

'Nightmare Is Over,' EPA Repeals WOTUS

Greg Henderson | September 12, 2019



The Environmental Protection Agency (EPA) and the Department of the Army finalized a rule to repeal the “waters of the United States” (WOTUS), the 2015 federal regulation of waters and wetlands.

The action officially ends an Obama-era action called a “power grab” and sets the stage for a new rule that will provide much-needed regulatory certainty for farmers, home builders, and property owners nationwide.

In Washington, D.C., U.S. Environmental Protection Agency (EPA) Administrator Andrew Wheeler and Department of the Army Assistant Secretary of the Army for Civil Works R.D. James announced the repeal of the 2015 rule that impermissibly expanded the definition of “waters of the United States” under the Clean Water Act. The agencies are also recodifying the longstanding and familiar regulatory text that existed prior to the 2015 Rule—ending a regulatory patchwork that required implementing two competing Clean Water Act regulations, which has created regulatory uncertainty across the United States.

“Today’s Step 1 action fulfills a key promise of President Trump and sets the stage for Step 2 – a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders, and developers nationwide,” said EPA Administrator Andrew Wheeler.

“Before this final rule, a patchwork of regulations existed across the country as a result of various judicial decisions enjoining the 2015 Rule,” said R.D. James, Assistant Secretary of the Army for Civil Works. “This final rule reestablishes national consistency across the

country by returning all jurisdictions to the longstanding regulatory framework that existed prior to the 2015 Rule, which is more familiar to the agencies, States, Tribes, local governments, regulated entities, and the public while the agencies engage in a second rulemaking to revise the definition of ‘waters of the United States.’”

In a statement, National Cattlemen’s Beef Association president Jennifer Houston said, “The 2015 WOTUS rule was an illegal effort by the federal government to assert control over both land and water, significantly impacting our ability to implement vital conservation practices.”

Houston said cattle producers work hard to ensure that America’s natural resources remain pristine and to implement conservation practices to protect water resources.

“After years spent fighting the 2015 WOTUS Rule in the halls of Congress, in the Courts, and at the EPA, cattle producers will sleep a little easier tonight knowing that the nightmare is over,” she said. “Thanks to President Trump and Administrator Wheeler for their commitment to farmers and ranchers and restoring the rule of law. NCBA looks forward to the finalization of a practical Waters of the United States definition that will protect our water resource while allowing cattle producers to do their jobs effectively.”

In a joint statement, Wheeler and James said today’s rule is the first step—Step 1—in a two-step rulemaking process to define the scope of “waters of the United States” that are regulated under the Clean Water Act. Step 1 provides regulatory certainty as to the definition of “waters of the United States” following years of litigation surrounding the 2015 Rule. The two federal district courts that have reviewed the merits of the 2015 Rule found that the rule suffered from certain errors and issued orders remanding the 2015 Rule back to the agencies. Multiple other federal district courts have preliminarily enjoined the 2015 Rule pending a decision on the merits of the rule. In this action, EPA and the Army jointly conclude that multiple substantive and procedural errors warrant a repeal of the 2015 Rule. For example, the 2015 Rule:

- Did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act as intended by Congress and reflected in Supreme Court cases.
- Failed to adequately recognize, preserve, and protect the primary responsibilities and rights of states to manage their own land and water resources.
- Approached the limits of the agencies’ constitutional and statutory authority absent a clear statement from Congress.
- Suffered from certain procedural errors and a lack of adequate record support as it relates to the 2015 Rule’s distance-based limitations.

With this final repeal, the agencies will implement the pre-2015 regulations, which are currently in place in more than half of the states, informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice. The final rule takes effect 60 days after publication in the Federal Register.

In December 2018, EPA and the Army proposed a new definition—Step 2—that would clearly define where federal jurisdiction begins and ends in accordance with the Clean Water Act and Supreme Court precedent. In the proposal, the agencies provide a clear definition of the difference between federally regulated waterways and those waters that rightfully remain solely under state authority.

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