

# ENVIRONMENTALISTS SEE REGULATORY, FUNDING GAPS AMID CLEAN WATER ACT ROLLBACK



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Hiking near a snow-speckled mountain on a late spring day, it's not hard to find water running through a narrow stream. Come back several months later, and that stream might be empty.

In Nevada, most waterways work this way. Roughly 90 percent of the state's streams are intermittent or ephemeral, running at only certain times of the year in response to snowmelt or precipitation, according to data compiled by the Nevada Division of Environmental Protection (NDEP).

It's a fact throughout the West, from Arizona to New Mexico. Many streams are seasonal.

Scientists say these streams, despite running irregularly, are important for ecosystem health in arid areas. They connect waterways, replenish groundwater supplies and support wildlife. That's one reason many environmentalists are concerned about a Clean Water Act rollback, set to go into effect later this month, that would exclude most of these streams from federal protection.

In 1972, Congress passed the Clean Water Act, giving the federal government the authority to protect and regulate water. But for years, states, activists and industry have argued over its scope. And the new rule offers a narrower interpretation of

the federal government's role.

Although the Clean Water Act will still protect heavily used waterways in Nevada, including the Colorado River and the Truckee River, it excludes many wetlands and most seasonal streams.

As a result, the rule has set off a flurry of legal challenges from environmental groups. And in recent months, several Democrat-led Western states, including Colorado, California and New Mexico, have sued the Trump administration to challenge the final rule.

Nevada has not joined those suits. In comments submitted last year, NDEP described it as a "considerable improvement" over the Obama-era rule it replaced. Still, state regulators say they are evaluating the new rule's total effect, and they expect to have to adjust existing permitting programs. They argue any gaps in protecting water quality will be addressed under state law.

But several environmental groups say it is too early to tell.

Joro Walker, a lawyer with the Western Resource Advocates, questions whether Western states have the enforcement resources to enforce the rules as the federal government steps back.

"The practical aspect of this is incredibly important," said Walker, who works in the Mountain West. "If the state is not equipped, having great law doesn't really matter if you can't enforce it."

## **The regulatory gap**

As the state's environmental agency, NDEP is responsible for enforcing the state's water quality standards. Jennifer Carr, the agency's deputy director, said that the division is still mapping out how many streams and wetlands would lose federal

protection under the Clean Water Act.

Whatever the volume, the state expects to assume more regulatory responsibility.

“We have all the authorities in place that are needed to permit any sort of discharge activity in the state of Nevada, whether it's federally jurisdictional or not,” Carr said in an interview.

Like many states, Nevada has a permit program for maintaining water quality when developers seek to discharge water into streams or groundwater. But when it comes to modes of development that seek to dredge and fill wetlands protected under the Clean Water Act, the permitting process is done with the U.S. Army Corps of Engineers. That is expected to change.

“The fine points of whether or not a specific existing program needs a little bit of enhancement or refinement is one of the things that we're working through at this point in time,” Carr added.

The new rule redefines which wetlands are protected under the federal law. With more wetlands eliminated from federal jurisdiction, it's likely that the state would have to issue more permits on its own. Carr said it is “one of the real, more specific examples” where the agency might need to adjust an existing program for developers applying for a state “Working in Waterways permit.”

Regulators do not process many Clean Water Act wetland permits each year, Carr said. Over the past 12 years, she said the state has worked on about 16 wetland permits and five spring permits. She also noted that the majority of discharge permits, issued under the Clean Water Act over the past 12 years, have been for waters that remain protected under the new rule.

In other cases, the new rule calls into question whether even some larger rivers fall under the Clean Water Act. As part of the rulemaking, the Trump administration

approved a more narrow federal definition of what the Clean Water Act protects as Waters of the United States, or WOTUS.

The rule does not include all interstate waters. Instead, it ties protection to whether a waterway was traditionally navigable for commerce. This issue could leave the Walker River, which rises in northern California and runs through western Nevada, without federal protection, Carr said.

