

Energy and Environment

# Trump administration to propose repealing rule giving EPA broad authority over water pollution

---

By **Steven Mufson** and **Juliet Eilperin** June 27, 2017

President Trump's administration will revoke a rule that gives the Environmental Protection Agency broad authority over regulating the pollution of wetlands and tributaries that run into the nation's largest rivers, EPA Administrator Scott Pruitt said Tuesday.

Testifying before Congress, Pruitt — who earlier said he would recuse himself from working on active litigation related to the rule — said that the agency would “provide clarity” by “withdrawing” the rule and reverting standards to those adopted in 2008.

Pruitt, as Oklahoma attorney general, had sued EPA over the regulation, saying it “usurps” state authority, “unlawfully broadens” the definition of waters of the United States and imposes “numerous and costly obligations” on landowners.

A withdrawal was expected, based on the executive order Trump signed in February targeting the rule. But this is the first clear signal of how the EPA will act on the president's order.

The current rule, known as Waters of the United States (WOTUS), unambiguously gives EPA and the Army Corps of Engineers authority that many think the agencies already possessed under the Clean Water Act. The 1972 law gave the agencies control over navigable rivers and interstate waterways, but a series of court rulings left the extent of that power ambiguous. The Obama administration sought to end a decade of confusion by finalizing the WOTUS rule, which took effect in August 2015, triggering protests from a variety of real estate development, agricultural and industrial interests.

The existing regulation covers wetlands adjacent to either traditional navigable waters or interstate waters, as well as streams serving as tributaries to navigable waters. The rule says that wetlands and tributaries must be “relatively permanent,” a phrase used in previous court opinions, which means they can be intermittent. Defining it this way extends federal jurisdiction to 60 percent of the water bodies in the United States.

Trump signed an executive order in late February calling on EPA and the Army Corps of Engineers to revisit the regulation, a move he described as “paving the way for the elimination of this very destructive and horrible rule.”

The executive order instructed the agencies to change the interpretation of a 2006 Supreme Court decision on what falls under the federal jurisdiction under the Clean Water Act. In the *Rapanos v. United States* decision, the court split three ways. Its four most conservative justices at the time offered a very constrained view that only “navigable waters” met this test. But Justice Anthony M. Kennedy, who refused to join either the conservatives or the liberals, said in a concurring opinion that the government could intervene when there was a “significant nexus” between large water bodies and smaller, as well as intermittent, ones.

Trump’s executive order said that federal officials should rely on the dissenting opinion of the late Justice Antonin Scalia, who argued the law should only apply to “navigable waters.” No court has ever ruled that this test is the single decisive threshold for triggering Clean Water Act protections.

“This proposal strikes directly at public health,” Rhea Suh, president of the Natural Resources Defense Council, said in a statement. “It would strip out needed protections for the streams that feed drinking water sources for 1 in every 3 Americans.” She called it a “reckless attack on our waters and health.”

Pruitt told senators in testimony Tuesday that the Obama-era rule “created a situation where farmers and ranchers, landowners across the country did not know whether their stream or dry creek bed, in some instances, was actually subject ... to EPA jurisdiction and EPA authority.” He said that “they were facing fines that were substantial as they engaged in earth work to build subdivisions — I mean, it was something that created a substantial amount of uncertainty and confusion.”

But Suh said that the repeal of WOTUS “would make it easier for irresponsible developers and others to contaminate our waters and send the pollution downstream.”

Kieran Suckling, executive director of the Center for Biological Diversity, said in a statement that “from vernal pools in California to prairie pothole ponds in the Midwest, small wetlands provide essential habitat to hundreds of endangered species, birds and migrating wildlife.”

Foes of the WOTUS rule hailed the administration’s plans to revoke it.

“The West has finally won in the battle over the Obama administration’s WOTUS rule,” House Speaker Paul D. Ryan (R-Wisc.). “This regulation would have been a disaster for rural communities in the West and across the country, giving Washington near-total control over water resources.”

National Rural Electric Cooperative Association chief executive Jim Matheson said that as written, the rule “would have increased costs and impaired the ability of co-ops to build and maintain power lines.” He urged EPA and the Army Corps to propose “a new common-sense rule.”

The administration's push to revoke the rule has sparked nearly 500,000 public comments, many of which urge the federal government to preserve the existing regulation.


After taking comment on repealing the rule and reaching a final decision, EPA will have to craft its own proposed rule for defining which waters deserve federal protection under the 1972 law. That new regulation, which will be subject to public comment, will very likely be challenged in federal court by environmental and outdoors groups.

Jo Ellen Darcy, who co-authored the Obama-era rule as assistant secretary of the Army for civil works and now sits on the board of the advocacy group American Rivers, questioned why the new administration would revisit a regulation that received more than 1 million comments and drew on more than 1,200 peer-reviewed studies.

“By tossing out years of scientific study and public input, Scott Pruitt and the Trump administration are muddying the very waters the Clean Water Rule sought to clarify,” Darcy said.

*Brady Dennis contributed to this report.*

 **250 Comments**

Steven Mufson covers energy and other financial matters. Since joining The Post, he has covered the White House, China, economic policy and diplomacy. Follow @StevenMufson.  Follow @StevenMufson

Juliet Eilperin is The Washington Post's senior national affairs correspondent, covering how the new administration is transforming a range of U.S. policies and the federal government itself. She is the author of two books—one on sharks, and another on Congress, not to be confused with each other—and has worked for the Post since 1998.

 Follow @eilperin

