

Déjà Vu: EPA, Army Corps Take First Step to Redefine “Waters of the U.S.”



Last week EPA and the U.S. Army Corps of Engineers announced that they again will be taking the first step in the long-awaited rulemaking process to redefine the scope of “waters of the United States” (WOTUS) under the federal Clean Water Act. This first step will repeal the Obama-era Clean Water Rule and re-implement the pre-2015 regulatory definition of WOTUS nationwide. It will take effect 60 days after publication in the Federal Register.

The new repeal rule is the latest installment in the saga to define the scope of federal jurisdiction under the Clean Water Act. The rule reverses the Obama Administration’s controversial 2015 regulatory amendments to the definition of WOTUS, which have been the subject of numerous lawsuits from states and industry. If this all sounds familiar, that is because it is. In February 2018, the Trump Administration attempted to achieve the same outcome by issuing a similar rule that [suspended](#) the 2015 standards, but that move generated extensive litigation, resulting in the 2015 regulatory provisions applying in [22 states](#) while the pre-2015 regulations applied in the other 28 states. This latest repeal rule makes another go at it and seeks to remove the competing regulatory standards that sprang from the litigation over its predecessor until the agencies can finalize the Trump Administration’s new definition of WOTUS. They expect to finalize that rule, which they [proposed last December](#), sometime this winter.

Although the new repeal rule has not been published in the Federal Register yet, let alone taken effect, several states and environmental organizations already have announced that they will challenge it. Even if those lawsuits prove unsuccessful, the repeal rule will only have succeeded in temporarily reinstating regulatory standards that were so confusing that two Administrations in a row

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have tried to replace them. As a result, the uncertainty that has plagued Clean Water Act regulation and permitting will remain for now.

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