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Waters of the United States: Timeline of Definitions

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The term "waters of the United States" is a central component of the Clean Water Act ("CWA"), the federal statute that regulates water pollution in the United States. Knowing which waters are "waters of the United States" ("WOTUS") and which are not is critical because only waters that fall into the definition of WOTUS are subject to the CWA. However, the definition of WOTUS has shifted many times since it was initially defined in 1973. This has resulted in a patchwork of regulations that can sometimes make it difficult to determine whether a waterbody is a WOTUS. The following is a timeline tracking the various changes to the definition of WOTUS. Identifying when and where each definition of WOTUS is applicable can help bring clarity to a shifting regulatory landscape.

The Clean Water Act ("CWA") of 1972 is the main federal law in the United States governing water pollution. The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To accomplish this objective, the CWA prohibits the discharge of pollutants into "navigable waters." When the CWA was passed in 1972, Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." Since its passage, interpretation of the CWA's "waters of the United States" has been an on-going challenge.

Two agencies are in charge of implementing the CWA. The Environmental Protection Agency ("EPA") is the primary administrator of the CWA. It works with state governments to manage the National Pollutant Discharge Elimination System ("NPDES"), a program central to the CWA, which provides that all discharges of pollutants into a water of the United States ("WOTUS") require a permit. While EPA manages the NPDES program, the Army Corps of Engineers ("Corps") is tasked with regulating discharges of dredge or fill material into a WOTUS. Section 404 of the CWA makes it the responsibility of the Corps to issue permits for any discharge that would affect the bottom elevation of a WOTUS.

Knowing exactly what waterbodies fall under the definition of WOTUS is crucial for implementation of and compliance with the CWA. However, the definition has shifted multiple times over the statute's lifespan as EPA and the Corps have sought to bring the definition into agreement with opinions from the United States Supreme Court and Executive Orders. This timeline includes regulatory changes, court cases, and guidance documents that have altered the WOTUS definition over the years.

This document will be updated to stay current with any changes to the WOTUS definition.

1972

Sweeping amendments are made to the Federal Water Pollution Control Act of 1948. The amendments, known as the Clean Water Act, grant federal jurisdiction over "waters of the United States, including the territorial seas." Congress leaves it up to EPA and the Corps to interpret this key phrase.

May, 1973

EPA issued its first set of regulations implementing the CWA. In those regulations, EPA defined the term WOTUS to include six distinct categories of waterbodies:

(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate waters;
(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13,529 (1973) (codified at 40 C.F.R. § 125.1(p) (1974)).

This six-category definition of WOTUS only applied to the NPDES permit program.

April 1974

The Corps released its first set of regulations implementing Section 404 of the CWA. Those regulations included a definition of WOTUS that differed from the one released by EPA the year prior. That meant that as of April 1974, the two agencies were using different WOTUS definitions. The Corps definition applied to Section 404 discharges of dredge and fill material while the EPA definition applied to discharges of pollutants that would be included in the NPDES program.

The Corps' 1974 regulations defined the jurisdictional waters of the CWA as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R § 209.12(d)(1) (1974). Essentially, the Corps had defined the term WOTUS to only include those waters which were considered traditionally navigable due to their ability to be used in interstate or foreign commerce.

March 27, 1975

The United States District Court for the District of Columbia struck down the Corps' April, 1974 interpretation of WOTUS under the CWA in *Nat. Res. Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). In its decision, the court held that jurisdictional waters of the CWA could not be "limited to the traditional tests of navigability" because in the CWA Congress had "asserted federal jurisdiction over the nation's water to the maximum extent permissible" under the United States Constitution. The court ordered the Corps to publish a new rule that "clearly recogniz[ed] the full mandate of the [CWA]."

