

Waters of the U.S. Proposed Rule

Webcast sponsored by EPA's Watershed Academy



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1:00pm – 3:00pm Eastern

Instructors:

Nancy Stoner, Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

Donna Downing, Jurisdiction Team Leader, Wetlands Division, U.S. Environmental Protection Agency

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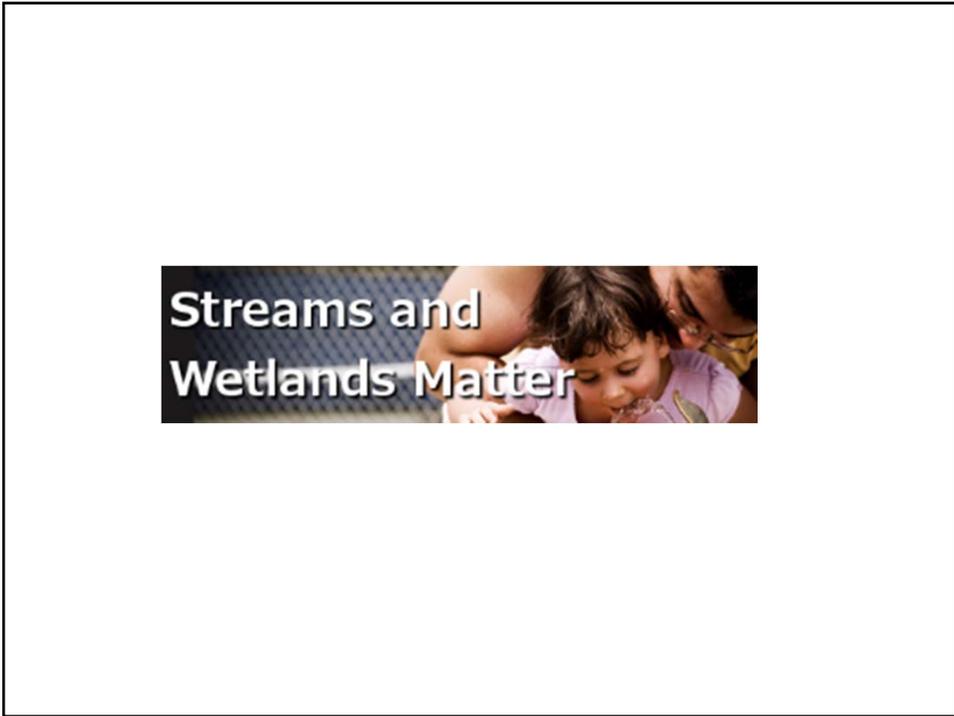
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Today’s Webcast

- **“Waters of the US” Proposed Rule**
 - Developed and released jointly by the US Environmental Protection Agency and the US Army Corps of Engineers
 - The proposed rule defines the term “waters of the United States,” which describes waters protected by Clean Water Act programs
 - Clarifies protection under the Clean Water Act for streams and wetlands



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Streams and wetlands benefit communities

Streams and wetlands trap floodwaters, recharge groundwater supplies, remove pollution & provide habitat for fish

 www.epa.gov

Streams and wetlands are economic drivers

Streams and wetlands are major economic drivers because of their role in

The infographic features a central circular icon of a stream winding through a landscape. Surrounding this central icon are six smaller circular icons, each representing an economic sector: a fish for fishing, a person with a bow for hunting, a tractor for agriculture, a person swimming for recreation, a factory for manufacturing, and solar panels for energy. Dotted lines connect these icons in a circular pattern around the central stream icon.

fishing hunting agriculture recreation manufacturing energy

EPA www.epa.gov

Upstream waters impact downstream waters

The infographic features a stylized illustration of a river flowing from a brown, hilly landscape on the left towards a green landscape on the right. The sky is blue with white clouds. The text is overlaid on the right side of the river.

60% of stream miles in the U.S. only flow **seasonally** or after the rain, but have a huge **impact** on **downstream** waters

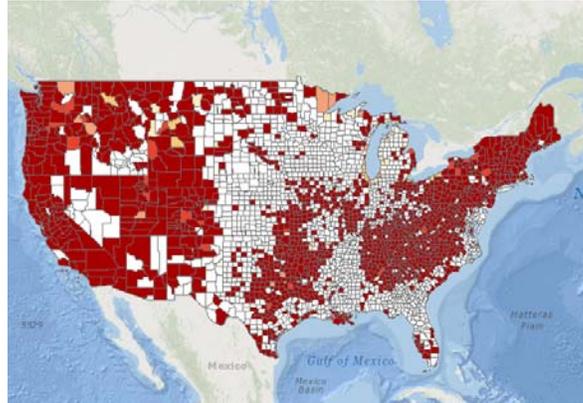
EPA www.epa.gov

Streams provide drinking water

1 in 3
Americans
get their
drinking
water from
public systems
that rely on
seasonal
and rain-
dependent
streams



