

US EPA ARCHIVE DOCUMENT



Facts About the Waters of the U.S. Proposal

For more information: www.epa.gov/uswaters

The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.

- The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The proposed rule does not change or limit any of them.
- The agencies also worked with USDA to develop and publish through an interpretive rule, a list of NRCS agricultural conservation practices that will not be subject to CWA section 404 permitting requirements. These practices encourage conservation while protecting and improving water quality.

The proposed rule will NOT bring all ditches on farms under federal jurisdiction.

- Some ditches have been regulated under the Clean Water Act since the 1970s.
- The proposed rule does not expand jurisdiction.
- For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don't have perennial flow, are not "waters of the U.S." This includes many roadside ditches and many ditches collecting runoff or drainage from crop fields.
 - Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.
 - Ditches that are OUT are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water.
- Farmers, ranchers and foresters continue to receive exemptions from Clean Water Act Section 404 permitting requirements when they construct and maintain irrigation ditches and maintain drainage ditches, even if ditches are jurisdictional.

The proposed rule does NOT mean permits are needed for walking cows across a wet field or stream.

- Normal farming, ranching and silviculture activities are exempt from dredge and fill permitting requirements under the Clean Water Act.

The proposed rule will NOT apply to wet areas on fields or erosional features on fields.

- Wet areas on crop fields are not jurisdictional.
- The proposal specifically excludes the erosional features "gullies and rills and non-wetland swales" from being "waters of the U.S."

EPA and the Corps are NOT taking control of ponds in the middle of the farm.

- The proposed rule does not change existing practice regarding farm ponds.
- The rule does not affect the existing exemption under section 404 for construction and maintenance of farm or stock ponds built in dry land.
- The proposed rule would for the first time specifically exclude artificial stock watering and irrigation ponds constructed in dry lands from jurisdiction in rule language.

The interpretive rule does NOT redefine normal farming as only those 56 conservation practices.

- If a CWA permit was not needed for a particular practice before, a permit won't be needed now.
- These 56 practices clarify and add to all of the practices that are currently considered normal farming and exempt from permitting. The interpretive rule adds to what is exempt.
- The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices or don't use NRCS funds they would continue to be exempt in the same way they are now.
- A farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting.

NPDES permits will NOT be required for the application of fertilizer or pesticides to farm fields.

- Pesticide applications to dry land does not require a NPDES permit.
- Applications of pesticides made directly to waters of the U.S., like streams or wetlands, require a permit. General permits are available.

Federal agencies are NOT asserting regulatory authority over land use.

- The Clean Water Act only regulates the pollution and destruction of waters.
- The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation.

EPA and the Corps are NOT regulating groundwater or "shallow subsurface connections."

- The proposal specifically says groundwater and shallow subsurface connections are not regulated.

The proposed rule would NOT result in a takeover of private property.

- The proposed rule does nothing to change private property rights.
- The Clean Water Act applies to surface waters, not to land or to rain gutters, wet lawns, groundwater, or a host of other kinds of waters.

The proposed rule does NOT mean all highway ditches are going to be jurisdictional.

- Instead, the proposed rule would narrow Clean Water Act jurisdiction, leaving out thousands of miles of upland ditches that have water in them only seasonally.
- Highway ditches that are made from dry land, that drain dry land, and that don't flow year-round, are not jurisdictional, nor are ditches that don't connect to waters of the United States. That is true in current practice, and is specifically stated in the proposed rule.

The proposed rule does NOT automatically assert jurisdiction over washes, erosional features, and arroyos.

- As the Supreme Court has recognized, the Clean Water Act applies to some waters that don't flow 100 percent of the time.
- The agencies' proposed rule includes definitions for various Clean Water Act terms to make it easier to figure out what's in and what's out.
 - The proposed rule says that all "tributaries" are jurisdictional.
 - The rule includes a definition of "tributary," and says a tributary is something with a bed and bank and an ordinary high water mark.
- Water features that don't flow frequently enough or with enough volume to exhibit these characteristics would not be jurisdictional.

EPA and the Corps will NOT be regulating rainwater that falls on lawns, farm fields, or playgrounds.

- This is misinformation and simply not true.

EPA and the Corps' rule will NOT regulate land in floodplains.

- The Clean Water Act does not give authority to regulate land, and the agencies cannot and are not asserting jurisdiction over land in floodplains.
- The agencies' proposed rule simply recognizes that waters within a floodplain are more likely to affect downstream waters than those that are not. It does not say the entire floodplain would be jurisdictional.
- The permit exemptions for normal farming and ranching activities continue unchanged *even if they happen in a water in a floodplain*. The proposed rule will not change a farmer's ability to farm his or her fields within a floodplain.

