

Navigable Waters Protection Rule

Background

Under the Clean Water Act, Congress gave the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) jurisdiction to regulate “navigable waters”. “Navigable waters” are defined in the law as “the waters of the United States” (WOTUS). Any waters not regulated by the EPA and the Corps (the federal government) as WOTUS are under the authority of state and local governments.

The term “waters of the United States” has been defined by the EPA and the Corps through regulation, but the definition has been the subject of controversy and multiple Supreme Court decisions over the years. In June 2015, the EPA and the Corps enacted a regulation (the “2015 WOTUS rule”) that would have increased their regulatory reach by expanding the definition of WOTUS to include many waters and water features that previously have never been subject to federal jurisdiction, including areas that ordinarily are dry land.

Under the 2015 WOTUS rule, the EPA and the Corps gave themselves unprecedented permitting and enforcement authority over land-use decisions that Congress did not authorize and had previously been under state or local jurisdiction.

For example:

Many farmers with low spots or ditches along their fields needed to apply for Clean Water Act permits for common farming practices, such as changing from one crop to another.

Construction companies needed to rethink conventional building practices near any wet area, and property owners could face heavy fines for using their own ponds and creeks.

Critical infrastructure projects could be slowed as a result of additional permitting requirements that involve the EPA and the Corps, when in the past they may have only included city, county, or state governments.

In September 2019, the EPA and the Corps repealed the 2015 WOTUS rule and proposed a new rule clarifying which level of government - federal or state - would oversee water features and dry land that is sometimes wet.

The 2020 Navigable Waters Protection Rule does not change who oversees permanent waterways, such as lakes, rivers, streams, and other bodies that always or usually contain water. However, the new rule draws clear lines indicating that usually dry areas should no longer be considered federal waters.

The Navigable Waters Protection Rule Is Needed

The Navigable Waters Protection Rule is better for the economy and protects the environment

- In an era of intense global competition, U.S. small businesses need regulatory clarity and certainty in order to make confident decisions that will create jobs, strengthen local economies, and create high-quality, American-made goods and services.
- Clarity about what waters are subject to federal jurisdiction and what waters are subject to state jurisdiction will make water management more efficient and effective. Federal and state governments will continue to protect waters under their respective authorities.

The Navigable Waters Protection Rule represents small changes with a big positive impact

- The Clean Water Act established a regulatory partnership between the federal and state governments, and the new rule clarifies that partnership in a way that is consistent with Congressional intent. It's important to be clear about what the rule does and does not do:

| The new rule <i>does</i> ... | The new rule <i>does not</i> ... |
|---|--|
| acknowledge that most ditches and other usually dry areas (ephemeral waters) should no longer be considered federal waters | change rules regarding who oversees and protects permanent waterways (lakes, rivers, streams, wetlands, and other bodies that always or usually contain water) |
| maintain strict protections for drinking water, because it does not make any changes to standards or enforcement of the Safe Drinking Water Act | loosen any government requirements for the handling of pollutants |

- The Navigable Waters Protection Rule brings the clarity and certainty needed for all kinds of small businesses to operate. Under the new rule, U.S. businesses of all sizes and across all industries can better:
 - Build community shopping centers that meet the needs of the people they serve. (Under previous rules, footprint restrictions resulting from overly broad WOTUS definitions prevented some shopping centers from including grocery stores.)
 - Grow crops the American people want. (Previous rule made it more difficult for farmers to change the crops they grew in a particular field, meaning it took longer and cost more to respond to market demand and agricultural changes.)

- Support infrastructure projects (such as roads and bridges) with locally sourced raw materials. (The aggregates used in all kinds of construction—stone, sand, and gravel—are expensive to transport, and overly broad definitions of WOTUS made it more difficult to source materials locally, which added to costs for infrastructure and other projects.)
- The Navigable Waters Protection Rule has received bipartisan support from Congressional leaders. Members of Congress should oppose any actions that would undermine the regulatory clarity and robust federal and state water protections provided under the Navigable Waters Protection Rule.
 - “Since the first inception of this rule, I’ve worked to secure changes to it with the goal of protecting clean water without making it harder for farmers and ranchers to operate. I’m encouraged that the new rule takes steps to protect lakes, ponds, streams, and other tributaries, while providing that certainty to our ag producers.” – U.S. Rep. Collin Peterson (D-MN), Chairman, House Committee on Agriculture ¹
 - “The original ‘WOTUS’ rule was nothing but a severe regulatory overreach. The growing threat farmers were facing from the previous administration’s regulatory warpath would have only added costs to their businesses and stymied their ability to compete. I’m thankful this administration’s rule is a much more reasonable approach to regulation.” – U.S. Sen. Pat Roberts (R-KS), Chairman, Senate Committee on Agriculture, Nutrition, and Forestry ²

America’s local farmers, builders, and manufacturers support strong protections for our environment and go above and beyond regulatory requirements to be good stewards

- On a professional level, America’s local farmers, builders, manufacturers, and other small and large business owners rely on clean water to make a living, so they support clear rules that protect clean water.
- On a personal level, America’s local farmers, builders, manufacturers, and other small and large business owners also are America’s outdoor enthusiasts. As hunters, fishermen, campers and more, they understand the importance of clean water and want nothing more than to protect it.
- America’s farmers, builders, manufacturers, and other small and large business owners go above and beyond numerous federal and state regulations to protect our environment. (Federal regulations include the Clean Water Act; the Safe Drinking Water Act; and the Federal Insecticide, Fungicide, and Rodenticide Act, among others)

¹ (2020, April 21). *Peterson Statement on Final Navigable Waters Protection Rule*. Retrieved from Rep. Collin Peterson Press Releases: <https://collinpeterson.house.gov/media/press-releases/peterson-statement-final-navigable-waters-protection-rule>

² (2020, January 24). *More Widespread Support for EPA and Army’s Navigable Waters Protection Rule – A New Definition of WOTUS*. Retrieved from EPA News Releases from Headquarters: <https://www.epa.gov/newsreleases/more-widespread-support-epa-and-armys-navigable-waters-protection-rule-new-definition>

A return to overbroad WOTUS definitions could directly and indirectly affect many of our nation's most pressing issues:



Food deserts: Vague WOTUS definitions can make it difficult to build grocery stores where they're needed most.



Affordable housing: Compliance with vague or overly broad regulation has a direct impact on the cost of housing; 25% of the cost of a new home is driven by regulation.



Public health & safety: State and county authorities should not have to risk federal fines for keeping their communities safe from mosquito-borne illnesses or to institute vegetation management that help preemptively fight fires, which has been the case in the past.



Infrastructure: Overreaching and duplicative regulations increase the costs and timelines for critical infrastructure projects, like the building of roads and bridges. They also affect the production of critical resources such as sand, stone, and gravel. Local access to those resources is critical to keep down the high costs and environmental impact of shipping those materials long distances.