EPA
www.epa.gov



**Why Do a
Rulemaking**



Rulemaking was requested by many stakeholders

Congress Industry Public

State & local government Agriculture

Hunters & fishermen Environmental groups

Protection

under the law has been difficult

Drinking Water and Edwards Creek, Texas



Recreation in Lake Blackshear, Georgia

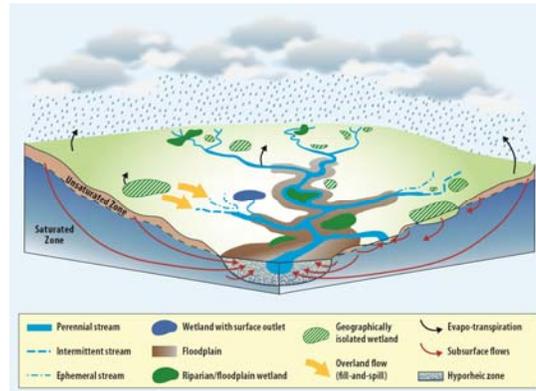


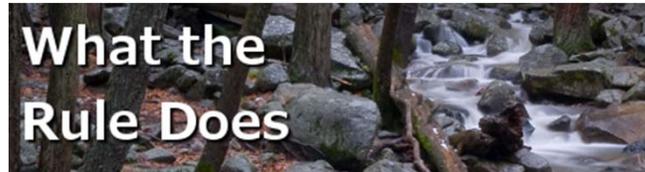
Pollution in San Pedro River, Arizona



Supported by latest peer-reviewed science

Scientific assessment of **1,000+** pieces of literature





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Reduces
confusion
about
Clean
Water Act
protection



Stream systems are protected



Wetlands near
rivers and
streams
are protected



Other types of waters will be evaluated on a case specific analysis.



Saves Time and Money



Provides More Benefits to Public Than Costs

BENEFITS

\$388 to \$514 million

- Reducing flooding
- Filtering pollution
- Providing wildlife habitat
- Supporting hunting & fishing
- Recharging groundwater

COSTS

\$162 to \$279 million

- Mitigating impacts to streams & wetlands from dredged or fill material
- Taking steps to reduce pollution to waterways.

Helps states to protect their waters





What the Rule Does Not Do

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What the Rule Does **NOT** Do

- Does **NOT** protect any new types of waters
- Does **NOT** broaden historical coverage of the Clean Water Act
- Does **NOT** regulate groundwater
- Does **NOT** expand regulation of ditches
- Does **NOT** remove any exemption currently in the statute or regulations



Input from agriculture community
shaped the proposal



All Exemptions and Exclusions Preserved

- Normal farming, silviculture, and ranching practices.
- Upland soil and water conservation practices.
- Agricultural stormwater discharges.
- Return flows from irrigated agriculture.
- Construction/maintenance of farm or stock ponds or irrigation ditches on dry land.
- Maintenance of drainage ditches.
- Construction or maintenance of farm, forest, and temporary mining roads.
- Artificially irrigated areas that would revert to upland if irrigation stops.
- Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such as rice growing, stock watering or irrigation.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.
- Pits excavated in upland for fill, sand, or gravel.
- Prior converted cropland.
- Waste treatment systems (including treatment ponds or lagoons).

56 conservation practices exempt from dredged or fill permitting

- Conservation cover
- Wildlife habitat restoration
- Wetland enhancement
- Riparian forest buffer
- Tree/shrub establishment
- Stream crossing

Permit not needed for the specific NRCS practices



Questions?

How we got here

The Clean Water Act, Supreme Court cases ,and calls for rulemaking

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The Clean Water Act



- The Clean Water Act covers “navigable waters,” which the Act defines as “waters of the United States including the territorial seas.”
- The scope of Clean Water Act jurisdiction affects all Clean Water Act programs, including pollutant permitting (§402), permitting for dredged or fill material (§404), and oil spill prevention (§311).
- The Clean Water Act’s goal is to protect the physical, chemical, and biological integrity of the nation’s waters
- The Act does not define “Waters of the United States,” leaving it to the EPA and the Corps to give more detail to the term through rulemaking.
- The current regulatory definition is **essentially unchanged since the late 1970s**

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Supreme Court Decisions

- **Riverside Bayview Homes** (1985): Unanimous decision upholding agencies' regulatory definition including "adjacent wetlands" as waters of the U.S.
- **SWANCC** (2001): Use of waters by migratory birds not sufficient basis for jurisdiction.
- **Rapanos** (2006): Splintered decision provides relative permanence and significant nexus as standards for determining CWA protection.

