On Monday, I posted a quick summary of the Trump administration's recent action to start rolling back the Clean Water Rule, a joint rule by the Environmental Protection Agency and U.S. Army Corps of Engineers that defines the range of waterways the Clean Water Act protects. The proposed action the agencies announced last week, following an executive order from February that ordered the review and rollback of this rule, would rescind the rule. But it wouldn't yet roll back any protections for streams or wetlands, though proposals for those rollbacks will come down the road. Eliminating federal protections for health and the environment will be a long, cumbersome process for the administration requiring multiple steps. Here, I'll discuss some of the legal issues, procedural hurdles, and other challenges the administration faces in completing the rollback.

Background

Here's a reminder of what the administration's plan is, according to its proposed rule (from my prior post):

> [The Environmental Protection Agency and Army Corps of Engineers] propose[] 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.
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> 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.
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> 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.
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> 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.

This action is bad news for the health of our nation's waters, and illustrates how EPA's work is now dominated by the concerns of a few industry lobbyists and anti-regulatory ideologues. But at the same time, it's not yet a disaster. At least for now, despite the administration's trumpeting of its action, the government is proposing – for now – to specifically keep the rules that are already being followed, which give the government broad jurisdiction to protect waterways and wetlands under the Clean Water Act, and provide more agency discretion than the Clean Water Rule (also called the Waters of the United States Rule, or WOTUS Rule) would. Ann Carlson predicted this, noting that "The withdrawal of the WOTUS rule will leave the Army Corps employees with significant discretion to continue to determine what that standard means until EPA and the Corps can issue a new rule." So the status quo will be unchanged, for now., and there are reasons to think it won't be easy for the administration to complete this initiative.

Here are some thoughts on ways that replacing this rule may be complex and difficult for the Trump administration.

The action rescinding the current rule may be vulnerable to court challenge

The administration may struggle to find a sound legal basis for a new rule, and any final action will be vulnerable to legal challenges. As this article (in Science Magazine Online, republished from E&E News) explains, the initial proposed rule to rescind the Clean Water Rule seems to be carefully drafted to avoid having to defend the action on scientific grounds. As that article notes, under the 2009 U.S. Supreme Court case FCC v. Fox Television Stations, an agency's burden to amend a prior rule based on a policy change is rather easy to meet: the agency must provide a "reasoned basis" for its change in policy. The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." Rather, "[i]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the

agency *believes* it to be better, which the conscious change of course adequately indicates." The E&E News article describes the agency's stated policy reasons for proposing to rescind the rule:

> The proposed repeal makes two major policy arguments.
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> The first focuses on the 6th U.S. Circuit Court of Appeals' stay on WOTUS. The Supreme Court is currently considering whether challenges to the rule belong in circuit or district courts and that stay could dissolve if the high court rules in favor of district courts.
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> Though the U.S. District Court for the District of North Dakota had preliminarily enjoined WOTUS in 13 states, such a result could lead to "inconsistencies, uncertainty and confusion," the proposed repeal says.
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> Rescinding WOTUS and reverting back to the 1986 regulation would maintain the status quo and avoid that confusion, the Trump EPA proposal argues.
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> EPA and the Army Corps of Engineers also argue that WOTUS didn't adequately consider Section 101(b) of the Clean Water Act, which describes the role that states play in regulating water quality.

These two arguments are rather weak. First, it's obvious that courts and agencies could, and ordinarily would, resolve any inconsistencies in application of the WOTUS Rule without eliminating the rule. The Supreme Court is capable of crafting an opinion that avoids the inconsistencies, uncertainty, and confusion that might result from inconsistent application across states and federal circuits. And it it doesn't, regulated parties and federal agencies can – just as they do in many other situations – deal with any inconsistencies among lower courts and use their own discretion to determine how to administer and comply with rules that vary among jurisdictions. Indeed, for years, federal courts have been addressing compliance with the *Rapanos v. U.S.* decision in this very way, and would continue to do this case by case in the absence of the 2015 Clean Water Rule. This is how our system is set up to work. Eventually, the U.S. Supreme Court can step in and resolve any discrepancies. It would be quite unusual for federal agencies to make a dramatic change in policy based on speculation about future inconsistent court decisions interpreting the law.

Second, the argument that the agencies' prior failure to address Clean Water Act Section 101(b) justifies eliminating the rule is a stretch. This statute, part of Congress's

"declaration of goals and policy" under the Clean Water Act, says:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

Unsurprisingly, many states commented on the Clean Water Rule, and EPA took their views into account over the multi-year process of developing the rule. Note also that the policy is to protect responsibilities and rights of states "to prevent, reduce, and eliminate pollution" – not to allow and facilitate pollution. Moreover, the prior subsection of the Act, 101(a), includes its own goals and objectives:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
> ***
> and
> (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to

> enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

If these goals, objectives, and policies were taken literally, decisions about applying the Clean Water Act would always err on the side of protecting more of our nation's waters, and protecting them more strictly.

