning to a judicial solution; however, precedent does not provide stakeholders much clarity on a judicial outcome. *Rapanos* is a plurality decision (4-1-4), meaning that there a holding, but no majority opinion, leaving Circuit courts to wrestle with which opinion (Scalia's or Kennedy's) is binding precedent. *Marks v. United States*, 430 U.S. 188 (1977) serves as the authority on how to interpret plurality opinions issued by the High Court. Under *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id*. at 193. Courts of Appeals are split on how to interpret *Rapanos* without controlling authority, and six of the circuit courts have either determined that Justice Kennedy's concurrence constitutes the "narrowest grounds" or have given weight to both the Justice Scalia's plurality approach and Justice Kennedy's concurrence. As of the date of this article, no circuit court has determined any opinion issued as controlling. Thus, any judicial challenge to the Proposed Rule provides the Supreme Court the opportunity to revisit and finally resolve the varying interpretations after *Rapanos*.

Conclusion

Conservative Slant

The composition of today's High Court is markedly different than when *Rapanos* was decided in 2006. Neither late Justice Scalia nor retired Justice Kennedy remain on the Court to revisit their old opinions, and the current court is expected to slant more conservative with the more recent additions of Justices Gorsuch and Kavanaugh — two former clerks of Justice Kennedy. Although the tenors of these two junior Justices' Supreme Court jurisprudence remain largely unknown, their time served on the lower courts may serve as guideposts. Justice Gorsuch is known as an "originalist," which may tempt Court observers to predict that

WOTUS

Gorsuch's View

Kavanaugh Stance

his opinions would track closely with Scalia's. Notably, during Justice Gorsuch's tenure on bench of the Tenth Circuit, he did not rule on many environmental cases and has neither voiced opposition nor favor for environmental laws and protections. Hailing from Colorado, Justice Gorsuch has also been reported as an "outdoorsman," and thus his stance on natural resource related laws remains an open question for the moment. On the other hand, Justice Kavanaugh's environmental stance is much clearer as he has consistently ruled pro-industry and anti-regulatory, deciding against several environmental initiatives put forward by the Obama EPA during his time on the District of Columbia Circuit court. Thus, despite serving as a law clerk to the author of the "significant nexus" test that the Proposed Rule seeks to abandon, there is no strong indication that these two new Justices would be strongly inclined to preserve Justice Kennedy's views on the jurisdictional reach of the CWA.

Turning back to the Proposed Rule, stakeholders are able to submit comments through the Federal eRulemaking Portal: http://www.regulations.gov and by following the online instructions for submitting comments in docket EPA-HQ-OW-2018-0149. The Agencies will hold an informational webcast on January 10, 2019 and will host a listening session on the Proposed Rule in Kansas City, Kansas, on January 23, 2019.

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Morgan Gerard's practice focuses on advising public and private sector clients on environmental and energy regulatory compliance, including permitting, rulemaking, and enforcement actions. Morgan's practice has focused on following the emerging energy trends and the associated environmental issues that arise in strengthening grid resilience and modernizing the energy system. Morgan has counseled clients ranging from those engaging in the hydropower licensing and re-licensing process to electric utilities and wholesale generators and distributed energy manufacturers, including electric vehicle manufacturers, solar installers, and energy storage providers. Morgan counsels clients on matters arising under the National Environmental Policy Act, Federal Power Act, the Clean Air Act, the Clean Water Act, the Coastal Zone Management Act, the Endangered Species Act and similar state and local regulatory schemes. Before joining Troutman Sanders, Morgan was a founding member of the energy efficiency company, Fisonic, where she assisted in the commercialization of new heating and water-based technologies.