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About the proposed rule

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WUS Proposal Overview

- Defines “waters of the US” (WUS) for all CWA programs in light of Supreme Court cases.
- Establishes bright line categories for:
 - Waters that are WUS and covered by the CWA.
 - Waters that are not WUS.
- **Retains** existing exemptions.
- For certain issues, poses questions to solicit public comment on options.

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Bright line categories of jurisdictional waters

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Traditional Navigable Waters (TNWs)

- Rule language is unchanged: categorically a water of the U.S.
- TNWs are waters that either carry or have potential to carry commercial navigation, including recreational navigation.
 - When deciding if water has potential for future commercial navigation, among relevant factors are the water's physical characteristics.
- Does not define or affect scope of waters for which states can assume responsibility for CWA section 404 permitting.



Interstate Waters

- Rule language is unchanged: categorically a water of the U.S.
- Proposal and its Appendix B discuss interstate waters, emphasizing they are jurisdictional even if the interstate water is neither a traditional navigable water (TNW) nor is connected to a TNW.
- Supports states' ability to protect against pollution from outside their borders



Territorial Seas



- Rule language is unchanged: categorically a water of the U.S.
- The CWA lists territorial seas as jurisdictional

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Impoundments

- Proposal indicates impoundments of TNWs, interstate waters, territorial seas, and tributaries are jurisdictional
- Current regulations provide that impoundments of waters of the US remain jurisdictional



Tributaries

- Existing regulations and proposal both consider tributaries to be waters of the U.S.
- Existing peer-reviewed scientific literature supports a conclusion that tributaries categorically have a significant nexus.



- Proposal for first time defines “tributary” –
 - Waters with “bed and banks” and an “ordinary high water mark” (OHWM) that contribute flow to TNW, interstate water, or territorial sea.
 - Wetlands can be a “tributary” if contribute flow even if lacking bed and banks and OHWM.

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Adjacent Waters



- Waters adjacent to TNW, interstate water, territorial sea, tributary or jurisdictional impoundment are waters of the U.S.
- Existing peer-reviewed scientific literature supports a conclusion that adjacent waters categorically have a significant nexus.
- Existing regulations define “adjacent” as “bordering, contiguous, or neighboring.” That regulatory definition is unchanged, while proposal defines “neighboring” for the first time.
- Existing regulations include wetlands as “adjacent.” Proposal applies adjacency to all waters, thereby clarifying the status of ponds and lakes adjacent to jurisdictional waters.

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Questions?

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Waters that require a
case-specific evaluation

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“Other Waters” Including Geographically Isolated Waters

- Waters that do not fall into the categories above are jurisdictional only where case-specific analysis shows that they have a significant nexus to a TNW, interstate water, or territorial sea.
 - “Significant nexus” is test for jurisdiction laid out in U.S. Supreme Court cases.
- A significant nexus analysis considers whether an “other water,” either alone or in combination with similarly situated waters in the region, has a significant nexus that is more than speculative or insubstantial.
 - This language is based on Justice Kennedy’s opinion in Rapanos
 - Which waters are aggregated during a significant nexus analyses depends on size of the “region” and which waters are “similarly situated.”
 - The rule provides EPA’s proposed definitions of “region” and “similarly situated”
- EPA’s connectivity report suggests that there is a gradient of connection between categories of “other waters” and large rivers and other large waters downstream.

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Bright line categories of
non-jurisdictional waters

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Waters Not Jurisdictional

- Retains exemptions in CWA or in existing regulations:
 - Prior converted cropland (PCC)
 - Waste Treatment Systems
- Does not affect how these exemptions are implemented

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Waters Not Jurisdictional, cont.

- Adds to regulations several waters that ongoing practice has considered generally non-jurisdictional, providing additional certainty.
 - Irrigated areas that would revert to upland if irrigation ceased.
 - Artificial lakes or ponds created on dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing
 - Artificial reflecting or swimming pools created on dry land
 - Small ornamental waters created on dry land
 - Water-filled depressions created incidental to construction activity
 - Groundwater, including groundwater drained through sub-surface drainage systems
 - Gullies and rills and non-wetland swales

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Waters Not Jurisdictional, cont.