WOTUS Timeline: Definition Changes Under the Clean Water Act

1972
The Clean Water Act becomes law.

May, 1973
EPA issues its first set of regulations defining WOTUS

April 1974
The Corps issues its first set of regulations defining WOTUS

March 1975
A federal court strikes down the Corps' April, 1974 interpretation of WOTUS in *Nat. Res. Defense Council v. Callaway*

1977

In response to the *Callaway* decision, the Corps issued final regulations reinterpreting the term WOTUS into five categories:

(1) The territorial seas with respect to the discharge of fill material;
(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
(3) Tributaries to navigable waters of the United States, including adjacent wetlands
(4) Interstate waters and their tributaries, including adjacent wetlands; and
(5) All other waters of the United States not identified in paragraphs (1) – (4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

33 C.F.R. §323.2(a) (1978).

At this point, the Corps and EPA were still using two separate WOTUS definitions. The 1973 EPA rule continued to be used for implantation of the NPDES program, while the 1977 Corps rule was used to implement the Section 404 program.

May 19, 1980

In 1979, the United States Attorney General released a legal opinion which concluded that EPA had the ultimate authority to define what constituted a WOTUS for purposes of Section 404. Benjamin R. Civiletti, Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197, 197-202 (1979). Although it took until 1989 for EPA and the Corps to execute a Memorandum of Agreement concluding that EPA would take the lead on defining jurisdictional waters under the CWA, the two agencies had adopted identical WOTUS definitions by 1982. EPA published a revised definition of WOTUS in the Federal Register on May 19, 1980. The 1980 definition replace the definition EPA published in 1973, and was adopted by the Corps two years later in 1982.

Under the 1980 EPA rule, a WOTUS under the CWA was defined as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(b) All interstate waters, including interstate "wetlands;"
(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
    (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
    (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
(d) All impoundments of waters otherwise defined as waters of the United States under this definition;
(e) Tributaries of waters identified in paragraphs (1) – (4) of this definition;

1977
The Corps issues new regulations defining WOTUS in response to the *Callaway* decision

May 1980
EPA releases new regulations defining WOTUS that replace the regulations issued in 1973

(f) The territorial sea; and
(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) – (f) of this definition.

Final Rule, Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (codified in 40 C.F.R. § 122.3 (1981)).

July 22, 1982

The Corps issued regulations adopting the 1980 EPA definition of WOTUS. Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,810 (July 22, 1982) (codified in 33 C.F.R. § 323.2 (1983)).

December 4, 1985

The United States Supreme Court issued its opinion in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), concluding that the Corps had reasonably interpreted the CWA to require permits for the discharge of fill material into wetlands adjacent to "waters of the United States." The case concerned a challenge to the 1977 regulations adopted by the Corps which provided that wetlands were included within the definition of WOTUS and defined "wetlands" as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

The defendant in the case, Riverside Bayview Homes, Inc., owned 80 acres of low-lying, marshy land located near the shores of Lake St. Clair in Michigan. In preparation for construction of a housing development, the defendant began to place fill material into the marshy land without a CWA permit from the Corps. The Corps believed that the land fell under CWA jurisdiction and brought suit against the defendant.

Before reaching the Supreme Court, the case resulted in an opinion from the Sixth Circuit Court of Appeals. That opinion interpreted the Corps' regulations to exclude "wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation" from the definition of WOTUS. According to the Sixth Circuit's interpretation of the regulation, the defendant's property would not qualify as a jurisdictional wetland because its aquatic characteristics were not the result of regular flooding.

The Supreme Court reversed the Sixth Circuit's opinion, concluding that the plain language of the Corps' regulation fully refuted the Sixth Circuit's interpretation. Because the Corps was in charge with interpreting § 404 of the CWA, and it's interpretation of "wetlands" was reasonable, the Supreme Court overturned the Sixth Circuit's opinion. The Corps' interpretation that the CWA required permits for the discharge of fill material into wetlands adjacent to "waters of the United States" was allowed to stand.

July 1982
The Corps adopts identical regulations to those issued by EPA in 1980

Dec. 1985
The Supreme Court issues its opinion in *U.S. v. Riverside Bayview Home, Inc.*, concluding that the Corps may require CWA permits for discharges of fill material into certain wetlands

November 13, 1986

Through regulations issued by the Corps, both it and EPA adopted what the agencies referred to as a clarification of the WOTUS definition. The regulatory definition of WOTUS adopted by EPA in 1980 and the Corps in 1982 did not change, but the Corps published a statement in the Federal Register noting that: "EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

(a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
(b) Which are or would be used as habitat by other migratory birds which cross state lines; or
(c) Which are or would be used as habitat for endangered species; or
(d) Used to irrigate crops sold in interstate commerce."

Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

The clarification became known as the Migratory Bird Rule, and expanded the definition of WOTUS.

August 25, 1993

In a final rule published in the Federal Register, EPA codified "the current policy that prior converted croplands are not waters of the United States." Clean Water Act Regulatory Programs; Final Rule, 58 Fed. Reg. 45,008, 45,031, 45,036-37 (Aug. 25, 1993). This did not change the definition of WOTUS, but rather clarified that the definition excluded areas that had previously been drained of water and converted to agricultural use.

December 23, 1997

In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Fourth Circuit Court of Appeals held that the CWA did not authorize a definition of WOTUS that included "those waters whose degradation 'could affect' interstate commerce." Specifically, the plaintiffs in the case challenged the Corps' definition of WOTUS at 33 C.F.R. § 328.3(a)(3) (1993) which includes:

> All other water such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce…

The court agreed with the plaintiffs that the definition was too broad and went beyond the bounds of what was authorized under the CWA. The court concluded that by including intrastate waters that were not hydrologically connected to navigable or interstate waters, 33 C.F.R. § 328.3(a)(3) (1993) expanded WOTUS beyond what the CWA intended. Accordingly, the court invalidated 33 C.F.R. § 328.3(a)(3) (1993).

Because the decision in *Wilson* never made it to the United States Supreme Court, it only applied in the Fourth Circuit. This meant that the jurisdictions within the Fourth Circuit – Maryland, North Carolina, South Carolina, Virginia, and West Virginia – followed a different WOTUS definition than the rest of the United States because their definition no longer included intrastate waters that were not hydrologically connected to a navigable or interstate water whose

Nov. 1986
EPA and the Corps adopt the Migratory Bird Rule

Aug. 1993
EPA codifies a policy excluding prior converted croplands from the WOTUS definition

Dec. 1997
The Fourth Circuit Court of Appeals issues a decision in *U.S. v. Wilson*, concluding that the CWA did not allow the term WOTUS to include waters that were not connected to a navigable or interstate water

degradation could affect interstate commerce.

March 9, 2000

The Corps codified the Fourth Circuit's decision in *Wilson* by publishing in the Federal Register that "within the Fourth Circuit, isolated waters must be shown to have an actual connection to interstate or foreign commerce." Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (March 9, 2000). All other jurisdictions continued to follow the WOTUS definition adopted by EPA in 1980 and by the Corps in 1982.

January 9, 2001

The United States Supreme Court overturned the Migratory Bird Rule that had been adopted by EPA and the Corps in 1986 in *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). The case involved a dispute over whether CWA jurisdiction extended to an abandoned sand and gravel pit that provided habitat for migratory birds. Ultimately, the court concluded that the Migratory Bird Rule extended the definition of WOTUS beyond the jurisdiction of the CWA. The court based its decision on Congress' use of the phrase "navigable waters" in the CWA which the court felt did not accommodate isolated, seasonal, intrastate ponds simply because they served as habitat for migratory birds.

The ruling was narrow and applied only to the Migratory Bird Rule. However, the court did use the phrase "significant nexus" to describe its understanding of the relationship that wetlands needed to have to a navigable water in order to bring them under CWA jurisdiction. This term would later be used in other Supreme Court decisions interpreting the definition of WOTUS.

After this case, the WOTUS definition adopted by EPA in 1980 and the Corps in 1982 remained in place, but the Migratory Bird Rule had been struck down.

June 19, 2006

The United States Supreme Court once again considered the definition of WOTUS in *Rapanos v. U.S.*, 547 U.S. 715 (2006). The case did not result in a majority opinion. Instead, five of the justices agreed on the outcome, but not on the legal reasoning used to reach the outcome. This resulted in three opinions: a four-justice plurality authored by Justice Scalia; a concurrence authored by Justice Kennedy writing for himself; and a four-justice dissent. Of the three opinions, the Scalia plurality and the Kennedy opinion were both used as guidance for the definition of WOTUS going forward.

