

# PUBLICATION

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## WOTUS Repeal – Step One

September 17, 2019

**On September 12, 2019, the Environmental Protection Agency (EPA) and the Department of the Army (DOA) announced the repeal of the 2015 Obama-era Waters of the United States (WOTUS) rule and a return to a pre-WOTUS regulatory regime. The move, labeled "Step 1," follows years of controversy surrounding WOTUS.**

The Clean Water Act (CWA) is the primary federal law in the United States governing water pollution. The purpose of the CWA is to protect the United States "navigable waters" and "the waters of the United States," which is accomplished through a system of permitting and regulation. The ambiguity surrounding the terms "navigable waters" and "waters of the United States," however, has led to confusion and differing interpretations of federal jurisdiction. Confusion was heightened by the Supreme Court in *Rapanos v. U.S.*, a 2006 decision in which the Court split 4-1-4 over the applicability of the term "waters of the United States" to certain wetlands.

In 2015, the EPA and United States Army Corps of Engineers published the Clean Water Rule (aka WOTUS), which sought to clarify the scope of federal regulation under the CWA. Among other things, WOTUS outlined what bodies of water were per se regulated (e.g., ephemeral tributaries) and what bodies would require case-by-case analysis (e.g., isolated wetlands and certain large ponds). WOTUS came under immediate scrutiny from states, industry groups and environmental organizations. Thirty-one states and more than 50 non-state parties filed complaints and petitions for review in multiple jurisdictions. Among the leading voices of opposition were the agricultural, ranching and forestry industries, which saw the rule as a major overreach to control previously unregulated bodies of water and private property.

On February 28, 2017, President Trump issued an executive order to review and revoke WOTUS. And, on September 12, 2019, the EPA and the DOA finalized a rule to repeal WOTUS and recodify the pre-WOTUS regulatory regime. Speakers for the agencies announced that the repeal, labeled "Step 1," ends "the previous administration's overreach in the federal regulation of U.S. waters," and sets "the stage for Step 2 – a new WOTUS definition that will provide greater regulatory certainty for farmers, landowners, home builders and developers nationwide." Step 2 appears already well underway. In December of 2018, the EPA and the DOA proposed a new definition of "waters of the United States" that the agencies assert will "clearly define where federal jurisdiction begins and ends in accordance with the Clean Water Act and Supreme Court precedent."

Step 1 will be effective 60 days after publication in the Federal Register. Step 2 is expected to be finalized by year's end and public comments related to Step 2 are currently under review. Until Step 2 is finalized and effective, the pre-WOTUS regulatory regime will be the governing CWA law. Though the EPA touts Step 1 as a move towards consistency, pre-WOTUS regulations were far from uniform and necessitated WOTUS at the outset. Authorities on CWA expect much regulatory confusion in the interim for federal agencies, industries and environmentalists alike. Litigation over the repeal is likely to arise in the near future.

For questions about the CWA and WOTUS, or concerns about other environmental or EPA-related issues, please contact a member of Baker Donelson's [Environmental](#) Group.