

Trump Administration Signals Intent to Roll Back Federal Jurisdiction over Wetlands and Intermittent Streams

The Trump Administration has signaled its intent to roll back the scope of federal jurisdiction under the Clean Water Act in an [Executive Order](#) issued on February 28. The Executive Order directs U.S. EPA and the Corps of Engineers to consider rescinding or revising the "[Clean Water Rule](#)," which defines when the Clean Water Act applies to wetlands, ponds, intermittent streams, and other water bodies that have a "significant nexus" to "navigable waters." Immediately following the release of Executive Order, EPA and the Corps issued a [Notice of Proposed Rulemaking](#) announcing their plans to review the rule.

The Obama Administration adopted the Clean Water Rule in an effort to clarify decades of confusion—exemplified by the Supreme Court's fractured decision in [Rapanos v. United States, 547 U.S. 715 \(2006\)](#)—regarding whether and how the Clean Water Act should be applied to isolated water bodies or intermittent waterways. However, opponents of the rule, led by farming and ranching groups, viewed this attempted "clarification" as an unwarranted expansion of federal authority, and feared EPA and the Corps of Engineers could require permits for agricultural activities that have historically been outside the scope of federal regulation. The Sixth Circuit issued a [nationwide stay](#) of the implementation of the rule pending the resolution of challenges to the rule filed by 18 states.

The Executive Order leaves little doubt as to the Trump Administration's intentions. The order notes the importance of "promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution," and directs EPA and the Corps of Engineers to review the Clean Water Rule with those interests in mind. The order also directs EPA and the Corps to "consider" interpreting the statutory term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*, which states:

"In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and]

lakes.’ See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”

An agency interpretation that follows the plurality opinion in *Rapanos* would significantly curtail the application of Corps of Engineer permitting requirements to minor tributaries, channels, wetlands, ditches and other small, isolated, or ephemeral water bodies. However, implementation of the policy preferences expressed in the Executive Order requires a rulemaking process to rescind or modify the Clean Water Rule. The Notice of Proposed Rulemaking issued by EPA and the Corps of Engineers is the first step in that often-lengthy process.

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