



Regulation Review

Final WOTUS Rule

MAY 28, 2015

The Environmental Protection Agency (EPA) recently released the final version of its much anticipated “Water of the United States” (WOTUS) rule. The rule seeks to define the waterways under EPA’s jurisdiction under the Clean Water Act (CWA). The unofficial, pre-publication version of [the rule](#) is 297 pages. The American Action Forum (AAF) previously reviewed its proposed version [here](#).

BREAKDOWN

- Proposed Rule Costs: \$166.4 Million (\$64.6 in Federal expenditures or costs of “past actions”)
- Final Rule Costs: \$462.9 Million (\$2.1 Million in Federal government costs)

ANALYSIS

Even after more than one million public comments and intense public scrutiny (including multiple bills in Congress addressing it), its final high-end cost estimate is a significant increase from the proposed version. This is due to “an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations (JDs) annually.” Nonetheless, EPA makes sure to stress how this rule will “narrow” and “clarify” the scope of WOTUS criteria.

Although EPA may have narrowed the scope of potential waterways, it makes clear that those covered by the CWA will be more likely to receive positive JDs than in the past, and thus more likely to face the permitting process and its subsequent costs. For instance, the following is EPA’s calculation (from its [Economic Analysis](#)) for the high-end increase in JDs:



Note how in column E, EPA assumes that: 1) streams and wetlands in question will essentially face an automatic JD, and 2) “Other Waters” will face an increase from zero percent under current standards to 34.5 percent for the rule. Despite a series of explicit exclusions – including “puddles,” among others – there are apparently certain waterways that now face a more certain fate because of this rule and the subsequent CWA requirements. The following are now explicitly covered:



The most significant aspect of this “automatic jurisdiction” is for subpart (1)(vi), or “adjacent” waters. According to the Economic Analysis, this accounts for 17.1 percent of the 34.5 percent change noted in *Figure 3* because: “Prior to the new rule, non-wetland adjacent waters were subject to a case-specific analysis because the definition of 'adjacent' applied only to wetlands, not all waters.”

Beyond those six categories, there are a series of other potential waterways that, pending a “significant nexus” test, could also face a positive JD. The first subset includes some oddly particular areas: “Prairie potholes,” “Carolina bays and Delmarva bays,” “Pocosins,” “Western vernal pools,” and “Texas coastal prairie wetlands.” The second subset is far more ambiguous in nature:

(viii) All waters located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark.

EPA discounts the effect of this broader category, claiming that many of the areas covered by it would already likely face the more definitive jurisdictional determinations. However, it follows that the “if a portion” aspect could open that range up further as a waterway and it would need only graze that boundary for it to apply.

EPA claims to have listened to the overwhelming input and scrutiny it has faced on this rule during the past year, but there are still significant issues lingering. It would not be surprising to see this rule face continued legislative and judicial resistance. Although EPA has perhaps made its jurisdiction “clearer,” it is also clearly more focused on exerting its CWA authority and imposing millions in economic costs.