



**National Conference of State Legislatures
Office of State-Federal Relations**

**President Trump Issues Executive Order to Review, and Potentially
Rescind, WOTUS Final Rule**

March 1, 2017

On Feb. 28, President Donald Trump [issued an executive order](#) (EO) to begin the process of reviewing, and possibly rescinding, the Environmental Protection Administration's (EPA) and the U.S. Army Corps of Engineers (USACE) [Clean Water Rule: Definition of Waters of the United States](#). Any changes to the rule, or even its removal, will require EPA and USACE to follow the [Administrative Procedures Act](#) that necessitates the use of notice and comment periods.

Finalized in June 2015, the rule, more commonly referred to as WOTUS, was designed by the EPA and USACE to define "waters of the United States," as used in the Clean Water Act (CWA). The rule aims to determine the scope of federal authority to regulate such water, and when states, local governments and others must seek federal permits to develop land because it contains WOTUS. The rule was issued following a U.S. Supreme Court ruling in the 2006 case [Rapanos et ux., et al. v. United States](#), a case challenging federal jurisdiction to regulate certain types of wetlands under the CWA. Although the Supreme Court issued a 4-1-4 decision in favor of Rapanos, the court was split on how to define the federal government's jurisdiction. EPA used Justice Anthony Kennedy's concurring opinion in the case as the basis for its rule, which stated that waters must have a "significant nexus" to actual navigable rivers and sea to qualify as protected under the CWA. The rule has faced legal challenges since its inception, with arguments that the rule unconstitutionally expanded the CWA's reach and misapplied Kennedy's opinion from the 2006 case.

On Jan.13, 2017, the Supreme Court, agreed to review a [challenge](#) to the regulation from 31 states. SCOTUS will resolve whether federal appellate, or district court judges have jurisdiction to review the regulation. Following this decision, which may not come until 2018, the appropriate court would then begin hearing the challenge to rule. The EO also instructs EPA and USACE to inform the U.S. attorney general of the pending review so that they may act, as they deem appropriate, in the court (or courts). It remains unclear how any such actions could affect both the case before the Supreme Court and either the appellate or district court.

Additionally, the EO directs the EPA and USACE to consider relying on the late Justice Antonin Scalia's [plurality opinion](#) in *Rapanos v. United States*, rather than Kennedy's, in reviewing the regulation. Scalia argued that the Clean Water Act strictly applies to "navigable waters," and only applies to non-navigable waters if the waters are "relatively permanent, standing or flowing bodies of water," such as streams, rivers, lakes and bodies of water forming geographical features.

For any questions or further concerns regarding the executive order or the CWA, please contact NCSL staff [Ben Husch](#) (202-624-7779) or [Kristen Hildreth](#) (202-624-3597).