State regulators, she added, are “looking very closely at the Walker River and what its ultimate jurisdictional status might be,” but Carr noted that it would still be protected under state law.

With a more narrow WOTUS definition, environmentalists are concerned about shifting much of the responsibility for protecting water quality to state agencies, with often limited resources.

“If you're Nevada and all of the sudden 99 percent of streams, rivers and washes are [not] protected, that's a huge assumption of responsibility that you're going to have to undertake,” said Brett Hartl, government affairs director for the Center for Biological Diversity.

In many cases, federal funding for state-led compliance is tied to the amount of water, within a state boundary, that is protected by the Clean Water Act. As federal protection is removed for mapped streams, wetlands and other rivers, it could translate to less federal funding.

Carr said NDEP has raised this concern with EPA, which has said that it will keep funding stable in the short-term. She said the state agency will be working with EPA on the long-term formula.

## **Where pollution comes from**

The state regularly evaluates the conditions of federally-protected waters in a triennial report. That document examines whether protected waters meet the standards of “beneficial use” for aquatic life, fish consumption, irrigation, municipal supply, recreation and livestock watering.

In the [most recent assessment](#), published in April, NDEP concluded that only about 30 percent of roughly 700 waterbodies met that threshold. NDEP reported that there was “insufficient” data to draw conclusions about 34 percent of the waterbodies examined. And about 35 percent of waters were not meeting the standards established for at least one of the potential uses.

The public review, however, only provides a snapshot of water quality in the state. It focuses on Nevada’s heavily used rivers. But the report does not include information for ephemeral and intermittent streams, which account for about 90 percent of the state’s waterways.

And of the waterbodies assessed, the report assessed about 43 percent of year-round streams, 69 percent of lakes and reservoirs and about 41 percent of fresh wetlands.

Across the state, the leading cause of impaired water is elevated phosphorus levels, which [can be caused](#) by fertilizers, agriculture, stormwater and the disposal of home items.

Phosphorus accounts for about 21 percent of impaired water. Temperature accounts for another roughly 13 percent, what NDEP said could result from the destruction of shaded vegetation around a waterway.

The majority of impaired waters — about 57 percent — failed to meet standards set out for the protection of aquatic life. About 16 percent do not meet standards for recreations with contact.

**Table ES-2. Number and Percentage of Impairments by Beneficial Use**

<b>Beneficial Use Code</b>	<b>Beneficial Use</b>	<b>No. of Impairments by Beneficial Use*</b>	<b>% of Total Impairments by Beneficial Use</b>
<b>AQL</b>	Protection of Aquatic Life	391	57.2%
<b>FC</b>	Fish Consumption (Hg)	40	5.8%
<b>IRR</b>	Irrigation	50	7.3%
<b>MDS</b>	Municipal/Domestic Supply	83	12.1%
<b>RWC</b>	Recreation with Contact	109	15.9%
<b>WLS</b>	Watering of Livestock	11	1.6%

\* Note: There may be multiple impairments per waterbody for each beneficial use, so the total number of impairments is **not** the same as the total number of impaired waterbodies.

*A table in NDEP's triennial report. (Nevada Division of Environmental Protection)*

This pollution is not always a result of direct discharges into streams. Many of the impairments noted in the report stem from what is known as nonpoint source pollution.

That type of pollution arises when indirect sources, such as runoff or rainfall pick up chemicals and nutrients, carrying them to a lake or a river. That makes nonpoint source pollution often challenging to regulate.

“It’s a big issue,” said Paul Comba, chief of NDEP’s Bureau of Water Quality Planning.

Comba said the state has worked on addressing nonpoint source pollution through streambank restoration, moving cattle to specific access points and educating the general public. The state has also developed 55 site-specific plans, approved by the EPA, that establish a maximum level of pollutants that can be discharged to a river or lake and still meet water quality standards.

