

# Waters of the United States

## Summary

On May 27, 2015, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) released a final rule to redefine the definition of waters of the U.S. (WOTUS) under the Clean Water Act of 1972 (CWA). The American Public Power Association (APPA or Association) believes that the 2015 WOTUS rule is problematic because it dramatically expanded the definition of WOTUS, thereby subjecting more utility projects and activities to CWA jurisdiction. The 2015 rule has been the subject of intense litigation at the federal district and circuit court levels and, as a result, is currently in effect in 22 states while the pre-2015 regulation remains in place in 28 states. On December 11, 2018, EPA and the Corps unveiled a proposal for a new definition of WOTUS intended to more clearly and concisely define federal authority under the CWA. If finalized, the agencies' proposed rule would apply nationwide. APPA is reviewing the proposed rule.

## Background

The CWA gave the federal government the authority to regulate pollution of navigable waters (also known as waters of the U.S.). This seemed straight forward on its face but given the interconnectedness of surface water—clearly navigable large rivers and lakes are fed by streams and other smaller bodies of water that are clearly not navigable—the line of the federal government's jurisdiction is a fuzzy and moving one. Years of legal battles came to a head in a messy 4-1-4 ruling by the U.S. Supreme Court in 2006. Justice Anthony Kennedy joined the conservative wing of the court in ruling that the government could no longer broadly interpret its jurisdiction. In other words, the government needed to write a new set of rules for determining where it had jurisdiction. Justice Kennedy wrote a standalone opinion suggesting that the government limit its jurisdiction to waters that have a “significant nexus” with navigable waters. Instead of providing clarity, what constituted a significant nexus kicked off another round of confusion between the federal government and industry.

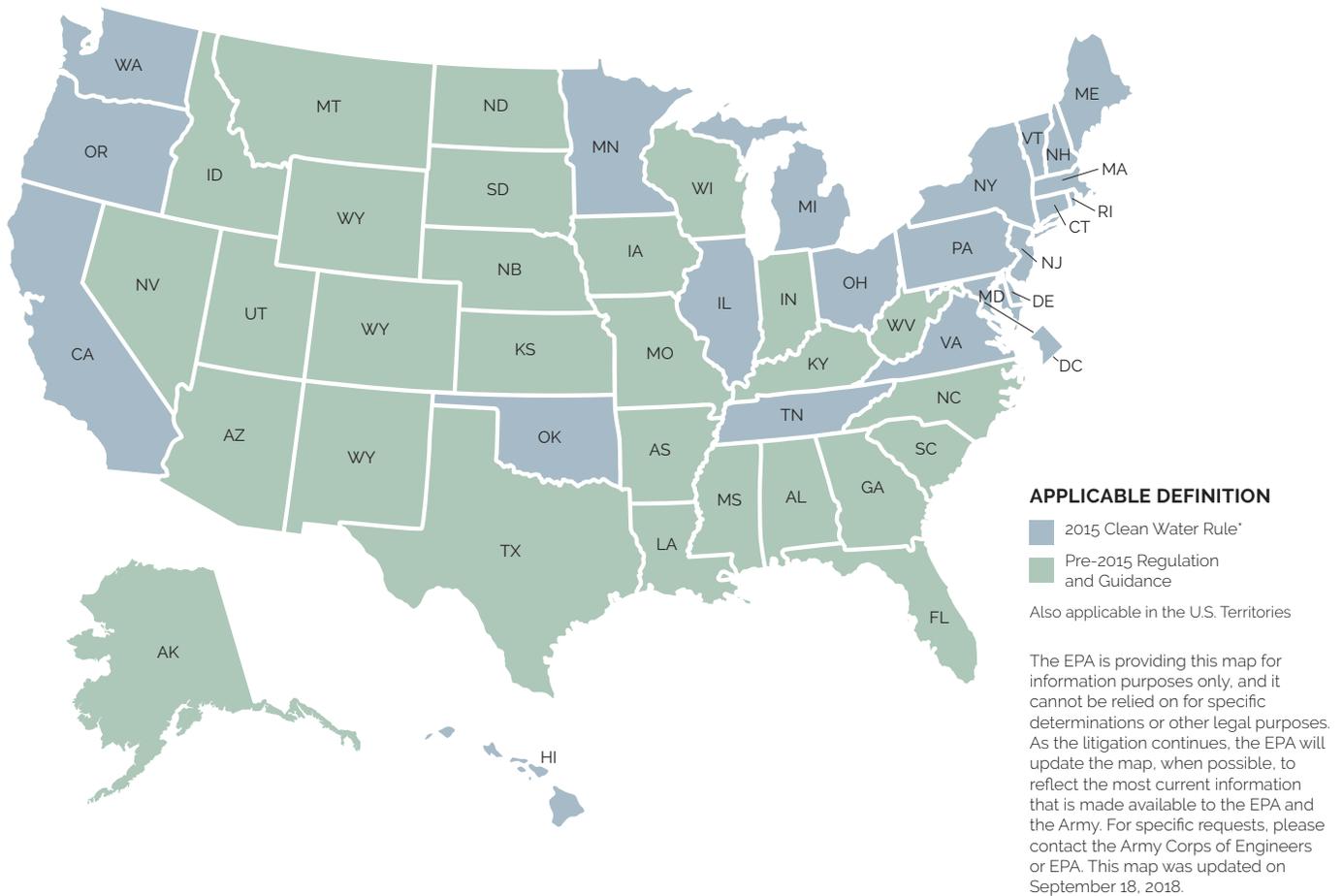
EPA and the Corps released a proposed rule attempting to define what constitutes a significant nexus in April 2014. APPA believed the proposed rule dramatically expanded the agencies' federal authority and would therefore trigger additional, costly CWA permit requirements for utility projects. EPA and the Corps released a final rule in May 2015. While it did address some of the issues that the Association outlined in its comments on the proposed rule, the changes did not go far enough to allay APPA's concerns, specifically with regards to the expansive interpretation of adjacent waters, ditches, and waste treatment system (WTS) exclusions. Such expansive interpretations, resulting in an increase in federal jurisdiction, would have a substantial effect on public power utilities' ability to finance and develop new projects or perform maintenance on existing infrastructure and facilities. APPA's members' construction and operations activities often require various permits under the CWA. The agencies' expansion of jurisdiction under the revised WOTUS rule would result in additional permit obligations for all CWA programs.

