

EPA to Revise or Replace Trump-Era Clean Water Act Rules, But Will Leave Existing Rules In Place For Now

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The US Environmental Protection Agency (“EPA”), under Administrator Michael Regan, has begun the process of reviewing and revising two key Clean Water Act (“CWA”) rules: [The Navigable Waters Protection Rule](#) and the CWA Section 401 Certification Rule. In recent court filings in cases where litigants have challenged both of these Trump-era rules, EPA has requested those cases be remanded because EPA has commenced new rulemaking processes that will revise or replace the challenged rules. However, if the courts grant EPA’s requests, EPA has requested that the existing rules remain in effect until EPA finalizes replacement rules through the formal notice and comment rulemaking process.

The first of the two key CWA rules at issue is the Navigable Waters Protection Rule, which defines “Waters of the United States”. This is a significant rule and definition because the jurisdiction of the CWA is limited to Waters of the United States. Thus, by setting the definition of Waters of the United States, EPA establishes the reach of the CWA. Due to the significance of this definition, it has been widely contested throughout the years and every attempt by EPA and the US Army Corps of Engineers to promulgate a definition has faced legal challenges.

In 2019, the Trump Administration rescinded the Obama-era Waters of the United States rule and in 2020, issued the Navigable Waters Protection Rule, narrowing the definition of Waters of the United States. The most significant change in the Trump rule is that the new definition excludes ephemeral waters (those flowing only in direct response to precipitation) and many wetlands that are near other jurisdictional waters but lack a physical or surface connection to them.

In several court filings in June, EPA has stated its plans “to commence a new rulemaking to revise or replace the [Navigable Waters Protection] rule.” Notably, EPA is not requesting vacatur of the existing rule during the rulemaking process.

The second CWA rule facing a similar fate is the CWA Section 401 Certification Rule. Under the CWA, a federal agency may not issue a permit or license for an activity that may result in a discharge into a Water of the United States unless a Section 401 Certification has been issued verifying compliance with water quality requirements. States and authorized tribes are generally responsible

for issuing Section 401 Certifications, and they are required to act on a Section 401 Certification request “within a reasonable period of time (which shall not to exceed one year) after receipt” of such a request. 33 U.S.C. § 1341(a)(1).

The Trump EPA issued the final CWA Section 401 Certification Rule on July 13, 2020, with the goal of expediting infrastructure permitting by making the 401 Certification process quicker. The biggest changes made by this rule were limiting the scope of state and tribal certification review and limiting the imposition of conditions in the certifications. Just as with the Navigable Waters Protection Rule, EPA has now indicated in court filings (and on its [website](#)) that the Section 401 Certification Rule is under review and will be revised or revoked, but also will not be vacated in the interim.

EPA has a lot of work ahead to propose new versions of these rules for public review and comment. Promulgation of final rules will therefore be many months, if not more than a year away. In the meantime, environmental groups and other challengers have indicated they will continue to challenge the Trump-era rules still in effect. The [Corporate Environmental Lawyer blog](#) will keep a close watch and report on all key developments.

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