

# The Navigable Waters Protection Rule Highlights and Initial Take-aways

## Agriculture applauds new WOTUS rule

By CAROL RYAN DUMAS Capital Press Jan 23, 2020



The Trump administration has announced a new Waters of the United States rule.

ESMG File



**TRUMP'S DIRTY WATER RULE WILL ALLOW THE OIL & GAS INDUSTRY TO DUMP MORE TOXIC POLLUTION INTO OUR RIVERS & STREAMS.**

**Trump's Dirty Water Rule: Another Gift to Oil and Gas**

WATER, OIL AND GAS | NATIONAL

JANUARY 23, 2020

By Andrew Grinberg - Special Projects Manager



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March 25, 2020



## Politics

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# Trump claims farmers wept behind him when he signed an executive order. Video shows otherwise.

All the people who Trump says cry around him



Daniel Dale

@ddale8

In Iowa this week, Trump told a story about how homebuilders, farmers and ranchers were crying as they stood behind him when he signed his executive order on the Waters of the United States rule.

He signed the order on camera. Nobody cried at any point.

[youtube.com/watch?v=dgbhcJ...](https://www.youtube.com/watch?v=dgbhcJ...)

And we got rid of the horrible, disastrous calamity known as the Waters of the United States rule. And I tell you, Joni and Deb, I was getting ready to sign that one. You know, the Waters of the United States rule. What could be more beautiful sounding? That was the only thing good about it -- the title. Everything else was a catastrophe. They took your land away. If you had a puddle in the middle of your field, they considered it a lake. The rules and regulations made it impossible. And I signed that, and behind me I had homebuilders and farmers mostly, and ranchers. And many of them never cried in their life, including when they born, and they were crying. Yeah. It's true, though. They were crying behind me. You know that. You know that, Pete. They were crying because we gave them back their land. We took it away. It was like eminent domain. I was terrible. We gave it back. And, you know, I thought it was going to be a tough time for a while, and it wasn't. People got it, and they got it right away. And that was a great honor for you folks.



# Outline

- WOTUS rulemaking recap
- Key changes in the NWPR
- Likely impacts of the NWPR
- WOTUS litigation landscape



# WOTUS rulemaking recap

- Clean Water Rule (2015)
- Suspension of Clean Water Rule (2018)
- Repeal of Clean Water Rule (2019)
- Navigable Waters Protection Rule (2020)

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# Key changes in the NWPR

- No jurisdiction over ephemeral waters
- More restrictive definition of adjacent waters
- Elimination of the significant nexus approach

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A RIVER DELTA IN ALASKA. ALASKA SHOREZONE PROGRAM NOAA/NER/S/AR/SL. MANDY LINDBERG (CC-BY)

## EPA claims 'no data' on impact of weakening water rule. But the numbers exist

By Ariel Wittenberg, E&E News, Kevin Bogardus, E&E News | Dec. 11, 2018, 2:45 PM

Originally published by E&E News

U.S. President Donald Trump's administration says it doesn't know how many streams it is proposing to exclude from Clean Water Act jurisdiction today.

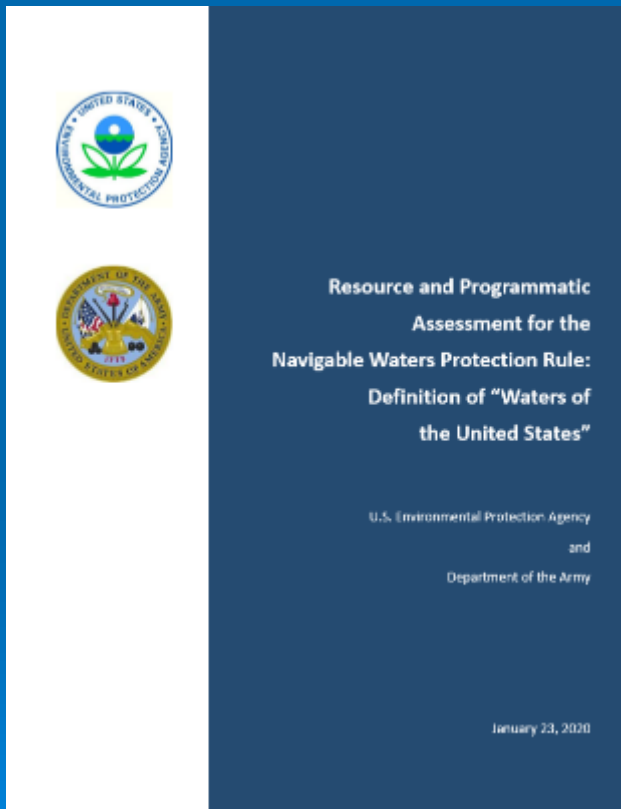
But a 2017 slideshow prepared by the Environmental Protection Agency (EPA) and Army Corps of Engineers staff shows that at least 18% of streams and 51% of wetlands nationwide would not be protected under the new definition of "waters of the United States," or WOTUS, announced today.

