



## **Summary of EPA's Supplemental Notice to the July 2017 Proposed Rulemaking repealing the 2015 Clean Water Rule**

The ["Supplemental Notice of Proposed Rulemaking"](#) (SNPRM) released by the U.S. Environmental Protection Agency (EPA) and Department of the Army (USACE) on Friday, June 29 2018, is an addendum to the [July 2017 Proposed Rule](#) to repeal the 2015 Clean Water Rule. This supplemental notice essentially has two functions:

- 1) Providing more information on why EPA and USACE ("the agencies" from here forward) are considering repealing the 2015 rule, and**
- 2) Asking the public to provide comment on many specific issues (ranging from legal to scientific to technical to factual questions) concerning possible problems with the 2015 rule.**

The 93-page SNPRM is a long, detailed document, working through a *very* wide breadth of issues and questions related to the 2015 rule. The agencies discuss details of the development of the Clean Water Act, its legislative history, important Supreme Court cases both old and new, the processes involved in the 2015 rule, the Connectivity Report issued by the EPA Science Advisory Board, the comments submitted during development of the 2015 rule, the comments submitted for both "step 1" (the July 2017 repeal proposed rule) and "step 0" (the applicability date proposed rule) of this administration's WOTUS reform, the recent court cases challenging the 2015 rule both substantively and procedurally, and more, in order to provide context.

Notably, this SNPRM is likely the closest we will come to seeing a preview of arguments deployed by opponents of the 2015 rule when courts inevitably begin hearing challenges to the 2015 rule on the merits.

ACWA recommends interested members read the notice in full, as it goes over many questions raised to the agencies both by the public and by internal review concerning the 2015 rule, **and solicits public input on nearly every single one**, and they all cannot be summarized in brief. This summary attempts to cover the more notable questions and conclusions in concise fashion.

Finally, below this summary ACWA has "outlined" the SNPRM into a "Table of Contents" made up of the headings and subheadings from the SNPRM, as reading the SNPRM with a roadmap of sorts will be helpful given the length of the document.

## **“Background”**

- The first section of the SNPRM, the Background section, reviews key changes the 2015 rule made to definitions and other rule text, focusing on changes which were added after the notice of proposed rule, therefore precluding the public from a chance to comment on them, such as the definition of “neighboring” and how it affects “adjacent” waters, wetlands, and tributaries.
- This section also provides a brief overview of legal challenges to the 2015 rule and of the Executive Order 13778 on considering redefining WOTUS and the Applicability Date proposed rule.
- The agencies expressly say that because of the high volume of comments on the July 2017 proposed rule to repeal the 2015 Clean Water Rule, they are issuing the SNPRM to provide additional clarity and solicit more public input specifically on questions about the substantive legal and policy reasons for repealing the 2015 rule.

## **“Proposal to Repeal the 2015 Rule”**

This section is split into several lengthy sections, some of which I will provide brief bullet-point summaries on below.

- Legal Authority to Repeal: briefly provides overview of authority for agencies to rescind a rule due to changes in policy considerations stemming from a new administration and/or new analysis over time.
- Legal Background: this long section provides a history of the CWA, including an emphasis on section 1251(b), in which congress emphasized the role of the states in implementing the CWA and the importance of preserving state independent authority over certain land and water regulation. The section takes us through landmark CWA cases about the definition of navigable waters, the role of the federal government via interstate commerce in regulating waters, and Supreme Court precedent in defining adjacent wetlands and tributaries.

Notably, the document spends pages reviewing Justice Kennedy’s opinion (“the significant nexus” and more) and Justice Scalia’s plurality opinion from *Rapanos*. The analysis of *Rapanos* goes into presumed points of agreements between Kennedy and Scalia, especially regarding the affect of proximity of wetlands to tributaries in lack of jurisdiction and why the 2015 rule may run afoul of those areas of agreement. The analysis is a bit of a pivot from the Executive Order philosophically, as the agencies are now framing the 2015 rule as not just based off of an incorrect premise (the significant nexus test), but also framing the 2015 rule as *not constitutional according to the Kennedy opinion in the first place*.

- Proposed Reasons for Repeal: In a subsection of the Legal Background section titled “Proposed Reasons for Repeal”, the agencies explain why repeal is appropriate:
  - 1) Lack of regulatory certainty from the 2015 rule,
  - 2) An expansive interpretation of the Significant Nexus Test which does not comport with the limits on agency authority set forth in the CWA or with the relevant Supreme Court precedent, and
  - 3) Lack of confidence that the 2015 rule will stand up to judicial scrutiny in light of the two District Court decisions resulting in the 2015 rule being stayed in over 20 states due to rulings that the states challenging the 2015 rule were “likely to succeed on the merits”.
- The role of Science in the 2015 Rule and it’s Public Framing: This is not the title of a section of the SNPRM, but a topic which becomes the subject of the SNPRM concerning potential ways in which the

2015 rule may have exceeded agency authority under the CWA beginning on page 47-48. Notably, the section expressly proclaims that the agencies placed too much emphasis on the Connectivity Report in setting jurisdictional lines in the 2015 rule. The agencies emphasized that the report plays a very specific role – an informational one – and should not be relied on in place of sound interpretations of the statutory text and congressional intent behind it. Additionally, the SNPRM spends a long stretch of pages delving into the quantitative indicators researched by the agencies to show that the 2015 rule would not result in a significant increase in jurisdictional waters, calling many of the procedures used to derive their conclusions into question and raising contrary information provided by states as counterpoints, ending by soliciting comment from the public on those questions as well.

### **Outline of EPA’s Supplemental Notice to the July 2017 Proposed Rulemaking**

- I. Background
  - a. The 2015 Rule (p4)
  - b. Legal Challenges to the 2015 Rule (p10)
  - c. Executive Order 13778, the Notice of Proposed Rulemaking, and the Applicability Date Rule (p13)
  - d. Comments on the Original Notice of Proposed Rulemaking (i.e. July 2017 NPRM) (p14)
  - e. Comments on this Supplemental Notice of Proposed Rulemaking (p16)
- II. Proposal to Repeal the 2015 Rule
  - a. Legal Authority to Repeal (p16)
  - b. Legal Background (p17)
    - 1. The Clean Water Act (p17)
    - 2. *(SNPRM accidentally skips #2)*
    - 3. U.S. Supreme Court Precedent (p26)
      - a. Adjacent Wetlands (p26)
      - b. Tributaries (p35)
    - 4. Principles and Considerations (p37)
  - c. Proposed Reasons for Repeal (p39)
    - 1. The 2015 Rule Fails to Achieve Regulatory Certainty (p41)
      - a. Litigation to Date (p 41)
      - b. Stakeholder confusion regarding scope of the 2015 Rule and extent of federal CWA jurisdiction (p43)
      - c. Impact on state programs (p45)
      - d. Agency experience with the 1986 regulations (p46)
    - 2. The 2015 Rule May Exceed the Agencies’ Authority under the CWA (p47)
    - 3. Concerns Regarding the 2015 Rule’s Effect on the Scope of CWA Jurisdiction (p57)
    - 4. Additional Bases for Repealing the 2015 Rule that the Agencies are Considering (p80)
  - d. *(The SNPRM actually says “C” but they likely meant “D”)* The Agencies Next Steps (p82)
  - e. *(The SNPRM actually says “D” but they likely meant “E”)* Effect of Repeal (p83)
- III. Minimal Reliance Interests Implicated by a Repeal of the 2015 Rule (p85)
- IV. Statutory and Executive Order Reviews (p87)