

“Waters of the United States” USEPA and Corps Proposed Rule

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Introduction

- On March 25, 2014, USEPA and the Corps proposed a rule that would expand their regulatory authority under the Clean Water Act.
- Long, complicated proposal
- Will cover only the main issues today

Introduction

- Draft “connectivity report” used to claim that, from a scientific standpoint, all waters have a chemical and ecological nexus to one another. Not a new concept.
- The new concept: USEPA/Corps made a policy decision that all connections between waters are “significant” regardless of how much or how often they actually have water.

Introduction

- The claim: USEPA/Corps have claimed the rule would have minimal economic impact and not affect many acres (only about 1,300 nationwide).
- The truth: Tremendous economic impacts on the entire economy (agriculture, home building, mining, road construction, etc.)

Introduction

- At the same time they proposed the “WOTUS” rule, the agencies unveiled an interpretive rule (immediately effective) regarding farmer exemptions for conservation practices.
- The claim: USEPA/Corps claim these are a good thing for farmers.
- The truth: These exemptions are a “game changer” for agriculture.

What Will Be Covered Today

- Clean Water Act basics
- How we got here
- What USEPA and the Corps propose to regulate
- What will be different for agriculture under this proposed rule
- Farmer exemptions
- What you can do to make a difference

Clean Water Act Basics

- 1972 – Congress passed the CWA with the goal of improving water quality across the nation.
- Cooperative federalism – preserves primary state authority over land and water use, but prohibits “discharges” into “navigable waters” from a “point source” unless authorized by a federal permit.

Clean Water Act Basics

- The claim: USEPA/Corps say just “clarification” of their jurisdiction; no expansion.
- The truth: The proposal gives USEPA/Corps power to regulate or prohibit land-use and farming practices in or near jurisdictional land features and waters.
 - Regulating land, not water!
 - The agencies have been asserting this jurisdiction for some time. Doesn’t mean it’s right!

Clean Water Act Basics

- “Navigable waters” are “waters of the U.S.”
- State and local governments have jurisdiction over smaller, more-remote waters, such as ponds and isolated wetlands.

Clean Water Act Basics

- 2 sections of the CWA impact agriculture the most:
 - Section 404 – allows the Corps to issue permits for discharges of “dredge and fill” material into navigable waters.
 - Section 402 – establishes NPDES permitting program in which USEPA or states (with USEPA oversight) can issue permits for discharges of other pollutants into navigable waters.

EPA's current position

- “It is the responsibility of the potential discharger to determine whether or not his or her system might discharge to a water of the United States.”
 - If you install a new or replacement surface discharging system on your land, would effluent or pollutants (even diluted ones) from your system end up in a water of the United States or a conveyance, such as a ditch, drainage pipe, channel, tunnel, conduit, discrete fissure or other means that leads to a water of the United States?

EPA's current position

- “In evaluating this question, consider that rain water, irrigation activities, lawn sprinkling systems and any other ways that water can carry pollutants....if so, even though pollutants would not be carried to waters of the U.S. unless your area experienced an exceptionally wet season, you are still required to obtain coverage under a permit.”

EPA's current position

- “If you do not obtain a permit, but actually discharge, you may be subject to an enforcement action under CWA.”

General Pesticide NPDES Permit

- **Is an NPDES permit required for pesticides applied to waters of the United States that are dry at the time of the discharge?**
- **Yes. If a permitting authority determines that the pesticide application will indeed result in a discharge to waters of the United States, a National Pollutant Discharge Elimination System (NPDES) permit is required. A water of the United States does not lose its jurisdictional status if it becomes dry during extraordinary circumstances such as drought or if it flows continuously during parts of the year and has no flow during dry months. A discharger will need a permit regardless of whether the waters of the United States are wet, partially wet, or dry at the time of the discharge.**

How We Got Here

- Slow increase of USEPA and Corps jurisdiction through guidance documents and regulatory enforcement based on ever-broader interpretations of “WOTUS.”
- Federal case law limited jurisdiction.

What USEPA/Corps Propose to Regulate

- Waters that meet definition of “navigable waters” (no change from current):
 - Large tidal water bodies used in interstate commerce
 - Interstate waters
 - Territorial seas
- Impoundments of these traditional “navigable waters”

What USEPA/Corps Propose to Regulate

- “Tributaries”
 - New definition – “any feature with a bed and bank and ordinary high water mark that contributes flow to traditional waters in any amount, whether directly or through other water bodies.”
 - Ponds, impoundments, lakes and wetlands do not need bed/bank/ordinary high water mark to be a tributary.
 - No amount, frequency or duration of flow limits definition of tributary.

