

Proposed Clean Water Act Rule: Redefining Waters of the U.S.

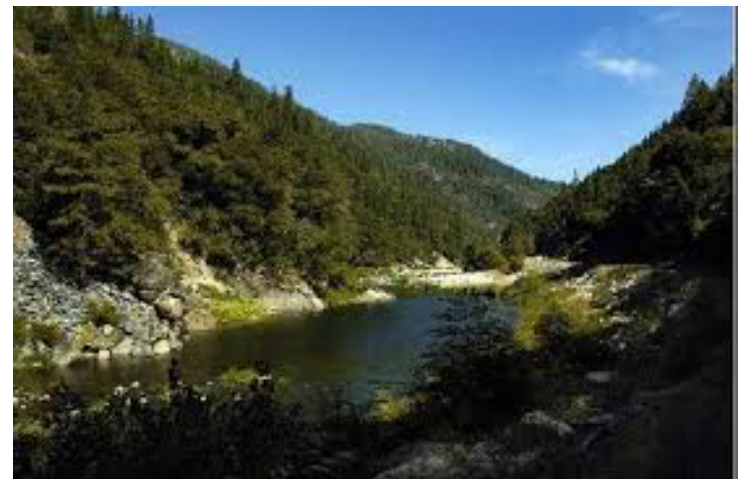


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Waters of the U.S.

- No change from current rule
 - Waters susceptible to interstate commerce (traditionally navigable waters)
 - All interstate waters
 - Impoundments of the above waters
 - The territorial seas



Tributaries: Jurisdictional and Defined



- Water physically characterized by the presence of a bed and banks and high water mark.
- Wetlands, lakes and ponds if they contribute flow directly or indirectly to WoTUS.
- Can be natural, man-altered or man-made and includes canals, ditches, impoundments, rivers, streams, lakes, and ponds.

Translation:

- Any water that meets the proposed definition of a tributary whether it is perennial, intermittent, or ephemeral is WoTUS.

Ditches



- Jurisdictional
 - Natural streams that have been altered
 - Perennial flow
 - Connect 2 or more WoTUS
- Excluded
 - “excavated wholly in uplands, drain only uplands, **and** have less than perennial flow”
 - “do not contribute flow, either directly or through another water to a traditionally navigable water, interstate water, territorial seas or an impoundment of a jurisdictional water.



Ditches with 404 permits: No mention of current guidance (RGL 07-2) exempting construction and maintenance of irrigation ditches.

Adjacent Waters: Wetlands and More!

- Adjacent: bordering, contiguous or neighboring
- Jurisdictional
 - Wetlands and water bodies such as ponds and lakes
 - Neighboring waters
 - “all waters located within the riparian area or floodplain.. or waters with a confined surface or shallow subsurface hydrologic connection to a jurisdictional water”.



Adjacent Waters: More New Definitions



- Floodplain
 - Inundated during periods of moderate to high water flows
 - Flood frequency based on location
- Riparian Area
 - Borders a water
 - Surface or subsurface hydrology directly influences the ecological processes and plant and animal community structure in that area
- Confined Surface
 - Permanent, intermittent or ephemeral surface connections through directional flowpaths.
- Subsurface Connection
 - Lateral water flow through a shallow subsurface layer.
 - In contact with the same shallow aquifer as adjacent or neighboring waters.
 - Within or below the root zone.