## Legal Challenges

The 2015 rule has been the subject of intense litigation at the federal district and circuit court levels and, as a result, is currently in effect in 22 states while the pre-2015 regulation remains in place in 28 states. The 2015 rule will remain in effect in some states and enjoined in others until EPA and the Corps issue a new final rule or a decision is issued by a district court on the merits of the 2015 rule.

## Administrative Action

In February 2017, President Trump signed Executive Order (EO) 13778, entitled *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule*. The EO directed EPA and the Corps to review the WOTUS rule for consistency with the Administration's policy directive that seeks to ensure the “Nation's navigable waters



are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.” The EO directed EPA and the Corps to engage in a notice and comment rulemaking to propose a rule to rescind or revise the WOTUS rule consistent with the CWA. In addition, EPA, the Corps, and the heads of all executive departments and agencies were to review “all orders, rules, regulations, guidelines, or policies implementing or enforcing” the WOTUS rule for consistency with the EO’s policy statement. The EO further directed EPA and the Corps to interpret the term navigable waters, as defined in the CWA, in a manner consistent with an opinion authored by Justice Antonin Scalia in the 2006 U.S. Supreme Court case, *Rapanos v. United States*. Justice Scalia’s opinion interpreted federal jurisdiction as applicable where navigable waters are connected by a surface flow at least part of the year, a significant departure from previous policy positions.

On December 11, 2018, EPA and the Corps unveiled a proposal for a new definition of WOTUS intended to more clearly and concisely define federal authority under the CWA. If

finalized, the agencies’ proposed rule would apply nationwide. The proposed rule lists six categories of jurisdictional waters:

- **Traditional Navigable Waters (TNW)** — the proposed rule would maintain jurisdiction over waters currently used, used in the past, or susceptible to use in interstate or foreign commerce, including territorial seas and waters subject to the ebb and flow of the tide.
- **Tributaries** — the proposed rule would maintain jurisdiction over tributaries of traditional navigable waters but would significantly change the prior definition of the term. The proposed rule no longer defines a tributary based on the presence of physical indicators of a bed, banks, and an ordinary high-water mark. Rather, a tributary is defined by having perennial or intermittent flow. Perennial flow is continuous year-round surface water flow in a typical year. Intermittent flow is continuous surface water flow during certain times in a typical year and not merely in direct response to precipitation. Ephemeral channels of water that only flow in direct response to a precipitation event would be excluded under the proposed rule.

