



CSG West Legislative Council on River Governance

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Update on the Clean Water Act “Waters of the U.S.” Rule



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Recent Procedural History

- The rule seeks to clarify which waterways are overseen by the federal government.
- The current standard has long been a source of confusion and the Supreme Court has had to weigh in twice.
- The Obama administration set out to clarify the issue in early 2014, releasing a proposed rule that it said would make clear the reach of federal oversight and preserve long held exemptions for agriculture.
- On May 27, 2015, the EPA and the Corps of Engineers announced the final WOTUS rule.
- The rule becomes effective 60 days after its publication in the Federal Register: THIS FRIDAY!

Intent of the Clean Water Act (CWA)

- CWA Objective: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”.
- EPA Position: While the term “navigable” is the “Congressional link”, the CWA was intended to protect “the entire stream system” from pollution.



Intent of the Clean Water Act

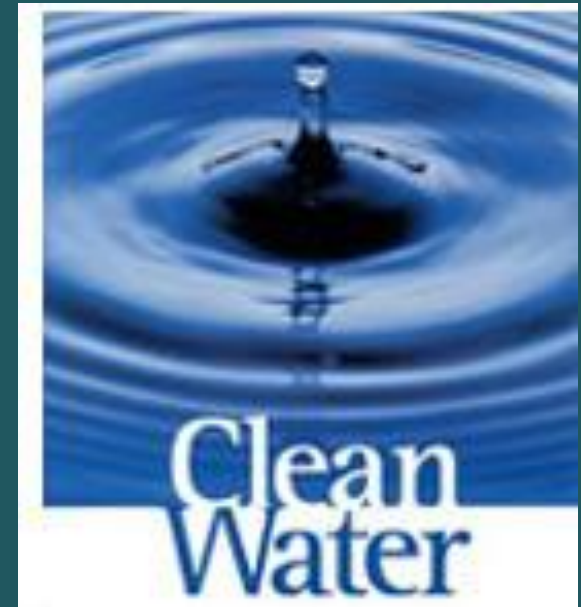
The previous definition of WOTUS included:

- 1) traditionally navigable waters;
- 2) coastal waters;
- 3) waterways that cross state borders;
- 4) lakes made by damming a water of the U.S.;
- 5) waters that could affect interstate commerce;
- 6) tributaries of these waters; and
- 7) wetlands next to these waters.



New Definition of WOTUS

- The final rule includes traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictional waters in the definition of “waters of the United States.”
- These waters are jurisdictional by rule under the Clean Water Act (CWA).



New Definition of WOTUS

Under the new definition of WOTUS, the first four items on this list would hold, and the list would now also include:

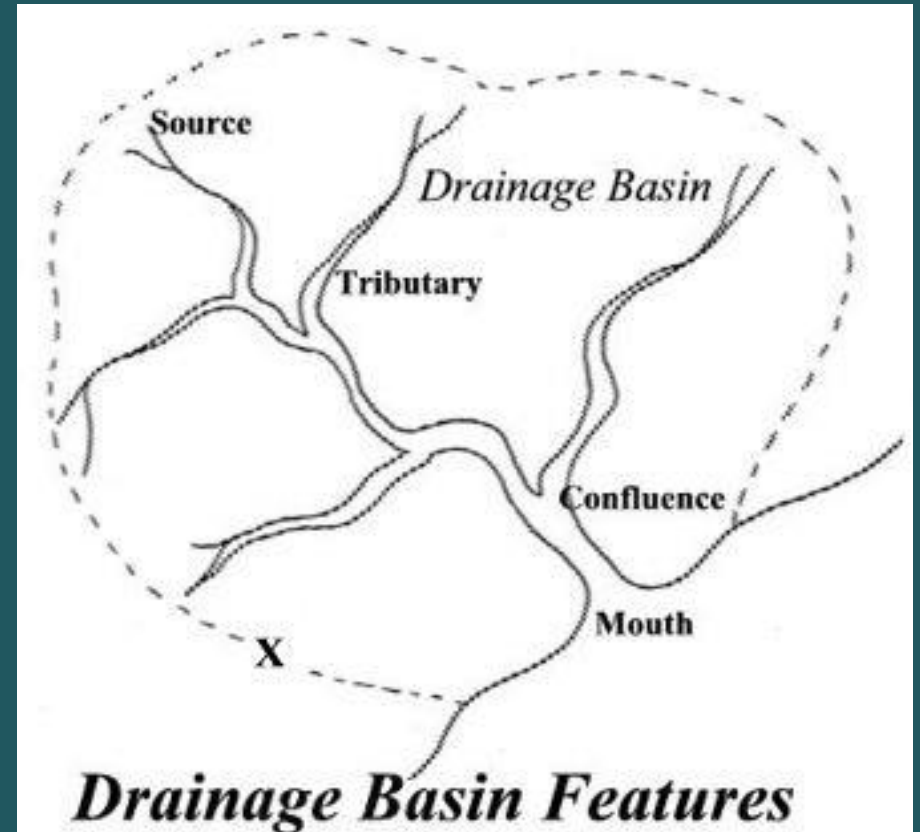
- 1) waters that have a significant nexus (connection);
- 2) tributaries of these waters (bed, bank, high water mark); and
- 3) waters next to rivers, lakes, streams and coastal waters.

