



Navigable Waters Protection Rule

Mapping and the Navigable Waters Protection Rule

On January 23, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) fulfilled yet another promise of President Trump by finalizing the Navigable Waters Protection Rule to define “waters of the United States” (WOTUS). For the first time, the agencies are streamlining the definition so that it includes four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined before. Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.” The Navigable Waters Protection Rule regulates these waters and the core tributary systems that provide perennial or intermittent flow into them. The final rule fulfills [Executive Order 13788](#) and reflects legal precedent set by key Supreme Court cases as well as robust public outreach and engagement, including pre-proposal input and comments received on the proposed rule.

The Navigable Waters Protection Rule protects the environment while respecting states, localities, tribes, and private property owners. It clearly delineates where federal regulations apply and gives state and local authorities more flexibility to determine how best to manage waters within their borders. Assertions have been made that the new rule will reduce jurisdiction over thousands of stream miles and millions of acres of wetlands. These assertions are incorrect because they are based on data that is too inaccurate and speculative to be meaningful for regulatory purposes. The final rule along with state, local, and tribal regulations and programs provide a network of protective coverage for the nation’s water resources.

EXISTING TOOLS CANNOT ACCURATELY MAP THE SCOPE OF CLEAN WATER ACT JURISDICTION

- Due to existing data and mapping limitations, it is not possible to accurately determine the full scope of waters that are “in” or “out” under any WOTUS definition.
- When the *Navigable Waters Protection Rule* was proposed, some claimed that 51% of the nation’s wetlands and more than 18% of the nation’s streams would lose CWA protection.
- These estimates are highly unreliable and are based on stream and wetland datasets that were not created for regulatory purposes and which have significant limitations.
- Purported statistics of jurisdictional changes are unreliable and inherently inaccurate, in part because:
 - there are currently no comprehensive datasets through which the agencies can depict the universe of “waters of the United States,” and
 - the datasets used to generate these figures – the U.S. Geological Survey (USGS) National Hydrography Dataset (NHD) and the U.S. Fish and Wildlife Service (FWS) National Wetlands Inventory (NWI) – were not developed for regulatory purposes and have significant technical limitations that prevent the agencies from using them to identify CWA jurisdiction, regardless of the regulatory definition of “WOTUS.”

- While the NHD and NWI are the most comprehensive hydrogeographic datasets mapping waters and wetlands in the United States and are useful resources for a variety of federal programs, including CWA programs, they cannot be used as standalone tools to determine the scope of CWA jurisdiction.
- Importantly, the *Navigable Waters Protection Rule* covers tributaries with intermittent flow and excludes other features with only ephemeral flow, but the NHD—even at high resolution—cannot differentiate between intermittent or ephemeral flow in most parts of the country.
- Further, the NWI uses a different definition of “wetlands” than the agencies’ regulatory definition of “wetlands.” The NWI also does not contain information sufficient to evaluate whether those mapped wetlands meet the definition of “adjacent wetlands” under previous regulations or under the final rule. For example, the NWI does not identify whether a wetland is inundated by the nearest jurisdictional water.
- The NHD has other limitations that prevent its use for accurately mapping the scope of jurisdictional waters under the CWA, including:
 - errors of omission (*e.g.*, failure to map streams that exist on the ground),
 - errors of commission (*e.g.*, mapping streams that do not exist on the ground),
 - horizontal positional inaccuracies,
 - misclassification of stream flow permanence, particularly in headwaters, and
 - inconsistent mapping in different parts of the country.
- The NWI also has additional limitations, including:
 - errors of omission (*e.g.*, failure to map wetlands that exist on the ground),
 - errors of commission (*e.g.*, mapping wetlands that do not exist on the ground), and
 - potentially inaccurate wetland boundary identification.
- While early in the regulatory process the agencies attempted to use the NHD and NWI to assess the potential change in CWA jurisdiction as a result of the proposed rule, the agencies ultimately concluded that the limitations of these datasets preclude their use for quantifying the extent of waters whose jurisdictional status could change under the proposal.
- Due to these limitations, which were confirmed during the public comment period for the proposed rule and an extensive evaluation by the agencies, the agencies did not use the NHD or NWI to assess potential changes in jurisdiction as a result of the final rule.

