

## **Waters of the United States Rulemaking**

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### **I. WOTUS Background**

A. CWA Section 101(a)

B. Definition of Navigable Waters, 33 U.S.C. § 1362(7) (“‘navigable waters’ means the waters of the United States, including the territorial seas”)

C. *SWANCC* and *Rapanos*

### **II. Rulemaking/Litigation**

- 79 Fed. Reg. 22188 (April 21, 2014) (draft WOTUS rule)
- 80 Fed. Reg. 2100 (January 15, 2015) (EPA ORD “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”)
- 80 Fed. Reg. 37054 (June 29, 2015) (final WOTUS rule)
- North Dakota stay (21 states); North Dakota v. EPA, 127 F. Supp. 3d 1047 (D. N.D. 2015)
- Sixth Circuit stay (nationwide); In re Clean Water Rule, 803 F.3d 804 (6<sup>th</sup> Cir. 2015)
- Executive Order, “Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” (February 28, 2017)
- 82 Fed. Reg. 12532 (March 6, 2017) (Notice of proposed rule making to withdraw and reissue Clean Water Rule)
- 82 Fed. Reg. 39712 (August 22, 2017) (extension of time to comment on withdrawal of WOTUS rule)
- 82 Fed. Reg. 55542 (Nov. 22, 2017) (proposal to extend WOTUS rule implementation date two years)
- Supreme Court reversal of sixth Circuit; National Assoc. of Manuf’s v. Dept. of Def., \_\_\_\_ U.S. \_\_\_\_, 2018 WL 491526 (2018)
- 83 Fed. Reg. 32227 (July 12, 2018) (Definition of “Waters of the United States” – Recodification of Existing Rule)

- S.C. stay of applicability date rule (nationwide); South Carolina Coastal Conserv. League v. EPA, 2018 WL 3933811 (D.S.C. 2018)
- S.D. Tex. stay (Texas, Louisiana and Mississippi)
- EPA map <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>

### **III. Implications for Idaho**

- Until stay is lifted in Idaho, status quo (2008 Rapanos Guidance).
  - Most ditches will be considered WOTUS.
  - Intermittent and ephemeral streams and wetlands will need to go through sig. nexus analysis under 2008 Guidance.
- If the 2015 Rule is successfully repealed, likely status quo until new rule issues.
  - If the new rule goes into effect, it would likely be based on Scalia test (relatively permanent waters).
    - Most headwaters intermittent and ephemeral streams and many adjacent wetlands will be excluded.
    - Ditches will likely be excluded (are they then point sources?)
  - Expect immediate challenges to the new replacement rule with years of litigation. It may not go into effect before the end of the current Trump administration.
- If the 2015 rule is finally upheld, there will be significant changes to jurisdiction in Idaho.
  - All tributaries and adjacent wetlands would be jurisdictional
  - Many ditches would be non-jurisdictional.
- If the 2015 rule is remanded, expect more years of continued rulemaking, politics and litigation.



