

The legal status of WOTUS




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Outline

- An abbreviated WOTUS history
 - Clean Water Rule litigation
 - The Trump Administration's rulemaking
 - Action in Congress?
- 

In the beginning (or shortly thereafter) ...

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Riverside Bayview Homes



SWANCC



Rapanos



Isolated waters
5-4



Non-navigable
tributary
4-1-4

Wetland adjacent to
non-navigable tributary



9-0
Wetland adjacent to
traditional navigable water



2008 Rapanos Guidance

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries



2008 Rapanos Guidance

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water



2008 Rapanos Guidance

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Clean Water Rule

- Proposed rule issued in April 2014
- Comment period until November 2014
- Final rule issued in June 2015



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Waters of the United States

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Proposal to Protect Clean Water

Clarifying protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources.

- [Read an op-ed by Administrator McCarthy](#)
- [Learn about the proposal to protect clean water](#)
- [Submit a formal comment \(open until 11/14/14\)](#)
- [Access all documents related to this rulemaking](#)

Do You Choose? YouTube



Previous Rule

vs.

2015 Clean Water Rule

- ✓ (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- ✓ (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;
- ✓ (4) All impoundments of waters otherwise identified as waters of the United States under this definition;
- ✓ (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- ✓ (6) The territorial seas;
- ✓ (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters otherwise identified as waters of the United States under this section;
- (5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;
- (6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;



Previous Rule

vs.

2015 Clean Water Rule

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i.) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
- (ii.) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
- (iii.) Which are used or could be used for industrial purpose by industries in interstate commerce;

- (4) All impoundments or waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

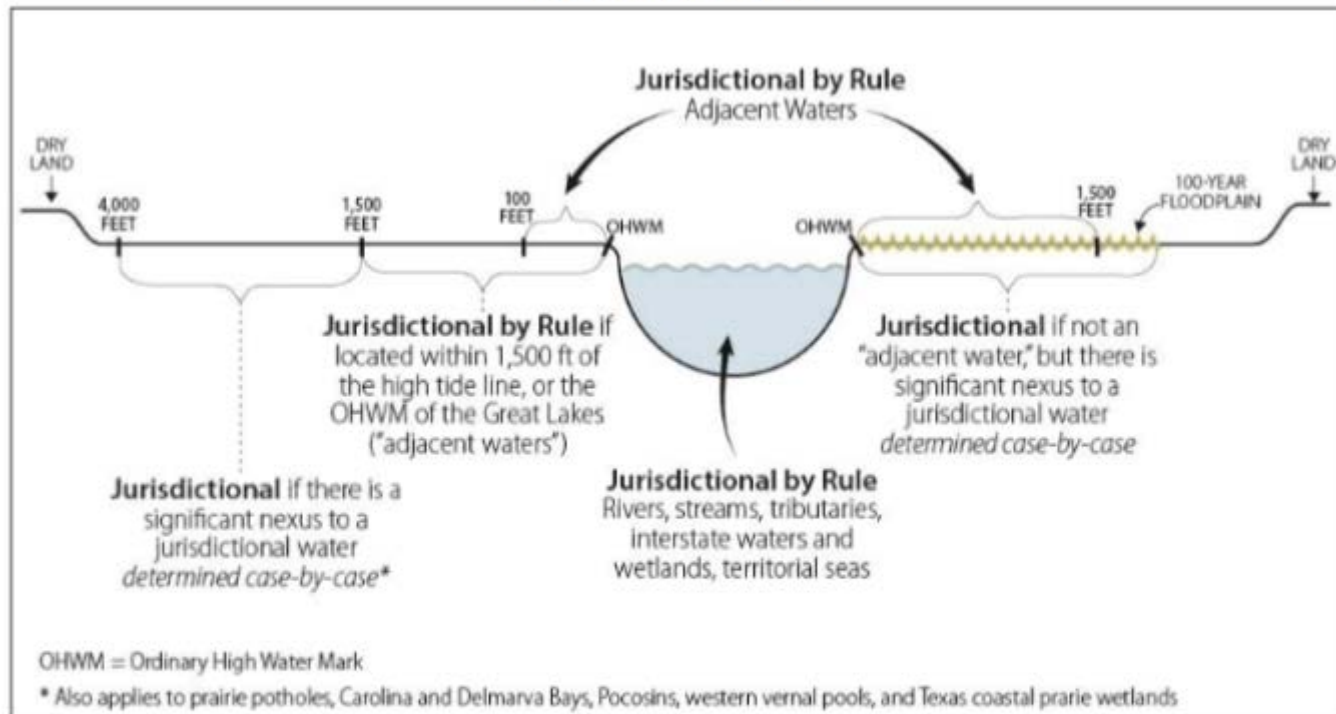
(v) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

From the Congressional Research Service ...