The *Rapanos* case concerned the scope of CWA jurisdiction over "adjacent" wetlands. Specifically, the court addressed whether CWA jurisdiction included wetlands that were hydrologically isolated from any other waters of the United States, or whether it included non-navigable wetlands that did not "abut" a navigable water.

In the plurality opinion written by Justice Scalia, four justices concluded that the only possible interpretation of the phrase "waters of the United States" included waters that were relatively permanent, standing, or continuously flowing bodies of water which the justices identified as streams, rivers, and lakes. Although the plurality opinion found that wetlands could be included under CWA jurisdiction, the inclusion was limited to wetlands that shared a continuous surface connection to other waters of the United States.

March 2000
The Corps codifies the *Wilson* decision

Jan. 2001
The Supreme Court overturns the Migratory Bird Rule and uses the phrase "significant nexus" for the first time in *Solid Waste Agency of N. Cook City v. U.S. Army Corps of Eng'rs*

June 2006
The Supreme Court issues its decision in *Rapanos v. U.S.*, considering the scope of CWA jurisdiction over "adjacent" wetlands, without a majority opinion

In contrast, the opinion written by Justice Kennedy concluded that it should be determined on a case-by-case basis whether a wetland could be regulated as a WOTUS based on whether the wetland possessed a "significant nexus" to a navigable water. According to Justice Kennedy, a significant nexus exists between a wetland and a navigable water when a wetland, either alone or in connection with similarly situated lands, has a significant impact on the chemical, physical, and biological integrity of a traditionally navigable water.

Since the *Rapanos* opinion was issued, lower courts have struggled with how to apply it when considering cases concerning jurisdictional disputes under the CWA. For the most part, the lower courts have applied Justice Kennedy's "significant nexus" test either on its own or in conjunction with Justice Scalia's plurality opinion.

December 2, 2008

EPA and the Corps issued a joint guidance document directing both agencies on how to implement the CWA in light of the *Raponos* opinion. Specifically, the document identified which waters were within CWA jurisdiction, which waters would have CWA jurisdiction determined on a case-by-case basis, which waters were not under CWA jurisdiction, and how the significant nexus standard would be applied.

EPA and the Corps identified four types of waters that fell under the definition of WOTUS: (1) traditional navigable waters; (2) wetlands adjacent to traditional navigable waters; (3) non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months); and (4) wetlands that directly abut such tributaries.

Waters identified as requiring a case-by-case determination to determine whether the water was a WOTUS included: (1) non-navigable tributaries that are not relatively permanent; (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent; and (3) wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

Finally, waters that the agencies identified as not within the definition of WOTUS were: (1) swales or erosional features; and (2) ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

Although this guidance document dictated how EPA and the Corps would identify whether a water qualified as a WOTUS for purposes of the CWA, it was not a regulation. At this point, the regulations adopted by both agencies in the 1980s remained in place. The guidance document provided additional information on how those regulations were to be interpreted and applied.

August 27, 2015

In *North Dakota v. U.S. Envtl. Prot. Agency*, 127 F.Supp.3d 1047 (2015) the United States District Court for the District of North Dakota issued an opinion preventing the Clean Water Rule from going into effect in Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. The decision was preemptive because the Clean Water Rule, new regulations that would give WOTUS a new definition, was not set to take legal effect until the following day. In the states included in the order, the regulations adopted by EPA and the Corps in the 1980s remained in effect after August 28, 2015.

WOTUS Timeline: Definition Changes Under the Clean Water Act

Dec. 2008

EPA and the Corps issue a joint guidance document directing the agencies on how to implement the CWA following the *Rapanos* decision

Aug. 27 2015

A federal court preemptively bars new WOTUS regulations from going into effect in several states

August 28, 2015

EPA and the Corps issued new regulations on the definition of WOTUS under the CWA went into effect. Known as the Clean Water Rule or the 2015 Rule, the regulations attempted to clarify the definition of WOTUS following the *SWANCC* and *Rapanos* decisions. Like the guidance document issued in 2008, the Clean Water Rule divided waters into three general categories: (1) waters that were always under CWA jurisdiction; (2) waters that were always excluded from CWA jurisdiction; and (3) waters that would have CWA jurisdiction determined on a case-by-case basis.

