

# Replacing the Clean Water Rule – Is the Dance Really Over?

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**On April 21, 2020, the United States Environmental Protection Agency ('EPA') and Army Corps of Engineers ('Corps') completed step two of the two-step 'repeal and replace' process ordered by President Trump in 2017 by publishing the final rule defining the scope of waters**

**federally regulated under the Clean Water Act ('CWA').**

The Navigable Waters Protection Rule ("Rule") will become effective June 2, 2020, replacing the rule published in October 2019.

## **A Brief History**

Back in October, the EPA and the Corps completed step one by publishing the formal repeal of the Obama-era 2015 Clean Water Rule. The repeal, which took effect on December 23, 2019, returned the country to national uniformity, but also to the confusion existing under the pre-2015 regulations. One month later, the agencies announced the issuance of "The Navigable Waters Protection Rule: Definition of Waters of the United States." The draft definition of "waters of the United States," ubiquitously called WOTUS, was published in the Federal Register in February 2019 for public comment on whether it clarified the uncertainty surrounding the Clean Water Rule, while still protecting resources. On January 23, 2020, after receiving over 11,000 comments, the agencies announced the long-awaited rule would be forthcoming.

## **Step Two: Navigable Waters Protection Rule = The Replacement Rule**

The Rule completes the process designed to modify and narrow CWA federal jurisdiction. The key elements of the Rule, similar to what was proposed, are intended as categorical bright lines to improve clarity and predictability for the regulators and the regulated. According to the agencies, WOTUS includes:

1. The territorial seas and traditional navigable waters (long ago expanded beyond commercially navigable-in-fact waters);
2. Tributaries of such waters;
3. Lakes, ponds and impoundments of such waters; and,
4. Adjacent wetlands.

Twelve exclusions from the WOTUS definition, or non-jurisdictional waters, include: groundwater; ephemeral streams; stormwater runoff and stormwater control features; ditches that are not jurisdictional; prior converted cropland; artificial lakes and ponds; and artificially irrigated areas, including agricultural areas that would revert to uplands were the irrigation to cease.

The Rule also includes 16 definitions, including "wetlands," "ditch," "perennial," "intermittent," "ephemeral," and "tributary" to help interpret the Rule. No "significant nexus" test will be applied.

For the sake of simplicity, the EPA and the Corps will codify the new definition of WOTUS in two locations of the Code of Federal Regulations, within Title 40 and Title 33, where each agency's jurisdiction under the Act is implemented. A copy of the published Rule can be found [here](#).

## **You Can't Always Get What You Want**

As expected, industries whose operations typically affect WOTUS through dredging, filling, and permitted or unpermitted discharges—including agriculture, construction, manufacturing, and real estate development—will be affected by the Rule. But legal challenges are already at play that may cause a delayed implementation of the Rule. North Carolina, which challenged the 2015 Clean Water Rule under a previous administration, has joined a multistate lawsuit opposing the Rule. The North Carolina Department of Environmental Quality joined North Carolina's Attorney General and 16 other states in suing on the Rule. Several environmental conservation groups have filed legal challenges as well.

Further adding to the confusion is the decision by the United States Supreme Court in *County of Maui, Hawaii v. Hawaii Wildlife Fund*. Decided on April 23, 2020, after the Rule was published but before its effective date, the opinion holds that the provisions of the Act at issue require a National Pollutant Discharge Elimination System permit when there is a direct discharge from a point source into navigable waters or when there is a "functional equivalent of a direct discharge" through groundwater. What effect this will have on the Rule's exclusion of groundwater from federal jurisdiction remains to be seen.

The regulated community can expect uncertainty and inconsistency once the Rule becomes effective next month, and as lawsuits proceed. Perhaps it's a new riff in an old song.

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