Figure 1. Jurisdictional Waters under the Final Clean Water Rule

(Not drawn to scale)



Source: Prepared by CRS, from Department of the Army, Corps of Engineers, and Environmental Protection Agency, "Clean Water Rule: Definition of "Waters of the United States," Final Rule," 80 *Federal Register* 37054-37127, June 29, 2015.

Notes: "Jurisdictional by Rule" waters are jurisdictional *per se* without case-specific analysis. Other waters in this figure may be jurisdictional if there is a significant nexus to a jurisdictional downstream water. See text for discussion.

The litigation response ...

- United States District Courts
 - At least 17 cases filed (1 of which was voluntarily dismissed)
- United States Circuit Courts of Appeals
 - At least 22 petitions for review filed



Plaintiffs/Petitioners

States/Industry/Associations

➤ American Farm Bureau Federation

- American Forest & Paper Association
- American Petroleum Institute
- American Road and Transportation Builders Association
- Greater Houston Builders Association
- Leading Builders of America
- Matagorda County Farm Bureau
- National Alliance of Forest Owners
- National Association of Home Builders
- National Association of Manufacturers
- National Association of Realtors
- National Cattlemen's Beef Association
- National Corn Growers Association
- National Mining Association
- National Pork Producers Council
- National Stone, Sand, and Gravel Association
- Public Lands Council
- Texas Farm Bureau
- U.S. Poultry & Egg Association

➤ Georgia

- West Virginia
- Alabama
- Florida
- Indiana
- Kansas
- Kentucky
- North Carolina Department of Environment and Natural Resources
- South Carolina
- Utah
- Wisconsin

➤ Chamber of Commerce of the United States of America

- National Federation of Independent Business
- State Chamber of Oklahoma
- Tulsa Regional Chamber
- Portland Cement Association

Plaintiffs/Petitioners (continued)

States/Industry/Associations

- North Dakota
 - Alaska
 - Arizona
 - Arkansas
 - Colorado
 - Idaho
 - Missouri
 - Montana
 - Nebraska
 - Nevada
 - South Dakota
 - Wyoming
 - New Mexico Environment Department
 - New Mexico State Engineer
- Oklahoma
- Southeastern Legal Foundation, Inc.
 - Georgia Agribusiness Council, Inc.
 - Greater Atlanta Homebuilders Association, Inc.
- Texas
 - Louisiana
 - Mississippi
- Utility Water Act Group
- Washington Cattlemen's Association
 - California Cattlemen's Association
 - Oregon Cattlemen's Association
 - New Mexico Cattle Growers Association
 - New Mexico Wool Growers, Inc.
 - New Mexico Federal Lands Council
 - Coalition of Arizona/New Mexico Counties for Stable Economic Growth
 - Duarte Nursery, Inc.
 - Pierce Investment Company
 - LPF Properties, LLC.
 - Hawkes Company, Inc.
- Murray Energy Corporation

Plaintiffs/Petitioners (continued)

States/Industry/Associations

- Ohio
 - Attorney General Bill Schuette on Behalf of the People of Michigan
 - Tennessee
- Arizona Mining Association
 - Arizona Farm Bureau
 - Association of Commerce and Industry
 - New Mexico Mining Association
 - Arizona Chamber of Commerce & Industry
 - Arizona Rock Products Association
 - New Mexico Farm & Livestock Bureau
- Association of American Railroads
 - Port Terminal Railroad Association
- Southeast Stormwater Association
 - Florida Stormwater Association
 - Florida Rural Water Association, Inc.
 - Florida League of Cities
- American Exploration and Mining Association
- Texas Alliance for Responsible Growth, Environment and Transportation
- Michigan Farm Bureau

Plaintiffs/Petitioners (continued)

Environmental Organizations

- National Wildlife Federation
- Natural Resources Defense Council, Inc.
- Puget Soundkeeper Alliance
 - Sierra Club
- Waterkeeper Alliance, Inc.
 - Center for Biological Diversity
 - Center for Food Safety
 - Humboldt Baykeeper
 - Russian Riverkeeper
 - Monterey Coastkeeper
 - Snake River Waterkeeper, Inc.
 - Upper Missouri Waterkeeper, Inc.
 - Turtle Island Restoration Network, Inc.
- One Hundred Miles
 - South Carolina Coastal Conservation League

