

GROWERTALKS

Features

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WOTUS: Protecting Waters & Creating Confusion

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On February 28, 2017, President Trump signed an executive order that took a controversial new rule on federally regulated waterways off the table and sent it back for reconsideration. It's been a tough road for the "Clean Water Rule: Definition of 'Waters of the United States'" and it's not over yet.

"Waters of the United States" (WOTUS) is a term that's used in several EPA programs, as well as the Clean Water Act (CWA) of 1972 that was meant "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."



However, the big problem, which arose in lawsuits over the years, was the confusion—and debate—about what qualified as WOTUS and "navigable waters." Thus, the EPA and the Army Corps of Engineers set out to write a Clean Water Rule that gave WOTUS a clear definition.

Private land owners, golf courses, oil companies, farmers and others all had a stake in how the new definition might affect them. No sooner had the rule been finalized, in June 2015, then the lawsuits began flowing in. Ultimately, 31 states sued for overreach. Environmental groups also sued, saying the rule would remove safeguards for clean water. Agriculture found itself in the middle of an intense debate, framed as an "overreach of the federal government" and a "land grab."

By January 2017, the rule was still on hold, pending litigation, but it had been mentioned on the campaign trail as problematic, and Trump's new administration was expected to address it.

Under the new executive order, the EPA and Corps must now go back to the drawing boards and figure out how, exactly, to redefine the rule or whether to scrap the rule entirely or in part. As water supply and quality issues escalate, especially between states, the stakes are high and there are many agendas on—and under—the table.

The root of the problem and where the road splits

Three major Supreme Court decisions have “guided” how the EPA determined what qualified as WOTUS, but the last ruling, in 2006, made it clear that they needed to address the definition head on.

In President Trump’s executive order, he instructed that the EPA and Corps “shall consider interpreting the term ‘navigable waters,’ as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*.”

That particular case was a split decision. Scalia authored the plurality opinion, which stated that WOTUS was limited to “relatively permanent, standing or flowing bodies of water” and wetlands that had “a continuous surface connection to waters of the U.S.” However, Justice Kennedy wrote a concurring opinion that said “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

The rule that was and then wasn’t

In creating the new rule, the EPA and Corps had been following Kennedy’s guidance. It didn’t establish any new regulatory requirements; it only defined the scope of WOTUS so that it was “consistent with the Clean Water Act, Supreme Court precedent and science.”

Here’s a (very truncated) summary of how the June 2015 rule defined WOTUS:

WOTUS included: Traditional navigable waters, interstate waters, territorial seas, impoundments of jurisdictional waters, covered tributaries and covered adjacent waters.

WOTUS excluded these categories: Waste treatment systems that meet the CWA requirements and cropland that’s already been converted, groundwater, certain ditches, certain stormwater control features, and wastewater recycling structures created on dry land.

The third category is where it got messy and where the real controversy begins.

The to-be-determined category, which would require a case-specific analysis concerning the “significant nexus” measure in order to classify a body of water as WOTUS. This included Prairie potholes, Delmarva and Carolina bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. It also included anything within the 100-year floodplain of a traditional navigable water, interstate water or the territorial seas. Waters located within 4,000 ft. from the high-tide line or the ordinary high-water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries would also need an analysis to see if they were functionally connected in an ecological way.

The blowback

Agriculture associations lobbied extensively against the new rule, including the Farm Bureau, American Hort and Society of American Florists (SAF). Across the board, they claimed it was federal overreach and would result in burdensome requirements on ag producers. They argued it expanded the definition of WOTUS in a way that went beyond the limits approved by Congress and the Supreme Court.

In their official statement against the new WOTUS rule, the Farm Bureau said, “The final rule provides none of the clarity and certainty it promises. Instead, it creates confusion and risk by giving the agencies almost unlimited authority to regulate, at their discretion, any low spot where rainwater collects, including common farm ditches, ephemeral drainages, agricultural ponds and isolated wetlands found in and near farms and ranches across the nation. The rule defines terms like ‘tributary’ and ‘adjacent’ in ways that make it impossible for farmers and ranchers to know whether the specific ditches, ephemeral drains or low areas on their land will be deemed ‘waters of the U.S.’”

The EPA denied this and provided literature explaining that the rule exempted agriculture production, that “Farmers, ranchers and foresters continue to receive exemptions from Clean Water Act Section 404 permitting requirements when they construct and maintain irrigation ditches and maintain drainage ditches, even if ditches are jurisdictional.”

AmericanHort and SAF said the proposed rule could create confusion and require permits for activities such as removing debris and vegetation from a ditch or building a patio, fence or pond.

In January 2017, the nonpartisan Congressional Research Service released an analysis of the WOTUS rule. They said, “The final rule makes no change to and does not affect existing statutory and regulatory exclusions: exemptions for normal farming, ranching and silviculture activities such as plowing, seeding and cultivation.”

We asked the Farm Bureau for details on clarification about the debate on agriculture exemptions. They did not respond to our request. The EPA, at this time, is not responding to media requests, either.

The Congressional Research Report did note that the rule helped clarify a lot of exclusions that hadn’t been present before, such as “artificially irrigated areas that would revert to dry land should application of irrigation water to the area cease; artificial reflecting pools or swimming pools created in dry land; and puddles.”

Another important exclusion that pertained to growers was for constructed detention and retention basins created in dry land used for wastewater recycling, as well as groundwater recharge basins and percolation ponds built for wastewater recycling. But critics of the rule pointed out that even the term “dry land” wasn’t well defined.

What’s next?

On March 6, 2017, the EPA and the Corps published in the Federal Register their formal notice of intent to review and rescind or revise the Clean Water Rule. While agriculture was, in general, pleased with Trump’s executive order, other groups were not. Trout Unlimited, which advocates for fish habitat, stated, “If Justice Scalia’s direction is followed, 60% of U.S. streams and 20 million acres of wetlands would lose protection of the Clean Water Act; an unmitigated disaster for fish and wildlife, hunting and fishing, and clean water.”

However, that’s not to say that state or local governments wouldn’t step in to regulate those waters in a similar fashion.

It’s not known if the EPA is leaning towards revision or repeal, but Bergeson & Campbell PC, a law firm that specializes in chemical law, penned a regulatory update that said, “EPA and the Corps are likely to rework

the more controversial CWR concepts, including the rule's definitions for adjacency and tributary, exclusions for ditches, and inclusion of streams with intermittent and ephemeral flow. The rule revision is also likely to address a key question in the WOTUS debate: what role, if any, should the 'significant nexus' test from Kennedy's concurring opinion in *Rapanos* serve in defining jurisdictional waters?"

For now, WOTUS, as a term, remains ambiguous and the EPA, under new leadership and facing an enormous budget cut, will have not only figure out their next move on the rule, but on how budget cuts will affect existing programs and regulations. **GT**

Downstream Connections

For a moment, consider water without its politics. Consider the staggering labyrinth—from small streams high in the mountains to a web of tributaries and adjacent waters, the network of wetlands that pulse with storms, floods and droughts. Imagine the tangle and flow as it filters down, into rivers and lakes and oceans. Into our faucets and hoses. Pollute something upstream and eventually, it makes its way downstream. That's ecological connectivity. It's complex and, as the Clean Water Rule exemplifies, ridiculously difficult to define and regulate in written rules and regulations because everyone, somehow, is impacted.

(Find research on this in "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.")