

A BUSY WEEK FOR WOTUS

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On Tuesday, January 19, 2016, President Obama vetoed the U.S. Senate's resolution, S.J. 22, to nullify the U.S. [Environmental Protection Agency's](#) Clean Water Rule (Waters of the United States or "WOTUS"). On Thursday, January 21, 2016, the U.S. Senate's effort to override the veto failed. The vote on the override was 52-40. The Senate needed 60 votes to move forward to a final vote, which then would have required 67 votes to pass.

Majority Leader Mitch McConnell, R-Ky. stated that EPA overreached its regulatory authority under the Clean Water Act. There are many opponents to WOTUS, including the agriculture industry, real estate developers, manufacturing entities, and other property owners. Opponents argue that WOTUS gives EPA virtually unlimited authority to regulate any body of water on any piece of property, including a puddle or a ditch, without regard to its connection to navigable waters of the United States as required by the Clean Water Act.

The Senate first passed the resolution, S.J. Res. 22, under the Congressional Review Act, in November. The House of Representatives passed it on Jan. 13, over the threat of a veto. After the resolution passed the House, Obama carried through on the threat, [issuing a veto message](#) for the resolution on Tuesday, January 19, 2016. The veto message included the following statement from President Obama:

"We must protect the waters that are vital for the health of our communities and the success of our businesses, agriculture, and energy development. As I have noted before, too many of our waters have been left vulnerable. Pollution from upstream sources ends up in the rivers, lakes, reservoirs, and coastal waters near which most Americans live and on which they depend for their drinking water, recreation, and economic development. Clarifying the scope of the Clean Water Act helps to protect these resources and safeguard public health. Because this resolution seeks to block the progress represented by this rule and deny businesses and communities the regulatory certainty and clarity needed to invest in projects that rely on clean water, I cannot support it. I am therefore vetoing this resolution."

The rule, proposed on June 29, 2015 in the Federal Register, redefines the Clean Water Act's "navigable waters of the U.S." to include "those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas." Congress defined "navigable waters" in section 502(7) of the Clean Water Act as "waters of the United States, including the territorial seas." The term is critical to determine when a permit for discharge is required and to determine whether there has been an unlawful discharge to such waters in violation of the Clean Water Act.

The rule defines which features constitute riparian areas, floodplains, and tributaries under the Clean Water Act. The new definition allows for regulation of any area that has any amount of water with bed and banks and an ordinary high water mark. The definition excludes certain manmade ditches and drains, but includes wetlands that are remote and intermittent. EPA asserts that upstream waters fall within its jurisdiction of because they are integral parts of the aquatic environment and necessary to maintain the integrity of downstream waters; if these upstream waters are polluted, EPA claims, there is a significant effect downstream.

The rule specifically excludes certain types of (but not all) ditches and stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Developers, industries with NPDES outfalls, farmers, vineyard owners, state and local governments, energy companies, and many others will be impacted by the new rule when it goes into effect.

The rule has been challenged in several lawsuits, which **are still pending**. Plaintiffs challenging the rule allege that the rule is overreaching because it could be applied to areas that are dry most of the time. The rule could give EPA and the Corps jurisdiction over waters within a stream's 100-year floodplain or within 4,000 feet of a high-tide line, which were not previously regulated by the Clean Water Act as "navigable waters of the U.S." The states also argue that the rule will require them to devote more state resources in order to comply with federal pollution and water quality standards.

WOTUS became effective in many states on August 28, 2015. It is, however, now stayed across the nation by a decision by the Sixth Circuit on Friday, October 9, 2015, pending review of challenges currently before the Sixth Circuit and in several other federal district courts.

[Untangling 'Waters Of the US' Web In 6th Circuit](#)