

# Waters of the United States: Churning with No Certainty Yet

## Background

The Federal Water Pollution Control Act Amendments of 1972, what is known today as the Clean Water Act ("CWA"), was enacted by Congress with overwhelming bipartisan support. However, what began as a bipartisan effort to remedy water pollution issues has devolved into regulatory uncertainty for landowners and almost continuous litigation since the mid-1980s, much of which centers on what exactly are "waters of the United States" ("WOTUS")?

The CWA prohibits "the discharge of any pollutant by any person," unless expressly permitted.<sup>1</sup> A "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source."<sup>2</sup> "Navigable waters" is ambiguously defined as "the waters of the United States."<sup>3</sup> The statutory term "waters of the United States" delineates the geographic reach of the Environmental Protection Agency's ("EPA") discharge permitting programs.<sup>4</sup>

In 2015, after decades of litigating the meaning of WOTUS and a continuing lack of clarity regarding what water bodies counted as a water of the United States, the EPA and the

Army Corps of Engineers ("Corps") jointly released a new rule defining "waters of the United States" ("WOTUS Rule").<sup>5</sup>

The WOTUS Rule separates "waters of the United States" into three groups. Group one includes "waters that are categorically jurisdictional (e.g., interstate waters)." Group two includes "waters that require a case-specific showing of their significant nexus to traditionally covered waters (e.g., waters lying in the flood plain of interstate waters)." Group three includes "waters that are categorically excluded from jurisdiction (e.g., swimming pools and puddles)."<sup>6</sup>

## Court Decisions Stalling WOTUS Rule Implementation


Immediately after the WOTUS Rule was released, 12 states and two New Mexico administrative agencies ("plaintiffs") challenged the rule in Federal District Court in North Dakota.<sup>7</sup> The court found it had jurisdiction to hear the challenge and it granted the plaintiffs' request for an injunction to prevent the EPA or the Corps from enforcing the WOTUS Rule in their states.<sup>8</sup> However, this injunction was only applicable to the states involved in this case and did not prevent implementation



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of the WOTUS Rule nationwide. Meanwhile, the district courts for the Northern District of West Virginia and the Southern District of Georgia found just the opposite, ruling they did not have jurisdiction to review the WOTUS Rule<sup>9</sup>

Around that same time, many other cases were filed in federal district courts across the country challenging the WOTUS Rule. The federal agency defendants argued that due to the two ways the CWA allows for judicial review of regulations, the litigation should not have been in the district courts, but instead had to be filed in the Courts of Appeals.<sup>10</sup> Ohio, 18 other states, and various interest groups also sued the EPA immediately after the 2015 WOTUS Rule came into effect, and those cases were brought directly to the Sixth Circuit Court of Appeals.<sup>11</sup> The Sixth Circuit Court of Appeals determined that due to the inconsistent rulings of the district courts around the country regarding whether or not the WOTUS Rule was to take effect, it was necessary to issue a nationwide stay of the WOTUS Rule.<sup>12</sup> That decision meant that the WOTUS Rule could not be enforced nationwide.

Meanwhile, motions to dismiss were filed in that same case arguing that the Sixth Circuit did not have jurisdiction to hear the challenge to the WOTUS Rule because jurisdiction must be in the district courts.<sup>13</sup> The practical implications of these motions would have been to lift the nationwide stay except in the states subject to the North Dakota District Court's decision. The Sixth Circuit Court's decision regarding its jurisdiction to hear the case to stay the WOTUS Rule was subsequently appealed to the U.S. Supreme Court.<sup>14</sup>

The Supreme Court heard the federal government argue that the WOTUS Rule falls within two of seven categories outlined in the CWA that provide for exclusive jurisdiction in the courts of appeals and therefore, jurisdiction in all the district courts was improper.<sup>15</sup> However, the Supreme Court decided against the federal defendants in January 2018 and found the WOTUS Rule must be heard in federal district courts initially.<sup>16</sup> Therefore, the nationwide stay issued by the Sixth Circuit Court of Appeals was lifted.<sup>17</sup>

