

EPA, U.S. Army Repeal 2015 Rule Defining “Waters of the United States” Ending Regulatory Patchwork

WASHINGTON – At an event in Washington, D.C., U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler and Department of the Army Assistant Secretary of the Army for Civil Works R.D. James announced that the agencies are repealing a 2015 rule that impermissibly expanded the definition of “waters of the United States” (WOTUS) under the Clean Water Act. The agencies are also recodifying the longstanding and familiar regulatory text that existed prior to the 2015 Rule—ending a regulatory patchwork that required implementing two competing Clean Water Act regulations, which has created regulatory uncertainty across the United States.

“Today, EPA and the Department of the Army finalized a rule to repeal the previous administration’s overreach in the federal regulation of U.S. waters and recodify the longstanding and familiar regulatory text that previously existed,” **said EPA Administrator Andrew Wheeler**. “Today’s Step 1 action fulfills a key promise of President Trump and sets the stage for Step 2 – a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders, and developers nationwide.”

Today’s rule is the first step—Step 1—in a two-step rulemaking process to define the scope of “waters of the United States” that are regulated under the Clean Water Act. Step 1 provides regulatory certainty as to the definition of “waters of the United States” following years of litigation surrounding the 2015 Rule. The two federal district courts that have reviewed the merits of the 2015 Rule found that the rule suffered from certain errors and issued orders remanding the 2015 Rule back to the agencies. Multiple other federal district courts have preliminarily enjoined the 2015 Rule pending a decision on the merits of the rule. In this action, EPA and the Army jointly conclude that multiple substantive and procedural errors warrant a repeal of the 2015 Rule. For example, the 2015 Rule:

- Did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act as intended by Congress and reflected in Supreme Court cases.
- Failed to adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources.
- Approached the limits of the agencies’ constitutional and statutory authority absent a clear statement from Congress.
- Suffered from certain procedural errors and a lack of adequate record support as it relates to the 2015 rule’s distance-based limitations.

With this final repeal, the agencies will implement the pre-2015 regulations, which are currently in place in more than half of the states, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. The final rule takes effect 60 days after publication in the Federal Register.

“Today, Administrator Wheeler and I signed a final rule that repeals the 2015 Rule and restores the previous regulatory regime exactly how it existed prior to finalization of the 2015 Rule,” **said R.D. James, Assistant Secretary of the Army for Civil Works**. “Before this final rule, a patchwork of regulations existed across the country as a result of various judicial decisions enjoining the 2015 Rule. This final rule reestablishes national consistency across the country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of ‘waters of the United States.’”

In December 2018, EPA and the Army proposed a new definition—Step 2—that would clearly define where federal jurisdiction begins and ends in accordance with the Clean Water Act and Supreme Court precedent. In the proposal, the agencies provide a clear definition of the difference between federally regulated waterways and those waters that rightfully remain solely under state authority.

Additional information is available at: <http://www.epa.gov/wotus-rule>.

Background

The final Step 1 rule follows President Trump’s Executive Order 13778, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” Section 1 of the Executive Order states that “[i]t is in the national interest to ensure that 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 Congress and the States under the Constitution.” The Executive Order also directs the EPA and the Department of the Army to review the 2015 Rule for consistency with the policy outlined in Section 1 of the order and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law.

Additional Information

Water quality will not be harmed as EPA and the Army repeal the unlawful Obama Administration WOTUS rule and restore longstanding and familiar Clean Water Act regulations. The final Step 1 rule will end the regulatory patchwork that included implementing two competing Clean Water Act regulations, which created uncertainty across the United States.

- EPA will go forward with finalizing the Step 2 proposal that would give states and tribes more flexibility to determine how best to manage waters within their orders, in accordance with the objective and policies of the Clean Water Act.

This action continues President Trump’s deregulatory agenda. Under President Trump, EPA has finalized **46 deregulatory actions**, saving Americans more than **\$3.7 billion dollars in regulatory costs**. We have an additional 45 actions in development projected to save billions more.

Step 1 Final Rule Background

- One of President Trump’s earliest acts in office was an executive order directing EPA and the Army Corps to review and potentially replace the Obama EPA’s definition of the “waters of the United States.”
- The previous administration’s 2015 rule wasn’t about water quality. It was about power – power in the hands of the federal government over farmers, developers, and landowners.
- Shortly, EPA and the Army will repeal the 2015 Rule—a rule that impermissibly expanded the definition of “waters of the United States” under the Clean Water Act.
- The agencies upcoming action will restore the regulatory text that existed prior to the 2015 Rule and will end the inconsistent regulatory patchwork that has created uncertainty and has hindered projects from moving forward that can benefit both the environment and the economy.
- The agencies’ repeal remedies the legal and procedural deficiencies of the 2015 Rule, addresses the extensive litigation surrounding it, and recodifies and restores a regulatory process that has been in place for years.
 - The agencies will implement the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.
- The rule also provides regulatory certainty to our nation’s farmers and businesses as to the definition of “waters of the United States.”
 - The applicability of the rule has remained in flux due to a shifting set of preliminary injunctions barring implementation of the rule in different states across the country.
 - Currently, the 2015 Rule is in effect in 22 states, the District of Columbia, and the U.S. territories, which will be eliminated with this repeal, and the previous regulations, issued in the 1980s, are in effect in 27 states. The applicability of the 2015 Rule in New Mexico is currently under federal court consideration.
- This final rule was informed by approximately 770,000 comments on the initial proposed rule (July 27, 2017) and a supplemental proposal to clarify, supplement and seek additional comment on the original Step 1 proposal (July 12, 2018).
- While we look forward to finalizing the “Step 2” rulemaking to revise the definition of WOTUS, restoring the pre-existing regulations is appropriate because it provides a familiar regulatory framework for the regulated community.

Step 2 Proposed Rule Background

- On December 11, 2018, the agencies signed the proposed rule for a revised definition of “waters of the United States.” The proposed rule was published in the Federal Register on February 14, 2019, and the public comment period closed on April 15, 2019. The agencies received approximately 620,000 comments.
- The proposal respects the limited powers that the executive branch has been given under the Constitution and the Clean Water Act to regulate navigable waters.
- The proposal would limit where federal regulations apply and give states and tribes more flexibility to determine how best to manage waters within their borders. Together, the agencies’ proposal and existing state and tribal regulations and programs would provide a network of coverage for the nation’s water resources in accordance with the objective and policies of the Clean Water Act.
- The agencies’ proposal is consistent with the statutory authority granted by Congress, the legal precedent set by key Supreme Court cases, and the February 2017 Presidential Executive Order entitled “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”
- The agencies will carefully consider the public comments received on the proposed rule before taking final action, which is anticipated this winter.