The state is also working to update it’s antidegradation standards, which require

waterways to be protected in accordance with their natural quality, even if it is above beneficial use standards.

But resources are limited.

“Significant time and funding are needed to address impaired waters; this means that the pace of developing [maximum pollutant levels], watershed management plans, and alternative approaches may be slowed by staffing and budget constraints,” the report said.

### **The ongoing legal battle**

Pollution only tells one side of the story.

Development — filling wetlands or paving over small streams — can also degrade waterways. That’s why many environmental groups want to see wetlands and small streams, especially in Nevada, to be explicitly included in a broad definition of what the Clean Water Act protects.

Hartl, with the Center for Biological Diversity, notes that it has long been difficult to determine whether or not an ephemeral or intermittent stream fell under protection of the Clean Water Act.

“No one knows the answer until someone decides to pave over it,” he said.

For years, activists, politicians and the courts have argued over the scope of the Clean Water Act, specifically where the state’s jurisdiction begins and federal jurisdiction ends.

In 2015, the Obama administration broadened the scope of the Clean Water Act, applying it to wetlands and seasonal streams. The move came in response to significant confusion over a [2006 Supreme Court case](#) that produced no majority opinion and five separate opinions.

The Obama administration's rule started a new round of criticism and litigation, including from then-Gov. [Brian Sandoval](#) and Attorney General [Adam Laxalt](#). Joining 12 other states, Laxalt [sued](#), arguing that the Obama rule was an example of "unreasonable federal overreach."

After Trump was elected, he began the process of repealing and replacing the 2015 rule. Where Obama's rulemaking relied on Justice Anthony Kennedy's interpretation of the law, the Trump administration turned to a much narrower interpretation written by Justice Antonin Scalia.

Since the final rule was released in April, [environmental groups](#) and [more than a dozen states](#) have sued the Trump administration, kickstarting what is likely to be another round of lawsuits and court guidance. One of the litigants is [Environment America](#), which has a Nevada chapter.

Levi Kamolnick, state director for Environment Nevada, said that water does not abide by state borders. He worries lax regulation of seasonal streams in one state could affect Nevada. For that reason, Kamolnick said seasonal streams should be protected by the federal government.

According to an EPA analysis completed in 2009, about 27,000 Nevadans were served by drinking water systems that relied on intermittent, ephemeral or headwater streams, he added.

"We absolutely think that the Trump Dirty Water Rule runs counter to the intent of the Clean Water Act," Kamolnick said. "We believe strongly that any moves to exclude non-permanent water sources [from federal protection] is detrimental to the health of Nevadans."

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- *Center for Biological Diversity - \$100.00*

# NEVADA STATE OFFICIALS STAND BY AS EPA WITHDRAWS CLEAN WATER PROTECTIONS

By **Brian Bahouth** - September 15, 2019



*Conservation groups say seasonal wetlands in arid states like Nevada are likely to lose federal protections by repealing the Waters of the United States rule. (Ken\_Lund)*

Carson City – The Trump administration announced on Thursday the withdrawal of Obama-era anti-pollution protections for smaller streams, known as the Waters of the United States (WOTUS) rule – and in Nevada, state officials are not denouncing the move.

Listen to an audio report.



Nevada Attorney General Aaron Ford's statement says, "At this time, Nevada believes it would be in its best interest to remain under the pre-2015 WOTUS rule."

Scott Edwards, with the nonprofit Food & Water Watch, says states are free to raise their standards above the federal level – and thinks Nevada is too close to the mining industry.

"The whole Southwest mining industry is not well regulated by the state governments,"

Edwards charges. "A lot of the challenges to the Obama 2015 WOTUS rule were coming out of southwestern mining states, who didn't like what they claimed was the overreach of the Obama rule."

Several years ago, former Attorney General Adam Laxalt joined a dozen other states in suing the EPA to get the WOTUS rule overturned.

