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2015 Clean Water Act Rule Repealed

A [new final regulation](#) issued on September 12, 2019 by the Environmental Protection Agency and the Army Corps of Engineers repeals the Obama administration's [2015 "Clean Water Rule,"](#) but does little to clear up the longstanding confusion over the scope of federal authority and jurisdiction under the Clean Water Act. The 2015 rule provided an expansive definition of the critical term "[waters of the United States](#)" which has been unclear since the Supreme Court's 2006 decision in *Rapanos v. United States*. The agencies have [proposed a new, more limited definition](#) to replace the 2015 rule, and this proposal is anticipated to be finalized in the coming months. But the current regulation simply repeals the 2015 rule, without any replacement, such that the pre-existing Clean Water Act regulations and guidance are intended to apply until there is a new regulatory definition in place. Under the pre-existing regulations – which were first adopted in 1986 and amended in 1993, and then supplemented by non-binding interpretive guidance in 2008 – federal jurisdiction often is unclear for smaller water bodies such as seasonal washes and intermittent creeks, requiring intensive case-by-case technical analysis.

The new final rule explains the reasons for repealing the 2015 rule.

- First, the agencies have concluded that the 2015 rule "did not implement the legal limits on the scope of federal authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases."
- Second, the agencies have concluded that the 2015 rule does not adequately consider and accord due weight to the policy in Section 101(b) of the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b).
- Third, the agencies wish "to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority."
- Lastly, the agencies have concluded that the distance-based grounds for federal jurisdiction in the 2015 rule (e.g., a water body within the floodplain of a river and 1,500 feet from the river) lacked support in the factual record.

The new regulation states that it will become effective within 60 days after it is published in the Federal Register, which is expected to occur in the coming days. However, as with prior regulations on this topic, lawsuits are expected, and the uncertainty surrounding the scope of federal Clean Water Act authority is likely to continue.

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