IT IS THE CONSISTENT POSITION OF THE AGENCIES THAT NO MAPS EXIST THAT IDENTIFY THE SCOPE OF “WOTUS”

- It has been the consistent position of the agencies that the NHD and the NWI do not represent the scope of waters subject to CWA jurisdiction.
- Of note, the agencies did not use these maps to estimate changes in jurisdiction when the 2003 *SWANCC* Guidance was issued, when the 2008 *Rapanos* Guidance was issued, or when the 2015 Rule was promulgated.
- As the agencies promulgated the 2015 Rule, EPA stated at the time that they “do not have maps depicting waters of the United States under either present regulatory standards or those

in the final [2015] rule.”¹ This remains true today; the agencies do not have maps of WOTUS under the 2015 Rule, under the 2019 Rule, or under this final rule.

- In 2015, former EPA Administrator McCarthy testified before Congress² about the NHD and the NWI—the very same datasets some have used to inaccurately estimate changes in jurisdiction under the proposed *Navigable Waters Protection Rule*. According to Administrator McCarthy’s testimony, those datasets:
 - were “not used to determine jurisdiction and not intended to be used for jurisdiction;”
 - “are not relevant to the jurisdiction of the ‘waters of the U.S.,”
 - “are not consistent with how we look at the jurisdiction of the Clean Water Act;” and
 - have “nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act.”
- Under the previous administration, EPA Office of Water Acting Assistant Administrator Nancy Stoner wrote to the House Committee on Science, Space, and Technology that “no national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act.... To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]”³
- Former EPA Office of Water Deputy Assistant Administrator Ken Kopocis wrote a similar letter to the House Science Committee, stating: “These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act.”⁴
- And in 2014, an EPA blog post entitled “Mapping the Truth” stated, “While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or *ever*.”⁵

¹ See *Response to Comments for the Clean Water Rule*, Clean Water Rule Comment Compendium Topic 8: Tributaries, Docket ID. No. EPA-HQ-OW-2011-0880-20872, p. 442, <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872>.

² Impact of the Proposed “Waters of the United States” Rule on State and Local Governments Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env’t & Pub. Works, 114th Cong. (2015) (testimony of Gina McCarthy, Adm’r, EPA).

³ Letter from Nancy Stoner, Acting Assistant Adm’r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (July 28, 2014) (emphasis added), available at https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf.

⁴ Letter from Kenneth J. Kopocis, Deputy Assistant Adm’r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015)

⁵ U.S. EPA, *Mapping the Truth*, THE EPA BLOG (Aug. 28, 2014), available at <https://blog.epa.gov/2014/08/28/mapping-the-truth/>

MAPPING THE FUTURE

- The agencies acknowledge that prior Administrations have taken the position that “maps of all the jurisdictional or non-jurisdictional waters are not feasible,” and that maps “cannot be used to determine Clean Water Act jurisdiction – now or ever.”
- Rather than declaring the task too difficult, however, the agencies under this Administration have decided to initiate development of state-of-the-art geospatial data tools through federal, state, and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as:
 - the location of federally jurisdictional waters;
 - the applicability of state and tribal water quality standards;
 - permitted facility locations;
 - impaired waters; and
 - other significant features.
- For federal, state and tribal agencies, such geospatial datasets could improve the administration of CWA programs and attainment of water quality goals.
- Geospatial datasets and resulting future maps that indicate waters likely subject to federal jurisdiction could allow members of the regulated community to more easily and quickly know if a water or wetland is a WOTUS and regulated under the CWA.
- To help inform this effort, the agencies are engaging with stakeholders and our federal partners in a number of ways to make progress on these WOTUS mapping goals, including forming a work group of participants from other federal agencies with interest and expertise in geospatial mapping.
- Maps of CWA jurisdiction, when fully developed, will promote greater regulatory certainty, relieve some of the regulatory burden associated with determining the need for a permit, and play an important part in helping to attain the goals of the CWA.