The New Clean Water Rule: Adoption, Implementation & Definitions of “Waters of the U.S.”

Linda Morrison
Senior Advisor
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WOTUS goals: Clarify scope & simplify implementation

- White House: New rules applies to ~60% of U.S. bodies of water
- Existing Guidance leaves room for interpretation & gives Corps Districts much-needed flexibility
- Army already asked for additional $$$ to implement regulations
- Multiple lawsuits (inc. 16+ state AGs) filed to stop the new rule
Concerns Prior to Release of New Rule

- Uncertainty from “other waters” category that could allow expanded water regulation
- Inconsistent application of the significant nexus analysis in a JD

- New Rule tries to limit waters subject to a case-specific nexus determination.
- New Rule offers detailed significant nexus definition & lists specific functions considered in analysis.
Lawsuits filed against the new rule

- **Ag**: American Farm Bureau & 10+ industry groups filed suit July 2 ("DitchTheRule")
- **Mining**: Industry says Rule could exacerbate permitting delays. Released a study quantifying the costs
- **Congress**: Republican lawmakers moving to block or delay
- **States**: Attorneys Generals of 16+ states (inc. GA, WV, AL, FL, KY, SC, WI, & UT) filed or joined suits
Basis for lawsuits

- One-size-fits-all Rule fails to accommodate specific area’s unique attributes.
- Uncertainty for ranchers, farmers & small business facing regulatory expansion.
- Impact on the value and future sale of farmland
- Requires states to establish water quality standards for newly regulated ephemeral streams, ponds, prairie potholes, wetlands, and ditches
- States also confront dramatic increase in permit applications involving pollutant and ordinary fill discharge (Arizona, et. al. suit)
“Other Waters” Category Most Affected

EPA & the Corps used random analysis of 188 negative JDs in 32 states (FY13 - 14)

Conclusion: Increase of 2.8% - 4.6% in waters found to be jurisdictional with adoption of New Rule

Most change would be in JDs for waters that fit the “Other Waters” category
“Other Waters” Category (cont.)

- Streams – 99.3% positive go to 100% (tributaries) positive
- Adjacent Wetlands – 98.9% positive to 100% positive
- Other Waters - Change to positive estimated at 34.5% increase
  - Adjacent waters – up to a 17.1 % increase (a)(6)
  - Significant nexus – up to a 15.7 % increase (a)(7)
  - Bright Line – Up to a 1.7 % increase (a)(1) to (a)(5) within the 100-year floodplain or 4K feet of high tide line or ordinary high water mark of a WOTUS (a)(8)

Negative JDs that would be positive under New Rule
Specific Affects Across the Country “Similarly Situated” by Rule

- (a)(7) Similarly Situated by Rule - Prairie potholes, Carolina and Delmarva bays, Pocosins, Western Vernal Pools in California, and Texas coastal prairie wetlands.
- If not otherwise jurisdictional under (a)(1) through (a)(6), determined to be “similarly situated” by rule (a)(7):
  - **Prairie Potholes** – Lacking a surface hydrologic connection (outlet) – function together to significantly reduce or attenuate flooding
  - **Texas Sand Sheet Wetlands** - Similarly situated and considered in combination with other Texas coastal sand sheet wetlands
  - **Arid West** – Very large watersheds can be broken down into smaller watersheds (HUC-10) watershed “the region” for similarly situated waters.
Key “Other Waters” Potentially Brought into Jurisdiction

- Depressional & small isolated wetlands (similarly situated)
- Ditches
  - Agricultural isolated ditches with change in use: no longer considered isolated
  - Excludes those with ephemeral flow “except” with excavation or relocation of covered tributary
- Arid West Ephemeral Washes: “The rule has a particularly strong impact here because they cover ephemeral washes — those that stay dry most of the year. Most streams and washes in the Tucson area are ephemeral.” (State of Arizona lawsuit)
Example - Potential Jurisdictional Changes

LEGEND

- **Non Jurisdictional**
  - Isolated Wetlands 22.87 AC

- **USACE Jurisdictional Wetlands** 155.09 AC

- **Non Jurisdictional**
  - Borrow Pit ±19.0 AC

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