

LARIMER COUNTY AGRICULTURAL ADVISORY BOARD  
Information from Special Meeting on August 13, 2014

Presentation regarding Waters of the US – USEPA Region 8

From the presenter: Rebecca Perrin, Region 8 Agriculture Advisor | Office of the Regional Administrator | USEPA, 1595 Wynkoop Street | Denver CO 80202

The current definition for Waters of the US is <http://www.gpo.gov/fdsys/pkg/CFR-2011-title33-vol3/pdf/CFR-2011-title33-vol3-part328.pdf>

- Waters of the US Website: <http://www2.epa.gov/uswaters>
- Proposed Rule: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0001> (Pages number for the pdf Federal Register (FR) version on this website.)
  - o Executive Summary: pages 22190 – 22195 (or pages 4 – 9 if viewing the pdf electronically.)
  - o Proposed rule language: pages 22262 – 22263 (or page 76 -77)

Presentation in pdf and also on website.



# **Waters of the U.S. Proposed Rule: Additional Background and Information**

Larimer County  
Agriculture Advisory Board  
August 13, 2014  
Presented by  
EPA Region 8

The background of the slide is a photograph of a stream heavily polluted with plastic waste. Numerous pieces of clear, blue, and white plastic are scattered throughout the water and along the rocky banks. The water appears murky and the overall scene is one of environmental degradation.

What is covered under the Clean Water Act?

What is exempt from the Clean Water Act?

What are currently Waters of the U.S.?  
How does this change under the proposed rule?

The background of the slide is a photograph of a stream heavily polluted with plastic waste, including bottles, bags, and other debris. The water is murky and the surrounding area is cluttered with trash.

What is covered under the Clean Water Act?

What is exempt from the Clean Water Act?

What are currently Waters of the U.S.?  
How does this change under the proposed rule?

The Clean Water Act permitting requirements apply when there is discharge of a pollutant from a point source into a Water of the U.S.



e.g., Wastewater treatment plants



e.g., dredge and fill

Am I regulated under the Clean Water Act?

No

**NO CHANGE:** This proposed rule doesn't affect your activity.

Yes

What is exempt from the Clean Water Act?

What are currently Waters of the U.S.?  
How does this change under the proposed rule?

Am I regulated under the Clean Water Act?

No

**NO CHANGE:** This proposed rule doesn't affect your activity.

Yes

What is exempt from the Clean Water Act?

What are currently Waters of the U.S.?  
How does this change under the proposed rule?

# What is exempt from the Clean Water Act?

- Prior Converted Cropland and Waste Treatment Systems are NOT Waters of the U.S. under the current regulatory definition

\*These exemptions are **not changed** and the proposed rule **does not change** how these exemptions are implemented





# What is exempt from the Clean Water Act?

- **Agricultural stormwater discharges.**
- **Return flows from irrigated agriculture.**
- Normal farming, silviculture, and ranching practices.
- Upland soil and water conservation practices.
- Construction and maintenance of farm or stock ponds or irrigation ditches.
- Maintenance of drainage ditches.
- Construction or maintenance of farm, forest, and temporary mining roads.

\*Exemptions for agricultural activities are **not affected** by the proposed rule

# What is exempt from the Clean Water Act?

- Exemptions are self-implementing
- Approval from EPA or the Corps of Engineers is not required
- Section 404(f) exemptions apply as long as the activities do not bring an area of waters into a new use that may impair the flow or reduce the reach of those waters.
- If you are unsure, call your local Corps office.



Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

What are currently Waters of the U.S.?  
How does this change under the proposed rule?

Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

**What are currently Waters of the U.S.?**

How does this change under the proposed rule?