Significant Nexus and Other Waters

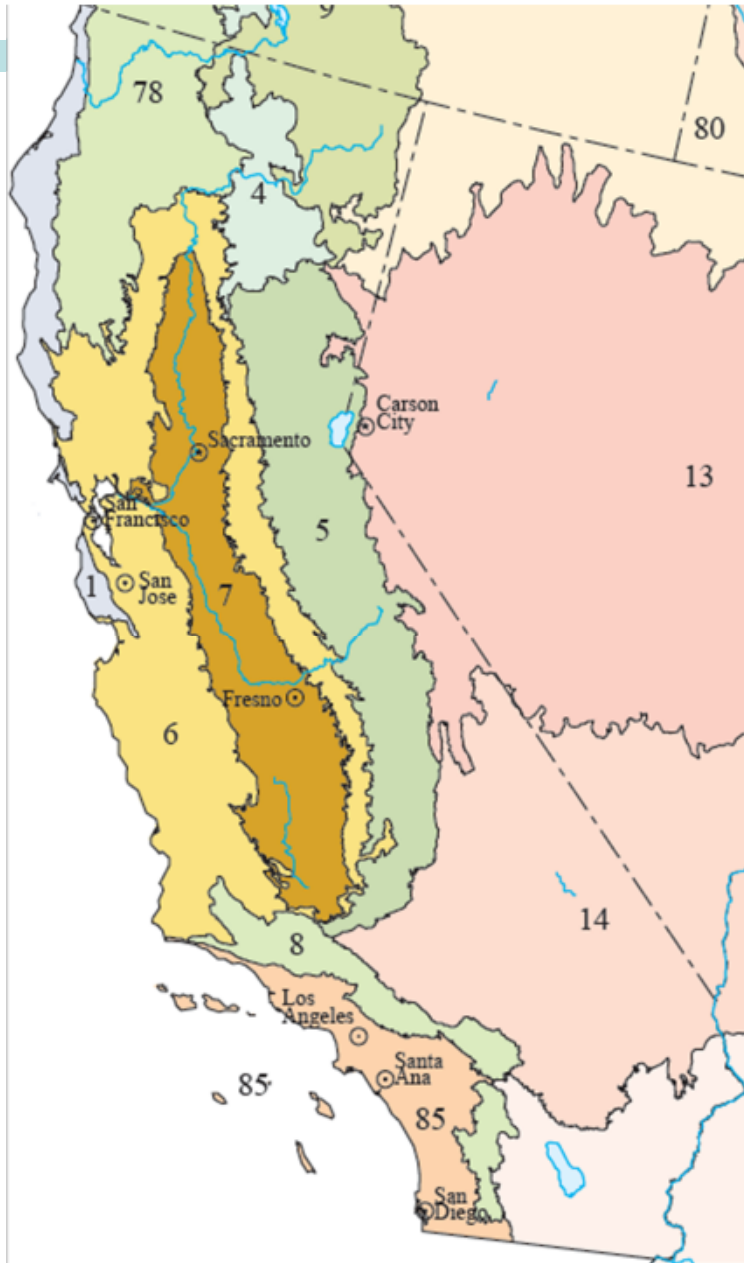


Theory: “Other waters” subject to a case specific “significant nexus” test

Proposed Rule:

- Analyze chemical, physical or biological effects individually or together with all similarly situated “other waters” in the region.
- “similarly situated” waters:
 - Perform similar functions
 - Sufficiently close together, or close to jurisdiction water
 - Can be evaluated as a single landscape unit
- In the region
 - Watershed that drains to the nearest WOTUS through a single point of entry

“Other Waters”



- Goal: overarching framework to minimize case specific analysis of jurisdiction.
 - Level III Ecoregions (or even finer gradation)
 - 25/85 regions in continental US are jurisdictional
 - CA regions 6,7,8,78, and 81 jurisdictional
 - Hydrologic landscape regions
 - Inclusion by specific rule: western vernal pools, Texas coastal prairie wetlands.

Exemptions



- Waste treatment systems designed to meet the requirements of CWA
- Specific ditches
- Prior converted cropland
- “The following features”
 - Artificially irrigated areas
 - Artificial lakes and ponds
 - Artificial reflecting pools
 - Groundwater
 - Water filled depressions
 - Gullies

Interpretive Rule under 404(f)(1)(A)



- 56 specific NRCS conservation practices exempt from permit requirements. Weed control
 - Tree/Shrub pruning
 - Mulching
- Lots of good ones left out!
- Urban counterpart??
- Concerns about turning voluntary NRCS programs into mandatory practices.
- Enforcement issues

More Permits

**404
dredge
and fill**

**402
pollution
discharge
permit**



This in turn result in need for 401 water quality permits and NEPA reviews



This in turn results in consultation with federal agencies that could trigger ESA consultations.

Water Transfer Rule



- Exemption from CWA NPDES discharge permits vacated by district court in Southern NY
- Oregon case upholding Klamath River transfers being appealed to 9th Circuit
- No mention of exemption in this rule

ACWA Action



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More Questions



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