



**THE ENVIRONMENTAL PROTECTION AGENCY/ARMY CORPS OF ENGINEERS
WATERS OF THE UNITED STATES RULE (MAY 27, 2015)**

This new final rule covers Clean Water Act regulatory jurisdiction, including programs on oil discharges, hazardous substance discharges and reportable quantities, National Pollutant Discharge Elimination System “end of the pipe” discharges, and wetlands. Wetlands are the most controversial subject.

The earlier, proposed rule was politically sensitive, dragged on for a lengthy period, and was preceded by years of complex agency guidance attempting to interpret U.S. Supreme Court case law. The final rule tries to add some specific parameters (e.g., neighboring) and clearer exemptions (e.g., ditches), as well as relax case-specific analyses to some extent. The question remains as to how far regulators will push the envelope of the new rule.

Some refer to the new rule as a Federal land grab or “economic hell;” others consider it to be a slice of heaven. Whatever it will be, it will certainly be like a regulatory wormhole to venture into. Judge for yourself with this summary:

SUBJECT	FINAL RULE
(i) Traditional Navigable Waters	Jurisdictional, e.g., requiring permits, spill reports, enforcement, etc.
(ii) Interstate Waters	Jurisdictional
(iii) Territorial Seas	Jurisdictional
(iv) Impoundments	Jurisdictional
(v) Tributaries to the Traditionally Navigable Waters	Defines tributary as either natural or man-made and with or without breaks (e.g., culverts, bridges), but with water features of a bed, banks, and ordinary high-water mark, and flow downstream to subject waters (i)-(iii). Wetlands and open waters without beds,

SUBJECT	FINAL RULE
	banks, and high-water marks will be evaluated for adjacency to subject waters. ¹ See below.
(vi) Adjacent Wetlands/Waters	Includes waters “neighboring” (a subset of adjacency) jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high-water mark ² or high-tide line to subject waters (i)-(v). ³
(vii-viii) Isolated or “Other” Waters	<p>(vii) Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California and Texas coastal prairie wetlands, when they have a case specific, significant nexus to subject (i)-(iii) waters.⁴ (These specific waters are not prevalent in Louisiana or all states). If these specific waters are also adjacent to subject waters (vi), a case specific analysis is not required.</p> <p>(viii) This includes other waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas (subject waters (i)-(iii)), as well as waters with a significant nexus within 4,000 feet of most jurisdictional waters (subject waters (i)-(v)).</p>

¹ Bordering, contiguous, neighboring a regulated water (generally, subject (i)-(v) waters). Separations by dikes or dunes are included. Wetlands abutting open waters (such as ponds or lakes) are included. Connections to, or at headwaters of, subject waters (i)-(v) are included.

² Shoreline established by water fluctuations, e.g., natural line, shelving, litter and debris, absence of territorial vegetation.

³ Line of intersection of land and high tide, e.g., actual data, or vegetation lines, physical markings, tidal gages.

⁴ A water’s effects, either alone or in combination with similarly situated waters (a function of closeness and functioning together), on the chemical, physical, or biological integrity of regulated waters, e.g., sediment trapping, retention of flood water, runoff storage, flow, life-cycle dependent aquatic habitat, etc.

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	This is case specific. They are not to be combined with other waters in the significant nexus determination. No case-specific analysis is needed if these other waters are adjacent to subject waters (i)-(v).
Exclusions to the definition of “Waters of the U.S.”	Excludes wastewater-treatment systems, prior converted cropland, most ditches (e.g., ones that are not a relocated tributary, that do not drain wetlands, or that do not flow into subject (i)-(iii) waters), groundwater, gullies, rills, non-wetland swales, puddles, artificial irrigation on dry land, artificial ponds on dry land, artificial pools on dry land, ornamental waters on dry land, stormwater control features on dry land, water-recycling structures, and most erosional features.

For further information, contact [Stanley A. Millan](#).

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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