

LEGAL UPDATES

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Service

Environmental

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Final Rule Released Defining Waters of the United States and Restoring Uniformity Across States

On October 22, 2019, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published a final rule that will repeal the Obama-era Clean Water Rule (CWR) defining Waters of the United States (WOTUS) and re-establish the pre-2015 definition throughout the country (84 FR 56626). This final rule is **not** an abandonment of the February 2018 proposed rule, in which the Trump administration proposed its own definition of WOTUS (see Part 3 of our Clean Water Act series of blog posts).

Restoring uniformity

In February 2018, EPA and the Corps tried to delay the effective date of the CWR, but that effort was nixed by federal courts in South Carolina and Washington. The vacatur resulted in a return to the split among the states, with roughly half enforcing the pre-2015 rule and the others enforcing the 2015 CWR.

In this latest move, the agencies are repealing the CWR as the first step in a two-step process. Vacating the 2015 CWR will eliminate the current split among the states and restore uniformity in the administration of the Clean Water Act throughout the country. Notably, the October 22, 2019 preamble indicates that by first reverting to the pre-2015 WOTUS definition under this new final rule, the pre-2015 rule will remain in effect throughout the country, even if the Trump administration is unable to promulgate in a second step its own WOTUS definition or that definition is later vacated.

What this means to you

On December 23, 2019, when the rule vacating the 2015 CWR becomes effective, and absent litigation, the definition of WOTUS will be as consistent throughout the country as it was prior to the 2015 CWR. The current administration, in step two anticipated this winter, intends to put forth another definition of WOTUS. Legal challenges to the repeal of the CWR, and then the new definition, will undoubtedly follow.

Contact us

For more information about the EPA's rulemaking or the CWA, please contact Carlota Hopinks-Baul, Alison Nelson, Karin Jacoby or Daniel Fanning of Husch Blackwell's Environmental team.