

Drowning in Confusion: What Is a “Water of the United States”?

A [decision](#) by the U.S. District Court for the Southern District of Georgia issued on August 21, 2019, highlights the continuing confusion over the definition of "waters of the United States" under the Clean Water Act. The decision found that the Obama administration's [2015 "Clean Water Rule"](#) is an impermissible construction of the statutory language, and it remanded the matter to the Environmental Protection Agency and Army Corps of Engineers for further rulemaking proceedings. The case is one of numerous challenges to the 2015 Rule that are winding their way through district courts across the country. Meanwhile, EPA and the Corps published a [proposed regulation](#) earlier this year to replace the 2015 Rule.

The result is a muddled patchwork. As a result of litigation, the 2015 Rule has been prevented from taking effect in 27 states. But the rule applies in 22 other states and the District of Columbia. And more litigation is certain if and when the proposed new regulation is finalized.

This update explains the background for the current quandary, the importance of the Georgia district court's decision and the implications for what comes next.

Background

The Clean Water Act applies to "navigable waters," which the act defines merely as "waters of the United States." A clear and consistent definition of this critically important phrase has proved elusive ever since the U.S. Supreme Court issued its fragmented decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In that case, Justice Anthony Kennedy established the open-ended, case-by-case "significant nexus" test that many courts have followed, while Justice Antonin Scalia's dissent proposed a more limited formulation of federal authority under the "continuous surface connection" standard.

In 2008, the Bush administration published interpretive guidance on how to apply the "significant nexus" test, but the guidance was not legally binding, left several key issues unresolved, and ultimately did little to clarify when the CWA applies and when it does not. Seven years later, and nine years after the *Rapanos* decision, the Obama administration published a final regulation that provided a much clearer, and much broader, definition of federal jurisdiction under the CWA. 80 Fed. Reg. 37,054 (June 29, 2015).

But a flood of lawsuits across the country resulted in the 2015 Rule being enjoined in 27 states (Alaska, Alabama, Arizona, Arkansas, Georgia, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin and Wyoming). *See, e.g., State of North Dakota et al. v. U.S. Environmental Protection Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *State of Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *State of Texas v. U.S. Environmental Protection Agency*, 2018 WL 4518230 (S.D. Tex. 2018). In these states, the pre-existing regulations and the 2008 Bush-era guidance—and the accompanying uncertainty—continue to govern.

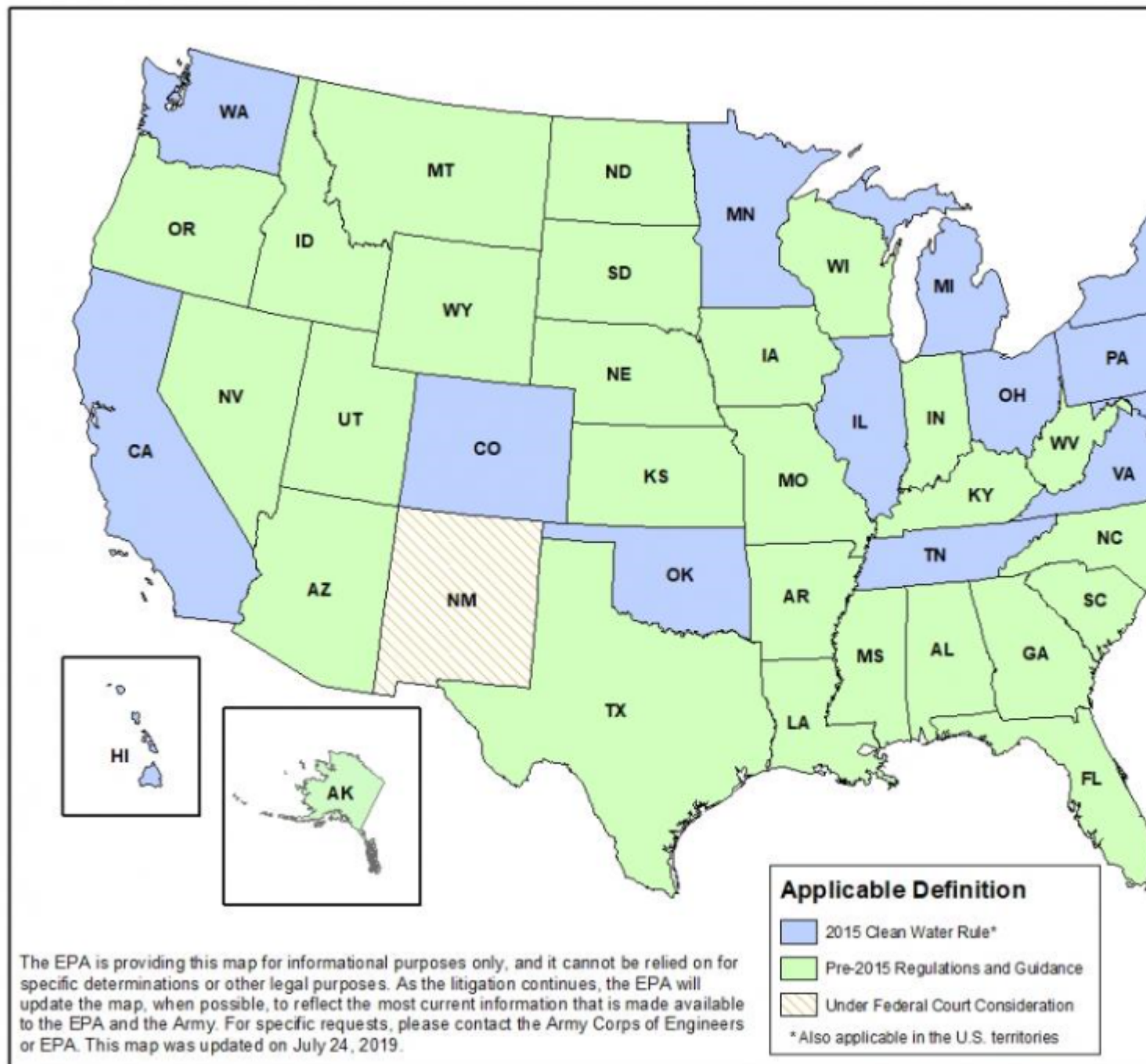
The 2015 Rule remains in effect in 22 other states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont and Washington), as well as the District

