

Biden Administration to reconsider “Waters of the US” definition and associated regs

On his first day in office, President Biden issued a flurry of Executive Orders to reverse actions taken by the Trump Administration. Among those was Executive Order 13990 that among other things called for a review of the 2020 Navigable Waters Protection Rule (2020NWPR) which had the effect of revising the Obama-era Clean Water Rule that included a fairly broad definition of the term “Waters of the US” (WOTUS).

The concept of WOTUS can be traced back to the 1972 Clean Water Act that addressed the issue of water pollution in the navigable waters of the US or waters of the US. In the initial implementation of the law, the focus included clear violations of the law like pipes that poured sewage and industrial waste directly into a flowing stream.

Over time, it became necessary to clarify what constituted WOTUS and what did not. Readers can review our 2014 columns on the topic for a more extended discussion of the evolution of the term (columns 718-722, links to these columns can be found at <http://www.agpolicy.org/articles14.htm>) and a discussion of the Obama-era Clean Water Rule.

On June 9, 2021, as a result of the review of the 2020NWPR triggered by Biden’s Executive order 13990, the US Environmental Protection Agency (EPA) and the Department of the Army announced “their intent to revise the definition of ‘waters of the United States’ (WOTUS) to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth” (<https://tinyurl.com/ynxjmk9>).

Speaking for the EPA and the Department of the Army, EPA Administrator Michael S. Regan said “We are committed to establishing a durable definition of ‘waters of the United States’ based on Supreme Court precedent and drawing from the lessons learned from the current and previous regulations, as well as input from a wide array of stakeholders, so we can better protect our nation’s waters, foster economic growth, and support thriving communities.”

The announcement was not well received by some sectors of the agricultural community. At the same time, there is a contingent of environmentally conscious farmers who will welcome the opportunity to find ways to protect waters downstream from their lands. We expect that process of discussion of what constitutes Waters of the US and the regulations to be developed around that definition will be contentious.

As economists and policy analysts, our expertise is not in the areas of hydrology and the best ways to protect the waters of the US from agriculturally-related pollution. What we understand very well, however, is the economic concept of negative externalities—costs that are imposed on others as the result of our own economic activities.

We also understand that the further upstream any one landowner is from an environmental problem, the smaller the impact of that landowner’s externality. For any one landowner the externality may seem miniscule and inconsequential while the cumulative impact downstream may be significant.

The process of rulemaking is to balance out the competing interests of those trying to make a living upstream and those living downstream who are affected by the resulting negative externalities of that economic activity.

Even when the Biden Administration comes up with a “durable definition of ‘waters of the United States,’” we do not expect the debate to end. Next year will mark the 50th anniversary

of the Clean Water Act, and we are still debating its reach. The back and forth of the debate could well be with us 50 years from now.

We make this observation not as pessimists, but to recognize that we have come a long way from the days when it was acceptable for people and businesses to drain their untreated sewage into public waterways. We hope that the next 50 years will result in further progress as we seek to reduce the negative impact of human activity on the blue marble we call “home.”

Policy Pennings Column 1081

Originally published in MidAmerica Farmer Grower, Vol. 37, No. 327, June 18, 2021

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