- Proposal narrows jurisdiction over ditches somewhat as compared to existing guidance and for the first time would exempt certain ditches by regulation:
- EXEMPTED ARE:
 - Ditches excavated wholly in uplands, draining only uplands, and that have less than perennial flow.
 - Ditches that do not contribute flow, either directly or through other waters, to a traditionally navigable water, interstate water, or territorial sea.

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Waters Not Jurisdictional – Important Points

- Waters listed as non-jurisdictional cannot become jurisdictional even if they have a significant nexus.
- Non-jurisdictional waters may serve as a hydrologic connection for purposes of determining adjacency or a significant nexus analysis.

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Questions?

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Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOUS	Draft Proposed Rule
Includes all traditional navigable waters	Same
Includes all interstate waters	Same – clarify that interstate waters are treated as TNW
Includes all tributaries	Tributaries that meet the regulatory definition of tributary are jurisdictional <i>per se</i> . <i>Explicitly recognizes non-jurisdictional ditches</i>

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Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOUS	Draft Proposed Rule
Includes all wetlands adjacent to a jurisdictional tributary	All waters that meet the regulatory definition of "adjacent" are jurisdictional <i>per se</i> . Covers all adjacent waters, not just wetlands.
Includes "other waters" (e.g., geographically isolated wetlands) with an effect on interstate commerce (e.g. wetlands used for recreation, fishing, industrial purposes). Most "other waters" jurisdictional before 2001.	Other waters included where they have a significant nexus to a traditional navigable water. Other waters may be aggregated where they perform similar functions and located close together in the same watershed.

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Comparison of Existing Regulations and Proposed Rule

Existing Regulatory Definition of WOUS	Draft Proposed Rule
Regulation does not define "tributary"	Defines "tributary" based on presence of bed and bank and "ordinary high water mark." Also defines "significant nexus," "neighboring," "floodplain," and "riparian area"
Regulation excludes jurisdiction over waste treatment systems and prior converted croplands	Same
Regulation does not identify features that are never jurisdictional	Includes list of features that are not jurisdictional including erosional features, upland ditches, rills, non-wetland swales

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Costs and Benefits

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Provides More Benefits to Public Than Costs

BENEFITS

**\$388 to
\$514
million**

- Reducing flooding
- Filtering pollution
- Wildlife habitat
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- Recharging groundwater

COSTS

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Costs and Benefits

- **The costs and benefits are indirect.** Any direct costs and benefits come as other Clean Water Act programs are implemented, not from changing the definition of “waters of the US.”
- **All Clean Water programs affected by the rule are considered in the estimated costs and benefits.** These programs included 303, 311, 401, 402, and 404.
- **The analysis**
 - **Includes consideration of aggregation** – in other words, for considering the cumulative effects of similar other waters in a watershed on downstream waters.
 - **Accounts for the possibility that confusion has led some people not to apply for permits where in fact they must.**

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Benefits and Efficiencies Outweigh Costs

- Restores CWA protection to some water bodies
- More clearly and accurately implements the SWANCC and Rapanos decisions
- Benefits habitat overall, especially headwater and ephemeral water bodies, and some “other waters”
- Clearer requirements should help expedite some aspects of permit evaluations (JDs, impact assessment, compensatory mitigation planning)
- Establishing policy via regulatory revision best assures consistent national implementation/fairness
- Prevents costs of repairing damage caused by unchecked pollution (such as drinking water filtration and stream restoration)

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Science runs through it

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Science Report

- Review and synthesis of the published, peer reviewed scientific literature on the “connectivity” of waters
- Findings:
 - Following categories clearly demonstrate connections and effects on downstream waters:
 - All tributaries, regardless of size or flow
 - Wetlands and open waters in riparian areas and floodplains
 - Currently insufficient information exists to generalize about the connectivity or downstream effects of “geographically isolated” waters
- Status:
 - Peer-reviewed draft now undergoing additional SAB review
 - Recent release of SAB panel comments; teleconferences soon

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Input is
Important

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Public input was considered

4+ years of dialogue

415,000 comments

Dozens of stakeholder meetings and listening sessions

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Outreach is underway across the country



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Want Comments and Input on Proposed Rule

90 day public comment period

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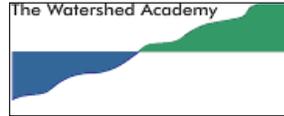
For more, see
www.epa.gov/uswaters

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Questions?

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Next Watershed Academy Webcast



Living Shorelines May 2014

Information will be posted at
www.epa.gov/watershedwebcasts

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