

# Will the Real WOTUS Rule Please Stand Up?

## Update of the Ongoing Rule Development and Litigation

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# The WOTUS Revolving Door

- August 28, 2015 – Obama-Era WOTUS Rule goes into effect
- Feb. 6, 2018 – WOTUS “Applicability Rule” finalized – delays effective date of 2015 Rule until 2020.
- December 11, 2018 – Proposed WOTUS “Revision Rule” published, significantly scaling back scope of 2015 Obama-era WOTUS Rule. Still waiting on publication of final rule.
- September 12, 2019 – EPA publishes final “Repeal Rule.” WOTUS definition reverts back to pre-2015 version until “Revision Rule” adopted

## History of WOTUS Litigation Relevant to Stakeholders in the Southeast

- June 30, 2015 – Florida, Georgia, and other aligned states file suit in the U.S. District Court for the Southern District of Georgia challenging 2015 WOTUS Rule.
- Additional lawsuits challenging the WOTUS Rule were also filed throughout the country in the following districts:
  - District of North Dakota;
  - Southern District of Texas;
  - Southern District of Ohio;
  - Northern District of Oklahoma;
  - Northern District of Georgia;
  - Northern District of Florida;
  - District Court for the District of Columbia; and
  - Northern District of California.



## History of WOTUS Litigation Relevant to Stakeholders in the Southeast

- August 16, 2018 – The U.S. District Court for the District of South Carolina granted summary judgment to plaintiffs challenging the “Applicability Rule.”
- November 26, 2018 – The U.S. District Court for the Western District of Washington vacated the “Applicability Rule.”
- As a result of these two cases, 22 states were under the jurisdiction of the 2015 WOTUS Rule, while the other states were under the jurisdiction of the pre-2015 WOTUS Rule.

## History of WOTUS Litigation Relevant to Stakeholders in the Southeast

- January 22, 2018 – The U. S. Supreme Court rules that Federal District Courts have jurisdiction over WOTUS Rule challenges.
- June 8, 2018 – The U.S. District Court for the Southern District of Georgia issues an injunction staying the 2015 Rule in Florida, Georgia, and nine other states.
- August 22, 2019 – The Southern District of Georgia rules invalidating the 2015 Rule and remanding the Rule back to EPA.

## SESWA's Primary Argument in the WOTUS Litigation

- Municipal Separate Storm Sewer Systems or “MS4s” are point sources and thus cannot simultaneously be “waters of the United States,” which they would be under the 2015 Obama-Era WOTUS Rule.
- The 2015 Rule impermissibly ascribes the same meaning to “point source” as it does WOTUS. The rule asserts jurisdiction over man-altered or man-made waters including rivers, streams, canals, and ditches not otherwise excluded and channelized waters and piped streams, even where used as part of a stormwater management system. *See* 33 C.F.R. § 328.3(c)(3); 80 Fed. Reg. at 37,100.
- Jurisdictional ditches include those with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, and those that are excavated in or relocate a tributary regardless of flow. *See* 80 Fed. Reg. at 37,078.
- The Corps and EPA concede that stormwater conveyances may be treated as both a point source and a water of the United States under the 2015 Rule. *See* 80 Fed. Reg. at 37,098.

## SESWA's Primary Argument in the WOTUS Litigation

- The CWA's structure and text “conceive of ‘point source’ and ‘navigable waters’ as separate and distinct categories.” *Rapanos v. United States*, 547 U.S. 715, 735 (2006).
- The CWA defines “discharge of pollutant” as the “addition of any pollutant to navigable waters from a point source,” making the distinction clear. *See* 33 U.S.C. § 1362(12)(A).
- Importantly, section 402 of the CWA requires permits only for discharges from MS4s into navigable waters. 33 U.S.C. § 1342(p)(3)(B). This makes the inclusion of any part of the MS4 system – a point source – into the definition of a WOTUS directly contrary to the CWA.

# Why Care About WOTUS?



**Figure 2:** Dade City Canal in Florida is a man-made, mostly dry conveyance for flood control. Dade City Canal is not currently a water of the United States but would likely be deemed a “tributary” under the Rule. Fla. Stormwater Ass’n Comments 10, ID-7965

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# Why Care About WOTUS?



**Figure 6:** Ditch #5 in Pinellas County, Florida, is a manmade stormwater conveyance that discharges through a wetland into a navigable creek. It is already regulated as a point source. Under the Rule, it will be *additionally* regulated as a “water of the United States.”  
Fla. Stormwater Ass’n Comments 13

## Proposed "Revision Rule"

- Published in *Federal Register* on February 14, 2019.
- The key changes to the definition of WOTUS found in the Revision Rule include:
  - Removing “ephemeral” waters features as definitional WOTUS, only including rivers and streams with yearly perennial or intermittent flow to downstream navigable waters.
  - Removing jurisdictional coverage of all interstate waters. Under the revised definition, interstate waters are no longer an independent category of jurisdictional waters. Instead, the proposed rule requires that an interstate water separately meet the definition of WOTUS under another jurisdictional category (such as being tributary to a navigable water, or being a navigable water).
  - Removing upland and ephemeral ditches from definitional WOTUS.
  - Only including lakes or ponds that are traditional navigable waters or connected to traditional navigable waters through tributaries.
  - Narrowing the coverage of wetlands, only including wetlands that are abutting jurisdictional waters or that have a direct hydrological surface water connection to jurisdictional waters (thus removing wetlands separated by a berm, dike, or other barrier that were previously considered jurisdictional).

## Proposed "Revision Rule" – Stormwater Conveyances

- The Revision Rule specifically excludes from the WOTUS definition “stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off.”
- By replacing the term “dry land” from the 2015 rule with “upland,” the new proposed WOTUS rule does provide a broader stormwater exclusion than what was established under the 2015 WOTUS rule.
- On the other hand, some waters, such as channelized streams with intermittent or perennial flow, would be jurisdictional even where used as part of a stormwater management system, continuing (although more limited) the situation created under the 2015 Rule that allows some stormwater conveyances to be treated as both a point source and a water of the United States.

## Proposed "Revision Rule" - Status

- After publication of the proposed Revision Rule, EPA and the Corps opened a 60-day public comment period, which closed on April 15, 2019.
- Now waiting on the Agencies to publish the Final Rule.



# Which WOTUS Rule Applies in the Southeast?

- Currently, the pre-2015 WOTUS Rule is applicable in Florida while we wait on EPA to finalize the “Revision Rule.”
- The pre-2015 Rule version of the WOTUS definition, however, could be in effective for the foreseeable future.

## What Does the Future Hold?

- The “Repeal Rule” will take effect 60-days after being published in the *Federal Register*. Once this occurs, the 2015 Obama-Era WOTUS Rule will be gone.
- But, litigation is all but guaranteed to occur and parties that support the 2015 Rule will likely seek a stay of the Repeal Rule. This could create a new hodgepodge of WOTUS applicability if some courts grant a stay of the Repeal Rule and other do not.
- The same scenario will likely occur with the “Revision Rule” once that rule becomes final and will also likely result in litigation.
- You could have a situation where some states are under the pre-2015 Rule, some states under the 2015 Rule, and some states under the “Revision Rule”.



# Thank you! Questions?

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