

WATERS OF THE UNITED STATES

Support 'Repeal/Replace' of 2015 WOTUS Rule

RECENT ACTION: On December 11, 2018, U.S. EPA and the Corps released a proposed **new clean water rule** to replace the 2015 WOTUS rule. Repeal of the 2015 rule expected in early 2019.

What AGC Wants in a New Clean Water Rule:

1. Regulatory Certainty: *Clear understanding of when a federal permit is needed without having to hire a team of consultants.*

2. Respectful of state roles in protecting traditionally state waters.

3. Excludes ditches and other stormwater control features from regulation as federal waters.

Background:

- The Clean Water Act grants the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over “navigable waters,” defined in the act as “Waters of the United States” (WOTUS) without further clarification. Both the federal agencies and the courts have long struggled to define WOTUS: establishing which waters are regulated by the federal government and which fall under the jurisdiction of state and local governments for protection.
- In 2015, the Corps and EPA finalized a rule that expanded jurisdiction affecting all Clean Water Act (CWA) programs (not just dredge and fill/wetlands permits)—which would increase the number of construction sites required to obtain a federal CWA permit in addition to state and/or local water permits. Fortunately, the rule was challenged in court and was on hold until early 2018.
- In 2017, EPA and Corps began efforts to repeal and replace the rule by further delaying implementation until 2020. This effort was recently rejected by a district court, and the 2015 WOTUS rule is now in effect in 22 states. Twenty-eight states are protected through injunctions against the 2015 rule in separate district court cases, creating a patchwork of implementation nationwide and regulatory uncertainty for contractors. Every court that has reviewed the 2015 rule on its merits has deemed it likely unlawful.

AGC Message:

- **Support “Repeal and Replace” of the 2015 WOTUS Rule, a Trump Administration Priority.** “Repeal and replace” has proven to be a complex and time-consuming process. In 2017, the agencies released a proposal to repeal the 2015 rule, which is expected to be finalized in early 2019. In Dec. 2018, after incorporating extensive information gathered during the pre-proposal process, the agencies are releasing their proposed replacement rule. Based on direction from President Trump’s Executive Order, the much-anticipated proposal is expected to be a step in the right direction to achieving clean water through clear rules.
- **The 2015 WOTUS Rule Is Flawed and Drastically Expands Federal CWA Jurisdiction.** The 2015 rule goes beyond the traditionally navigable waters covered by the Act. AGC maintains that the federal government should not assert control over waters that have historically been under the sole jurisdiction of the states. An expanded federal permitting process would slow economic growth by increasing the cost of, and delaying necessary improvements to, public and private infrastructure. Furthermore, EPA’s economic analysis on the 2015 rule has been limited to costs associated with dredge and fill/wetlands permits and fails to consider the full costs of expanding jurisdiction.