

## Replacement of the Clean Water Rule to Be a Two-Step Process



The Environmental Protection Agency and Army Corps of Engineers announced yesterday that the implementation of President Trump’s [executive order](#) directing EPA and the Corps to replace the Clean Water Rule will be a two-step affair. The first step, contained in a [pre-publication proposed rule](#) issued by both agencies, will rescind the Clean Water Rule and restore the definition of “waters of the United States” (WOTUS) that was in place before EPA and the Corps issued the Rule in 2015. In step two, which will occur at some future date, EPA and Corps will propose a new, narrower WOTUS definition.

### An Emphasis on Certainty and Continuity

Practically speaking, the proposed rule aims to ensure that the pre-2015 definition of WOTUS—and not the Clean Water Rule—remains controlling while litigation over the Clean Water Rule plays out and the agencies develop a new definition. The U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the Clean Water Rule in October 2015, but that stay may not remain in place while the administration tries to develop and defend a new definition of WOTUS. That stay would be lifted if the Supreme Court holds, [in a case to be decided next term](#), that the Sixth Circuit lacks jurisdiction over challenges to the Clean Water Rule. Assuming that the administration’s proposed rule holds up to legal challenges, any dissolution of the stay would not result in the Clean Water Rule taking effect in some parts of the country.

The proposed rule offers assurances—beyond simply restoring the prior version of the WOTUS definition—that the status quo will remain in place for the time being. The preamble assures the regulated community that EPA and the Corps will continue to apply pre-Clean Water Rule guidance documents in making regulatory determinations under the Clean Water Act. Notably, the guidance

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### AUTHORS

**Jamie Auslander**  
Principal  
+1.202.789.6148  
[jauslander@bdlaw.com](mailto:jauslander@bdlaw.com)



**Richard Davis**  
Principal  
+1.202.789.6025  
[rdavis@bdlaw.com](mailto:rdavis@bdlaw.com)



**Karen Hansen**  
Principal  
+1.512.391.8040  
[khansen@bdlaw.com](mailto:khansen@bdlaw.com)



**W. Parker Moore**  
Principal  
+1.202.789.6028  
[pmoore@bdlaw.com](mailto:pmoore@bdlaw.com)



**Tim Sullivan**  
Principal  
+1.410.230.1355  
[tsullivan@bdlaw.com](mailto:tsullivan@bdlaw.com)



**Drew Silton**  
Principal  
+1.202.789.6061  
[asilton@bdlaw.com](mailto:asilton@bdlaw.com)



documents that the agencies will continue to use include 2003 and 2008 joint guidance that interpret the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

## Balancing the Clean Water Act's Objectives

In addition to focusing on regulatory certainty, the agencies' rationale for rescinding the Clean Water Rule emphasizes their focus on the role of states in regulating water pollution. Section 101(b) of the Clean Water Act recognizes "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution ...." The proposed rule issued today argues that this policy received insufficient consideration in the development of the Clean Water Rule and will play a more central role in the development and justification of its replacement. As a consequence, Section 101(b) will likely play a substantial role in litigation challenging yesterday's proposed rule and any future rulemaking to redefine WOTUS along the lines of Justice Scalia's plurality opinion in *Rapanos*.

## More to Come

The agencies' proposed rule is just the beginning of what will be a flurry of activity over the coming months and years relating to the Clean Water Rule and its replacement. Comments on the proposed rule will be due in late July or early August 2017, depending on when EPA and the Corps publish their proposal in the Federal Register. In addition to the current litigation over the Clean Water Rule, one can expect multiple lawsuits challenging the rescission of the Clean Water Rule and any replacement that the agencies issue.

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