

## New Regulations Redefine the Scope of the Clean Water Act

The Clean Water Act applies by its terms to "navigable waters," which the act defines merely as "waters of the United States." A clear and consistent definition of this critically important phrase, which demarcates the boundaries of federal jurisdiction and permitting authority under the act, has for years proved painfully elusive—and highly controversial. On January 23, 2020, the U.S. Environmental Protection Agency and the Army Corps of Engineers, the two federal agencies charged with implementing the act, jointly issued [new regulations](#) to redefine what types of waterbodies are covered by the act and what types of waterbodies are instead subject only to state and local authority. The new regulations, dubbed the "Navigable Waters Protection Rule," will dramatically narrow the scope of the act as compared to the previous regulations.

The new rule is the culmination of the administration's efforts to undo the broad interpretation of federal jurisdiction embodied in the Obama administration's 2015 "Clean Water Rule." These efforts started in February 2017 with the President's Executive Order 13778, which directed the agencies to propose new regulations to rescind or revise the 2015 rule. The agencies then embarked on a two-step rulemaking process, first to repeal the 2015 rule and then to replace it. The agencies completed their "[step one](#)" repeal in the fall of 2019, but the repeal rule merely left in place the preexisting regulations from 1986, which have been a significant source of the pervasive uncertainty in recent years surrounding the act's reach. The agencies signaled their approach towards the "step two" replacement rule in [proposed regulations issued in December 2018](#), and the new final rule largely tracks that approach.

According to the preamble, the new rule maintains "federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress' policy directive to preserve States' primary authority over land and water resources." The agencies also contend that the new rule "increases the predictability and consistency of Clean Water Act programs by clarifying the scope of 'waters of the United States' federally regulated under the Act."

The new rule will become effective 60 days after publication in the Federal Register, which is expected to occur in the coming days. But the rule hardly represents the final word on what qualifies as a "water of the United States." Litigation to challenge the new rule is certain, and litigation challenging both the 2019 repeal rule and the 2015 Clean Water Rule is ongoing. The current uncertainty over the Clean Water Act's reach is therefore likely to continue until the courts definitively resolve the interpretation of what is inescapably an open-ended and indeterminate statutory phrase that has long puzzled stakeholders, scholars, regulators, and judges.

### Background

The regulations adopted in 1986 reflected a broad interpretation of federal jurisdiction under the act. But two U.S. Supreme Court decisions, in 2001 and 2006, scaled back this broad view. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). In 2008, the agencies published non-binding, interpretive guidance that sought to interpret and apply the *Rapanos* decision, and, in particular, Justice Anthony Kennedy's "significant nexus" test. But the guidance did

little to clarify the boundaries of federal jurisdiction, and it called for a case-by-case scientific analysis for many waterbodies without an obvious connection to a larger river, lake, or bay. This resulted in a complicated and time-consuming process just to figure out as a threshold matter if the Clean Water Act applied to a particular parcel.

The agencies adopted the Clean Water Rule in June 2015 in an effort to resolve this uncertainty and to establish clearer standards for federal jurisdiction. 80 Fed. Reg. 37,054 (June 29, 2015). But due to a nationwide stay resulting from litigation, the 2015 rule did not take effect until 2018. And when the 2015 rule finally did take effect, it did so only in 22 states, with various district court orders preventing application of the rule in 27 other states (and a lack of clarity over which rules applied in New Mexico). *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). The result was a [confusing patchwork](#), compelling the EPA to post a color-coded map on its website to show which set of rules—either the 2015 Clean Water Rule, or the preexisting 1986 regulations as supplemented by *Rapanos* and other case law and by the agencies' 2008 interpretive guidance—applied in which states.

The agencies' repeal of the 2015 rule then took effect on December 23, 2019. *See* 84 Fed. Reg. 56,626 (Oct. 22, 2019). The repeal restored national uniformity, but it did not establish certainty over the scope of federal jurisdiction. Indeed, the repeal simply reverted back to the fact-specific, case-by-case approach reflected in the 2008 *Rapanos* guidance.

