

Unintended Consequences of WOTUS Provision in FY2018 Ominbus Bill

Earlier funding bills HR 3266 and HR 3354 contained the following text:

(a) AUTHORIZATION.—The Administrator of the Environmental Protection Agency and the Secretary of the Army may withdraw the Waters of the United States rule without regard to any provision of statute or regulation that establishes a requirement for such withdrawal.

(b) EFFECT OF WITHDRAWAL.—Except as otherwise provided by any Act or rule that takes effect after the date of enactment of this Act, if the Administrator of the Environmental Protection Agency and the Secretary of the Army withdraw the Waters of the United States rule under subsection (a), the Administrator and Secretary shall implement the provisions of law under which such rule was issued in accordance with the regulations and guidance in effect under such provisions immediately before the effective date of such rule.

(c) DEFINITIONS.—In this section the term “Waters of the United States rule” means the final rule issued by the Administrator of the Environmental Protection Agency and the Secretary of the Army entitled “Clean Water Rule: Definition of ‘Waters of the United States’” on June 29, 2015 (80 Fed. Reg. 37053).

Subsection (a) protects the EPA/Corps from suit if they withdraw the 2015 WOTUS rule now stayed nationwide by court order. This is an important protection because some activists dispute the justification for withdrawing the rule, even though two courts have already concluded it is likely invalid on its face for several reasons: that the rule did not follow proper rule-making procedures, it exceeds the limits established by the *SWANCC* and *Rapanos* decisions, it is not supported by the scientific evidence, and it raises important federalism concerns by impinging on traditional state authority to control local land and water use.

Subsection (b), however, will result in severe, adverse, and unintended consequences:

1. Subsection (b) is intended to restore the status quo ante while EPA revises the 2015 WOTUS rule over the next two years as directed by executive order. But subsection (b) goes well beyond restoring the status quo ante; it would statutorily insulate prior, illegal rules during the interim period, and that could easily become permanent. Subsection (b) effectively amends the Clean Water Act by statutorily approving decades of overbroad agency definitions of “waters of the United States” adopted in prior rules and guidelines. Such a statutory approval of EPA/Corps’ expansive jurisdictional assertions may be immune from judicial challenge except on constitutional grounds. Yet many pre-2015 rules and guidelines, which subsection (b) would endorse, have been challenged in court on multiple grounds, including inconsistency with the Clean Water Act itself and Supreme Court decisions. The unintended consequence is that subsection (b) would eliminate those grounds for challenging the prior rules and guidelines, thereby depriving the regulated public of an essential tool to protect itself against overzealous enforcement of the Act. This is an unnecessary, unprecedented, and drastic change to current law and to the law that existed prior to the WOTUS rule’s issuance.

2. The prior rules and guidelines, which subsection (b) would codify, were nearly as broad as the 2015 WOTUS rule itself. The agencies acknowledged in 2015 that the WOTUS rule was issued to

clarify the agencies' own open-ended interpretations of *SWANCC* and *Rapanos* and their own prior rules and guidelines, not the court decisions in the first instance. The 2015 WOTUS rule was a small step from the prior rules and guidelines, that themselves authorized federal regulation of virtually all waters and much of the land in the nation. EPA Administrator McCarthy had that in mind when she said the WOTUS rule did not significantly expand the agency's previous assertion of authority.

3. Congressionally "approved" rules and guidelines are not only harmful in the next two years, they could also severely hamstring the next rule's issuance and its subsequent court review. Subsection (b) expressly *allows* the agencies to replace the pre-2015 regulations and guidance with a new rule, but it does not insulate the new rule from normal APA challenges. Some activists will argue and some courts will likely agree that it is harder to justify departing from regulations and guidance which Congress expressly approved in law than those the agency could otherwise say were too broad or legally questionable. Subsection (b) makes it a whole lot harder to depart from pre-2015 rules and guidance and survive judicial review. In short, a contraction of federal jurisdiction from the WOTUS rule will be challenged as too narrow and inconsistent with congressional intent. Unfortunately, the adoption of subsection (b) will give credence to that argument. It will be hard for the EPA to defend a definition of WOTUS that is narrower than the prior rules and guidelines if Congress has already endorsed that expansive interpretation as proper.

4. If the new rule is stayed or disapproved, for whatever reason, the default would be the statutorily approved pre-2015 rules and guidance in subsection (b), perhaps for decades or longer.

5. The statutorily approved pre-2015 rules and guidance would be the floor from which a future administration could issue a rule even worse than WOTUS. The WOTUS rule is now stayed in part because it is inconsistent with the Clean Water Act, but it would be much harder to challenge the reissuance of the same rule or one that goes further on statutory grounds if it was based on pre-2015 rules and guidance that Congress approved in subsection (b) above.

6. Subsection (b) is entirely unnecessary, since the withdrawal of the 2015 WOTUS rule (with or without section (a) above) would not alter the prior rules and guidance documents. Moreover, the agencies already explained in the notice proposing the withdrawal of the 2015 WOTUS rule that the older rules and guidance would be used during any interim period to guide their continued enforcement of the Clean Water Act. But if Congress still wants to ensure that the pre-2015 rules and guidance continue with whatever force they had immediately before the 2015 WOTUS rule was issued, but without approving them in law, it should borrow a phrase from the Congressional Review Act that applies when a rule goes into effect and is disapproved by Congress. Applying that CRA language in italics to this situation could be done as follows: "If EPA/Corps withdraws the 2015 WOTUS rule, it *shall be treated as though such rule had never taken effect.*"

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