

EPA Proposes to Narrow “Waters of the United States” Definition

On June 27, 2017, the US EPA and the Army Corps of Engineers took the first of two steps to narrow the Clean Water Act’s scope. The agencies proposed a rule rescinding the Obama Administration’s 2015 Clean Water Rule defining “waters of the United States” (“WOTUS”) and replacing it with its prior definition. Once this first step is complete, the agencies will later propose a second rule providing a new definition of WOTUS to include “only those relatively permanent, standing or flowing bodies of water” and exclude intermittent or ephemeral waters. This definition will conform to Justice Antonin Scalia’s WOTUS interpretation provided in his 2006 *Rapanos v. United States* plurality opinion. The 2015 WOTUS definition called for specific types of regional waters to be assessed on a case-by-case basis to determine whether there is “a significant nexus” between those regional waters and downstream, traditionally navigable waters. Application of the 2015 Clean Water Rule definition was stayed by the 6th Circuit Court of Appeals in October 2015, resulting in continued uncertainty regarding WOTUS’s (and the Clean Water Act’s) scope. This first proposed rule aims “to provide continuity and certainty” by “simply codif [ying] the current legal *status quo*”; that is, to formally reinstate the pre-2015 WOTUS definition. Before this first proposed rule becomes permanent in agency regulations, however, it must go through the formal notice-and-comment rulemaking process. [The text of the first proposed rule is available here.](#)



by Sean G. Herman

For more information, please contact:

Sean G. Herman, Associate
415-995-5899
SHerman@hansonbridgett.com