# The Clean Water Act (CWA)

- The CWA covers “navigable waters,” defined in the statute as “waters of the United States including the territorial seas”
- The statute does not further define “Waters of the U.S.,” but leaves it to Corps and EPA to add detail through rulemaking
- The current regulatory definition is essentially unchanged since the late 1970s



# What is the current definition of Waters of the U.S.?

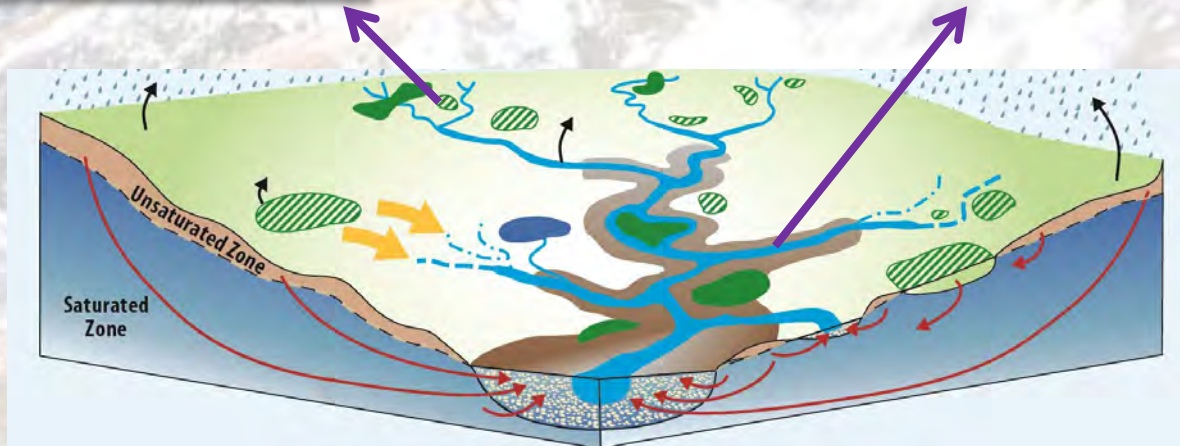
- Traditionally Navigable Waters: waters used in interstate or foreign commerce (past, present and future)
- Territorial seas
- Interstate waters
- Impoundments of waters of the U.S.
- Intrastate waters, where their use, degradation, or destruction could affect interstate commerce
- Tributaries of above waters
- Wetlands adjacent to above waters

# What is the current definition of Waters of the U.S.?



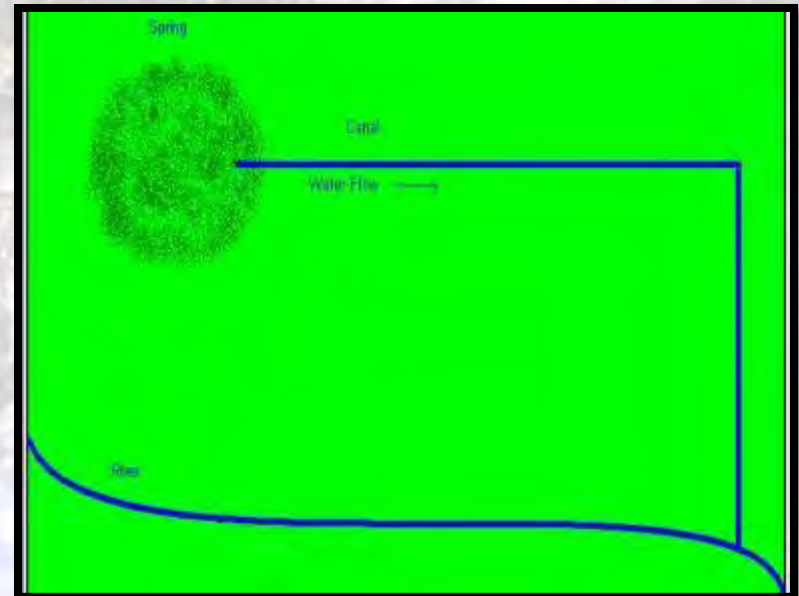
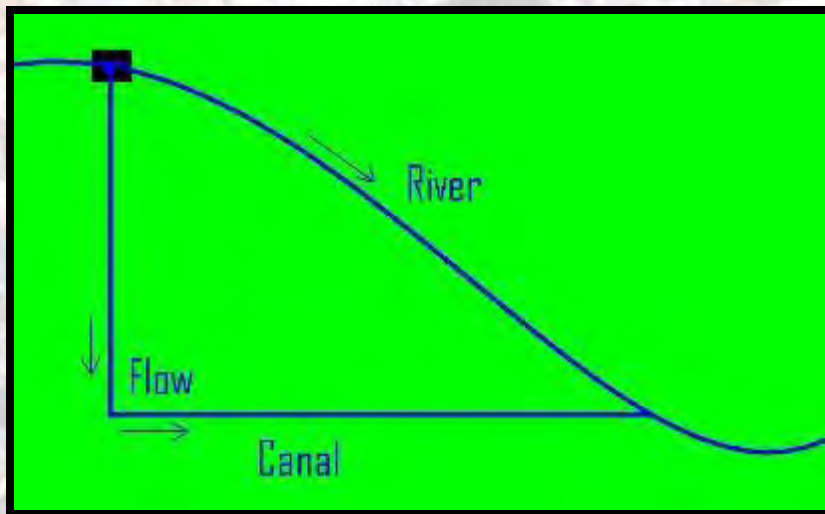
Ordinary High Water Mark

