



Victory for property rights as EPA changes course on water rule

EPA announced its intention to roll back the Obama Administration's WOTUS, "Waters of the United States Rule"

[CFACT's Bonner Cohen](#) describes the Obama plan as the "biggest power grab in the 48-year history of the Environmental Protection Agency (EPA)."

EPA is the poster child for bureaucratic overreach. EPA's has grabbed a lot of power. "Biggest power grab" is saying a lot.

Federal authority over water is premised on the water being "navigable." The Obama Administration sought to bring virtually all land near water under its authority by coming up with the notion of the water having a "nexus" with navigable water. [Bonner Cohen explains](#):

What constituted a "significant nexus" was anyone guess, leaving landowners, municipalities, businesses, and just about everyone else completely in the dark. Eager to take advantage of a murky situation and beef up EPA's enforcement authority, the Obama administration in 2015 proposed "clarifying" the issue by greatly expanding EPA's jurisdiction to include ditches, ponds, groundwater, and even "ephemeral" waters (those that form only after rainfall). The rule would have forced farmers, ranchers, and other landowners to obtain permits from EPA if they wanted to make any modifications to their property. A host of organizations sued EPA, and a federal judge ordered a stay on the rule in 24 states.

The Obama interpretation stood the plain intent of the statute on its head. Reversing the Obama plan is a welcome reform.

CFACT joined with farm bureaus and other organizations to fight hard against the WOTUS rule. Thank you to everyone who signed our petitions and gave generously to help us win.

EPA and the rest of the federal regulatory machinery must learn to work within the bounds written into law for them by Congress.

Bringing federal regulation of land and water back within the plain meaning of the law is a victory for property rights and all rights.

May we see many more such victories.

For nature and people too,

Craig Rucker, President



Trump Administration scuttles Obama-era WOTUS “Waters of the United States” rule



By Bonner Cohen, Ph. D. | December 18th, 2018

In a significant victory for farmers, ranchers, and other landowners, the Trump administration December 11 pulled the plug on an Obama-era regulatory scheme that would have subjected millions of acres of private land to federal zoning.

By rolling back Obama’s 2015 “Waters of the United States” (WOTUS) rule, the administration has put an end to the biggest power grab in the 48-year history of the Environmental Protection Agency (EPA). The Obama-era rule was sold as an effort to “clarify” the federal government’s jurisdiction over bodies of water under the 1972 Clean Water Act (CWA), which granted EPA and the U.S. Army Corps of Engineers jurisdiction over “navigable waters of the United States.”

Over the years, questions arose over whether Washington also had jurisdiction over bodies of water, which may not be navigable themselves, but which are adjacent to, or have some connection to, navigable waters. The Supreme Court’s 2006 *Rapanos v. United States* decision, failed to resolve the issue, with Justice Anthony Kennedy infamously opining that federal jurisdiction extended to such waters provided they had a “significant nexus” to navigable waters.

The Power Grab

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Having vowed to kill the rule during the 2016 presidential campaign, President Trump issued an executive order in February 2017 directing EPA to carry out the "elimination of this very destructive and horrible rule." Trump's first EPA Administrator, Scott Pruitt, tried to delay implementation of the Obama WOTUS rule, but a U.S. district court in South Carolina invalidated the delay in August 2018.

Now, the Trump administration has its own plan for untangling the jurisdictional mess that has surrounded the regulation of waterways for decades.

What is and What is not Subject to Federal Regulation

"Our proposal would replace the Obama EPA's 2015 definition with one that respects the limits of the Clean Water Act and provides states and landowners the certainty they need to manage their natural resources and grow local economies," said Acting EPA Administrator Andrew Wheeler in a statement. "For the first time, we are defining the difference between federally protected waterways and state protected waterways."

