

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

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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

- New Rule tries to limit waters subject to a case-specific nexus determination.

Inconsistent
application of the
significant nexus
analysis in a JD

- New Rule offers detailed significant nexus definition & lists specific functions considered in analysis.

Lawsuits filed against the new rule

Clean
Water Act
allows
challenges
in federal
district
courts

- 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.)

Negative
JDs that
would be
positive
under New
Rule

- 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)

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

