

WOTUS controversy: What's that about?

Government regulations! They are the bane of our existence when they limit an action we want to take, require us to fill out paperwork, or make something that we want to do more expensive. But let the lack of regulations negatively affect us and we are the first ones in line calling on the relevant government entity for relief.

Harwood observed this phenomenon when he was living in Martin County, Minnesota. While farmers may complain about the farming practices of some of their neighbors at the coffee shop, they generally avoid seeking to get the government involved in solving the problem. But when concentrated hog operations began to proliferate, so if they weren't overwhelmed by the smell of hog barns to the west of them, they had to smell raw hog manure spread on open ground in the fall and not incorporated into the soil until spring, everything changed.

Some of the earliest governmental units to place a moratorium on approving permits for new hog operations were rural townships, and many of those complaining were neighboring farmers. They were not happy about having to keep their windows closed on nice spring and fall days; that's not to mention hog manure odors wafting over their graduation, confirmation, and birthday parties.

How one feels about government regulations depends on whose ox is being gored and that is true of most of us.

We share this observation with our readers because of the current administration's consistent efforts to reduce or eliminate regulations include a regulation that numerous farmers have complained about: WOTUS. That's short for the Obama administration's promulgation of the regulation known as "Waters of the US" that had expanded the types of covered waterways (see our previous coverage in May 2014 at <https://tinyurl.com/ya7tn4ny>).

On February 28, 2017, President Trump issued Executive Order 13778, "Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." While not making any immediate changes to WOTUS, the executive order set in motion a process that included the suspension of the WOTUS changes by EPA Secretary Scott Pruitt in January 2018, and the issuance of a new rule, "Revised Definition of 'Waters of the United States,'" (<https://tinyurl.com/ycdabpj7>) in December 2018 by Acting EPA head Andrew Wheeler.

Due to the ongoing government shutdown, the new rule has not been published in the Federal Register (<https://www.epa.gov/wotus-rule>). As a result, the 60-day comment period will not start until official publication, but our readers can download the rule from that site and read the rule for themselves.

The gist of the change is that it removes ephemeral streams from the jurisdiction of the EPA and the Army Corps of Engineers which is responsible for the navigable waters of the US. Ephemeral streams are generally described as those which are dry most of the year but regularly flow for 7 days or less as the result of heavy rains or snow melt. Most of the areas affected by the inclusion of ephemeral streams are in the arid west.

So why might the original WOTUS rule that was made by the Obama era make sense and why might the repeal be a problem?

That brings us to our original illustration. The smell coming from hog barns and manure spread on the ground but not immediately incorporated in the soil is called an externality. It affects people who are not direct parties in the production of hogs. We know, we have talked about externalities as recently as last week, but it is an important concept.

Economic activities in ephemeral stream areas have the potential to create an externality because these activities may be a source of a portion of the pollutants that affect the perennial streams that are still covered by the revised WOTUS. The purpose of requiring entities (farming and otherwise) to obtain permits from the EPA when they engage in making changes to these ephemeral stream areas is to determine if the activity will ultimately affect water quality downstream. While ephemeral stream areas in the arid west may be more difficult to identify than other covered waterways in other areas leaving farmers in a quandry, the issue of externalities is no less important.

A better solution changing WOTUS may be to require the federal government to map the areas that it determines are in the watershed of ephemeral streams. Then farmers will not be faced the problem of not knowing whether or not they need to apply for a permit before engaging changes to their land.

That sounds like a win all the way around and we don't have to worry about gored oxen.

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Dr. Harwood D. Schaffer: Adjunct Research Assistant Professor, Sociology Department, University of Tennessee and Director, Agricultural Policy Analysis Center. Dr. Daryll E. Ray: Emeritus Professor, Institute of Agriculture, University of Tennessee and Retired Director, Agricultural Policy Analysis Center.

Email: hdschaffer@utk.edu and dray@utk.edu; <http://www.agpolicy.org>.

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