

## Definition of Waters of the U.S.

December 10, 2018

The focus of the proposed rule will be the definition of “waters of the U.S.” which determines which bodies of water and wetlands fall within the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) and Section 404 wetland permitting programs.

The Environmental Protection Agency, in coordination with the Army Corps of Engineers, has said: “The agencies plan to propose a new definition that would replace the approach in the 2015 Rule and the pre-2015 regulations, taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.”<sup>1</sup>

The draft proposal is likely to address the following issues:

- Whether streams that do not flow consistently year-round (perennial, intermittent, and ephemeral streams) can be considered “waters of the U.S.”
- The connectedness standard that wetlands adjacent to “waters of the U.S.” must meet in order to also be “waters of the U.S.”

### **Overview of issue:**

The Clean Water Rule, adopted in 2015, was preceded by decades of uncertainty, costly to both industry and the government. To relieve that uncertainty, reduce costs and ensure environmental protection for streams and waterways, the rule defined which streams and wetlands are protected from pollution by the Clean Water Act. The Clean Water Act protects water quality through a permitting program, which requires industrial facilities, concentrated animal feeding operations, and the source of any discharge that meets requirements under the Act to apply for and be granted a permit before discharging pollutants into the water. The scope of the NPDES permitting program and its protections is determined by the category of waters considered to be “waters of the U.S.” and thus subject to federal jurisdiction.

Many waters and wetlands had an unclear status – and thus unclear eligibility for pollution protection -- under the Clean Water Act for decades because of the way Congress wrote the Clean Water Act. The Act prohibits the discharge of any pollutant into navigable waters from any point source and goes on to define “navigable waters” as “waters of the U.S. including territorial seas.” See sections 502(12) and 502(7) of the Clean Water Act. Congress did not define “waters of the U.S.” in the Act, so it was left to the EPA and Army Corps to do so. The agencies had an important constraint because Congress used its authority under the Commerce Clause to enact the Clean Water Act, which limits the federal government’s authority to matters affecting interstate commerce.

Interstate waters and waters that can actually be navigated with a boat, whether a kayak or a barge, (“navigable in fact”) are waters of the U.S. The streams that flow into those navigable rivers, lakes, and bays do not always receive the same protection from pollution. The same is true for wetlands. A wetland that is adjacent to and clearly has a hydrological connection to a navigable water is protected from

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<sup>1</sup> <https://www.epa.gov/wotus-rule/rulemaking-process>

pollution, but a wetland's status could be uncertain depending on the wetland's distance from, and type of connection to, a navigable water.

States usually manage the Clean Water Act's permitting program, issuing National Pollutant Discharge Elimination System permits with oversight from the federal government. Section 404 of the Act established a permitting program for wetlands that requires permits for dredging projects in wetlands or projects that seek to fill in wetlands to make them shallower or create farm land or dry land. The Army Corps of Engineers manages the Section 404 permitting program for wetlands.

The Supreme Court has issued three major decisions on the boundaries of "waters of the U.S.":

- *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
- *Southern Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)* 531 U.S. 159 (2001).
- *Rapanos v. United States*, 547 U.S. 715 (2006).

All three decisions have been in the context of section 404, but the same definition is used across the Act. Unfortunately, in the process of answering the questions before the Court, these decisions gave rise to new questions about the limits of Clean Water Act jurisdiction. Since the most recent decision in *Rapanos*, lower courts have applied a combination of the opinions written by Justice Kennedy and Justice Scalia because the court was split 4-1-4 with Justice Scalia writing for the four justice plurality and Justice Kennedy concurring in the decision but writing a separate opinion because he disagreed with much of their reasoning. When a plurality decision like this is released, the lower courts view the plurality opinion and separate concurring opinion as a Venn diagram- applying the law that overlaps between the two opinions.

### ***What to expect from the new rule- looking to Rapanos v. U.S.***

Justice Scalia and the plurality in *Rapanos* rejected the argument that only navigable-in-fact waters can be regulated by the Clean Water Act, but also held that the word "navigable" in the Act cannot be divested of all meaning.

They held that the definitional term "waters of the United States" can only refer to "relatively permanent, standing or flowing bodies of water," not "occasional," "intermittent," or "ephemeral" flows.

Furthermore, a mere "hydrological connection" is not sufficient to qualify a wetland as covered by the CWA; it must have a "continuous surface connection" with a "water of the United States" that makes it "difficult to determine where the 'water' ends and the 'wetland' begins."

The new proposal is likely to eliminate perennial, intermittent, and ephemeral streams from being considered "waters of the U.S." despite their actual contributions to the pollution of larger water bodies. If a stream only flows after a large storm ("ephemeral stream") or goes dry during certain weeks or months of the year ("intermittent stream"), it will not be protected. If a stream loses flow during a drought ("perennial stream"), it will also lose its protection, which is troubling given that droughts are becoming more common due to climate change.