### Impacts of the Trump Administration

On February 28, 2017, just shortly after taking office, President Trump issued an Executive Order instructing the EPA and the Corps to review the WOTUS Rule and rescind or revise it "to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."<sup>18</sup> The Executive Order further outlined that future rulemaking should define WOTUS consistent with the opinion of former Justice Antonin Scalia in *Rapanos v. United States*. Scalia's *Rapanos* opinion defined WOTUS as only waters that are "relatively permanent, standing or continuously flowing bodies of water that form geographic features, which are described in ordinary parlance as streams, oceans, rivers, and lakes."<sup>20</sup> WOTUS does not include channels where water flows "intermittently or ephemerally, or channels that periodically provide drainage for rainfall."<sup>21</sup>

The EPA and the Corps went on to finalize a rule on February 6, 2018 adding an applicability date to the 2015 WOTUS Rule that is not until February 6, 2020.<sup>22</sup>


### Congress Attempts a WOTUS Fix

In 2017 a rider, which ultimately failed, was included in the 2018 fiscal year energy and water spending bill that would have expedited efforts to put forth a WOTUS replacement rule.<sup>23</sup> Subsequently, the fiscal year 2019 energy and water appropriations bill, containing a rider stating simply "the bill repeals the Waters of the United States Rule,"<sup>24</sup> passed out of committee on May 16, 2018.

While it remains to be seen whether this rider will pass and repeal the WOTUS Rule, decades of WOTUS litigation indicate it is likely there will be litigation surrounding how the WOTUS Rule is repealed and what WOTUS definition ultimately takes effect. For now, the federal government is implementing the *Rapanos* definition of WOTUS in the hope that this provides some much needed certainty to water users, at least in the short term.

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You can read more about this topic and other water rights issues at Schroeder Law Offices' Water Law Blog, <http://water-law.com/home/blog/>.

#### References

- <sup>1</sup> 33 U. S. C. § 1311(a).
- <sup>2</sup> Id. at § 1362(12).
- <sup>3</sup> Id. at § 1362(7).
- <sup>4</sup> Nat'l Ass'n of Mfrs. v. Dept. of Defense, 138 S. Ct. 617, 624 (2018).
- <sup>5</sup> Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015).
- <sup>6</sup> Id. at 37,102.
- <sup>7</sup> N.D. v. U.S. EPA, 127 F.Supp.3d 1047 (N.D. Dist., Aug. 27, 2015).
- <sup>8</sup> Id. at 1060.
- <sup>9</sup> Nat'l Ass'n of Mfrs., 138 S. Ct. at 627; see Murray Energy Corp. v. U.S. EPA, 2015 U.S. Dist. LEXIS 112944, p. 6 (N.D. W. Va., Aug. 26, 2015) and Ga. v. McCarthy, 2015 U.S. Dist. LEXIS 114040, p. 3 (S.D. Ga., Aug. 27, 2015).
- <sup>10</sup> States of N.D. v. U.S. EPA, 2015 U.S. Dist. Lexis 158992, pp. 5-6. (N.D. Dist., Nov. 10, 2015).
- <sup>11</sup> Ohio v. U.S. Army Corps of Eng'rs (In re EPA & DOD Final Rule), 803 F.3d 804, 805-806 (6th Cir., Oct. 9, 2015).
- <sup>12</sup> Id. at 808.
- <sup>13</sup> Murray Energy Corp. v. U.S. DOD (In re U.S. DOD), 817 F.3d 261, 264-65 (6th Cir., Feb. 22, 2016).
- <sup>14</sup> Nat'l Ass'n of Mfrs., 138 S. Ct. 617.
- <sup>15</sup> Id. at 628.
- <sup>16</sup> Id. at 634.
- <sup>17</sup> Id.
- <sup>18</sup> Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).
- <sup>19</sup> Id.
- <sup>20</sup> Rapanos v. U.S., 547 U.S. 715, 739 (2006).
- <sup>21</sup> Id.
- <sup>22</sup> 83 Fed. Reg. 5200 (Feb. 6, 2018).
- <sup>23</sup> H.R. \_\_\_, 115th Cong. 1st Sess., available at [https://appropriations.house.gov/uploadedfiles/fy18\\_interior\\_xml.pdf](https://appropriations.house.gov/uploadedfiles/fy18_interior_xml.pdf).
- <sup>24</sup> H. R. \_\_\_, 115th Cong. 2d Sess., available at <https://docs.house.gov/meetings/AP/AP10/20180507/108254/BILLS-115HR-SC-AP-FY2019-EnergyWater-SubcommitteeDraft.pdf>.



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