Update on Waters of the US (WOTUS) Regulatory Policy

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A quick search on the internet reveals the Environmental Protection Agency (EPA) has developed roughly 2,800 new regulations since 2009 when the current administration took office. While most regulations have likely met with some level of disapproval, it is probably fair to say that the recently proposed rule defining the scope of waters protected under the Clean Water Act (CWA), has been the most widely criticized rule proposed by the agency since the current administration assumed control over the executive branch. At last count, the EPA and Corps of Engineers received roughly one million comments on the proposed rule.

While there is little doubt the proposed rule will affect agriculture, concern for the rules over-reach is shared by numerous stakeholders. Majorities of the states, thirty-four to be exact, oppose the rule and almost half of the states urge EPA and the Corps of Engineers (Corps) to withdraw the rule completely. Likewise, the rule has met with serious resistance from a bipartisan contingent of Congress.

In late January of 2015, EPA and the Corps withdrew the interpretive rule after numerous agriculture groups voiced concern over how the rule would affect the implementation of conservation practices developed by the Natural Conservation Resources Service (NRCS.) Although the agencies claimed the rule was meant only to clarify what normal farming activities are exempt from the CWA, they failed to recognize the rule might require the NRCS to enforce the CWA on behalf of the EPA and Corps if these practices were not installed and managed in strict accordance with NRCS standards.

While EPA and the Corps have always asserted broad jurisdictional authority over most waters and drainage features, the CWA and the current definition of "waters of the US" simply does not support their declaration. Decisions delivered by a majority of the Supreme Court Justices pointed this out in two cases - *Solid Waste Agency of Northern Cook County vs. Army Corps of Engineers* and *Rapanos v United States* where the agencies jurisdictional authority was denied over remote waters because they could not legitimize a tie to waters that were clearly covered in the CWA.

The issue in Rapanos v United States revolved around the Corps determination that various areas, sometimes saturated, within a 54-acre tract of land being developed were "waters of the United States." This determination obligated the developer to obtain a permit prior to placing fill dirt. After hearing the Rapanos case, three Justices, Scalia, Thomas and Alito concluded, "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water. Their decision specifically pointed out "water of the United States do not include channels that carry water intermittently, or ephemerally or channels that periodically provide drainage after a rainfall event."

While Justice Kennedy concurred with the opinion of Justices, Scalia, Thomas, Alito and Roberts he addressed the need to establish a "significant nexus" when determining if a water or a wetland would fall under the jurisdiction of the CWA. Kennedy explained this "significant nexus" is

obtained “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable’”

Although one might suggest Kennedy is advocating the use of this standard broadly, he explains that when the wetland’s effects on water quality are “speculative” they fall outside the area typically covered by the term “navigable waters.” Furthermore, Kennedy explains, “Absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries, in order to avoid unreasonable applications of the Act.” Despite Kennedy’s guidance that a case-by-case determination is warranted, EPA and the Corps rationalize the use of this standard is appropriate for every creek, ditch or drainage feature. In fact, the agencies explain in the preamble of the proposed rule, “…it is reasonable to utilize the same standard for tributaries.”

Referencing a study only recently approved by EPA’s Science Advisory Board titled “*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* EPA and Corps conclude that all tributaries, as defined in the proposed rule, perform the functions outlined by Justice Kennedy and therefore qualify them to be considered, as a category, “waters of the United States.”

The Report purports to establish a scientific basis concluding that isolated, rarely existing “waters” are connected to more traditional navigable waters, and, therefore subject to CWA jurisdiction. In essence, this is an attempt to establish a statutory nexus for asserting all-encompassing jurisdictional authority over a very broad range of categories of waters and geographic features. EPA and the Corps are claiming that areas where water is present, as infrequently as once every few years, should be subject to CWA permit requirements because the water could potentially be connected to navigable water. Such a claim stretches CWA jurisdiction beyond statutory authority and practical implementation.

While the processes and inter-relationships identified in the Report provide mechanisms to establish potential chemical, biological and physical ties between waters, the idea of a universally applicable mechanism for every water or drainage feature that exists on the landscape lacks any degree of scientific robustness. Without the connectivity report, the agencies face a hurdle that prevents them from asserting jurisdictional authority over limitless water sources and landscape features. Applying the vague concept of connectivity universally to all areas that may drain water infrequently or retain insubstantial amounts water is plainly speculative and ignores the supreme courts acknowledgement that jurisdictional determinations on a case-by-case basis are necessary to avoid regulatory over-reach.

Coupled with a report that infers expansive mechanisms to claim connectivity, the rule establishes a number of new definitions to further expand the number of features that will fall under CWA jurisdiction. Unfortunately, for landowners, especially farmers and ranchers, the proposed rule’s definition of tributary embodies almost every conceivable type of water and drainage feature. This includes ephemeral streams that are small swales or natural ditches that are dry most of the time and carry flow infrequently. No consideration for the frequency, volume or duration of flow will be given when the agencies claim jurisdiction over the countless topographical features that fall into this category. Coupling the terms ”adjacent” and “neighboring” with a broad definition of “tributary” will bring riparian areas and floodplains under their jurisdiction as well.

While the EPA and Corps begin by defining a “tributary” as a drainage feature that has a bed, bank and an ordinary high water mark (OHWM), the agencies quickly expand the definition to include other geographical features that fall outside the stated parameters. Citing instances where in “some regions of the country where there is a very low gradient, the banks of a tributary may be very low or

may even disappear at times," EPA and the Corps use ambiguity to claim jurisdictional authority over features that often do not resemble a stream brook or creek.

