

Waters of the United States/Clean Water Act: U.S. Environmental Protection Agency Finalizes New Rule



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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On September 12th the United States Environmental Protection Agency and United States Corps of Engineers (collectively, “EPA”) announced the finalization of a new rule addressing the Clean Water Act definition of Waters of the United States (“WOTUS”).

EPA had previously rescinded the Obama era revision/clarification of WOTUS. See 80 Fed. Reg. 37054 for the 2015 revision/clarification rule.

The definition of WOTUS is arguably one of the three critical jurisdictional terms in the Clean Water Act. Its importance is magnified by the fact that it is also relevant to non-National Pollution Discharge Elimination System programs such as:

- Section 404 of the Clean Water Act Wetland Permits
- Section 311 Oil/Hazardous Substances Release Requirements
- Clean Water Act Spill Prevention Control and Countermeasure Regulations

As a result, it is easy to understand why the scope of the definition of WOTUS has been the subject of frequent litigation, legislative oversight, rulemakings and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

A Trump White House Executive Order had directed EPA to review the 2015 final rule. See Presidential Executive Order on Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the “Waters of the United States” Rule.

EPA had previously argued in rescinding the 2015 rule that the agencies were:

...concerned that the previous administration’s 2015 Rule defining “waters of the United States” may have greatly expanded Washington’s control over local land use decisions.

The agencies further argued that the proposal:

... respects the constitutional and statutory limits of federal government to regulate navigable water under the Clean Water Act and give states and tribes more flexibility to determine how to best manage waters within their borders.

The final rule is certain to be challenged by a number of states, environmental and public interest groups, and others arguing that it has greatly (and illegally) narrowed the scope of the term. It is further certain that other states, various agricultural, manufacturing, and energy organizations that have supported the rescinding of the 2015 rule will weigh in judicially to support it.

Regardless of the outcome of the struggle for the appropriate scope of WOTUS, it is important to remember that delegated states (including Arkansas) have their own statutes to authorize their environmental regulatory activities. Further, many of these states have key jurisdictional definitions that may in fact be broader than the corresponding federal terms.

A link to the final rule can be found [here](#).