

## WHERE ARE WE WITH WOTUS – FREQUENTLY ASKED QUESTIONS

January 23, 2018

On January 22, 2018, the U.S. Supreme Court issued a ruling that legal challenges to the 2015 WOTUS (Water of the United States) rule belong in the district rather than appellate courts. The definition of WOTUS dictates the scope of the federal government’s control and Clean Water Act permitting authority over construction work in water and wet areas.

In short, this Supreme Court decision will result in lifting the nationwide stay of the 2015 WOTUS rule that has been in effect since Oct. 2015. The lawsuit is being sent back to the district courts. Given the ongoing process to repeal and replace the rule, this will leave a patchwork of states under the jurisdiction of the 2015 rule.

This is a developing issue and AGC will continue to add to this Q&A document as conditions change.

### **Is the 2015 WOTUS Rule in Effect Right Now?**

*Implementation and enforcement of 2015 rule is imminent...* The Supreme Court moved the battle over the merits of the controversial 2015 WOTUS rule to the lower courts, told the United States Court of Appeals for the Sixth Circuit that it does not have jurisdiction to hear the case and, as a result, the nationwide stay will no longer be in place. However, we have not heard word of when the 6<sup>th</sup> Circuit Court will *officially* lift the nationwide stay — or exactly when the 2015 WOTUS rule will take effect (in most states – see below).

*Uncertain timeline...* Until the 6<sup>th</sup> Circuit removes the nationwide stay, nothing is changed. (The U.S. Army Corps of Engineers will continue using the 1986 regulations and applicable jurisdictional guidance in making jurisdictional determinations or taking other actions based on the definition of WOTUS.) Some experts have speculated that lifting the nationwide stay could be a simple and quick process, and others have suggested that the 6<sup>th</sup> Circuit Court may seek more direction before lifting the stay. There is also the possibility that the lower courts could issue injunctions (possibly nationwide) as related cases undergo judicial review.

*Patchwork of WOTUS rules...* Lawsuits that were filed in district court are going to start moving forward, including the case in the U.S. District Court for the District of North Dakota. That court had issued an injunction of the 2015 WOTUS rule, halting it from being implemented in the 13 states that are parties in the case. These 13 states will continue to operate as they have been doing until the district court lifts its injunction (irrespective of action that the 6<sup>th</sup> Circuit takes in the interim): Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming. Likewise, there are other cases that will also move forward again in the lower courts. There is a likelihood of multiple, differing decisions resulting in a patchwork of WOTUS rules state by state.

### **What About President Trump’s Executive Order?**

*It started the process.* In Feb. 2017, President Trump signed an executive order directing the U.S. Environmental Protection Agency (EPA) and the Army Corps to reconsider the 2015 WOTUS rule and to propose for public comment a new rule repealing or revising the 2015 rule as appropriate. (See [AGC’s](#)

[article on the EO.](#)) To be clear, that executive order was only a direction to begin a process – no administration can simply undo a rule without taking the proper steps governed by administrative law. [Listen to AGC’s recent Podcast that explains this process.](#)

### **Is a Better Rule Coming?**

*We are working towards that goal.* In response to the executive order and to avoid some of the confusion that now exists after the SCOTUS ruling, EPA and the Corps initiated three rulemakings to address the definition of WOTUS, see below. AGC has been actively engaged in each of these steps.

- Step 0 **Delay Applicability of 2015 Rule** – Status: PROPOSED; final expected shortly – *Would delay implementation of the rule for two years to give the agencies time to complete Steps 1 and 2 below.* [Read AGC’s comments via the Waters Advocacy Coalition in support of this step.](#)
- Step 1 **Repeal 2015 Rule** – Status: PROPOSED; final expected Spring of 2018 - [Read AGC’s comments in support of this step.](#)
- Step 2 **Replace 2015 Rule with New WOTUS Definition** – Status: Proposal expected late Spring of 2018; final expected Fall/Winter of 2018 – *The agencies have been gathering feedback from interested members of the public.* [Read AGC’s early feedback on construction-specific concerns for the agencies to consider when drafting a new rule.](#)

### **What’s in the 2015 WOTUS Rule Again?**

AGC published [an in-depth look](#) at the 2015 WOTUS rule when it was finalized. Although AGC identified potential problems and areas of confusion with the final rule, the agencies did consider many of AGC recommendations in final rule language. AGC has a strong working relationship with the career staff at the agencies that spans administrations. AGC will engage with the agencies to resolve long-standing concerns with the definition of WOTUS and any issues that may arise if/when/where it goes into effect. The Association will continue to work towards a better rule in 2018.

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