The bar will likely be raised for the connectedness standard for wetlands that are adjacent to "waters of the U.S." The proposal may adopt the "continuous surface connection" standard created by Justice

Scalia, but that may be difficult for many wetlands to meet given the nature of wetlands, which are generally saturated with water but not always in a manner that is visible on the surface and can be called a "continuous surface connection."

It will be crucial to see the standards that the EPA and the Army Corps propose applying to waters and wetlands to determine which water bodies are covered by the Clean Water Act's protections. These guidelines will reveal whether the new rule will deliver adequate protection to rivers and wetlands or leave them exposed to higher levels of upstream pollution or, in the case of wetlands, damaging disturbance.

### ***2015 Clean Water Rule***

The 2015 Clean Water Rule addressed the questions of how many waters and wetlands and what types of waters and wetlands are protected by the Act's permitting programs. The Clean Water Rule recognized that water in larger rivers comes from the smaller streams that feed into them. Pollution in small streams can reach levels that are high enough to create and contribute to poor water quality in larger water bodies. Reflecting the scientific understanding of watersheds and the contributions of different types of water bodies to "navigable waters", the Clean Water Rule clarified that the Clean Water Act protected many small streams as instrumental to protecting the water quality in larger, navigable water bodies.

The Clean Water Rule created a system to determine which waters were waters of the U.S., also known as "jurisdictional waters", according to eight categories:

- The first three types of waters: **traditional navigable waters, interstate waters, and the territorial seas**, are jurisdictional by rule in all cases and subject to the NPDES permitting program. No additional analysis required.
- The fourth type of water, **impoundments of jurisdictional waters**, is also jurisdictional by rule in all cases.
- The next two types of waters, **"tributaries" and "adjacent" waters** are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.
- The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a **significant nexus to traditional navigable waters, interstate waters, or the territorial seas**, either alone or in combination with similarly situated waters in the region.

The "significant nexus" approach applied by the Clean Water Rule to tributaries, adjacent waters, and wetlands was created by Justice Kennedy's separate concurring opinion in *Rapanos* and reflected the EPA's understanding of the physical, chemical and biological contributions of upstream water to downstream water bodies. The clarity provided by the rule promised to benefit people who use these waters for recreation and drinking, as well as industry dependent on regulatory certainty with regard to NPDES and Section 404 wetlands permits for their facilities and projects. The rule was also poised to alleviate the heavy regulatory burdens and costs caused by the absence of a clear rule since previously the EPA and Army Corps had to regularly evaluate waters to determine whether they were waters of the U.S.

### ***Likely Issue in the Pending Proposal***

The administration's decision, made at the outset of EPA's rule development process, to reject Justice Kennedy's "significant nexus" approach, introduces a potential vulnerability. The Clean Water Rule reflects the realities of hydrology and upstream water quality impacts on downstream water bodies clearly covered by the Clean Water Act. Justice Scalia's approach severs that nexus and does so without the benefit of clear statutory language to support it. As a result, it may be difficult for the EPA and Army Corps to show that the new rule is superior to the Clean Water Rule in the absence of either explicit statutory authority or a full reckoning with hydrology. No doubt commenters on the proposal will argue that "waters of the U.S." must be interpreted in accordance with hydrological realities in order to avoid being arbitrary or an abuse of discretion.

### ***Timeline of relevant actions:***

- On **February 28, 2017** President Trump issued **Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule**.
- On **March 6, 2017** EPA and U.S. Army Corps of Engineers **published their intent to "review and rescind or revise"** the Clean Water Rule.
- In **July 2017** EPA and Army Corps **published the proposal to rescind the rule** in the Federal Register.
- On **November 16, 2017** EPA **proposed to delay** the effective date of the 2015 rule for two years after "the date of final action on this proposal."
  - The effective date of the 2015 Rule was supposed to be August 28, 2015
- On **February 6, 2018** EPA **finalized a rule that delays** the effective date of the 2015 Obama administration rule for two years, to **February 6, 2020**.
- On **March 30, 2018** then-Administrator Pruitt **signed a memo** making the EPA Administrator the **sole authority** over WOTUS designations, revoking the authority of regional administrators and the Army Corps.
- On **June 15, 2018**, the EPA and Army Corps **sent a new proposed rule** on the definition of "waters of the U.S." to the Office of Management and Budget for review.
- On **June 29, 2018**, the EPA and Army Corps **issued a supplemental notice of proposed rulemaking** to the July 2017 proposal to **repeal the 2015 Clean Water Rule**.
- The supplemental notice clarifies that the agencies propose to **permanently repeal** the entire Clean Water Rule and **put the pre-2015 regulations back in place** while they finalize a new definition of "waters of the United States."