Neither Ford's office nor the Nevada Department of Environmental Protection would comment on the current status of that lawsuit, but NDEP said it is in agreement with Ford that Nevada is "better off" under the pre-2015 rules.

The 2015 rule made smaller waterways and seasonal streams subject to Clean Water Act protections.

Edwards claims that Trump's replacement rule will imperil the country's water supply and allow developers, industrial farming operations and mining concerns to pollute smaller waterways.

"Under an analysis of the Trump WOTUS rule, over half of the wetlands in this country will have protections stripped away from them," he adds.

During the public comment period, the EPA was deluged with pleas to keep the Obama-era rule. But the agency scrapped it anyway, and is expected to issue a less-restrictive set of rules later this year.

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## Agency Lands

The State Land Office functions as the real estate agency for a number of state agencies. Our current land portfolio consists of over 300,000 acres. Under statutory authority, we hold title to state lands and interests in state lands, such as easements and water rights. This agency acquires land needed for state use, whether it's land for a new DMV, a veteran's facility or a state park.

We work with our federal and local agency partners as well as willing

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private sellers to acquire land to help us achieve our mission to conserve, protect, manage and enhance the state's natural resources. We also dispose of land when directed by a legislative action or when a property no longer meets the need of a managing agency.

One of the main roles of the State Land Office involves authorizing uses of state land. We are experts in issuing permits, easements and licenses to use state land and routinely review applications for commercial, agricultural and recreational uses. We are always happy to review an application prior to submission to answer any questions you may have about our process.

We have an extensive collection of records associated with state land, and can assist with researching land patent information upon request. If you need a copy of a document or a map, we can provide that for a nominal fee.

## Sovereign Lands

Upon statehood in 1864, title to the bed and banks of navigable water bodies passed from the federal government to the new state. It's important to note that there are currently a limited number of sovereign lands that the state claims; not all of Nevada's lakes and rivers are considered state owned. Here's a list of state owned sovereign lands:

Lake Tahoe, Truckee River, Carson River, Colorado River, Walker Lake, Washoe Lake, Winnemucca Lake, and the Virgin River

The state owns the bed and banks of these bodies of water, generally to the ordinary and permanent high water mark. Our ownership typically doesn't extend to wetlands, tributaries or flood overflow areas. Any use or disturbance of sovereign land needs to be authorized by this agency. Structures like piers, buoys, irrigation diversions, and bridges need authorizations and are subject to an annual use fee. If a dredging project or aquatic invasive species removal is planned, we can issue a short term authorization for these

uses. In order to obtain authorization, [please review our authorizations and permitting page](#) and submit the appropriate application to our office.

## School Trust Land

Pursuant to the Enabling Act of 1802 from the federal government, Nevada was originally granted sections 16 and 36 in each township (totaling approximately 3.9 million acres), to be taken when the land was surveyed. However, surveys were slow to be completed, and the state suggested a different approach and received approval for a land exchange from Congress.

In 1880, the state exchanged its remaining grant lands for 2 million acres of land to be selected by the state in any location where federal lands were available. The state then went on to sell these “state selection” lands, depositing revenues into the Permanent School Fund. By the early 1900’s, only a few parcels of land remained.

In 1926, the state once again requested and received approval from Congress to exchange the remaining lands for a like number of replacement acres. After returning to the federal government 30,000 acres of low potential land, the state was basically given a “credit” of 30,000 acres of federal land that could be acquired for the benefit of the trust. Most of these “exchange” lands were selected, sold, and the proceeds were deposited in the fund.

Currently the state holds about 3,000 acres of school trust lands concentrated in Washoe County, Carson City, Nye County and Clark County. These lands are considered assets to the trust and must be managed to generate revenue for the School Fund.

Persuant to NRS 387, the State Treasurer is the legal custodian of all securities in which the moneys of the State Permanent School Fund are invested.

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