With much fanfare, the Trump administration announced last Tuesday that it is proposing to rescind the Clean Water Rule, also known as the Waters of the United States (WOTUS) Rule. This rule is intended to govern determinations of which waterbodies and wetlands are "waters of the United States," protected under the Clean Water Act. The rule's most obvious application is defining when someone who disturbs a river or lake bed or wetland must obtain a permit from the Army Corps of Engineers before taking action (which is why the rule is a joint effort between the Environmental Protection Agency and the Army Corps of Engineers); the rule could also have broader impact on clean water protections.

This action proposes to rescind a rule that is key to protecting our nation's rivers, lakes, streams, and wetlands. As recently reported by Coral Davenport in the New York Times, this action, like many others, is surely the product of the administration's relentless efforts to please industry, while ignoring the work of longtime EPA staff. But, like many Trump administration agency initiatives to destroy environmental protections, the action hasn't yet accomplished the intended rollback, despite widespread reporting that it is a death blow for water-quality protection.

Water quality scientists, along with experts in the federal regulatory agencies, have long known that water quality and quantity in major rivers and lakes is linked inextricably to the flow and quality of water in tributaries that feed into those larger waterbodies, including intermittent streams and small water features, and nearby wetlands. Water from upstream and adjacent sources connects to the larger waterways both at the surface and underground. So ensuring water quality and flow in major waterways depends on the ability to regulate those other areas. Libertarian advocacy groups, so-called property rights advocates, and some land developers and polluting industries have nonetheless long contested the federal government's claim that small or intermittent streams and wetlands are properly within the regulatory jurisdiction of the United States. This report from the Congressional Research Service is an excellent background document for those who want to learn more, as is EPA's own WOTUS history page. The Clean Water Rule itself is available at EPA's snapshot archive website (which contains most, but not all, EPA materials as they existed on EPA's website on January 19, 2017) at this archived page. (Alarmingly and inappropriately, EPA appears to have purged information on the current Clean Water Rule, including the text of the rule, from its active website.) And this American Bar Association website contains a rich store of information about the rule, for anyone who wants to dig deeply.

Courts have been grappling for decades with the question of the limits of what waterways the Clean Water Act protects. There's no question that the Act protects waters that are "navigable in fact" as well as many other waterways that feed into those waters. But the

question of how far up the chain the protection goes – to small tributaries, intermittently-flowing waters as are common in much of the American West, or adjacent wetlands – is hotly contested. In a complex 2006 U.S. Supreme Court decision, *Rapanos v. United States*, the Court split sharply – with no majority opinion – on the limits of Clean Water Act authority. As I noted in a prior post, Justice Kennedy's view – that "wetlands and tributaries that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,' " are covered under the Clean Water Act – defined the general legal test because five Justices would find that there is federal jurisdiction in those cases. Justice Scalia, writing for the other group of four Justices, held that a "continuous surface connection" with a "relatively permanent body of water connected to traditional interstate navigable waters" was necessary for there to be jurisdiction.

Only four out of the nine Justices endorsed Justice Scalia's limited view of the reach of the Clean Water Act. So their stance doesn't define the law. Most courts since then have interpreted the court decisions to mean that any waterbody or wetland that meets either Kennedy's "significant nexus" or Scalia's "continuous surface connection" is within Clean Water Act jurisdiction, since a majority of Justices would have found that the Clean Water Act protects waters that meet either test.

Both before and since *Rapanos*, the agencies have provided guidance and rules that explain their criteria for determining whether a waterbody is covered. Those regulatory materials have not bound the agencies to extremely detailed decision rules, but instead have left the agencies a lot of discretion in their determinations. The Clean Water Rule, enacted in 2015, provides more detailed decision support, by articulating clear principles- based on the *Rapanos* opinions – for determining whether there is a significant nexus between smaller and larger bodies of water. The Rule also is likely to marginally expand Clean Water Act application compared with past practice: according to the Congressional Research Service, "[t]he agencies estimate that the new rule will result in approximately 3-5% more positive assertions of jurisdiction over U.S. waters, compared with current field practice." Notably, courts have blocked the implementation of the rule while various lawsuits are pending, so the actual practice today is the same as it has been for years.

The administration's announcement to rescind the Clean Water Rule is no surprise. Right-wing and libertarian interest groups, along with some land developers and industry groups, have been seeking to narrow the application of the Clean Water Act for many years now, and it clearly is a priority for Republican donors and think tanks. The administration is generally working hard to please these interest groups by gutting government programs to protect public health and the environment. The Environmental Protection Agency and Army

Corps announced back in February that they planned to take this action, immediately following an executive order in which President Trump tasked federal agencies with revising the rule to make it less protective.

Dan Farber has already provided a useful analysis of the substantive choices and challenges EPA and the Army Corps face in developing a revised rule consistent with President Trump's executive order, which tasks the agency with implementing the view of the law expressed by Justice Scalia in *Rapanos.* As Dan suggests, it may well be impossible for EPA to develop a legally-sound rule that accomplishes what the President has ordered, which is to implement Justice Scalia's view of the law.

So what, exactly, does last week's action accomplish? It proposes to move forward in two steps: First, rescind the Clean Water Rule and restore the prior regulations temporarily; and second, engage in a separate rulemaking process to develop, propose, and finalize a new rule that would be consistent with the executive order.

Step one, which the agency launched last week, proposes to temporarily, officially replace the Clean Water Rule with the prior regulations, exactly as they were before the Clean Water Rule was enacted, and interpreted through the lens of agency guidance issued in 2008. This is the same set of regulations that is currently active, since the courts have stayed the application of the rule pending judicial review. Thus, if this new rule is finalized, it would not have any immediate practical effect, other than to moot the pending court cases. Moreover, as noted above, the agencies estimate that the new rule, if implemented, would increase federal jurisdiction only in a few marginal cases compared with current practice. So the situation on the ground, for now, is unchanged.

After the proposed rule is officially published (probably within a week or two), the agencies will launch a 30-day comment period on the rule. The agencies will have to consider the comments before finalizing the rule. Notably, the agencies have specifically asked commenters to limit their comments to the proposal to rescind the Clean Water Rule and recodify and restore the prior regulations and guidance. The notice of the proposed rule makes clear that the agency is not (yet) interested in taking comments about what new rule would ultimately replace the rule.

After the Clean Water Rule is officially rescinded, the agencies will launch another, separate rulemaking to propose and finalize a new rule to more permanently replace it That process will involve public and stakeholder comment on the substance of the new rule. Eventually, the rulemaking is likely to implement the substance of the administration's planned rollback. Observers expect the end result to be a sharp limitation on the Clean Water Act's

protection for our waters. Under the executive order, the rule may attempt to implement Justice Scalia's view of the law, which would fail to protect smaller waterways and wetlands that lack a "continuous surface connection" to larger waterways even if protecting those smaller waterways and wetlands is crucial to protecting the flow or water quality in the larger ones.

I have a companion post to this one that looks at some of the legal issues and challenges the administration faces in completing the rollback of this rule, and what this all may mean for the rule going forward.