

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

Final “Waters of the U.S.” Rule
Expanded Federal Control

On Wednesday, May 27, 2015, the Environmental Protection Agency (EPA) released its final rule defining “waters of the United States” (WOTUS). In the final rule, EPA claims powers beyond current law and even beyond what was originally proposed. This impacts the ability of many Americans to use and enjoy their property.

The definition of “tributary” gives EPA broad authority to control any area where it thinks they can see a bed, bank, and “ordinary high water mark” -

- According to the final rule preamble, EPA and the Corps can identify tributaries by using remote sensing technology such as LiDAR, even though the Corps’ guidance says this is not appropriate and the U.S. Geological Survey warns that LiDAR will find channels everywhere, most of which will be erosion features, not water.

The final rule gives EPA the power to control -

- Any prairie pothole, vernal pool or wetland that EPA has declared a “regional water treasure,” affecting farmers’ fields and other land in ND, SD, IA, MT, MN, WI, TX, LA, MS, AL, GA, FL, SC, NC, TN, VA, MD, DE, NJ, NY, CT, MA, NH, ME, and CA.
- All waters in a 100-year floodplain of a navigable water and all waters 4,000 feet from a navigable water *or* a tributary, if EPA finds a “significant nexus.”

A “nexus” that creates jurisdiction has no meaningful limits because -

- **A claim that water provides “life cycle dependent aquatic habitat” for a species that spends part of its time in a navigable water.** This definition defies the limits placed on EPA and the Corps of Engineers (Corps) by the Supreme Court, which, in 2001, ruled that the mere fact a pond is used by “approximately 121 bird species . . ., including several known to depend upon aquatic environments for a significant portion of their life requirements” does *not* create federal jurisdiction.
- **Flow, including seepage into groundwater aquifers.** The final rule allows groundwater connections to create jurisdiction even though, according to Secretary Darcy, “The Corps has never interpreted groundwater to be a jurisdictional water or a hydrologic connection because the Clean Water Act (CWA) does not provide such authority.” Some aquifers, like the Ogallala in the Midwest and the Floridian in the Southeast, lie below multiple states and cover vast areas.
- **The ability to hold water.** This describes every single wetland and pond in existence.