States Challenging or Supporting the Clean Water Rule

States Challenging the Rule

Alabama	New Mexico (Environment
Alaska	Department and State
Arizona	Engineer)
Arkansas	North Carolina (Department
Colorado	of Environment and Natural
Florida	Resources)
Georgia	North Dakota
Idaho	Ohio
Indiana	Oklahoma
Kansas	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Michigan	Texas
Mississippi	Utah
Missouri	West Virginia
Montana	Wisconsin
Nebraska	Wyoming
Nevada	

States Supporting the Rule

Connecticut
District of Columbia
Hawaii
Massachusetts
New York
Oregon
Vermont
Washington

A multitude of legal claims ...

- Procedural violations associated with the rulemaking process
 - Substantial changes to proposed rule without additional public comment
 - Final rule is not a “logical outgrowth” of the proposed rule
 - Failed to make all information relied upon available to the public
 - Failed to respond appropriately to comments
- Clean Water Act (statutory) violations
 - Exceeds the agencies’ CWA authority
 - Inconsistent with CWA’s plain language
- Constitutional violations
 - Commerce Clause
 - Tenth Amendment
 - Due Process Clause
- Other violations
 - Regulatory Flexibility Act
 - Unfunded Mandates Reform Act
 - National Environmental Policy Act
 - Anti-Lobbying Act
 - Executive Orders

... in a multitude of courts

➤ District Courts

- Northern District of Georgia
- Southern District of Georgia
- District of Minnesota
- District of North Dakota
- Southern District of Ohio
- Northern District of Oklahoma
- Southern District of Texas
- Northern District of W. Virginia

➤ In October 2015, the U.S. Judicial Panel on Multidistrict Litigation denied the motion to centralize the pretrial proceedings in the district court cases

➤ Circuit Courts of Appeals

- Second Circuit
- Fifth Circuit
- Sixth Circuit
- Eighth Circuit
- Ninth Circuit
- Tenth Circuit
- Eleventh Circuit
- District of Columbia Circuit

➤ Most of the courts of appeals cases were consolidated in the Sixth Circuit

Question about (original) jurisdiction about (Clean Water Act) jurisdiction

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927(6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

**Do the District Courts or
the Courts of Appeals
have jurisdiction?**

80 Fed. Reg. 37104

Two-track litigation

US District Court

- August 2015: US District Court for the District of North Dakota issues preliminary injunction
- Injunction applies in 13 states

US Court of Appeals

- October 2015: Sixth Circuit issues national injunction (before deciding whether it has jurisdiction)
- February 2016: Sixth Circuit decides, 2-1, that it has jurisdiction

Two-track litigation

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January 2017: US Supreme Court agrees to review the Sixth Circuit case

Meanwhile ...



The White House

Office of the Press Secretary

For Immediate Release

February 28, 2017

Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule

EXECUTIVE ORDER

Sec. 3. Definition of "Navigable Waters" in Future Rulemaking. In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

The rulemaking process begins anew ...

Intention To Review and Rescind or Revise the Clean Water Rule

AGENCY: U.S. Army Corps of Engineers (Corps), Department of the Army, Department of Defense; Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: In accordance with a Presidential directive, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) announces its intention to review and rescind or revise the Clean Water Rule.

DATES: March 6, 2017.



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News Releases

News Releases from Headquarters

EPA and U.S. Army Solicit State Input on Redefining “Waters of the U.S.”

“EPA is restoring states’ important role in the regulation of water” – Administrator Pruitt

05/09/2017

Contact Information:
U.S. EPA Media Relations (press@epa.gov)

A two-step process ...



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Waters of the United States (WOTUS) Rulemaking

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Rulemaking Process

Frequently Asked
Questions

Pre-Publication Version of Proposed Rule: Definition of "Waters of the United States" – Recodification of Pre-existing Rules

The EPA Administrator, Scott Pruitt, along with Mr. Douglas Lamont, senior official performing the duties of the Assistant Secretary of the Army for Civil Works, signed the following proposed rule on 06/27/2017, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of public comment. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's [FDsys website](#) and on [Regulations.gov](#) in Docket No. EPA-HQ-OW-2017-0203. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

“Opportunities” on three fronts

➤ Courts

- US Supreme Court

➤ Agency rulemaking

- Rescind Clean Water Rule
- *Rapanos* plurality-based rule

➤ Congress

- Energy and Water Appropriations rider



Thank you for your attention!