Under the Trump proposal, the federal government, for the first time, has divided navigable waters into six categories:

- traditional navigable waters (rivers, bays, the Great Lakes, etc.);
- waterways connected to navigable waters, including tributaries;
- certain navigable ditches used for commercial shipping, such as the Erie Canal;
- lakes and ponds that contribute to navigable waterways;
- impoundments of jurisdictional waterways; and
- wetlands adjacent to navigable waterways through "direct subsurface connection."

Trump's WOTUS proposal also clearly states what EPA and the Corps of Engineers will not regulate. These include "features that only include water during or in response to rainfall (e.g., ephemeral features); groundwater; many ditches, including most roadside or farm ditches; prior converted cropland; storm water control features; and waste treatment systems."

Acting EPA Administrator Wheeler, who has been nominated for the top job at the agency by President Trump, points out that most bodies of water not covered under the new proposal are still subject to state protection. "We don't need to have the dual protection and the dual requirements and permits at both state and federal levels," he said on the Hugh Hewitt radio show (Washington Times, Dec. 12).

The difference between the Obama and Trump approaches can not be understated. A 2015 American Farm Bureau Federation study, for example, found that 99% of Pennsylvania would be subject to the Obama WOTUS rule.

“This new rule will empower farmers and ranchers to comply with the law, protect our water resources, and productively work their land without having to hire an army of lawyers and consultants,” said farm bureau president Zippy Duvall (Washington Times, Dec. 12).

The fight is far from over, with environmental groups expected to bring suit against EPA and the Corps.

There will be a 60-day public comment period that will last until mid-February 2019.

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EPA reins in murky “WOTUS” rule

By CFACT Ed | December 19th, 2018



Hoffman:

On December 11th, the Environmental Protection Agency (EPA) and the Army Corps of Engineers announced a sweeping change to the 2015 [Waters of the United States \(WOTUS\)](#) rule that deemed all bodies of water “navigable water.”

Per the official announcement, this rule change would provide “clarity, predictability and consistency” to the Clean Water Act for where it applies and doesn’t apply. In 2015, then-President Obama’s EPA deemed all bodies of water—including puddles and ditches—as “navigable waters” subject to regulation under the WOTUS rule.

Here's what would be [considered "navigable waters"](#) under the new rule change:

Under the agencies' proposal, traditional navigable waters, tributaries to those waters, certain ditches, certain lakes and ponds, impoundments of jurisdictional waters, and wetlands adjacent to jurisdictional waters would be federally regulated. It also details what are not "waters of the United States," such as features that only contain water during or in response to rainfall (e.g., ephemeral features); groundwater; many ditches, including most roadside or farm ditches; prior converted cropland; storm water control features; and waste treatment systems.

This proposal on rule changes would also give more credence to existing state and tribe regulations that apply to bodies of water in the confines of their borders, regardless if they are so-called "waters of the United States." The agencies' [proposal also permits](#) "states and tribes more flexibility in determining how best to manage their land and water resources while protecting the nation's navigable waters as intended by Congress when it enacted the Clean Water Act."

The rule change will clarify—not eliminate—the WOTUS rule emanating from the Clean Water Act.

"Our proposal would replace the Obama EPA's 2015 definition with one that respects the limits of the Clean Water Act and provides states and landowners the certainty they need to manage their natural resources and grow local economies," [said](#) EPA Acting Administrator Andrew Wheeler in a press release. "For the first time, we are clearly defining the difference between federally protected waterways and state protected waterways. Our simpler and clearer definition would help landowners understand whether a project on their property will require a federal permit or not, without spending thousands of dollars on engineering and legal professionals."

This clarification of the WOTUS rule is the second of four steps outlined by President Trump's February 2017 Executive Order titled ["Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."](#) This directive notes it's within our country's national interests to ensure navigable waters aren't polluted while promoting "economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."

The public has 60 days to offer comments on the proposed rule changes. The EPA and U.S. Army will host a joint webinar event on January 10, 2019, followed by a joint listening session on January 23, 2019, in Kansas City, MO.