Streams and wetlands are the real focus of this effort, according to EPA, since upstream waters impact downstream users



WOTUS Treatment of Tributaries

- The tributary definition requires that flow in tributaries must be of “sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark.” If a water lacks sufficient flow to create such characteristics, it will not be considered a “tributary” under the final rule.
- The final rule suggests that a feature that flows very rarely is not a tributary because it would not form the physical indicators required under the definition.



WOTUS Treatment of “Adjacent” Waters

Expanded Jurisdiction of WOTUS - The final rule changes now include waters adjacent to jurisdictional waters within a minimum of 100-feet and within the 100-year floodplain, and out to a maximum of 1,500-feet from the ordinary high water mark (high tide line) of such jurisdictional waters.

These “adjacent” waters are automatically considered “waters of the U.S.” by rule.



WOTUS Treatment of “Other” Waters

- Existing regulations include isolated or “other” waters as “WOTUS” if the use, degradation or destruction of which could affect interstate or foreign commerce.
- The final rule sets forth only two sets of isolated or “other” waters that could trigger a case-specific “significant nexus” analysis under the CWA to determine if they are “WOTUS” subject to federal regulation.

“Significant nexus”: a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a “Waters of the U.S.”

WOTUS Treatment of “Other” Waters

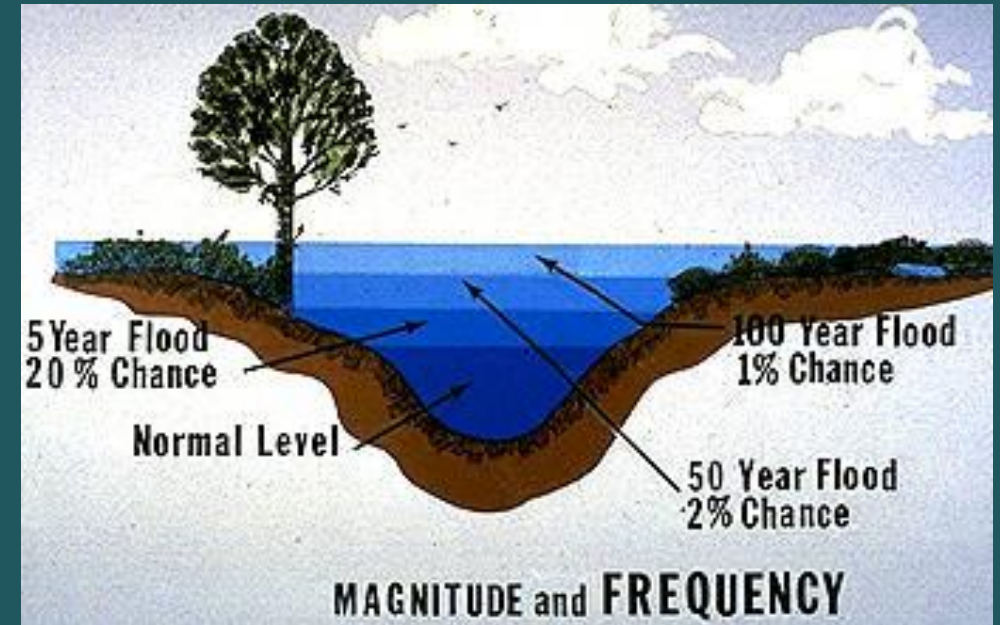
1. If specific waters - prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands- are determined to have a significant nexus to “WOTUS” then they are considered jurisdictional.



WOTUS Treatment of “Other” Waters

2. If isolated and “other” waters within the 100-year floodplain of traditionally navigable water, interstate water, or a territorial sea, AND all waters within 4,000-feet of any jurisdictional water are determined through a case-specific analysis to have a significant nexus to such jurisdictional waters, then they will be considered jurisdictional as “WOTUS.”

Isolated or “other” waters that do not meet these two tests CANNOT be considered as “WOTUS” and are EXCLUDED from CWA regulation.



Exclusions

- Waters that are excluded under existing regulations are limited to
 - Prior converted cropland
 - Wastewater treatment facilities.
- The final rule expands those exclusions to include certain ditches.