of Columbia. In one state (New Mexico), the status of the 2015 Rule currently is under judicial consideration.

Meanwhile, EPA and the Corps have pursued several avenues in an effort to thwart the 2015 Rule nationwide. First, they proposed a [regulation in 2017](#) to repeal the 2015 Rule. This proposal is anticipated to be finalized soon, but it is only an interim step as it does not include any replacement for the rule and likely will be challenged in court once it is finalized.

The agencies also adopted a final regulation in 2018 to suspend the effective date of the 2015 Rule for two years, until February 2020. But two courts found that the adoption of this regulation violated the Administrative Procedure Act. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); *Puget Soundkeeper Alliance v. Wheeler*, 2018 WL 6169196 (W.D. Wash. 2018).

This situation leaves us with the following map, which EPA has posted on its website:



The Georgia District Court's Decision

In its detailed 84-page opinion, the court—applying Justice Kennedy's "significant nexus" test as the governing standard—found that various aspects of the 2015 Rule exceeded the agencies' regulatory authority and were therefore invalid.

- **Interstate Waters:** The court first addressed the definition of "interstate waters." This definition has been in the regulations for decades and was unaltered by the 2015 Rule. According to the court, the challenge to this definition was not time-barred, since the 2015 Rule specifically addressed why the definition should

be retained, which "reopened the issue" for a challenge. The court further found that the definition was overly broad, since it covered non-navigable waters with little or no connection—and thus no significant nexus—to a navigable water. The court stated: "Under such a broad definition, a mere trickle, an isolated pond, or some other small, non-navigable body of water would be under federal jurisdiction simply because it crosses a state line or lies along a state border."

- **Tributaries:** The court found two problems with the new definition of "tributary" in the 2015 Rule, particularly as applied in the arid West. First, the definition allowed the use of "desktop tools" such as computer models and historical data to ascertain the presence of a bed and bank and an ordinary high-water mark, even if these key physical indicators of a tributary are "absent in the field." Second, the definition could cover dry areas that have these physical indicators only as the result of extreme weather events, but that do not otherwise have a significant nexus to a navigable water.
- **Adjacent Waters:** The 2015 Rule uses a set of prescribed geographical distances from a jurisdictional water to define which "adjacent waters" are also subject to federal authority. For the reasons noted above, the court faulted this definition for including water bodies adjacent to all "interstate waters" and "tributaries." The court further found that several of the geographic parameters used in 2015 Rule were unsupported. For example, the court found that including all waters that are within the floodplain of a river and within 1,500 feet of the river was overly broad, since the 2015 Rule "fails to show that the majority of waters within those limits have a significant nexus to navigable waters."
- **Encroachment on State Power:** The court next determined that the 2015 Rule impermissibly encroaches on traditional state powers. The court found that the rule's "vast expansion over waters and land traditionally within the states' regulatory authority cannot stand absent a clear statement from Congress."
- **Procedural Violation:** Lastly, the court found that the 2015 Rule violated the Administrative Procedure Act. According to the court, several aspects of the 2015 Rule were not "the logical outgrowth" of the rule as proposed, thereby denying the plaintiffs an opportunity to comment on those aspects of the final rule.

Implications of the Decision

The decision is important because it is the first published judicial decision concluding that the 2015 Rule violates the CWA. Previous decisions enjoined the implementation and enforcement of the rule pending further litigation, as a preliminary remedy to maintain the status quo until the merits of the dispute are resolved. Additionally, a [Texas district court decision](#) issued in May 2019 determined that the 2015 Rule violated the notice and comment provisions of the APA. But the Georgia district court's decision provides an extensive, detailed analysis of the Supreme Court's holding and reasoning in *Rapanos* and the extent of federal jurisdiction under the CWA, thereby establishing a lengthy set of legal findings that future courts addressing challenges to the 2015 Rule will likely be compelled to consider.

An appeal is anticipated, and there are numerous other cases throughout the country addressing the 2015 Rule. Additionally, a new final rule defining "waters of the United States"—which is likely to be issued in the coming months—would dramatically alter the legal landscape.

But at least for now, the Georgia district court's decision provides a substantial new marker in this rapidly evolving area of the law.

© 2019 Perkins Coie LLP

Authors



Marc R. Bruner

Partner

MBruner@perkinscoie.com [415.344.7171](tel:415.344.7171)



Christian Termyn

Counsel

CTermyn@perkinscoie.com [415.344.7018](tel:415.344.7018)

Explore more in

[Environment, Energy & Resources](#) [Real Estate & Land Use](#)

Related insights

Update

[Wrapping Paper Series: Issues and Trends Facing the Retail Industry During the Holiday Season](#)

Update

[Privacy Law Recap 2024: Regulatory Enforcement](#)