But this state of affairs was short lived. Only a month after the repeal regulation took effect, the agencies have now published their new replacement definition of what qualifies as a "water of the United States."

## Description of the New Rule

The rule sets forth the following four categories of waterbodies that are subject to federal jurisdiction under the act:

1. **Traditional navigable waters.** This category includes "[t]he territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide."

This category of waterbodies has been subject to the act since its initial passage in 1972. But the rule adds a new definition of what it means to be subject to the ebb and flow of the tide. The new definition covers "those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitation pulls of the moon and sun," and this coverage ends "where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects."

2. **Tributaries.** A tributary is defined as "a river, stream, or similar naturally occurring surface water channel that contributes surface flow" to a traditional navigable water in a typical year, either directly or indirectly through another tributary or through one of the two categories of waterbodies described below.

The rule specifies that a tributary must be perennial or intermittent in a typical year. "Perennial" means "surface water flowing continuously year-round," and "intermittent" means "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g.,

seasonally when the groundwater table is elevated or when snowpack melts)." A "typical year" means "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resources based on a rolling thirty-year period."

The rule provides that a tributary does not lose its jurisdictional status if its contribution of surface water flow to a traditional navigable water occurs through "a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar nature feature."

3. **Lakes, ponds and impoundments.** This category covers "standing bodies of open water that contribute surface water flow" to a traditional navigable water in a typical year, either directly or indirectly through a tributary; through another lake, pond or impoundment; or through an "adjacent wetland" (which is described below). As with a tributary, a lake, pond, or impoundment does not lose its jurisdictional status if its contribution of surface water flow to a traditional navigable water occurs through "a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar nature feature."

This category also covers standing bodies of open water that are inundated by flooding in a typical year from a traditional navigable water, a tributary, or another jurisdictional lake, pond, or impoundment.

4. **Adjacent wetlands.** This term covers wetlands that either (1) "abut, meaning to touch at least one point or side of," a waterbody in the one of the first three categories above; (2) "are inundated by flooding in a typical year" by such a waterbody; (3) are physically separated from such a waterbody "only by a natural berm, bank, dune, or other similar feature"; or (4) are physically separated from such a waterbody "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrological surface connection" between the wetlands and the waterbody in a typical year.

An adjacent wetland is jurisdictional "in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year."

The new rule then excludes from the act's coverage 12 specific categories of waterbodies. Some of these categories already were excluded under the previous regulations, but some of the exclusions are new. The exclusions cover the following:

1. Waterbodies that do not fit into one of the four jurisdictional categories outlined above
2. Groundwater
3. Ephemeral features such as swales, gullies, rills, and pools, with "ephemeral" defined as "surface water flowing or pooling only in direct response to precipitation"
4. Diffuse stormwater runoff and directional sheet flow over uplands
5. Ditches that do not otherwise qualify as a jurisdictional water
6. Prior converted cropland
7. Artificially irrigated areas that would revert to upland if the irrigation ceased
8. Artificial lakes and ponds, such as irrigation and farm ponds, constructed or excavated in uplands or in non-jurisdictional waters
9. Water-filled depressions incidental to mining and construction activity, and pits used to obtain fill, sand, or gravel, that are constructed or excavated in uplands or in non-jurisdictional waters
10. Stormwater control features constructed or excavated in uplands or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff
11. Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in uplands or in non-jurisdictional waters
12. Waste treatment systems

## What Comes Next

As the inevitable legal challenges wind their way through the courts, it likely will be many months, and perhaps even years, before there is a clear and reliable definition of federal jurisdiction under the Clean Water Act. Absent congressional action to define once and for all what it meant when it said that the act regulated "waters of the United States," the fate of the agencies' new regulatory definition lies with the courts—at least until different regulations are adopted by a future administration.

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