

The Clean Water Rule, otherwise popularly known as the “waters of the United States rule,” was finalized by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers and went into effect Aug. 28, 2015.

The Clean Water Rule has undeniably protected the quality of the waters of the United States, but the rule also has farmers, landowners and other businesses worried that many previously unregulated lands could fall under federal regulation.

This document presents a set of clarifications EPA put forth in the new version of the Clean Water Rule. Understanding these new definitions

and clarifications could prove extremely useful to individuals making contact with the government agencies that enforce the regulations to determine jurisdiction of the waters on their property.

In the Clean Water Rule, waters of the United States, or **WOTUS**, for short, are categorized as a) jurisdictional waters, b) excluded waters and c) waters and wetlands evaluated on a case-specific basis for determining significant nexus or connections. New clarifications have been added in the latest Clean Water Rule for the categories mentioned above. Table 1 highlights some of the new clarifications.

Table 1. Clarifications of the new Clean Water Rule compared to the previous version.

SUBJECT	OLD RULE	NEW CLEAN WATER RULE
Tributaries	Not defined.	Water that has a bed, bank, ordinary high water mark (OHW) ^a , and contributes flow. Exception added – Wetlands and open waters without bed, bank and OHW will be evaluated for adjacency.
Jurisdiction of waters ^b based on adjacency	Adjacency defined as bordering, contiguous or neighboring.	Adjacent still means bordering, contiguous or neighboring. The term neighboring is defined as all waters within a 100-year floodplain to a maximum of 1,500 feet from the ordinary high water mark of jurisdictional water(s). Beyond 1,500 feet, water within 100-year floodplain and within 4,000 feet of high tide line or ordinary high water mark of a jurisdictional water will be evaluated for surface hydrologic connection to another jurisdictional water to determine jurisdiction. This process is defined as the significant nexus test.
Functions waters perform	Functions not clearly mentioned.	Nine functions performed in isolation or in combination will be used for determining significant nexus. The functions are: <ul style="list-style-type: none"> • Sediment trapping • Nutrient recycling • Pollutant trapping • Transformation, filtration and transport, and retention and attenuation of floodwaters • Runoff storage • Flow contribution • Export of organic matter • Export of food resources • Provision of habitat for aquatic species
Ditches	Regulated if constructed in a tributary or if they are relocated tributaries or function like a tributary. Some inconsistency regarding flow.	Clarification added. Jurisdictional only if ditches, regardless of flow, are excavated in a tributary, are a relocated tributary or wetland or are connected to a jurisdictional water directly or through another water.
“Other” waters	Jurisdictional if it affects interstate commerce.	Subject to significant nexus test, if waters are similarly situated as: <ul style="list-style-type: none"> • Prairie potholes • Carolina and Delmarva bays • Pocosins • Western vernal pools in California • Texas Coastal prairie wetlands

^a Ordinary High Water Mark (OHW): Normal reach or water level during high-water season.

^b Waters here also include wetlands, ponds, lakes, oxbows, impoundments and similar water features.

Naveen Adusumilli, Assistant Professor,
Department of Agricultural Economics and Agribusiness, LSU AgCenter, Red River Research Station, Bossier City, La.

Some farmers, business groups and property owners are worried that the Clean Water Rule will result in a potentially time consuming process when determining whether federal permits are required for the waters on their property. Meanwhile, the Clean Water Rule has kept some of its current exclusions.

The major categories of excluded waters include:

- Prior converted cropland
- Waters in which normal farming, ranching and silviculture activities occur
- Groundwater (shallow and deep)
- Stormwater control features
- Erosional features (gullies, rills)
- Waste treatment systems
- Artificially irrigated areas that revert to dry land when irrigation ceases
- Constructed lakes, farm ponds and stock ponds in dry land
- Wetlands not adjacent to jurisdictional waters
- Fields flooded for rice
- Pools excavated in dry land, sand pits and excavation pits
- Grassed waterways (but not if in part of a tributary upstream or downstream)
- Shallow subsurface connections (artificial lakes and ponds could be connected to groundwater through subsurface connection)
- Cooling ponds constructed before the original CWA rule

Some of the exclusions and definitions are clear, but some are confusing and need more clarification. Determining jurisdiction of the waters could become complicated and time consuming in some instances. It is expected that lack of data on some of the water features can exacerbate the difficulty of determining jurisdiction. Ideally, it is our expectation that federal agencies will improve availability of information, reduce redundancy in the permitting process and not affect timely agricultural operations.

Questions and Assistance

Those in Louisiana with questions or needing additional assistance with respect to the new Clean Water Rule should contact **U.S. EPA Region 6 Water Enforcement Branch** at **214-665-6468**.

Note: The content in the fact sheet has been adapted from the EPA publication, Clean Water Rule: Definition of “Waters of the United States,” Federal Register 80(124): 37054-37127.
The text in this fact sheet does not substitute for any text in the Clean Water Rule.

Visit our website: www.LSUAgCenter.com