

WOTUS Operandi: The Clean Water Act's Bifurcated Regulatory Regime and Why it Matters

by Steven A. Weiler

Two sets of states interpret and implement the Clean Water Act ("CWA"), the nation's premier water pollution statute, in significantly different ways. The CWA applies to the nation's "navigable waters," which is further defined by administrative rules. The Obama administration attempted to further define "navigable waters" and arguably expanded the scope of the CWA by issuing the 2015 Clean Water Rule, also known as the Waters of the United States rule. The rule spawned intense litigation, resulting in the rule being in effect in fewer than half of the states and the pre-Obama era rules being in effect in the other states. If that were not confusing enough, the Trump administration has tried to rescind and replace the Clean Water Rule. But the replacement rule is not yet effective anywhere. In short, the regulatory waters are muddy and the projected outlook murky. This article attempts to resolve some of the confusion by describing the competing regulatory regimes, explaining how the division occurred, providing a [map](#) showing where the battle lines are drawn, and demonstrating why it matters.

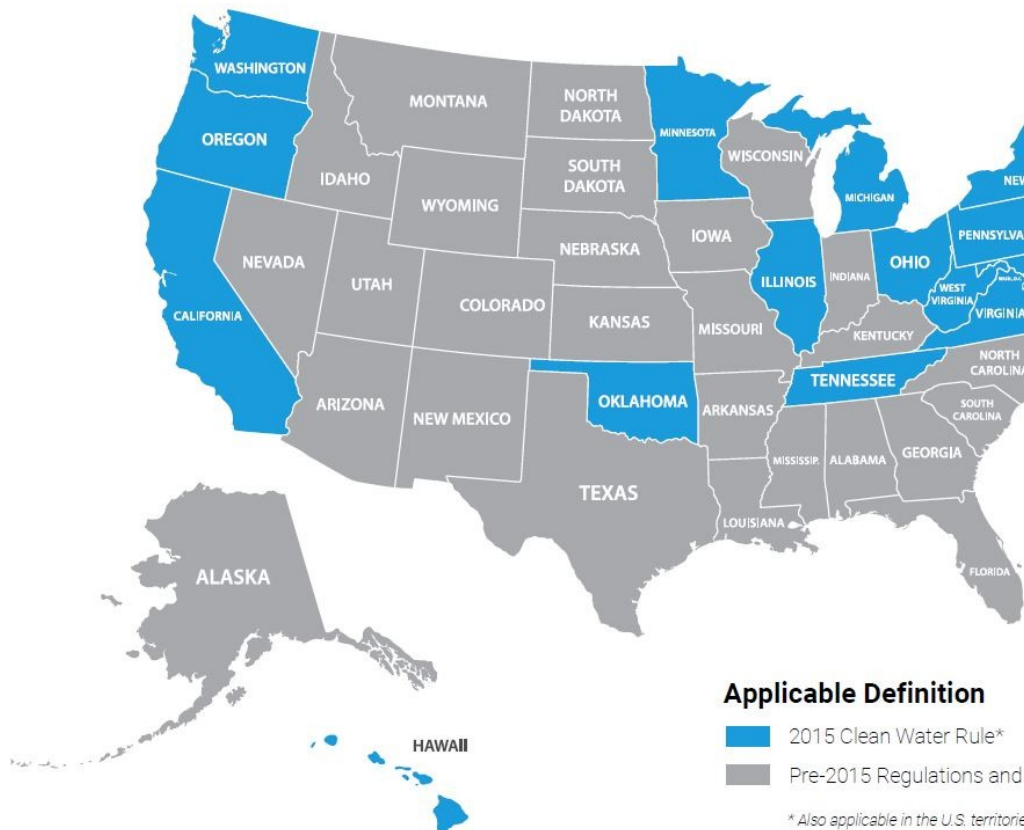
Related People

- Steven A. Weiler

Related Capabilities

- Food, Beverage & Agribusiness
- Environmental
- Energy & Natural Resources

Clean Water Rule Applicability



Background

A bit of background is necessary to understand the current regulatory split under the CWA. Historically, states addressed water pollution within the state's borders.¹ The federal government's first attempt to regulate water pollution, the Rivers and Harbors Act of 1899, banned discharges into navigable waters to facilitate navigation rather than to improve water quality.² After a number of legislative fits and starts, in 1972 Congress passed what we now know as the CWA, but imposed "major responsibility for control of water pollution on the states."³ The CWA defines the term "navigable waters" as "the waters of the United States, including the territorial seas."⁴ But "waters of the United States" or "WOTUS" is not further defined in the statute, and the regulatory definition of WOTUS has been heavily litigated since a definition was first promulgated in the early 1970s.

In 2015, the Obama administration issued the Clean Water Rule.⁵ The rule claimed to "clarify" the meaning of WOTUS to include "streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," as well as "wetlands adjacent to waters, [and] waste treatment systems, including treatment ponds or lagoons."⁶ Numerous parties immediately challenged the clarification in district and appellate courts, and the Sixth Circuit eventually stayed the

rule's nationwide implementation. In January 2018, the Supreme Court held challenges to the Clean Water Rule were properly brought in the federal district courts, leading to the invalidation of the nationwide stay.⁷