And finally, both of these reasons are clearly pretextual, in light of the administration's prejudgment that the Clean Water Rule should be gutted. Dan Farber noted earlier today in another context, courts are inclined to be suspicious of agency decisions where the basis for the decision is pretextual. And here, the evidence for pretext is unassailable. Administrator Pruitt sued the government claiming the rule was illegal, when he was Attorney General of Oklahoma. (While Pruitt has recused himself from engagement in that lawsuit and others now that he is EPA Administrator, he has not similarly recused himself from proceedings to implement, revise, or eliminate the Clean Water Rule or any of the other matters on which he sued the EPA.) He also said in April that

> The American people are tired of job-killing regulations that aren't firmly grounded in science or law. We're answering President Trump's call for a review of the WOTUS rule, and working with governors and the American public to strike the right balance between federal, state, and local protections.

President Trump's public comments have been even stronger, He said in February, at the signing statement for his executive order directing the agencies to review the Clean Water Rule:

> The EPA's so-called "Waters of the United States" rule is one of the worst examples of federal regulation, and it has truly run amok, and is one of the rules most strongly opposed by farmers, ranchers and agricultural workers all across our land. It's prohibiting them from being allowed to do what they're supposed to be doing. It's been a disaster.
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> ***
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> With today's executive order, I'm directing the EPA to take action, paving the

way for the elimination of this very destructive and horrible rule.

Indeed, the words of the executive order itself make these rationales for rescinding the rule appear pretextual, since the order says that in revising the rule, "the Administrator and the Assistant Secretary shall consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)." (See my prior post for more explanation about the significance of the Scalia opinion.) There's simply no question that the administration has already decided that the rule should be scuttled and replaced with a weaker rule.

Moreover, the administration's action to rescind this rule is arguably at odds with a directive from Chief Justice John Roberts. Justice Roberts has written that he believes that the agencies failed to issue a clear rule explaining the limits to their authority, failed to justify their authority to regulate widely under the Clean Water Act. As both Dan and Ann have discussed in detail, the Clean Water Rule was a direct response to Justice Roberts's concurring opinion in *Rapanos*, in which he chastised the Army Corps for failing to "refin[e] its view of its authority" by issuing a clear rule. The Obama administration did what Justice Roberts asked, by issuing a clear rule. The Trump administration is proposing to go back to the old regime, with a lack of standards that so frustrated Justice Roberts. (The federal court stay of the application of the Clean Water Rule had already accomplished this, at least for now, but this action makes it official, and the lack of standards right now is clearly the current administration's responsibility.) There is no reason in principle that the agencies couldn't instead have waited to propose a new rule, with new standards, instead of rescinding the Clean Water Rule first. Perhaps the administration wanted an earlier "win" to take credit for, since waiting to propose a new rule would have taken a lot of time. Regardless, its action may make the rescission of the Clean Water Rule more vulnerable in court.

So it is possible that the administration's proposal to rescind the Clean Water Rule could be challenged successfully in court. To be sure, this would not be an easy case for challengers to win, given the deference courts afford to agency decisions to make policy changes. But it's possible. (Update: Patrick Parenteau of Vermont Law School analyzes the administration's rationale for withdrawing the Clean Water Rule, and concludes that the proposal is likely to be struck down in court as arbitrary and capricious.)

A Trump Administration replacement rule will be hard to defend in court, subject to procedural hurdles, and slow for staff to develop

Assuming that the current proposal succeeds in rescinding the rule, the next questions will be what replaces the Clean Water Rule, how that replacement is formulated, and on what basis the replacement is justified. It's unclear how agency staff work on the replacement rule will proceed, and how successfully the administration can defend any replacement rule.

First, the agencies also may have trouble getting a new rule finalized because of internal agency dynamics. The agencies are short-handed and it's also rather clear that the career staff who develop these rules generally don't support Trump's policies or legal conclusions. The WOTUS rulemaking process included remarkably slow, careful, and detailed rounds of White House review, discussed here by our colleague Holly Doremus, and took many years. It took years for the WOTUS Rule to see the light of day in the first place, after many rounds of internal deliberation and external engagement. This new phased replacement will be managed by career EPA and Army Corps staff who are proud of the work they did, over a decade, to answer Justice Roberts's call for clarity, and who understand that the WOTUS Rule is science-based and a good-faith attempt to follow the legal precedents.

So we might expect the process to be exceedingly careful and deliberate, and for those civil servants not to easily let the administration destroy their own carefully-crafted work to define the limits of agency authority – and beyond that, we'd expect them to craft any replacement rule just as carefully. There will surely be internal battles over whether the new rule will follow Executive Order 13778's call to define jurisdictional waters "in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*," since it's pretty clear that would violate Supreme Court precedent and would not be based on sound science. And EPA may not even have sufficient resources to do the work to replace the rule, given the possibility of dramatic cuts to EPA funding and staff. It might, therefore, be a long time before a replacement rule is proposed. On the other hand, it's been reported that outside special interests are urging EPA management to "hand the job to private lawyers" from industry to rewrite the WOTUS Rule, an ethically and legally questionable move motivated specifically by an attempt to avoid involving staff for exactly the reasons discussed above.