Also excluded in the final rule are:

1. Artificially irrigated areas that revert to dry land if irrigation water ceases to be applied;
2. Facilities created in dry land:
 - Artificial, constructed lakes and ponds (e.g. farm and stock water ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds);
 - Artificial reflecting pools, swimming pools or small ornamental waters;
 - Water-filled depressions incidental to mining or construction activity, including pits excavated for fill, sand or gravel;
3. Certain erosional features, including gullies, rills, and other ephemeral features;
4. Puddles.



Finally, the rule excludes:

1. Groundwater, including groundwater drained through subsurface drainage systems;
2. Facilities constructed in dry land:
 - Features to convey, treat or store stormwater;
 - Wastewater recycling structures
3. Detention and retention basins built for wastewater recycling, groundwater recharge basins, percolation ponds used in wastewater recycling, and water distribution systems used to recycle water.



Expected Impact of the Rule: Expansion of “Tributary”

- In our view, the final WOTUS rule does expand federal jurisdiction over most waters under the CWA.
- The new broad definition of a “tributary”, where the focus will be on headwaters areas, is a concern.
- Small tributaries, adjacent waters and isolated wetlands and ponds will automatically become jurisdictional “waters of the U.S.” under the final rule and not be subject to any interpretational significant nexus analysis.



Expected Impact of the Rule: Constructed Features

- The overly broad “tributary” definition continues to be a concern for those ditches that flow directly or indirectly through another water to a jurisdictional water, and making them a “water of the U.S.” especially if a ditch has perennial flow.
- The final rule excludes other ephemeral features that do not meet the definition of tributary, as well as non-wetland swales.



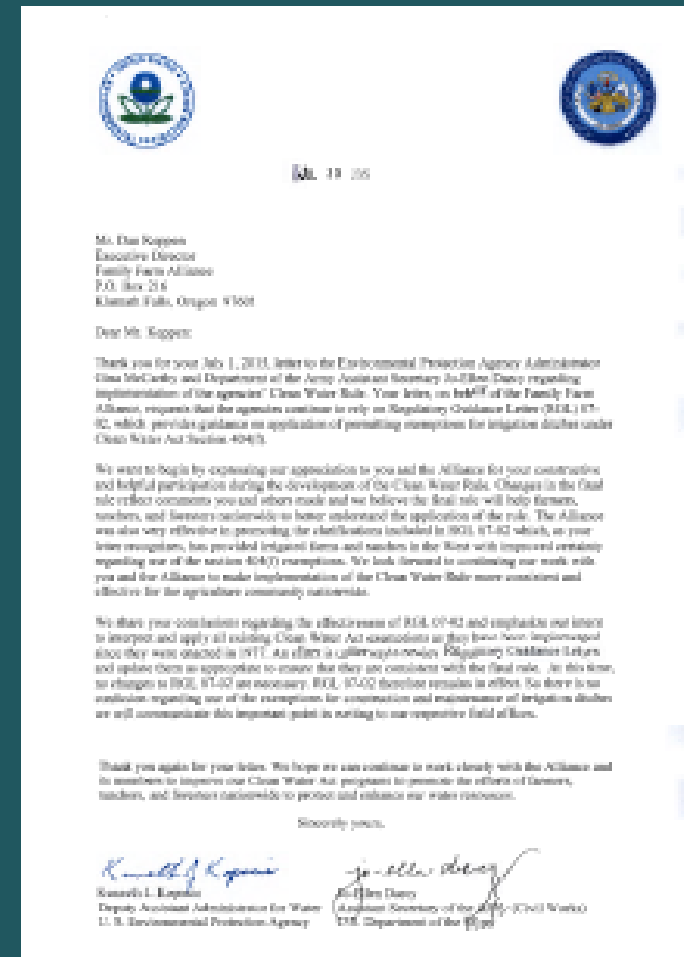
Expected Impact of the Rule: Irrigation Ditches

- Will likely be considered “tributaries” and therefore a “water of the U.S.” under the new rule.
- RGL 07-02 (July 2007) - provides a national approach for conducting exemption determinations for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the CWA.



Regulatory Guidance Letter 07-02

- Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into “waters of the U.S.” associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches.
- The EPA and the Corps have used this RGL to interpret these CWA exemptions in many cases in the West



Next Steps

- Final WOTUS rule goes into effect this Friday, August 28, 2015
- There are many activities pending, some that could change how or if the final rule stays in place.
 - Congress
 - Litigation driven by states, industry, and environmental interests.



Congressional Action

Congress is considering several pieces of legislation aimed at forcing the agencies to withdraw the final rule and restart an accelerated collaborative process with the states and other stakeholders to write and propose a new rule.

- [H.R. 1732](#) has passed the House
- [S. 1140](#) was marked up in committee earlier this summer
- A House Appropriations bill includes a provision defunding the Corps from implementing the final WOTUS rule.

Both House bills have garnered a veto threat from the White House.