Waters identified by the Clean Water Rule as always falling under the definition of WOTUS were: traditionally navigable waters; interstate waters and wetlands; territorial seas; impoundments of waters otherwise identified as a WOTUS; tributaries of waters otherwise identified as a WOTUS; and all waters adjacent to a water otherwise identified as a WOTUS, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters.

Waters identified by the Clean Water Rule was requiring a case-by-case analysis to determine CWA jurisdiction included: prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands; and all waters located within the 100-year floodplain of a traditionally navigable water, interstate water, or territorial sea.

The list of waters identified by the Clean Water Rule as not falling into the WOTUS definition was extensive. Such waters included: waste treatment systems; prior converted cropland; certain ditches; certain artificially constructed waterbodies; erosional features such as gullies and other ephemeral features; puddles; groundwater; storm water control features; and wastewater recycling systems and groundwater recharge basins.

The Clean Water Rule replaced the regulations adopted by EPA and the Corps in the 1980s as well as all guidance documents issued by the agencies since that time. However, the Clean Water Rule only took legal effect in certain states because of a court order issued the day before the Rule took effect that prevented the Rule from going into effect in thirteen states.

October 8, 2015

In *In re EPA*, 803 F. 3d 804, the Sixth Circuit Court of Appeals issued an order for a nationwide stay of the Clean Water Rule. Essentially, the order prevented the Clean Water Rule from continuing to have legal effect anywhere in the country. The court reasoned that "the status quo" of WOTUS interpretation should be maintained because there were several on-going litigations across the country challenging the Clean Water Rule. By staying the Clean Water Rule, the court effectively returned WOTUS regulation to where it was before the Clean Water Rule was instated. This meant that the regulations adopted by EPA and the Corps in the 1980s along with the guidance documents that had been issued that interpreted those regulations regained legal effect.

An important aspect of the case was whether, under the provisions of the CWA, the Sixth Circuit had jurisdiction to issue the case at all or whether the challenge to the Clean Water Rule should have first been brought in a district or circuit court before proceeding to the Sixth Circuit Court of Appeals. Generally, legal challenges are first brought in a lower district or circuit court, after which the ruling can be appealed to a higher appellate court. In this case, the Sixth Circuit ruled that it was appropriate for the challenge to have been brought directly to

Aug. 28 2015

EPA and the Corps issue the Clean Water Rule, redefining WOTUS following the *SWANCC* and *Rapanos* decisions

Oct. 2015

The Sixth Circuit Court of appeals issues a nationwide stay of the Clean Water Rule

appellate court without going to a lower court first.

February 28, 2017

President Trump issued Executive Order 13778 which directed EPA and the Corps to draft new regulations interpreting WOTUS under the CWA. The Executive Order suggested that the agencies draft regulations that were more in line with the plurality opinion authored by Justice Scalia in *Rapanos*.

Although the Executive Order did not have any immediate effect on the interpretation of WOTUS, it did prompt EPA and the Corps to start the process of drafting new regulations.

January 22, 2018

A challenge to the Sixth Circuit's ruling that it had jurisdiction to hear the initial challenge to the Clean Water Rule in *In re EPA* resulted in a ruling from the Supreme Court of the United States concluding that the Sixth Circuit did not have jurisdiction to hear the case. In *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (2018), the court listed several categories of agency actions that were subject to direct appellate review, and explained that a legal challenge to a rule defining WOTUS did not fall into any of those categories. As a result, the court vacated the Sixth Circuit's stay of the Clean Water Rule because the appellate court did not have the jurisdiction to hear the case in the first place.