Wetlands



# What is the current definition of Waters of the U.S.?

- Some ditches are Waters of the U.S., for example:
  - If a ditch receives water from a regulated stream and discharges into a regulated water.
  - If a ditch drains water from a spring or wetland into a regulated waterway.





# How did the Supreme Court affect implementation of these regulations?

- ***Riverside Bayview*** (1985): Upheld agencies' regulatory definition, including "adjacent wetlands" as waters of the U.S.
- ***SWANCC*** (2001): Use of water by migratory birds is not a sufficient basis for CWA jurisdiction.
- ***Rapanos and Carabell*** (2006): Relative flow permanence and significant nexus are used as standards for case-by-case evaluation of jurisdiction

# How did the Supreme Court affect these regulations?

- Traditionally Navigable Waters: waters used in interstate or foreign commerce (past, present and future)
- Territorial seas
- Interstate waters
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- Intrastate waters, where their use, degradation, or destruction could affect interstate commerce
- Tributaries of above waters
- Wetlands adjacent to above waters

Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

No

What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to some definitions

**CHANGES PROPOSED** for some definitions

**ADDED** as NOT Waters of the U.S.

Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

No

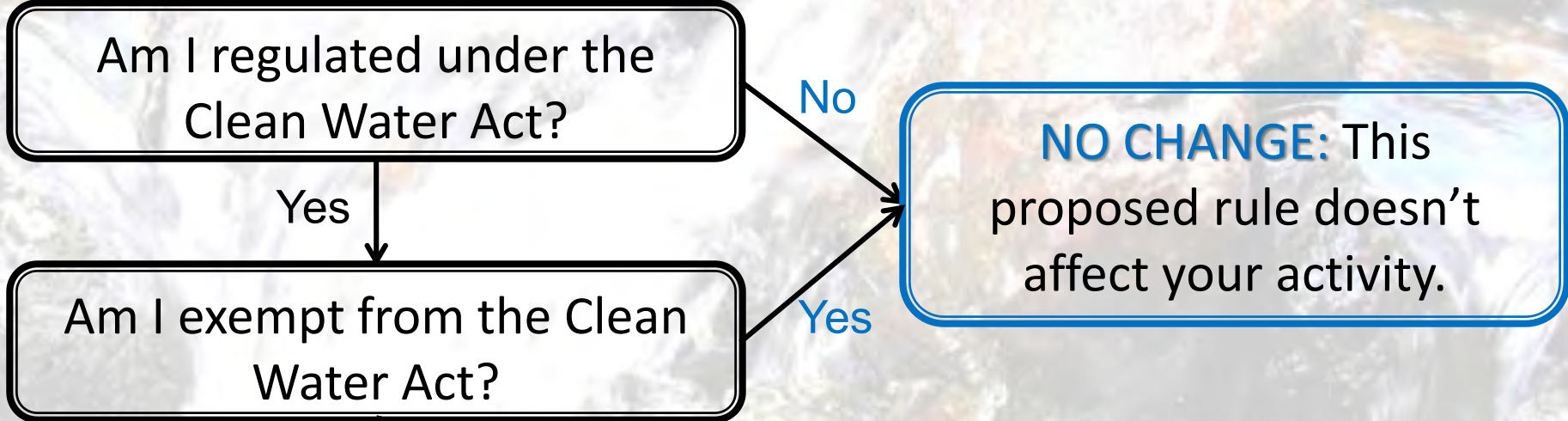
What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to these definitions:

