



## The EPA and Corps Request Additional Comments on the Proposed Repeal of the Clean Water Rule

Nearly one year after officially proposing to repeal the Clean Water Rule (CWR), the landmark 2015 Obama Administration rule that redefined “waters of the United States” and arguably expanded the geographic scope of the Clean Water Act (Act), the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (collectively, the “Agencies”) have clarified the legal basis for, and are soliciting additional comments related to, the proposed repeal. On July 12, 2018, the Agencies published a lengthy Supplemental Notice of Proposed Rulemaking (Supplemental Notice) in the *Federal Register* to clarify, supplement, and seek additional comment on their proposal to permanently repeal the CWR and recodify the regulatory definition of “waters of the United States” that existed before 2015. 83 Fed. Reg. 32227. Interested parties have until August 13, 2018 to submit comments in response to the Supplemental Notice.

As compared with the initial July 2017 proposal (82 Fed. Reg. 34899), the Supplemental Notice is rich in detail and includes significantly more legal analysis and citations, as well as references to and evaluations of documents included in the administrative record for the CWR. For almost every new or more detailed justification for the proposed repeal, the Agencies request comment. Some of the arguments and reoccurring themes for which the Agencies request comment include:

- The CWR exceeds the Agencies’ authority under the Act by (1) failing to give sufficient effect to the statute’s use of the term “navigable” to define the Agencies’ jurisdiction and (2) focusing too much on the biological and environmental importance of wetlands.
- The CWR is a misapplication of the “significant nexus” test for jurisdiction under the Act established by soon-to-be-retired U.S. Supreme Court Justice Anthony Kennedy in the 2006 decision in *Rapanos v. United States*, 547 U.S. 715 (2006).
- The CWR upsets the federal-state balance contrary to one of the Act’s identified Congressional policies “to recognize, preserve, and protect the primary responsibilities and rights of states” to plan the development and use of their water and land resources. 33 U.S.C. § 1251(b).

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- Specific findings and assumptions used by the Agencies to support the promulgation of the CWR were incorrect.

If you have any questions about the Supplemental Notice and the Agencies' requests for comments, please contact Lisa M. Bruderly at (412) 394-6495 or [lbruderly@babstcalland.com](mailto:lbruderly@babstcalland.com), or Gary E. Steinbauer at (412) 394-6590 or [gsteinbauer@babstcalland.com](mailto:gsteinbauer@babstcalland.com).

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