

U.S. Senate Committee on
ENVIRONMENT & PUBLIC WORKS
From the office of Chairman Jim Inhofe

Final “Waters of the U.S.” Rule

Broken Promises

On Wednesday, May 27, 2015, the Environmental Protection Agency (EPA) released its final rule defining “waters of the United States” (WOTUS). Despite many promises to “fix” the rule, it remains overly broad, ambiguous and inconsistent.

- **Administrator McCarthy told the National Farmers’ Union that irrigation ditches were of no interest to the agency.** But, because irrigation water is not ephemeral or intermittent, the final rule leaves them vulnerable to EPA regulation.
- **EPA failed to follow through on its promise to clarify the distinction between tributaries and erosion.** Like the proposed rule, the final rule continues to use a “bed, bank, and ordinary high water mark” to define a tributary. In fact, the final rule *increases* confusion by allowing reliance on LiDAR and other remote sensing technology to identify tributaries.

LiDAR will find channels everywhere, even if they are dry erosion features. This is one of the biggest concerns of the agriculture community, home builders, utilities that want to site new transmission lines or wind farms and solar arrays, and western water districts that want to build new reservoirs to address drought.

Administrator McCarthy and Secretary Darcy told Congress in February that isolated ponds not connected to other waters are not regulated.

But, the final rule gives EPA the power to regulate water that is geographically isolated, including:

All water in 100 year flood plain or within 4,000 feet of WOTUS

All Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools and Texas coastal prairie wetlands no matter how far from WOTUS-- if there is a significant nexus, including use as habitat, looking at all such pools and wetlands in a watershed in the aggregate.

- Administrator McCarthy told Congress in February that use of water by a bird or animal is “not sufficient as a sole reason for jurisdiction.” But the final rule says that a **single function**, including use of water as habitat for a bird or animal, is sufficient to establish a “significant nexus” that creates jurisdiction.
- EPA promised to address confusion over ditches created by ambiguous terms such as “uplands.” However, the final rule simply replaces “uplands” with the equally ambiguous and undefined term “dry land,” creating significant uncertainty, particularly for water management features that were built long ago.
- EPA promised to clarify the status of storm water management systems. Local governments had asked that they be treated in the same way as waste treatment systems. Instead, under the final rule, while waste treatment systems remain exempt even if they were not built in dry land, as long as that construction took place before the date of enactment of the Clean Water Act, stormwater management systems are not given the same consideration.