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## CLEAN WATER ACT – DEFINITION OF “WATERS OF THE U.S.”

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### Issue:

In 2015, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) finalized a rule significantly expanding the definition of “waters of the United States” under the Clean Water Act. The Trump Administration has initiated a rulemaking to repeal the 2015 Rule because it reaches land and waters well beyond the Agencies’ statutory authority, ignores important limits recognized by the Supreme Court, fails to preserve the States’ authority to regulate non-navigable waters, and fails to provide needed clarity and certainty for both regulators and the regulated community.

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### Background:

#### *NAVIGABLE WATERS*

Two Supreme Court decisions affirmed that the term “navigable waters” under the Clean Water Act does not include *all* waters. The 2015 WOTUS regulation ignores those limits by allowing EPA and the Corps to regulate activities on dry land and over remote, isolated wetlands under the Clean Water Act. Such an over-reach goes well beyond anything contemplated by the authors of the 1972 law.

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### Legislative/Regulatory Status:

The U.S. District Court for the District of South Carolina recently issued a nationwide ruling enjoining the Trump administration’s “applicability date” rule, which had delayed implementation of the Obama WOTUS Rule until February 2020. While the South Carolina ruling expressly enjoins the “applicability date” rule nationwide, district courts in North Dakota and Georgia have enjoined the Obama WOTUS Rule in 24 states in separate litigation over the merits of the Obama WOTUS Rule.<sup>1</sup> The American Farm Bureau, industry allies and the Justice Department have recently asked district courts to enjoin the Obama WOTUS Rule in all 50 states. Unless and until a nationwide stay is granted, the South Carolina court’s ruling means that the Obama WOTUS Rule is now in effect in the remaining 26 states where it has not been enjoined.

Farm Bureau members will be harmed in two primary ways from the South Carolina court’s ruling. First and foremost, the ruling permits the Obama WOTUS Rule to take effect in 26 states. The Obama Rule *itself* is being challenged on the grounds that it violated the Administrative Procedure Act (APA), the Clean Water Act, and the U.S. Constitution. The regulated public will be irreparably harmed from its implementation in the 26 states where it is now applicable. Second, the patchwork of regulations that the court’s decision will cause means that commonplace activities like building, farming, and energy

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<sup>1</sup> The 24 states where the Obama WOTUS Rule has been enjoined and would *not* go into effect are: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Wisconsin, West Virginia, and Wyoming.

generation and transmission will be subject to different complex federal permitting and enforcement schemes depending on which side of a state line they occur.

Farm Bureau members need the EPA and the Corps to finalize their proposed repeal of the Obama WOTUS Rule, which would permanently take the Obama WOTUS Rule off the books. Farm Bureau members should emphasize that the Obama WOTUS rule “lacks sufficient statutory basis” and “creates significant uncertainty for agency staff, regulated entities, and the public,” which will negatively impact farmers and ranchers as well as the nation’s economy. By repealing the rule, the agencies can put a stop to this unlawful patchwork of regulations and can provide much needed regulatory certainty.

EPA published a supplemental notice in the Federal Register to rescind the 2015 rule asking for comments on the basis for repealing the 2015 rule. The supplemental notice asked for specific comments on whether the 2015 Obama rule -

1. Exceeded the agencies’ authority under the Clean Water Act by asserting federal jurisdiction over remote, isolated wetlands and land where water only flows when it rains;
2. Improperly read the word “navigable” out of the statute;
3. Created enormous uncertainty and confusion for both regulators and the public;
4. Was so vague that it raises significant constitutional concerns; and
5. Is contrary to the policies of the Clean Water Act, including the Act’s policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,” 33 U.S.C. § 1251(b).

Farm Bureau’s WOTUS objectives for the Trump administration are:

- Ensure WOTUS remains a top regulatory reform priority;
- Ensure the administration devotes resources to WOTUS reform activities;
- Ensure prompt action to repeal the current rule;
- Ensure prompt action to propose a replacement WOTUS rule;
- Ensure the new administration has sufficient input from farmers and ranchers; and
- Use congressional interest to support Farm Bureau’s repeal and replace objectives.

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#### AFBF Policy:

Farm Bureau has significant concerns with the 2015 WOTUS rule and believes it expands federal jurisdiction, resulting in the imposition of burdensome requirements on agricultural producers.

Farm Bureau supports administrative efforts to repeal and replace the WOTUS rule.

Farm Bureau supports a rule that conforms to the limits approved by Congress and affirmed by the U.S. Supreme Court.

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