



▶ POTENTIAL WATERS OF THE U.S.



The proposed rule...

- ▶ Keeps intact all CWA exemptions and exclusions.

But because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer people will benefit from the exemptions. The exemptions for activities occurring in “waters of the U.S.” have been interpreted by the agencies to be narrow. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

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Kori Andrews, 8/14/2014

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Water Treatment and Management

- ▶ **Potential** **WotUS:** On-site water treatment and management systems and conveyances that do not discharge to a lake or stream or river; systems for conveying drinking water
- ▶ **Exclusion:** Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

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Agriculture



- ▶ **Potential** **WotUS:** Artificial lakes or ponds that are not used exclusively for purposes such as stock watering, irrigation, settling basins, or rice growing. Such artificial ponds, including ponds used to store rainwater to prevent runoff would be a water of the U.S. Ponds that are not artificial.
- ▶ **Exclusion:** Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

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Construction



- ▶ **Potential WotUS:** Artificial pools created by excavating and/or diking dry land that are not for reflecting or swimming.
- ▶ **Exclusion:** Artificial reflecting pools or swimming pools created by excavating and/or diking dry land.

Potential WotUS: Swales considered wetlands, including manmade swales used to capture stormwater by persons not subject to the requirements of the Act.

Exclusion: Non-wetland swales

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Other effects

- ▶ **Potential WotUS:** Water-filled depressions that are incidental to activity that is not construction-related, including tire ruts on land that is not under construction.
- ▶ **Exclusion:** Water-filled depressions created incidental to construction activity.

Potential WotUS: Erosion features on the land that would be considered ephemeral streams under the rule due to surface or groundwater connections

Exclusion: Gullies and rills



▶ THE EFFECTS

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STATE OF *Kentucky*

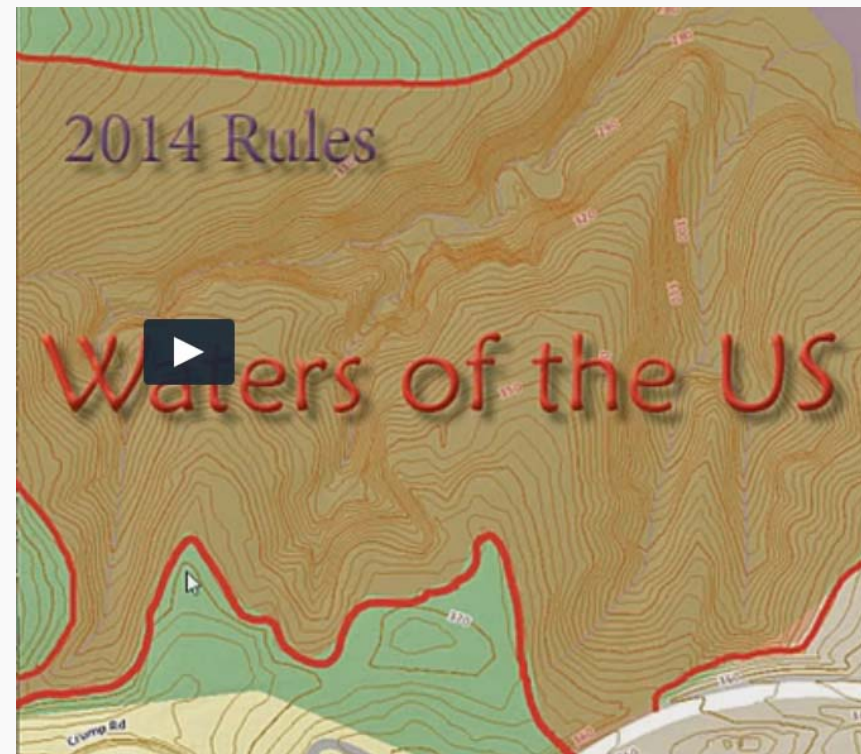
The act's single definition of "navigable waters" applies to the entire CWA

- ▶ There will be **more state and local requirements** to meet TMDLs, WQS, etc.

Applies to:

- federal prohibition on discharges of pollutants except in compliance with the act's requirements (§301),
- requirements for point sources to obtain a permit prior to discharge (§§402 and 404),
- water quality standards and measures to attain them (§303),
- oil spill liability and oil spill prevention and control measures (§311),
- certification that federally permitted activities comply with state water quality standards (§401), and enforcement (§309), and
- the Oil Pollution Act

More waters will be protected



<http://d258jt32o5tsbc.cloudfront.net/neweparules15.html>

More waters will be protected



- ▶ Overall, the agencies (EPA and the Corps) estimate that approximately 3% of U.S. waters will additionally be subject to CWA jurisdiction as a result of the proposed rule (including additional “other waters”), compared with current field practice.

The estimated increase includes about 17% of “other waters” that were not jurisdictional under the 2003/2008 guidance.

The proposed rule creates/alleviates confusion

- ▶ • The proposed rule leaves to a case-by-case judgment whether it's a two year floodplain or 100-year floodplain does not promote clarity or consistency.
- The agencies' broader assertion of jurisdiction does not identify specific waters that will be found to be jurisdictional but the proposed rule attempts to draw more of a bright line of CWA jurisdiction than in the past.
- Unclear for now is a question of the extent to which case law construing the existing administrative definition of "waters of the United States" will continue to apply. Some of that case law has been in place for more than 35 years.

More permits will be required



▶ US Army Corps of Engineers permits

- No unauthorized obstruction or alteration of any navigable water of the US unless you receive a permit from USACE (Rivers & Harbors Act)

Obstruction or alteration includes:

- construction of any structure in or over any navigable water of the United States,
 - excavation of dredge, or deposition of, fill material,
 - the accomplishment of any other work affecting the course, location, condition, or capacity of such waters
- Authorizes USACE to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. (See 33 CFR Part 323.) (CWA 404 permits)

Kentucky Division of Water permits

Increased permitting times and costs



- ▶ • **Additional permit application expenses.**
- **Increase in project lead time.**
- **Additional analysis** for projects will be necessary.
- **Higher mitigation costs** will be incurred, including compensatory mitigation requirements for permit impacts (if applicable), affecting land developers and state and local governments.
- Additional requirements for **oil storage and production facilities** needing to develop and implement spill prevention, control and countermeasure (SPCC) plans.
- EPA and the Corps estimate that costs of the proposal, from additional permit application expenses, range from **\$162 million to \$279 million** annually.

Additional costs to government



- ▶ • Federal and state governments would likely experience costs to administer and process additional permits.
- The only reduction in red tape and cost will be for regulators who can categorically regulate small, isolated and mostly dry features.
- EPA says there will be government savings on enforcement expenses, because the rule is intended to provide greater regulatory certainty, thus reducing the need for government enforcement.

- ▶ • **Less developable land** will be available.
- You will need to **modify stormwater management practices** (you don't want to create a WOTUS).
- **Additional stormwater permitting** for construction and development activities.



QUESTIONS?

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