



# Oregon Water Resources Congress

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## “Waters of the United States” Rule Overview

The final proposed “Waters of the United States” a.k.a. WOTUS rule was issued by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (ACOE) on May 27, 2015. The final rule does not drastically differ from the proposed draft rule released on April 21, 2014. You can see the Federal Register Notice here: <http://www.gpo.gov/fdsys/pkg/FR-2015-06-29/pdf/2015-13435.pdf>. The final rule was published in the federal register on June 29, 2015 and takes effect 60 days after publication date on August 28, 2015.

During the comment period OWRC submitted comments on the draft rule, highlighting OWRC’s primary concern about how the new definition would impact operation and maintenance of irrigation ditches and canals. Specifically OWRC requested that the ACOE Regulatory Guidance Letter 07-02 (RGL 07-02) be incorporated into the rule because it provides the clarity for our members in regards to permitting for operations and maintenance activities that the rule as proposed does not. Comments were also submitted by the Family Farm Alliance (FFA), which represents OWRC and other western states at the national level.

Along with publication of the final proposed rule, EPA and ACOE released their response to the comments they received, the exhaustive amount of responses can be found here: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20872>. Specifically, EPA/ACOE addressed the RGL 07-02 stating that “the agencies do not plan to modify the RGL 07-02, or issue an interpretive rule or further guidance for the 404(f)(1)(C) exemption at this time.” However, after meeting with senior policy officials at the EPA and ACOE, Dan Keppen from FFA expressed it would be in our best interest to again let the agencies know the importance of the RGL, which will help them ensure it remains in force after the final rule is put into effect. OWRC’s recently submitted letter is attached for your reference.

The main purpose of the new rule according to the EPA and ACOE is to “provide greater clarity and certainty” about what water bodies are jurisdictional and regulated under the CWA. The agencies also assert that it will not create any new permitting requirements or add an economic burden on agriculture. However, based on our review, rather than providing clarity for our members, the new rule places the burden on you to prove that your ditches or reservoirs are exempt under the rule if the agency or a third party asserts that they are jurisdictional. Functionally, the new rule will simply make enforcement actions easier for the EPA, ACOE and citizen lawsuits.

## **Key Features of the Final Rule**

- For almost all entities and waterbodies, the rule is unlikely to change the status quo. The new definition of WOTUS puts into rule the waters EPA and ACOE have been exercising jurisdiction over since the Supreme Court's 2006 *Rapanos* decision.
  - It retains the following existing categories under WOTUS:
    - Traditionally navigable waters;
    - Interstate waters;
    - The territorial sea; and
    - Impoundments of waters that are otherwise WOTUS
  - It deletes the category of "other waters" and replaces it with "significant nexus" category
  - It modifies the "tributaries" and "adjacent wetlands" categories to make sure that they have a "significant nexus" to traditionally navigable waters.
  - Finally, the new rule keeps the current rule's exclusions from WOTUS (wastewater treatment systems and "prior converted croplands") and adds the following new exclusions (which in practice were already being excluded under the old rule):
    - Ditches as defined under the rule, including:
      - Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
      - Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands;
      - Ditches that do not flow, either directly or through another water, into a traditionally navigable water, interstate water, or the territorial sea.
    - Artificially irrigated areas that would revert to dry land should application of water to that area cease;
    - Artificial, constructed lakes and ponds created in dryland such as farm and stock watering ponds, irrigation pools, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
    - Artificial reflecting pools or swimming pools created in dry land
    - Small ornamental waters created in dry land;
    - Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
    - Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways;
    - Puddles;
    - Groundwater, including groundwater drained through subsurface drainage systems;
    - Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land;
    - Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

## **Next Steps**

For now we will continue to be engaged as the new rule unfolds. The rule continues to have strong opposition in Congress and there continues to be bills passed in Washington requiring the EPA and ACOE to withdraw the rule, unfortunately, thus far those bills have not passed with a veto proof majority; however, they continue to gain momentum. These bills vary in approach, but most of the legislative efforts either limit funding to the EPA/ACOE to implement the rule and/or they potentially rollback or otherwise block implementation of the rule. Finally, lawsuits in opposition to the rule claiming the EPA and ACOE have exceeded their authority in regulating water have already begun, with the group of plaintiffs continuing to grow.

OWRC will continue to monitor and engage on this important issue along with our partner FFA. We have provided this brief overview of the final WOTUS rule for OWRC members and will continue to provide updates through OWRC's Federal Affairs Committee. This informational fact sheet is not meant to be legal advice and legal counsel should be consulted for specific guidance on rule application to individual districts and patrons. Please do not hesitate to contact OWRC if you have any questions about this fact sheet or would like to become more involved in our Federal Affairs Committee.