Congressional Action

- While it will be difficult to gain the 60-vote margin to move any of these bills forward in the Senate, it will be almost impossible to attain the 67-vote margin to override a presidential veto.
- The more likely path forward would be a negotiated deal with the White House for a rider on a spending bill
- However, any policy rider on the topic remains controversial in the Senate.



Litigation

- Federal judges in Georgia, North Dakota and West Virginia are mulling injunction requests from some of the 31 states and dozens of industry groups that have sued to block the rule.
- General concern: This is a federal land grab that covers every puddle and ditch. The proposed rule violates the Clean Water Act and several other federal statutes.



Others will sue, saying the rule doesn't do enough

Litigation

- If none of the requests for injunction are granted before Friday, EPA will start applying the rule to all new and pending applications for certain Clean Water Act permits
- Critics hope that an injunction will also win them time to get Congress to make a permanent fix.

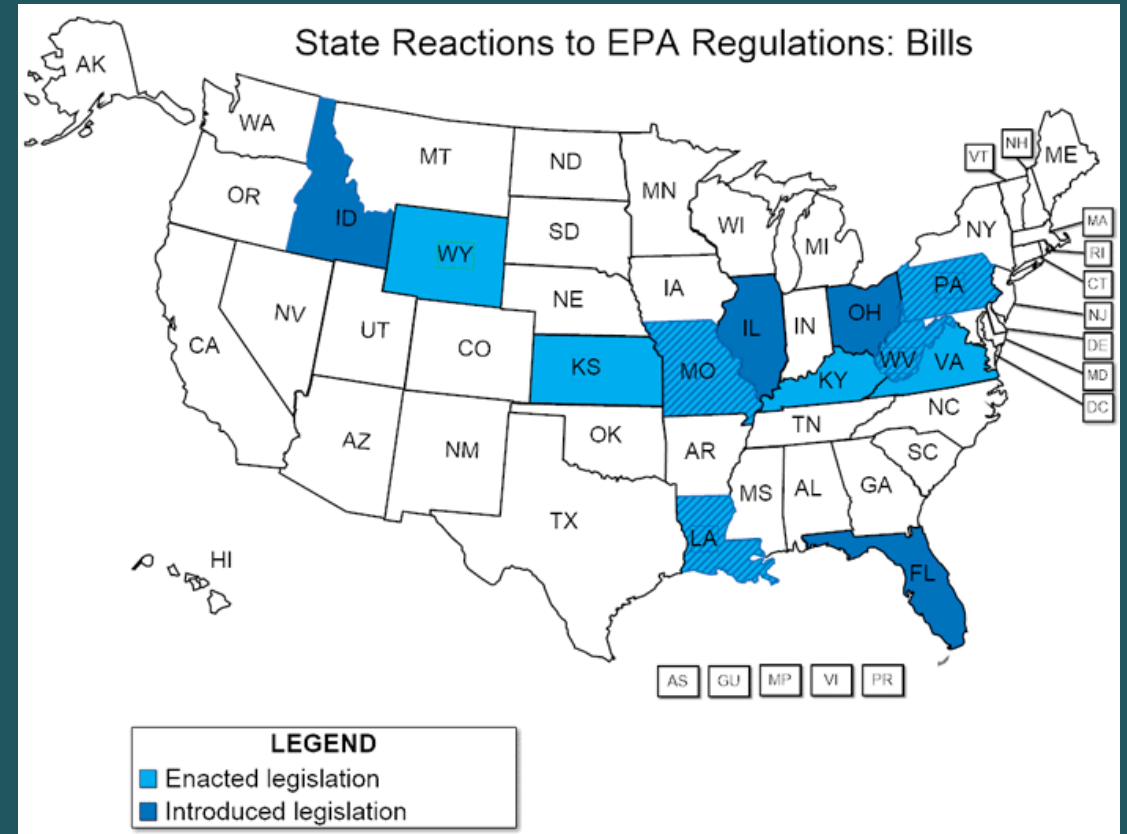
Enforcement

Clean Water Act

- Beazer Homes USA, Inc. agrees to pay \$925,000 civil penalty to resolve violations at construction sites in 21 states. Beazer will also implement a company-wide stormwater program to improve compliance with storm water runoff requirements.

States are Split on New WOTUS Rule

- States have long been divided over support for the WOTUS rulemaking.
- During its recent annual meeting, the National Conference of State Legislatures (NCSL) failed to reach consensus on a resolution expressing “dissatisfaction” with the new WOTUS rule.



EPA Webinar on August 27 to Provide More Details

- A webinar will be held on Thursday, August 27 at 1:00 pm to 2:00 pm EDT to provide more details about the final Clean Water Rule.
- This webinar is intended to provide a review of the final rule, answer some commonly asked questions, and discuss what to expect as the rule is implemented.
- For more information visit: www.epa.gov/cleanwaterrule and <http://www.army.mil/asacw>.