In an attempt to prevent the Clean Water Rule from taking effect nationwide following the Supreme Court's decision, the Trump administration finalized a rule to delay the effective date of the Clean Water Rule by two years.⁸ A federal district court in Charleston, South Carolina invalidated the two-year delay, placing the Clean Water Rule back into effect for 26 states. However, four of the 26 states (Texas, Louisiana, Mississippi and Iowa) later obtained preliminary injunctions preventing implementation of the Clean Water Rule.⁹ The result is the Clean Water Rule is currently in effect in 22 states and the District of Columbia, with the remaining 28 states subject to pre-2015 regulatory language and guidance issued in 1986, 1988, and 2008.¹⁰ The regulatory patchwork of old and new rules is the subject of ongoing litigation,¹¹ which is likely to produce even more change.

To establish a uniform application of the CWA throughout the country, on December 11, 2018, the Trump administration proposed to rescind and replace the Clean Water Rule with a revised definition of WOTUS. The Trump administration's proposed rule would limit the CWA's jurisdictional reach to only the following: (1) traditional navigable waters, including the territorial seas; (2) tributaries that contribute perennial or intermittent flow to such waters; (3) ditches that are navigable or are constructed in a tributary or wetland; (4) certain lakes and ponds; (5) impoundments of otherwise jurisdictional waters; and (6) wetlands adjacent to other jurisdictional waters that have a direct hydrologic surface connection to such waters.¹² But the Trump administration's initiative is also subject to litigation once finalized,¹³ and it is unclear whether the Trump administration's proposal will ever take effect.

Why the Meaning of “Navigable Waters” or WOTUS Matters

In enacting the CWA, Congress declared two national goals: one long-term, to eliminate the discharge of pollutants into the navigable waters; and the other, an interim water quality goal, to make the nation's waters “fishable and swimmable.”¹⁴ Understanding the jurisdictional reach of the CWA – that is, the meaning of “navigable waters” -- is critical for entities in the energy, natural resources, agriculture, construction, and transportation sectors.

For example, the CWA allows states, working with the EPA, to adopt water quality standards for the designated uses of the navigable waters and to determine the water quality criteria for those navigable waters.¹⁵ Section 401 of the CWA provides a state regulator may “veto” a federal license or permit by denying a certification that “the construction or operation of facilities, which may result in any discharge into the navigable waters,” will comply with the state's water quality standards.¹⁶ The reference to “federal license or permit” casts a broad net and includes, for example, a Natural Gas Act Section 7(c) certificate authorizing the construction of a pipeline project that may result in a discharge into navigable waters.¹⁷ So an interstate pipeline route might require a Section 401 water quality certification for impacts on a waterbody in one state but not for impacts on a similar waterbody in an adjacent state.

