

# PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

## Waters of the United States and the Clean Water Act

On June 22, 1969, The Cuyahoga River in Ohio caught fire and national attention. This was at least the 13th time since 1868 that the river has caught fire as a result of point source pollution of the river by manufacturers along its banks. Dumping flammable materials, along with other chemicals and human waste, was simply more economical than treating the waste in a responsible manner.

For the manufacturers, it was a matter of dollars and cents that they did not have to spend in the disposal of these waste products, even though the cost to people who lived on the river and the value of the loss of fisheries was borne by other people. As economists, we describe that sort of economic behavior as externalizing costs—the costs are not carried on the offending firm’s profit and loss statement, but by other firms who cannot draw fresh water from the river, and the public in general.

The result of the fire and similar problems across the country resulted in the passage of the Federal Water Pollution Control Act Amendments of 1972, which amended a 1948 law. In 1977, previous law was ended with the passage of the Clean Water Act (CWA). Further amendments were made in 1987.

Under federal statutes, groundwater contamination is governed by the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Superfund Act, while the CWA covers the surface waters of the US, variously called the “Waters of the US” or the navigable waters of the US. The question is where does the “waters” end and an intermittent stream or dry ditch begin. To what extend are the marshes and wetlands that are adjacent to a covered waterway also fall under the jurisdiction of the CWA that is governed jointly by the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (COE)?

Several recent Supreme Court rulings have set the stage for the need for a systematic clarification of what is covered by the CWA. On Monday, April 21, 2014, the EPA and the ACE issued a proposed rule titled “Definition of “Waters of the United States” Under the Clean Water Act” (<http://tinyurl.com/mk5a7nb>).

As the rule states, “The purposes of the proposed rule are to ensure protection of our nation’s aquatic resources and make the process of identifying “waters of the United States” less complicated and more efficient. The rule achieves these goals by increasing CWA program transparency, predictability, and consistency. This rule will result in more effective and efficient CWA permit evaluations with increased certainty and less litigation. This rule provides increased clarity regarding the CWA regulatory definition of “waters of the United States” and associated definitions and

concepts.”

As with all proposed rules there is a comment period. For this rule, the comment period ends July 21, 2014. Comments may be submitted, “identified by Docket ID No. EPA–HQ–

OW–2011–0880 by one of the following methods:

- “Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- “Email: [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include EPA–HQ–OW–2011–0880 in the subject line of the message.
- “Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2011–0880.
- “Hand Delivery/Courier: Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OW–2011–0880. Such deliveries are accepted only during the Docket’s normal hours of operation, which are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is 202–566–2426.”

Additional instructions for submitting comments can be found in the proposed rule using the link provided in this article.

Comments by leaders of agricultural organizations have been swift and contrasting.

In an article titled, “Farm Bureau pledges to fight EPA’s water rule,” Timothy Cana writes, “The American Farm Bureau Federation has promised to fight the Environmental Protection Agency (EPA) through multiple avenues on its proposed new definition of which bodies of water are under its jurisdiction, saying the rule could ‘impose unworkable regulations on the nation’s farms.’

‘Farm Bureau President Bob Stallman called EPA’s proposed rule, known as Waters of the United States, ‘the biggest federal land grab — in terms of power over land use — that we’ve seen to date....’

“But Republicans and business groups immediately slammed the proposal, saying that it drastically increases the amount of water and land under EPA’s authority. Land that has water flowing through it one day per year, for example, could be subject to EPA’s

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authority, the Farm Bureau said.

“Can you imagine the level of uncertainty that creates for farmers and ranchers,” Stallman asked. “And the issue that somehow we’re all protected by these exemptions? They actually make the situation worse than it is today.”

“If the rule is finalized, EPA could potentially require permits for spraying pesticides, building fences, digging ditches or even planting crops, Stallman said....

“Stallman said the Farm Bureau’s first priority in opposing the rule will be to meet with EPA officials.

“The Farm Bureau has asked congressional appropriators to block the rule’s implementation in spending bills. And Stallman said his group will consider suing EPA if it objects to the finalized rule.”

Contrast those comments with the statements of Roger Johnson, President of the National Farmers Union: The “NFU is encouraged by the report’s science-based approach that recognizes the unique circumstances of agricultural producers. Since 1902, NFU has advocated for the economic and social well-being and quality of life of family farmers and their communities through the sustainable production of food, fiber, feed and fuel. In addition to the report, I am pleased that the EPA and the Army Corps of Engineers have sent a draft rule to clarify [the] CWA to the Office of Management and Budget. It is NFU’s hope that this rule will clear up CWA jurisdiction in a way that gives farmers and ranchers more certainty. In particular, we hope that the draft rule clarifies CWA jurisdiction so that it encourages increased enrollment in important U.S. Department of Agriculture (USDA) conservation programs.

“As you know, existing agricultural exemptions from Clean Water Act jurisdiction include:

- “Agricultural stormwater discharges;
- “Return flows from irrigated agriculture;
- “Normal farming, silvicultural, and ranching activities;
- “Upland soil and water conservation practices;
- “Construction and maintenance of farm or stock ponds or irrigation ditches;
- “Maintenance of drainage ditches;
- “Construction or maintenance of farm, forest, and temporary mining roads;
- “Prior converted cropland, including the role of USDA; and
- “Waste treatment systems.

“NFU supports maintaining these existing exemptions and including them in the final rule [these are included on pages 22193 and 22194 in the proposed rule].

“In addition to existing agriculture exemptions, the proposed rule is expected to include the following new agricultural exclusions:

- “Non-tidal drainage, including tiles, and irrigation ditches excavated on dry land;
- “Artificially irrigated areas that would be dry if irrigation stops;
- “Artificial lakes or ponds used for purposes such as stock watering or irrigation;
- “Areas artificially flooded for rice growing;
- “Artificial ornamental waters created for primarily aesthetic reasons;
- “Water-filled depressions created as a result of construction activity; and
- “Pits excavated in uplands for fill, sand or gravel that fill with water.

“NFU supports including these additional exclusions in the final rule....

“NFU is...pleased that the proposed rule directs EPA to defer to state laws to regulate bodies of water that are fully contained within a state and are not suitable for transportation. I hope that this provision will be included in the final rule [see page 22193 of the proposed rule].

“As EPA reviews comments on the study and finalizes the proposed rule, NFU urges the continued outreach to the agriculture community. Again, I appreciate the opportunity to provide input, and I look forward to continuing to work with you to protect our nation’s natural resources.”

In the next several columns we will cover the major aspects of the proposed rule submitted by the EPA and the COE so that farmers and consumers, alike, can understand what is at stake in the definition of “Waters of the US” that is being proposed. Those wishing greater detail are urged to follow the link above to read the full text of the proposed rule.

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