By overturning the stay, the Supreme Court returned WOTUS regulation to where it was prior to the Sixth Circuit's holding in *In re EPA*. This meant that the Clean Water Rule went back into legal effect in every state except for the states that were part of *North Dakota v. U.S. Envt'l Prot. Agency*. The Supreme Court's decision in *Nat'l Ass'n of Mfrs.* also resulted in the reopening of legal actions to prevent the Clean Water Rule from taking effect that had been closed, but not fully resolved after the Sixth Circuit issued the nationwide stay.

States where the Clean Water Rule did not have legal effect after the Supreme Court lifted the Sixth Circuit's stay were: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

September 12, 2018

The United States District Court for the Southern District of Texas issued an order in *State of Texas v. U.S. Envt'l Prot. Agency*, No. 3:15-cv-00162 (S.D. Tex. Sept. 12, 2018) preventing the Clean Water Rule from having legal effect in Louisiana, Mississippi, and Texas. In those states, along with the other states where the Clean Water Rule was prevented from taking legal effect, the definition of WOTUS would be determined according to the regulations adopted by EPA and the Corps in the 1980s and the guidance documents interpreting those regulations. All other states continued to interpret the definition of WOTUS according to the Clean Water Rule.

States where the Clean Water Rule did not have legal effect after the court's ruling were: Alaska, Arizona, Arkansas, Colorado, Idaho, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas and Wyoming.

September 18, 2018

The court issued an order in *North Dakota v. U.S. Envt'l Prot. Agency* concluding

WOTUS Timeline: Definition Changes Under the Clean Water Act

Feb. 2017
President Trump issues Executive Order 13778, directing EPA and the Corps to draft new WOTUS regulations

Jan. 2018
The Supreme Court issues a decision in *Nat'l Ass'n of Mfrs v. Dep't of Def.* that vacates the Sixth Circuit's nationwide stay of the Clean Water Rule

Sept. 12, 2018
A federal court issues an order preventing the Clean Water Rule from going into effect in Louisiana, Mississippi and Texas, adding them to the list of states where the Clean Water Rule does not apply

Sept. 18, 2018
A federal court concludes that the Clean Water Rule would not apply in Iowa

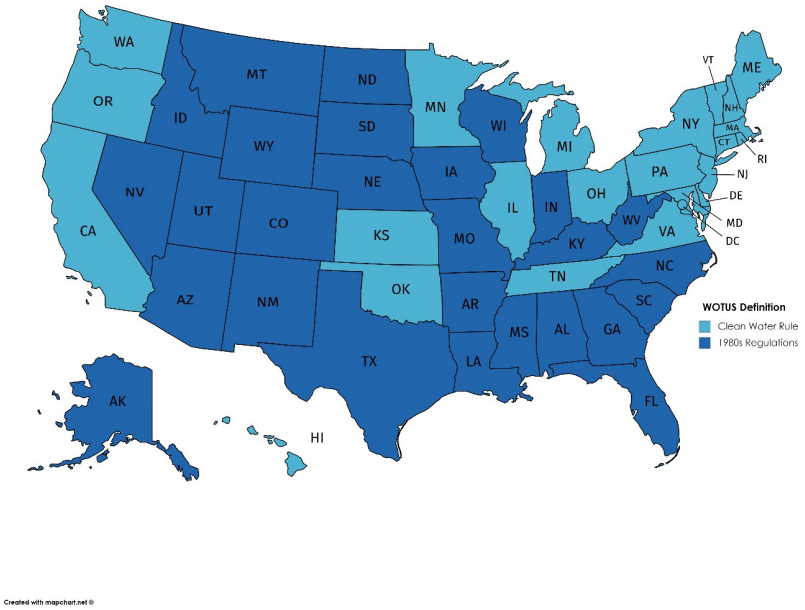
that the Iowa had appropriately joined as a plaintiff in the litigation. Therefore, the order preventing the Clean Water Rule from having legal effect was extended to include Iowa.

States where the Clean Water Rule did not have legal effect after the court's ruling were: Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas and Wyoming.

August 21, 2019

The United States District Court for the Southern District of Georgia issued a ruling in *State of Georgia v. Wheeler*, No. 2:15-cv-00079 (S.D. Ga. Aug. 21, 2019) that prevented the Clean Water Rule from continuing to have effect in Alabama, Florida, Georgia, Indiana, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin.