**CHANGES PROPOSED** for some definitions

**ADDED** as NOT Waters of the U.S.

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments of WOUS



What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to these definitions:

**CHANGES PROPOSED** for some definitions

**ADDED** as NOT Waters of the U.S.

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments of WOUS

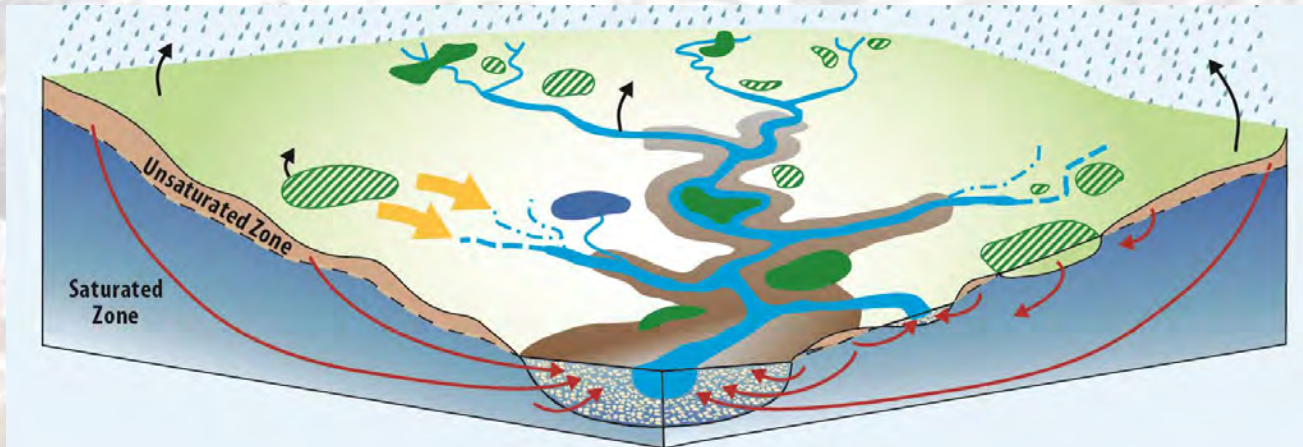
# Proposed Rule: What are Waters of the U.S.?

- Tributaries are jurisdictional when they meet the regulatory definition of tributary. The Rule defines tributary as **waters with bed and banks and an ordinary high water mark that contribute flow to traditionally navigable waters, interstate water or territorial seas.**



# Proposed Rule: What are Waters of the U.S.?

- Adjacent waters are jurisdictional. **Adjacency applies to all waters, not just wetlands.**
- Existing regulations define “adjacent” as “bordering, contiguous or neighboring.” **This rule adds a definition of neighboring.**



# Proposed Rule: What are Waters of the U.S.?

- The language about intrastate waters with an effect on interstate commerce is removed.
- **Indicates “other waters” are jurisdictional only where a case-specific analysis shows they have a significant nexus to a traditionally navigable water, interstate water or territorial sea.**
- **Indicates “other waters” may be aggregated where they perform similar functions and are located close together in the same watershed.**



Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

No

What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to these definitions:

**CHANGES PROPOSED** for these definitions:

**ADDED** as NOT Waters of the U.S.

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments of WOUS

- Tributaries
- Adjacent Waters
- Other Waters

Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

No

What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to these definitions:

**CHANGES PROPOSED** for these definitions:

**ADDED** as NOT Waters of the U.S.

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
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- Tributaries
- Adjacent Waters
- Other Waters