Similarly, CWA Section 404 regulates the discharge of dredged and fill material into waters of the United States. WOTUS defines the extent of geographic jurisdiction of Section 404. Regulated activities include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways, airports, or natural gas pipelines) and conversion of wetlands to uplands for farming and forestry. Section 404 requires a permit from the U.S. Army Corps of Engineers, with EPA review, for placing dredged or fill material into WOTUS. Accordingly, a Section 404 permit may be required in a state where the 2015 Clean Water Rule is in effect, but not in states where the pre-2015 regulatory regime is in place.

In addition to the CWA Section 404 regulations, many states have their own state programs to protect wetlands. These programs may have a broader scope and protect more wetlands than wetlands falling under CWA Section 404 jurisdiction. For example, California recently proposed a definition of “waters of the state” under its state wetlands protection program that is broader than the “waters of the United States” definition advanced by the Trump administration.¹⁸ Power abhors a vacuum. As the Trump administration seeks to narrow the definition of WOTUS, states with their own wetland protection programs may enter the fray and protect wetlands that do not fall within a narrowed definition of WOTUS under the Clean Water Act. The regulated community should examine both federal and state law before attempting to fill any wetlands.

The CWA was enacted to protect the waters of the United States. The Clean Water Rule arguably expanded the definition of WOTUS, enlarging the CWA’s jurisdictional reach, bringing more waterways and wetlands under federal protection, and making environmental compliance more difficult and costly. Ultimately, the courts will resolve whether WOTUS definitions proffered by the Obama or Trump administrations should prevail. Until then, businesses can save time and money by better understanding the regulatory landscape. If you would like to learn more about the Clean Water Act and its applicability to your business, please contact us.

¹ Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards under the Clean Water Act*, 36 VAND. L. REV. 1167, 1176 (1983); *see also* 33 U.S.C. § 1251(b) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .”).

² 33 U.S.C. § 407 (The Rivers and Harbors Act was also known as the Refuse Act); Bonnie A Malloy, *Testing Cooperative Federalism: Water Quality Standards under the Clean Water Act*, 6 ENVTL. & ENERGY L. & POL’Y J. 63, 69 (2011) (citations omitted).

³ *D.C. v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980).

⁴ 33 U.S.C. § 1362(7) (2018).

⁵ 80 *Fed. Reg.* 37,054 (June 29, 2015), *codified at* 40 C.F.R. § 230.3(o) (2018).

⁶ 40 C.F.R. §230.3(s)(3), (7).

⁷ *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 138 S. Ct. 617 (2018).

⁸ 83 *Fed. Reg.* 5,200 (February 6, 2018).

⁹ *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 967 (D. S.C. 2018).

¹⁰ See U.S. EPA, “About Waters of the United States,” *available at* <https://www.epa.gov/wotus-rule/about-waters-united-states>.

¹¹ See, e.g., *North Dakota v. EPA*, No. 3:15-cv-59 (D. N.D.); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.).

¹² The proposed rules to rescind and replace the Clean Water Rule are identified and explained in a Dorsey E-Update [here](#).

¹³ No litigation has been filed to date, but environmental NGOs have threatened to bring lawsuits to stop the proposal from taking effect. See, e.g., Press Release, Earthjustice (Dec. 11, 2018) (threatening to “make use of the full strength of our nation’s bedrock environmental laws” to stop the proposal in court).

¹⁴ 33 U.S.C. § 1251(a)(1)-(2) (1972); *id.* § 1251(a)(2) (“it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983”).

¹⁵ 33 U.S.C. §1313(b).

¹⁶ 33 U.S.C. § 1341(a)(1); see also *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (“Through [the Section 401 certification] requirement, Congress intended that states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”).

¹⁷ See, e.g., *Transco. Gas Pipe Line Co., LLC*, 157 F.E.R.C. ¶ 61,095 at P 42 (2016) (“state [water quality] certification is, of course, necessary before the Commission authorizes activities ‘which may result in a discharge into the navigable waters.’”) (footnote omitted).

¹⁸ California Water Resources Control Board, “State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State,” (Jan. 3, 2019), *available at*: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html.