- **Wetlands** — the proposed rule would significantly limit jurisdiction over wetlands. A wetland would be jurisdictional only if it is adjacent to a jurisdictional water, which means it either abuts (i.e., touches at least one point or side of) a jurisdictional water or has a direct hydrologic surface connection to a jurisdictional water. The proposed rule would exclude wetlands that have only subsurface hydrologic connections to a jurisdictional water.
- **Ditches** — the proposed rule retains jurisdiction over some ditches. The proposal defines a ditch as an artificial channel used to convey water if it: (1) is, or may be susceptible of, being used in interstate or foreign commerce (e.g., Erie Canal and tidal ditches); (2) is constructed in a tributary or relocates or alters a tributary, and satisfies the definition of a tributary; or (3) is constructed in an adjacent wetland and satisfies the definition of a tributary. Notably, the preamble clarifies that “the burden of proof would be on the agencies to determine the historic status of the ditch construction, and if field- and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland, then a determination would be made that the ditch is not jurisdictional under this proposed rule.”
- **Lakes and Ponds** — this is a new category intended to cover lakes and ponds that contribute perennial or intermittent flow to a TNW in a typical year. Lakes and ponds are jurisdictional if they: (1) contribute perennial or intermittent flow to a traditional navigable water in a typical year (either directly or indirectly) or (2) are flooded by a non-wetland jurisdictional water in a typical year.
- **Impoundments** — the proposed rule retains federal jurisdiction over impoundments of jurisdictional waters. The agencies are seeking comment on ways to improve, streamline, or provide a clearer definition.

The proposed rule excludes ephemeral features (defined as surface water that flows or pools only in direct response to precipitation) and diffuse stormwater runoff. The proposed rule retains many existing exemptions, including for groundwater, prior converted cropland, artificially irrigated areas, upland artificial lakes and ponds, artificial depressions, such as mining and construction pits, upland wastewater recycling structures, stormwater control features, and WTS.

Of importance to the American Public Power Association’s (APPA or Association) members, the proposed rule retains the long-standing WTS exclusion and clarifies the exclusion for the first time, providing a definition of waste treatment system and making two small ministerial edits. The agencies have proposed to define WTS to “clarify which waters and features are consid-

ered part of a waste treatment system and therefore excluded. The term WTS includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrated, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating such discharge).”

After the close of the 60-day comment period, the agencies will consider any comments received and draft the final rule. The rulemaking package will be sent to the White House Office of Management and Budget for interagency review. The agencies have said they intend to finalize the new rule by the end of 2019. Any final WOTUS rule will be subject to many district court challenges across the country, and those challenges may include claims targeting the WTS exclusion and regulation of groundwater.

## Congressional Action

There have been numerous unsuccessful attempts in Congress to nullify or force EPA and the Corps to withdraw and re-propose the rule since it was finalized in 2015. Though the Trump Administration is in the process of repealing and replacing it, some opponents of the rule think legislative action will strengthen the new rule when it is inevitably challenged in court. Most recently, in December 2018, Senator Rand Paul (R-KY) and Representative Jamie Herrera Buetler (R-WA) introduced similar bills, S. 3760 and H.R. 7194, respectively, that would define WOTUS as only waters that are “navigable in fact” or have permanent, standing, or continuously flowing water. There have also been multiple attempts to include language in appropriations bills to prohibit funds from being used to implement the 2015 rule and amendments on other legislation (such as the farm bill) to repeal the rule. It is unlikely that these attempts will succeed where others have failed, especially since Democrats are in the majority in the House of Representatives in the 116th Congress.

## American Public Power Association Position

APPA is reviewing the proposed new rule that was released on December 11, 2018, and appreciates the effort to make the definition of WOTUS clearer. The Association recommended that the following key principles guide the development of the new WOTUS rule and is using them in its evaluation of it:

- A new WOTUS rule should be developed with consideration of the roles states play in water resource management;
- A new WOTUS rule should recognize that clear boundaries are necessary to allow states to effectively regulate land and water use within their borders; and

- A new WOTUS rule should retain the WTS exclusion and further clarify that features that are part of a National Pollutant Discharge Elimination System permitted treatment system are not waters of the United States and the exclusion applies to the system, including conveyances, ponds, and those used for cooling water treatment or supply.

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The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.