

Agribusiness Alert: Rule Defining Waters Covered by the Clean Water Act Repealed

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On September 12, 2019, the Environmental Protection Agency and the Army Corps of Engineers jointly adopted an administrative rule repealing a 2015 rule that defined the scope of waters covered by the Clean Water Act (CWA). The repeal can be seen as a retreat by those agencies from a more expansive interpretation of federal jurisdiction under the CWA taken during the Obama administration. Because of the time and expense often associated with the CWA permitting process, a determination that a piece of land contains waters of the United States can significantly limit how the land can be used for agricultural and other purposes. In repealing the 2015 rule, sometimes referred to as the Waters of the United States (WOTUS) rule, the agencies expressed concern that the rule reflected an interpretation of the CWA that went beyond the authority clearly authorized by Congress. The repeal of the WOTUS rule may be especially significant for regulation of wetlands, where drawing boundaries can be technically challenging and very contentious, and for ephemeral streams, which flow with water only during certain parts of the year or after rainfalls.

Judicial Interpretation of CWA Jurisdiction

The CWA prohibits discharge of dredged or fill materials into "navigable waters" without a permit and authorizes the Army Corps of Engineers to make jurisdictional determinations and issue permits. The CWA defines "navigable waters" to mean "waters of the United States, including territorial seas." The application of this definition to wetlands, which are not themselves navigable but could have an affect on navigable waters, has presented the courts with special challenges. Thus, in 1985, the Court held that federal jurisdiction under the CWA extended to "at least some waters that could not be deemed 'navigable' under the classic understanding of that term" and included wetlands that directly abutted a navigable waterway.[1]

In 2006, in *Rapanos v. United States*,[2] the Court considered whether four Michigan wetlands located near ditches or manmade drains that eventually emptied into navigable waters were "waters of the United States" for purpose of the CWA. A five-Justice majority vacated the decision of the Sixth Circuit, which had found that the wetlands were subject to the CWA, articulating two different legal standards in reaching that conclusion. Justice Scalia, writing for a four-Justice plurality, applied a test that would extend federal

jurisdiction under the CWA to "only that wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is not clear demarcation between waters and wetlands adjacent to such waters and covered by the Act." Justice Kennedy concurred in the result but applied a different test. Justice Kennedy found that wetlands may be subject to the CWA only if they have a "significant nexus" to navigable waters, taking into account the affect of the wetlands on the chemical, physical, and biological integrity of covered waters.

Adoption of the Waters of the United States Rule

In 2015, the EPA and Corps of Engineers adopted the Waters of the United States rule for the stated purpose of "providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA." The rule identified three categories of waters: 1) waters that are always subject to the CWA; 2) waters that are excluded from federal jurisdiction; 3) a "narrow category" of waters for which jurisdiction would be determined on a case-by-case basis based on whether there was a significant nexus between the water body at issue and a navigable water. The rule was immediately controversial and was a target of various legal challenges brought by states and private parties. Those challenges were successful, at least in part, and courts enjoined the rule from taking effect in 28 states.

Repeal of the Waters of the United States Rule

On February 28, 2017, the President issued an executive order directing the EPA and Army Corps of Engineers to review the WOTUS rule. On March 6, 2017, the agencies published a notice of their intent to review the rule and that review process concluded on September 12, 2019, with the repeal of the WOTUS rule. In support of repeal, the agencies stated that the WOTUS rule had inappropriately expanded Justice Kennedy's significant nexus test by broadening the meaning of key terms, including "tributary," "adjacent," and "significant nexus." The agencies also found that the WOTUS rule could be used to support the potential assertion of federal jurisdiction over nearly all waters within large watersheds.

The repeal of the WOTUS rule also re-codified the rules that were in place before the WOTUS rule was adopted. As a result of the appeal, the same legal standard for determining CWA jurisdiction now applies in all states. The EPA and Army Corps of Engineers are now considering public comments on a proposed rule that would re-define waters of the United States.

A violation of the CWA can result in both civil and criminal penalties that can be quite severe. A landowner who is uncertain about whether a piece of land falls within the scope of the CWA may seek guidance from the Army Corps of Engineers in the form of a Jurisdictional Determination. Moreover, even if the CWA does



not apply, care must be taken to assure that all applicable state law permitting and other environmental requirements are met.

For more information, reach out to a member of the Gray Plant Mooty agribusiness team.

[1] *United States v. Riverside Bayview Homes, Inc.*, 479 U.S. 121 (1985); see also *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (presence of migrating birds insufficient to support the exercise of jurisdiction under the CWA over isolated ponds located wholly within one state).

[2] 547 U.S. 715 (2006).