# Proposed Rule:

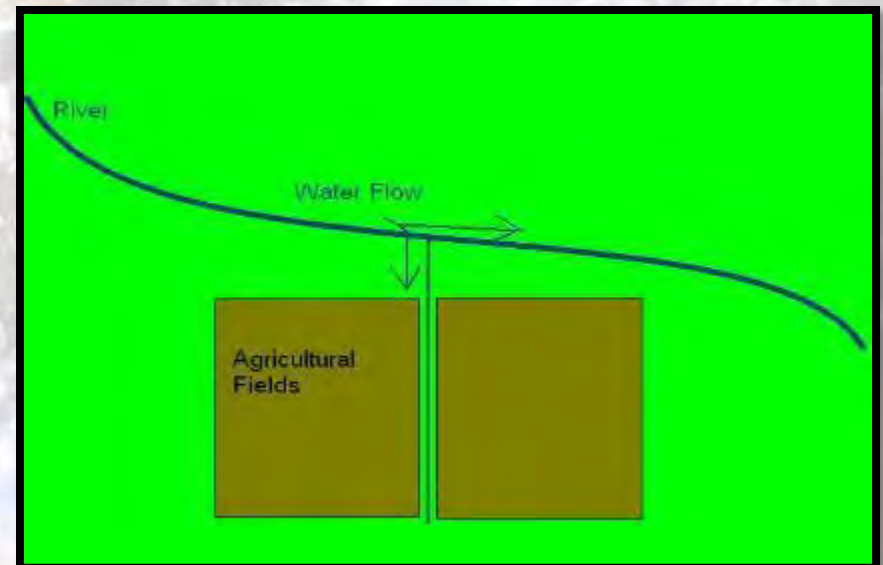
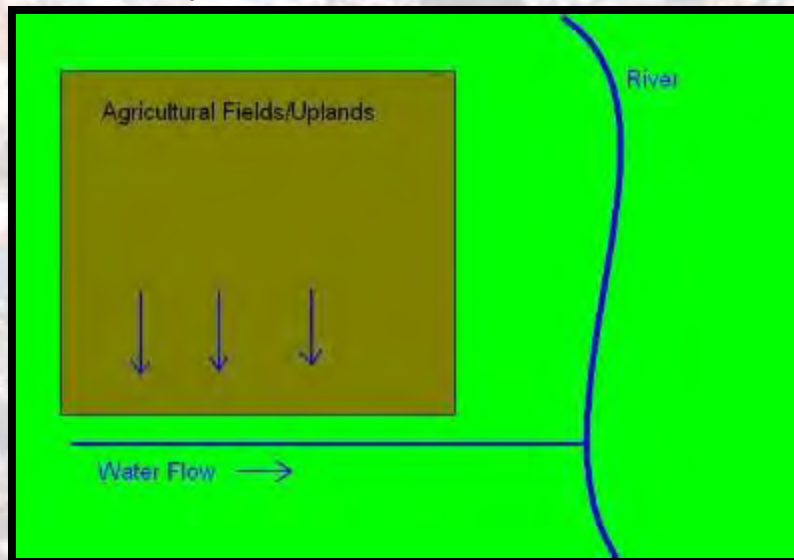
## What waters are NOT waters of the US?

- Irrigated areas that would revert to upland if irrigation ceased
- Artificial lakes or ponds created on dry land and used exclusively for stock watering, irrigation, settling basins or rice growing
- Small ornamental waters created on dry land
- Water-filled depressions created incidental to construction activity
- Groundwater, including groundwater drained through sub-surface drainage systems
- Gullies and rills and non-wetland swales

# Proposed Rule:

## What ditches are now exempt?

- Ditches that are excavated wholly in uplands, drain only uplands, and that have less than perennial flow
- Ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water, interstate water or territorial sea



Am I regulated under the Clean Water Act?

Yes

Am I exempt from the Clean Water Act?

No

Yes

**NO CHANGE:** This proposed rule doesn't affect your activity.

No

What are currently Waters of the U.S.?  
**How does this change under the proposed rule?**

**NO CHANGE** to these definitions

**CHANGES PROPOSED** for these definitions

**ADDED** as NOT Waters of the U.S.

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments of WOUS

- Tributaries
- Adjacent Waters
- Other Waters

- Certain water features
- 2 types of ditches



Please provide comments!!!

The EPA and the Corps want your input  
on the Proposed Rule

The public comment period has been  
extended to **October 20, 2014**

[www.epa.gov/uswaters](http://www.epa.gov/uswaters)