The agencies also face potential procedural hurdles to replacing the rule. For example, they will have to rescind at least one other rule (not necessarily related to the WOTUS rule) before they replace the WOTUS Rule. Under President Trump's Executive Order 13771, commonly called the "2-for-1 executive order," "[u]nless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed." According to the proposed rule, "this proposed rule is expected to be an E.O. 13771 deregulatory action." And presumably, in order to issue a new rule in compliance

with the 2-for-1 executive order, the agencies would have to rescind at least one more rule – and possibly two (one by the EPA and one by the Army Corps, since both agencies will promulgate this rule jointly) – to meet the 2-for-1 requirement. While the 2-for-1 order – which I have criticized sharply – has been challenged in court, and may well be struck down as arbitrary and capricious, the administration may, ironically, have limited its own options. (It also occurs to me that it's possible that the administration, anticipating the application of the 2-for-1 executive order, took this early, separate action to rescind the Clean Water Rule in order to give itself a head start on eliminating two rules in order to propose a new WOTUS rule.)

Any new rule will also have to undergo strict review by the White House; in the Obama era, White House review apparently was responsible for much of the multi-year delay in finalizing the rule. Given the chaos of the Trump administration and the likely tension among agency staff, agency political appointees, and various factions within the White House, delay seems just as likely for any future replacement rule.

Finally, a replacement rule will be vulnerable to court challenge on the merits of the rule. The dispute will focus on the agency's discretion to remove federal protection for intermittent waters, small tributaries, and wetlands that are hydrologically connected to, and have a "substantial nexus" with, larger waterways but are not "relatively permanent" and don't have a "continuous surface connection" to other waters that are covered. As quoted above, Congress proclaimed that the Clean Water Act's purpose is to "restore and maintain the chemical, physical and biological integrity of the nation's waters." The difficult question is how to evaluate federal jurisdiction to protect intermittent waters (as many streams are in the American West) or wetlands whose physical connection with, or geographical proximity to, larger waters is more attenuated. A majority of justices in *Rapanos* found that waters with a "substantial nexus" are covered because of their connection to the integrity of other waters. But Justice Scalia found federal jurisdiction only to protect "relatively permanent" waters – no matter how small or insignificant – and wetlands or waters with a "continuous surface connection" to relatively permanent waters.

To illustrate the issue, many rivers in the American West are seasonal in flow. Clean Water Act protection for these rivers would be in jeopardy under the Scalia standard if they were not found to be "relatively permanent" or have a continuous flow to relatively permanent rivers. (Scalia provides that it is possible for a seasonal river to be relatively permanent, but his standard is ambiguous and falls far short of protecting all seasonal rivers and streams.) And if a continuously-flowing river were protected under the Clean Water Act, but all or most of its tributaries were seasonal and not "reasonably permanent," there would be no effective way under Scalia's standard to ensure the "the chemical, physical and biological

integrity" of the river, since the river's water depends on all those other features. Scalia's test is thus rather arbitrary, since as every scientist and water quality expert – indeed, any high school student who has studied the water cycle – knows, waterbodies are often interconnected in ways that don't involve a "continuous surface connection" or permanent flow. Underground streams and groundwater flow, wetland filtration of water, and the seasonal flow of intermittent streams can dramatically affect the quality, temperature, and flow of larger rivers and lakes. Justice Kennedy's opinion that a "substantial nexus" between a tributary or wetland and a larger waterway justifies federal protection is based on this insight. Thus, it may be very difficult for the administration to defend scientifically a new rule applying the Scalia standard. Moreover, it's reasonable to conclude that a majority of current justices on the Supreme Court would reject the Scalia standard as too narrow, as the *Rapanos* justices did. (Dan Farber provides an overview of possible courses of action by the agencies, including some evaluation of this question, in this post from May.)

So if and when a less-protective replacement rule is finalized, there's no question that advocates for clean water will challenge it in court. And, consistent with Dan's analysis in his earlier post and as I note above, the challenges are likely to succeed, if the agencies follow the administration's plan to develop a rule that implements Justice Scalia's concurrence in the *Rapanos* case, since that case doesn't represent the governing law or follow the science. Of course, changes in the composition of the Supreme Court could alter that balance, illustrating just one of many ways that the courts affect environmental law and policy.

All in all, while the news isn't good for the future of the nation's waterways, the damage hasn't been done yet. The administration is declaring victory and highlighting this action as a big step toward loosening Clean Water Act protections. But really, it hasn't accomplished anything yet. We'll see how much that changes over the coming months. It will be particularly interesting to see whether the agency staff experts, who struggled for so long to develop the Clean Water Rule in the first place, will move forward quickly with a replacement that guts their own work. And as with many other issues, the composition of our courts – and particularly the U.S. Supreme Court – will be crucial. For the moment, the Supreme Court seems likely to maintain a majority supporting broad protection under the Clean Water Act. With changes in the Court – in particular, if Justice Kennedy retires and is replaced with a new justice with a narrower view of federal jurisdiction – it's more likely that the administration, and allied advocates at right-wing think tanks, will accomplish their goals.