# Key changes in the NWPR

“To assess the potential effect of the proposed rule on the CWA jurisdiction of wetlands adjacent to TNWs under Rapanos Guidance practice, 25 of the 38 Corps Districts examined specific AJD ORM2 data from FY13-FY17 for wetlands adjacent to TNWs . . . .

The Corps Districts found that 55 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were abutting (i.e., touching) and **45 percent of wetlands adjacent to TNWs in the AJDs that were evaluated were not abutting.**

To be clear, such non-abutting wetlands may remain jurisdictional under the final rule. About 10 percent of wetlands adjacent to TNWs in the desktop assessment that do not abut the TNW have a surface connection to the TNW via a culvert or tide gate. Such wetlands would likely meet the agencies’ definition of adjacent in the final rule.”



# Likely impacts of the NWPR

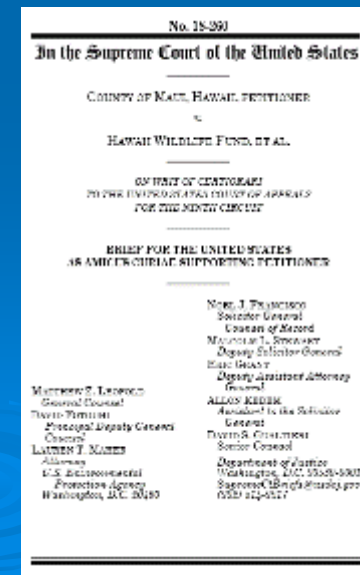
- No need for CWA permit to fill non-jurisdictional wetlands or streams (even if they were subject of previous denial)
- Magnitude of environmental impacts will depend on status of state laws, some of which are tethered to the CWA: as federal jurisdiction contracts, so may state jurisdiction





# Likely impacts of the NWPR

- If a water is non-jurisdictional, no need for a CWA section 401 state water quality certification
- It's uncertain to what extent NPDES permits would be required for discharges into non-jurisdictional waters, where the pollutants reach jurisdictional waters



# Likely impacts of the NWPR

- No need for CWA permit means no need for projects to provide offsets, and thus there would be no need to obtain mitigation credits
- No need for CWA permit means no need for ESA section 7 consultation and ITS (but ESA section 10 ITP may be required)



**U.S. Fish & Wildlife Service**  
**Endangered Species** Ecological Services

Search Endangered Species Database  Species

**Permits**

**Section 10 of the Endangered Species Act (ESA)** is designed to regulate any activity which affects the life of any designated species. This includes all activities which affect the life of any designated species, including but not limited to the following:

- Activities which affect the life of any designated species, including but not limited to the following:
- Construction of any new or expanded facility, including but not limited to the following:
- Activities which affect the life of any designated species, including but not limited to the following:

**What are the different types of permits?**

The U.S. Fish and Wildlife Service (USFWS) issues permits for activities that would affect designated species. There are two main types of permits: Incidental Take Permits (ITPs) and Experimental Action Permits (EAPs). ITPs are issued for activities that would result in the taking of a designated species, while EAPs are issued for activities that would result in the taking of a designated species for scientific or educational purposes.

# WOTUS litigation landscape

- Clean Water Rule (2015)
  - Challenges to CWR rendered moot (for now)
- Repeal of Clean Water Rule (2019)
- Navigable Waters Protection Rule (2020)

# WOTUS litigation landscape

- Clean Water Rule (2015)
- Repeal of Clean Water Rule (2019)
  - State of NY v. Wheeler
  - SC Coastal Conservation League v. Wheeler
  - NM Cattle Growers' Ass'n v. EPA
- Navigable Waters Protection Rule (2020)

# WOTUS litigation landscape

- Clean Water Rule (2015)
- Repeal of Clean Water Rule (2019)
- Navigable Waters Protection Rule (2020)
  - CBD et al. 60-day notice of intent to sue
  - Others in the pipeline ...

# Thank you for your attention!