The proposed rule does NOT include any waters that have not historically been covered under the Clean Water Act.

- The proposed rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court.
- Waters that have never been protected remain outside the scope of the Clean Water Act, and the rule protects fewer waters than prior to the Supreme Court cases.
- The proposed rule includes a definition of "significant nexus" yet the Agencies welcome comments on how the definitions can be improved, or whether additional terms should be defined.

Non-navigable waters have been regulated under the Clean Water Act since it was passed in 1972.

- Supreme Court decisions, including the one authored by Justice Scalia in *Rapanos*, and the legislative history of the Clean Water Act, make clear that the law applies to more than just waters that are "navigable."
- The Supreme Court said the Clean Water Act should cover navigable waters as well as those with a "significant nexus" to navigable waters, based on the science. That's exactly what this rule would do.

The proposed rule is consistent with Supreme Court decisions.

- The existing rule is being updated by the proposal specifically to comply with Supreme Court decisions.
- EPA and the Corps are responding to calls from Congress and the Supreme Court to clarify regulations on the definition of waters of the U.S.

- The proposed rule reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court.
- Chief Justice Roberts called for the EPA and the Corps to do rulemaking to provide clarity regarding Clean Water Act jurisdiction.

EPA and the Corps are NOT dramatically expanding jurisdiction.

- The proposed rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court.
- The agencies expect that a very small number of additional waters – 3.2 percent - will be found jurisdictional compared to current practice because of greater clarity regarding whether waters are protected or not.
- These waters are jurisdictional today, but because of the complexity and confusion, asserting jurisdiction was too resource-intensive.

EPA and the Corps are NOT rushing ahead with a rulemaking before any peer review of the science.

- EPA's "connectivity report" has already been through two rounds of peer review and is based entirely on previously peer-reviewed and publicly available literature published in scientific journals.
- The proposed rule will not be finalized until the Science Advisory Board's (SAB) review is complete.
- While the SAB sets its own schedule, EPA anticipates that the SAB will have completed its work before the extended comment period closes, so that the public can review the SAB's final report.

EPA is NOT refusing to allow its Science Advisory Board to review the draft rule.

- EPA agrees that the Science Advisory Board (SAB) has an important role in reviewing the science that underlies our regulatory decisions.
- The SAB will be reviewing the rule, and we're working right now with the SAB to decide how they can best do so.

The Clean Water Act gives states tools to protect their waters and does not take away their flexibility.

- The proposed rule will not affect state water laws, including those governing water supply and use.
- Water quality standards applicable to different types of waters can vary – whether they are wetlands, streams, rivers, or lakes.
- States are best equipped to determine what these standards should be, based on uses of those waters.
- Although some states have more stringent requirements for their state waters, many state water quality protections often depend on federal protections.

EPA consulted early with states when developing the proposed rule.

- The agencies are specifically working with state and local officials on the proposed rule.
- The agencies will conduct additional conversations with state and local officials in finalizing the rule.

The proposed rule will NOT limit states' ability to assume the 404 program.

- The definition of waters of the US and which waters may be assumed by states are separate definitions, and this is clear in the preamble to the proposed rule.

- The EPA is working with state associations to clarify what waters are assumable by states to help the states assume the Section 404 program.

This proposal is beneficial for the economy.

- Protecting water is important to the long-term health of the economy. Streams and wetlands are economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.
- The potential economic benefits of the proposed rule are estimated to be about double the potential costs – \$390 to \$510 million in benefits versus \$160 to \$278 million in costs.
- The economic analysis indicates that these benefits from protecting waters from pollution and destruction (e.g., flood protection, pollutant filtration, habitat/biodiversity provisioning, hunting and fishing support, groundwater recharge, biogeochemical cycling) greatly outweigh the costs.

The rule would NOT infringe on private property rights and hinder development.

- The Clean Water Act is not a barrier to economic development.
- The Clean Water Act stops the unlimited discharges that could pollute and destroy waters across the U.S. EPA, the Army Corps, and states issue thousands of permits annually that allow for property development and economic activity in ways that protect the environment.
- By providing clarity, the proposed rule will help improve efficiency in jurisdictional determinations.

The rule will NOT have a negative effect on small businesses.

- The agencies sought early and wide input from small businesses while developing the proposed rule, including meetings as far back as 2011.
- EPA and the Corps' proposed rule includes the required certification under the Regulatory Flexibility Act regarding the rule's impact on small businesses. This reflects the fact that the proposed rule's jurisdiction would be narrower than under our existing regulations.
- EPA and the Corps recognize the interests of the small business community in the proposed rule and continue to meet with them and other stakeholders to help inform the rule moving forward.