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# Clean Water Act/Definition of "Waters of the United States" Final Rule: U.S. Senate Environment and Public Works Committee Majority Staff Report

## Arkansas Environmental, Energy, and Water Law Blog

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The United States Senate Environment and Public Works Committee Majority Staff ("Committee") issued a September 20<sup>th</sup> report titled:

*From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles, and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency Under the Clean Water Act*

The purpose of the report is described as reviewing claims made by the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") regarding the agency's jurisdiction over land and water under the Clean Water Act under both currently applicable regulations and the recently promulgated waters of the United States ("WOTUS") final rule.

The WOTUS rule defines the key Clean Water Act jurisdictional phrase "waters of the United States".

The rule represents EPA and the Corps interpretation of the scope of waters protected under the Clean Water Act. See 80 Fed. Reg. 37054.

EPA has stated that the goal of the final rule is to clarify the scope of "waters of the United States", based upon the text of the statute, Supreme Court decisions, best available peer-review science, public input, and the agency's technical expertise and experience in implementing the statute.

A number of states and other organizations have challenged the validity of the final rule. Other organizations have intervened to support the final rule.

The Committee report argues that "case studies" it has reviewed demonstrate the new regulation will "codify many of the most extreme overreaches of federal authority asserted by these agencies". It further concludes:

Although the new regulation is currently stayed, pending the outcome of litigation challenging the rule, these case studies demonstrate that assurances given by EPA and the Corps regarding the scope of the WOTUS rule and its exemptions to the positions taken by these agencies in jurisdictional determinations and in litigation are factually false.

Additional conclusions that the Committee report believes can be drawn from the case studies include:

- EPA and the Corps have and will continue to advance very broad claims of jurisdiction based on discretionary authority to define their own jurisdiction.
- The WOTUS rule would codify the agency's broadest theory of jurisdiction, which Justice Kennedy recently called "ominous".
- Landowners will not be able to rely on current statutory exemptions or the new regulatory exemptions because the agencies have narrowed the exemptions in practice and simply regulate it under another name. For example, if activity takes place on land that is wet:
- Plowing to shallow depths is not exempt when the Corps calls a soil between furrows "mini-mountain ranges," "uplands", and "dry land";
- Discing is regulated even though it is a type of plowing;
- Changing from one agricultural commodity constitutes a new use that eliminates the exemption; and
- Puddles, tire ruts, sheep road, and standing water all can be renamed "disturbed wetlands" and regulated.
- If Congress does not act, the newly one ability to challenge Corps jurisdictional determinations and claim exemptions will be moot because the WOTUS rule establishes jurisdiction by a rule that will extend to all agencies described in the case studies.

The six case studies examined in the report include:

- Regulation of farmland
- Regulation based on remote sensing and aerial photographs
- Regulating the roads, ditches, and puddles
- Expanding the definition of wetlands
- Ephemeral drainage as waters of the United States
- Ecological functions, not impacts to navigable water, create jurisdiction

[A copy of the 38-page report can be downloaded here.](#)