The uncertainty and potential liability associated with implementation of the rule is further aggravated by the EPA and the Corps determination that "[a] water that otherwise qualifies as a tributary under the proposed definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." 79 Fed. Reg. at 22202. This determination prompts some practical, but critical questions for implementation of the rule. For example, how far will a farmer have to look "upstream" to ensure he is not liable for applying fertilizer or pesticide into an area that may lack a bed, a bank, and an OHWM, yet is still considered jurisdictional water? The agencies have specifically indicated that "[I]n many intermittent and ephemeral tributaries, including dry-land systems in the arid and semi-arid west, OHWM indicators can be discontinuous within an individual tributary due to the variability in hydrologic and climatic influences." 79 Fed. Reg. at 22202. Consequently, how does a farmer gauge his liability for CWA violations of $37,500 per day per occurrence and the risk of a citizen lawsuit when the discernible features required for a water to be a "tributary" do not exist in a specific location?

Where the jurisdictional authority that the agencies assert through the broad and ambiguous definition of "tributary" is not enough, the proposed rule claims even more authority over a new category of waters and drainage features labeled "adjacent waters." The agencies capture jurisdictional authority over a multitude of small streams, no matter how remote, by mandating through conjecture that the ecological functions provided by adjacent waters are biologically connected to adjacent navigable waters and tributaries.

New definitions for "neighboring waters," "riparian areas," and "floodplain" expand the agency's CWA jurisdiction even further. Prior to the proposed rule, "adjacent waters" have been considered wetlands that actually abut navigable waters because there is a significant nexus between the wetlands and the jurisdictional water. Under the proposed rule, non-wetlands can be considered jurisdictional waters of the U.S. The term, "neighboring," includes waters located in the riparian areas or floodplains of a major navigable water or tributary or water with a shallow subsurface hydrologic connection. This could include nearly all waters within the geographic area of a floodplain.

Additionally, the definitions of "riparian area" and "floodplain" rely on ambiguous and undefined concepts. For example, "riparian area" is defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." While this definition is vague and broad (particularly as it relates to ecological processes, communities and structures), there is no clarification in the proposed rule on how far a riparian area extends away from the water body.

"Floodplain" is defined as an area that has been inundated by actual waters or was formed by sediment deposition from actual water. However, the proposed rule does not specify whether it is the 10-year, 50-year, 100-year or 500-year floodplain. Using "best professional judgment" to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction.

Accordingly, "adjacent waters" in the proposed rule is a vague and overly broad concept that could include an area as vast as the 500-year floodplain of the Ohio River valley. Landowners in these areas or any area within miles of a navigable water or tributary could never be sure if activities on their land would trigger federal water permit requirements covered by the CWA.

To complete their CWA jurisdictional expansion, EPA and the Corps identify the mechanisms to regulate “other waters” under the CWA. Specifically, the term, “other waters,” includes “[o]n a case-specific basis” waters that “in combination with other similarly situated waters” have a “significant nexus” with navigable waters, tributaries and adjacent waters. The term, “significant nexus,” means a water, alone or in combination with other similarly situated waters, that “significantly affects the chemical, physical, or biological integrity” of a navigable water. EPA and the Corps therefore, could consider the cumulative impacts of multiple waters to determine the jurisdictional status of a particular area that has, or had, the presence of some water at some time. Accordingly, under the proposed rule it is difficult, if not impossible for landowners to assess the jurisdictional status of an area without undertaking a comprehensive, complex, and costly watershed study.

While the proposed rule indicates ditches are exempt, the exemption applies only under two narrow conditions. To be exempt, a ditch must be excavated wholly in an upland, drain only an upland and have less than perennial flow. Further, a ditch is exempt if it does not contribute flow, either directly to water, through another water or to a water traditionally defined as a “water of the US.” The exemption would not apply if a ditch flows into another ditch or ephemeral stream that eventually flows into a “waters of the US.”

Despite EPA’s claim that the proposed rule does nothing more than clarify the scope of ‘‘waters of the United States’’ protected under the Act , many consider it to be a huge land grab that would give the agencies limitless control over how a landowner uses their property. EPA and the Corps have assured the public the proposed rule would have no substantive regulatory impact and would actually reduce the areas that are subject to CWA jurisdiction. Yet maps developed by EPA and the U.S. Geological Survey identify 8.1 million miles of rivers and streams that would be subject to CWA jurisdiction under the revised definition of “waters of the U.S.” proposed by this rule. This represents a significant increase of more than 130 percent over the 2009 estimate of 3.5 million miles subject to CWA jurisdiction that EPA provided in a previous report to Congress. Furthermore, some states have reported an even greater increase of areas that would be subject to CWA jurisdiction under the proposed definition of waters of the U.S. This increase is a direct result of the expanded definition that includes ephemeral streams and the land areas that are adjacent to them as “waters of the U.S.” subject to CWA jurisdiction.

In spite of wide spread concern over the broad expansion of EPA and the Corps CWA jurisdiction, the agencies have indicated the rule will be finalized in the Spring of 2015. While the agencies have made the commitment to address the concerns of the multiple stakeholders and work with the regulated community, it is difficult comprehend how the agencies can respond to over 19,000 unique comments in a transparent and non-capricious manner.