



EPA And Corps Of Engineers Issue Repeal Of 2015 WOTUS Rule

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On October 22, the Environmental Protection Agency and Army Corps of Engineers published a final rule [repealing the 2015 Clean Water rule](#) that defined “waters of the United States.” The new rule specifies that it is effective 60 days after its publication, which will be December 23, 2019. It is expected that litigation challenging the decision will begin very shortly. It is also expected that parties challenging this new decision will ask for a stay of the decision, so that it will not go into effect on the designated date.

Just to be clear, this is the first step of the “repeal and replace” process for WOTUS. Step two will take place when the EPA and the Army Corps of Engineers take action to issue a [new final WOTUS rule](#). The latest news on that front is that the agencies expect to issue the new rule in February 2020.

So what does the “repeal” notice accomplish? Well, the introductory summary in the notice captures that well, so let’s start there:

“The Environmental Protection Agency (EPA) and the Department of the Army (‘the agencies’) are publishing a final rule to repeal the 2015 Clean Water Rule: Definition of ‘Waters of the United States’ (‘2015 Rule’), which amended portions of the Code of Federal Regulations (CFR), and to restore the regulatory text that existed prior to the 2015 Rule. 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.”

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And what are the reasons for taking this action? Again, the summary lays those out very clearly:

“The agencies are repealing the 2015 Rule for four primary reasons. First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy’s articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) 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 repeal the 2015 Rule 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 conclude that the 2015 Rule’s distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies find that these reasons, collectively and individually, warrant repealing the 2015 Rule.”

This decision is intended to entirely eliminate the 2015 WOTUS rule, which is currently in effect in some states (where it has not already been [stayed by court order](#)). However, as noted, litigation challenging this action is likely and courts may decide to stay the effect of the decision, which would mean that the 2015 rule would stay in effect in those states. We’ll be watching for further developments as this process unfolds, so stay tuned.