This brought the total number of states where the Clean Water Rule did not apply to twenty-eight, and the number of states where it did apply to twenty-two.



December 23, 2019

The first step of EPA's rulemaking process to comply with Executive Order 13778 went into effect. In order to comply with the Executive Order, EPA established a two-step process that would result in a new regulatory definition of the term WOTUS. First, EPA would pass regulations repealing the Clean Water Rule, returning to the 1980s regulations and the guidance documents that interpreted those regulations. Second, EPA would pass new regulations reinterpreting WOTUS.

One December 23, 2019, the first step of EPA's two-step process, the Final Rule Repealing the 2015 Rule ("Repeal Rule") took legal effect. According to the text of the Repeal Rule, it "implement[ed] the pre-2015 Rule regulations informed by applicable agency guidance documents and consistent with Supreme Court

Aug. 2019

A federal court issues a ruling preventing the Clean Water Rule from having effect in several states, bringing the total number of states where the Clean Water Rule did not apply to twenty-eight

Dec. 2019

EPA repeals the Clean Water Rule, returning to the 1980's regulations

decision and longstanding agency practice." In other words, the Repeal Rule had the legal effect of returning the state of WOTUS regulation to where it was prior to the Clean Water Rule. Although several lawsuits have been filed challenging the Repeal Rule, to date there have been no rulings in any such lawsuit, meaning that the Repeal Rule is currently effective nationwide.

January 23, 2020

EPA and the Corps finalized the rule intended to replace the Clean Water Rule and fulfill step two of the rulemaking process undertook by the agencies in response to Executive Order 13778. The rule, known as the Navigable Waters Protection Rule ("Navigable Waters Rule"), provides a new definition for WOTUS. Although the Navigable Waters Rule was finalized and released on January 23, 2020, as of that date the rule does not have any legal effect. The rule will not become effective until 60 days after it is published in the Federal Register.

According to EPA, the Navigable Waters Rule is meant to streamline the WOTUS definition by including four clear categories of jurisdiction water, specific exclusions of water features that have not typically been regulated under the CWA, and define terms within the regulatory text which have never been clearly idefined in the regulations. The Navigable Waters Rule aims to bring the WOTUS regulation more in line with the plurality opinion authored by Justice Scalia in the *Rapanos* decision, and to provide a clear distinction between waters subject to federal regulation and waters subject to sole control of the states in order to give states greater regulatory power.

The four categories of WOTUS outlined in the Navigable Waters Rule are: (1) territorial seas and traditional navigable waters; (2) tributaries; (3) lakes, ponds, and impoundments of jurisdictional waters; and (4) adjacent wetlands that physically touch other jurisdictional waters.

The waterbodies that will not be considered a WOTUS under the Navigable Waters Rule is extensive and includes groundwater, ephemeral water features, prior converted cropland, artificially irrigated areas, and several others.

Importantly, under the Navigable Waters Rule, the jurisdictional status of a waterbody will be informed by understanding the conditions of a "typical year." In other words, the jurisdictional status of a waterbody will be made after considering the normal range of precipitation and other climate-related variables for that waterbody. The goal is to allow EPA and the Corps to determine the jurisdictional status of a waterbody based on the normal hydrologic conditions of a waterbody rather than on conditions during an abnormally wet or abnormally dry year. Under the Navigable Waters Rule, agencies will consider the past thirty years of data on precipitation, drought, and other climate-related factors to determine what a "typical year" is for any given waterbody.

Currently, the Navigable Waters Rule has yet to take legal effect. Until it does, the definition of WOTUS is governed by the pre-2015 regulatory landscape that the Repeal Rule reinstated.

April 21, 2020

EPA and the Corps publish the Navigable Waters Rule in the Federal Register. The Rule is set to take legal effect on June 22, 2020.

Jan. 2020

EPA and the Corps finalize the Navigable Waters Protection Rule which will provide the new legal definition of WOTUS once it takes full legal effect

April 2020

The Navigable Waters Rule is published in the Federal Register