



ALERT – EPA and the Army Recodify Previous WOTUS Rules

By: Lynn Preston

Back to the Past...

Yesterday, October 22, 2019, the EPA and the Department of the Army published in the Federal Register the final rule to repeal the 2015 Clean Water Rule, Definition of the Waters of the United States, or as most of us know it, “WOTUS”. The final rule restores the definition of WOTUS to that which existed prior to the 2015 Rule. The final rule becomes effective on December 23, 2019.

The EPA and Army’s reasoning for repeal of the 2015 Rule as detailed in the Federal Register and on EPA’s website follows:

- > The 2015 Rule did not implement the legal limits on the scope of the agencies’ authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy’s articulation of the significant nexus test in *Rapanos*.
- > The 2015 Rule failed to adequately consider and accord due weight to the policy of the Congress in CWA (i.e., to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use . . . of land and water resources”).
- > To avoid interpretations that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachments of federal jurisdiction over traditional State land-use planning authority.
- > The 2015 Rule distance-based limitations suffered from certain procedural errors and a lack of adequate record support. See 84 FR 56626 and EPA website.

Results

Once effective, the regulations defining the scope of the Clean Water Act jurisdiction will look as they did prior to the 2015 amendments.



Contact Lynn Preston (lpreston@sheehan.com) if you have questions about how this law applies to your workplace.

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