What USEPA/Corps Propose to Regulate

- Includes ditches, unless fit two narrow exemptions:
 - Ditches excavated wholly in uplands, drain only uplands, and have less than perennial flow
 - Ditches that do not contribute flow, either directly or indirectly, through another water (including ditch or ephemeral stream)
- Roadside, irrigation and stormwater ditches would be seen as “tributaries”

What USEPA/Corps Propose to Regulate

- “Adjacent waters”
 - Current regulation: Only cover wetlands adjacent to waters of the U.S.
 - Proposed regulation: Expanded to include not only wetlands, but all waters adjacent to traditional navigable waters.
 - Defines “adjacent”: bordering, contiguous or neighboring waters separated from other waters of the U.S. by dikes or barriers.

What USEPA/Corps Propose to Regulate

- “Neighboring” includes “riparian areas” and “floodplains”
- “Riparian areas”: transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community
- “Floodplain”: does not specify flood interval, leaving to agency discretion.

What USEPA/Corps Propose to Regulate

- “Other waters” with a “significant nexus”
 - Either the waters alone or in aggregate with “similarly situated” features, have a “significant nexus” to more traditional navigable waters.
 - Term “significant nexus” is from U.S. Supreme Court cases
 - “more than speculative or insubstantial”

What USEPA/Corps Propose to Regulate

- Proposal includes list of exclusions from the term “WOTUS”
- BUT the exclusions only apply to limited set of features excavated wholly on upland (not in a water, ephemeral or wetland) with no characteristics of a tributary.

What USEPA/Corps Propose to Regulate

- 3 exclusions to “WOTUS” relevant to farming:
 - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease
 - Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins and rice growing
 - Gullies and rills and non-wetland swales (although USEPA acknowledges difficult to tell these from “ephemeral streams” that will be regulated)

What USEPA/Corps Propose to Regulate



Differences Under This Proposed Rule

- No limit to federal jurisdiction
- End-run around Congress
- Ignores U.S. Supreme Court mandate that imposes limits on federal jurisdiction and rejects USEPA/Corps theory that they can regulate a water feature of dry land if one could find any hydrologic connection to a traditional navigable water.

Differences Under This Proposed Rule

“WOTUS” applies throughout entire CWA:

- Water Quality Standards
- Total Maximum Daily Loads (for waters that do not meet WQS)
- Spill prevention regulations
- Section 402 (NPDES) permits
- Section 404 (Dredge and Fill) permits

Differences Under This Proposed Rule

- No legal right to a permit
- Would have to wait for permit to build fences, use pesticides, etc.
- Subject to citizen lawsuits and penalties of \$37,500 per “discharge” per day if act without a permit.

