

# EPA POWER GRAB: FINAL “WATERS OF THE UNITED STATES” RULE

## QUICK STATS

- ✘ **CONFERENCE:** Regulation
- ✘ **TEAM:** Environmental Protection Agency
- **FUMBLE:** \$500 million per year in costs to businesses and federal intrusion in private water and land rights
- **HOW TO RECOVER THE BALL:** Federal Water Quality Protection Act; Congressional Review Act resolution of disapproval; funding limitation in FY 2016 Appropriations Bill



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Since the Clean Water Act was signed into law in 1972, EPA has defined and regulated America’s navigable waters, which are waters “that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”<sup>177</sup>

When EPA and USACE finalized the “Waters of the U.S.” (WOTUS) rule on August 28, 2015, they blew the former definition out of the water. The new rule expands the definition into tributaries and small rivers, which were previously regulated and protected by state governments, and expands the amount of waters that require a site-specific “jurisdictional” determination.<sup>178</sup> The result is more federal involvement in land-use decisions and a lessened ability to know whether a specific project requires a federal permit.

Most Americans can agree that protecting natural resources and water sources is important. When it comes to navigable waters that support interstate commerce, it is even a constitutional and national responsibility. But when the agency in charge of administering the regulation describes the rule as “contradict[ory to] long-standing and well established legal principles” in an internal memo, it should be a reminder that even EPA cannot create policies that fall outside of the jurisdiction Congress gave it.<sup>179</sup>

An expansive definition could mean expensive changes for anyone using the land for farming, energy exploration, and building roads and bridges. The farming community could see the need for additional permits to carry out activities that they have done for years, like fertilizing fields or putting in fences, if these activities are done near ditches deemed navigable waters—or risk being fined thousands of dollars for each day they are in “violation.”<sup>180</sup> This only increases the cost of goods for American families and with little to show for it but paperwork.

State and local governments have protected local water sources for years. Because they are closer to the source, these government entities know how to do it best. Immediately after the rule’s final issuance, 27 states stood up to assert their authority by suing EPA and USACE. A

federal court then placed a temporary block on regulation enforcement, noting the burden the rule placed on state and private entities. In addition the court noted serious concerns about whether the rule exceeds EPA's jurisdiction, as previously articulated by the Supreme Court. The court also echoed USACE criticisms of the process by which changes to the rule were adopted during the rulemaking process, including whether EPA supported its policy choices with sufficient science. EPA should not disregard the limits of its own authority in the rulemaking process and issue such a rule that is unsubstantiated by both science and necessity.

## **RECOVERY**

On April 30, 2015, Senator John Barrasso (WY) introduced a bipartisan bill to require EPA and

USACE to rewrite the burdensome WOTUS rule.<sup>181</sup> Unfortunately a majority of Senate Democrats ultimately blocked the bill. Senator Joni Ernst's (IA) joint resolution of congressional disapproval of the WOTUS rule did successfully pass the U.S. Senate on November 4, 2015.<sup>182</sup> This joint resolution would roll back EPA's WOTUS rule and prevent the federal government from taking control of what it broadly defines as "navigable waterways." Congress should also consider preventing EPA and USACE from implementing this rule with funding limitations in the appropriate FY 2016 appropriations legislation. EPA should restart its rulemaking on this issue and reach out for valuable input from all Americans—rural farmers to small business owners.

*[For more information, please visit:](#)*

[Federal Register: Clean Water Rule: Definition of "Waters of the United States"; Final Rule S.J.Res.22](#)

[US Court of Appeals: Sixth Circuit Opinion](#)

[Army Corps of Engineers: Waters of the US Memos](#)