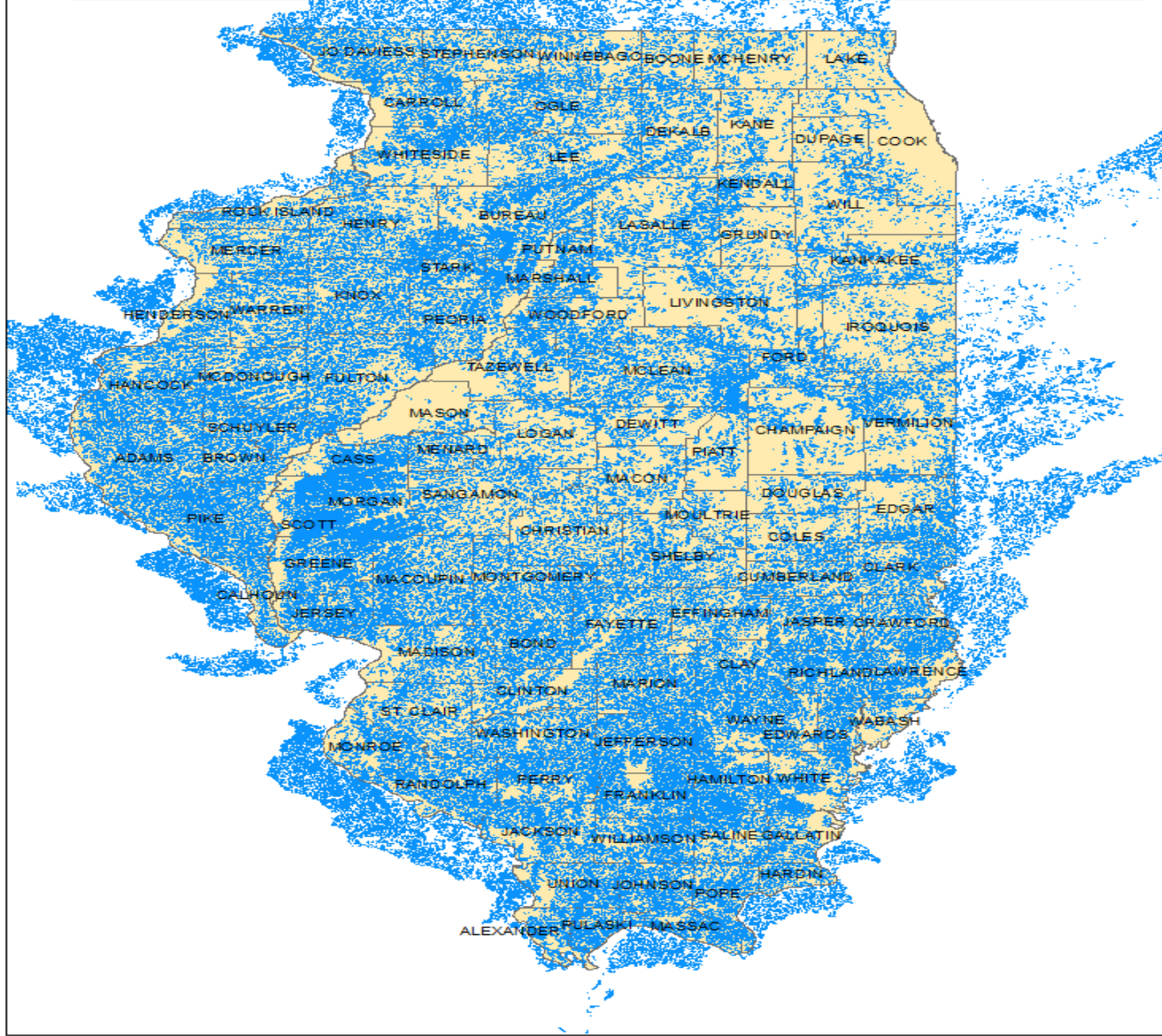
Farmer Exemptions

- Interpretive rule (USEPA, Corps, USDA)
- Immediately final, but agency guidance that can be changed at any time
- Over 50 conservation practices
- Only apply to Section 404 (Dredge and Fill) permits (no exemptions from weed control, fertilizer applications, etc under Section 402)
- Only apply to farmers who have been farming continuously since 1977

Farmer Exemptions

- Only apply if follow NRCS standards.
- Before: Farmers could undertake these practices as part of their normal farming practices
- Now: Farmers must comply with NRCS standards or risk CWA enforcement

Intermittent and Ephemeral Streams as Defined by the National Hydrography Dataset



Ditch the Rule Campaign Goals

- To inform and engage IFB members in a campaign to “ditch” the expanded WOTUS definition and to work with AFBF and other stakeholders and partners to stop it.
- To be able to look back and know that we did everything possible to defeat it.
- To begin a longer conversation on how farmers are improving water quality.

Tactics

- Solicited congressional support for Collins-Schrader letter (6Rs and 1D)
- Soliciting comments from members – at least two per county Farm Bureau
- “Call to Action” week of July 14 – Tell the President to “ditch the rule.”
- Media events with friendly legislators
- Op-eds
- Developing maps to show impact in state, county, or neighborhood
- Collecting photos from members
- Social media campaign #ditchtherule www.ditchtherule.fb.org
- Working with other stakeholders
- Ask our delegation to comment on the rule

Congress responds with legislation

- H.R. 5071 – Agriculture Conservation Flexibility Act (*Rep. Ribble*)
 - Response to the interpretive rule that “fell flat”
 - Clarifies that all soil and water conservation practices are considered normal farming, ranching and silvicultural activities under the CWA.
 - Agencies must withdraw interpretive rule and never use it again

Congress responds with legislation

- H.R. 5078 – Waters of the United States Regulatory Overreach Protection Act (*Rep. Southerland*)
 - AFBF and Waters Advocacy Coalition
 - Prevents agencies from using the rule as a basis for future administrative actions
 - Prevent agencies from developing guidance that would expand the scope of waters covered by CWA
 - Prevent agencies from implementing the interpretive rule

Congress responds with legislation

- H.R. 5078 - Waters of the United States Regulatory Overreach Protection Act (*Rep. Southerland*)
- -- Requires EPA and Corps to engage in federalism consultation with states and local governments
 - *Formulate a consensus regulatory proposal consistent with SCOTUS rulings*
 - *Prepare and submit to Congress a final report within two years*

Congress responds with hearings

- Agriculture – Don Parrish on interpretive rule
- Transportation & Infrastructure – Bob Stallman on WOTUS, EPA
- Science – Is water wet? EPA grilling