



## Washington Association of Wheat Growers

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### IN SUMMARY

- The rule expands the definition of WOTUS thereby expanding jurisdiction and regulatory power of the EPA and Corps beyond what the CWA originally intended.
- The rule increases the regulatory uncertainty for farmers. It is unacceptable for only agency staff to determine which land features meet the new definitions.
- The rule shifts the burden of proof—the responsibility of proving or disproving whether a water is considered a “WOTUS” to the landowner.



## IMPACTS OF THE WATERS OF THE US FINAL RULE FOR WASHINGTON STATE WHEAT

The controversial Waters of the U.S. (WOTUS) final rule regarding the Clean Water Act (CWA) by EPA and U.S. Army Corps of Engineers (Corps) was published in the federal register June 29th and is scheduled to become effective on August 28th.

### *General Concerns and Examples*

- The rule expands the definition of WOTUS thereby expanding the jurisdiction and regulatory power of the EPA and the Corps of Engineers beyond what the CWA originally intended.

- The rule increases the regulatory uncertainty for farmers, ranchers and other land-owners—new definitions are too vague to provide certainty of how this could be interpreted by regulating agencies.



Photo courtesy of USDA NRCS

- It is unacceptable that only agency staff, not the landowner, be able to determine which land features meet the new definition of tributary and identify a regulated ditch or newly regulated land, especially when that landowner will face strict liability for any discharge.

- The rule shifts the burden of proof— the responsibility of proving or disproving whether a water is now considered “WOTUS” to the regulated community: (Waqar, 2014) farmers, ranchers landowners, and local municipalities.

- The definition of “tributary” includes features with the presence of a bed, bank, and “ordinary high water mark”. The tributary definition also adds new categories of federally regulated water for intermittent and ephemeral water features and ditches without consideration of other factors. The US Supreme Court has stated at least seasonal flow is necessary for a water to be jurisdictional under the CWA. Ephemeral and intermittent do not meet this threshold, but would now be considered “WOTUS”. Many States have cited this issue of federal jurisdictional expansion beyond what the Supreme Court has allowed in prior rulings. In the 2006 *Rapanos v. US*, Supreme Court Justice Anthony Kennedy didn’t like the tributary definition that the EPA just adopted.

- Final Rule adds to the test for determining adjacency beyond prior US Supreme Court decisions.
- The rule purports to implement the “significant nexus” test from Rapanos case by utilizing EPA’s connectivity draft report from September 2013. This automatically incorporates a number of waters as “WOTUS”. These waters have been regulated by Ecology in WA as “Waters of the State”.
- Terms “neighboring,” “contiguous,” and “bordering” extend jurisdiction and include vaguely defined terms “riparian areas” and “floodplain areas”, where the determination of floodplain is left to the “best professional judgement” of the regulating agency. (Parrish, 2014). This contradicts Justice Kennedy’s ruling and existing case law requiring “significant nexus” test to “adjacent wetlands.” (Rapanos v. United States, 2006) The definition and term changes are contradictory to SWANCC v. Corps of Engineers, where the Supreme Court determined that the “Migratory Bird Rule” used by the EPA and Corps of Engineers to implement jurisdiction for section 404 of the CWA exceeded their authority. (Solid Waste Agency of Northern Cook County v. Corps, 2001) For Washington, again, most of these waters are considered to be “Waters of the State”.

### ***Impact to Washington State Wheat Farmers***

In Washington, the Department of Ecology administers the CWA for EPA. In doing this, Ecology takes on EPA’s jurisdictional authorities granted in the CWA. The Corps Seattle District makes CWA Section 404 determinations for Washington State, yet at the time this document was finalized the Corps had not received any instructions for implementation of the new rule. Walla Walla District handles Idaho, and Portland District oversees Oregon’s 404 permit determinations. Many of these impacts are contingent on US District Court interpretations of the final rule. Expect regulatory concerns for growers to be more prevalent.

- Farming could become more costly and permitting could delay or inhibit the ability to farm. The rule expands water now subject to compliance



According to the American Farm Bureau Federation, in 2014, the Corps declared this swatch of land running across a wheat field in Tennessee to be a “tributary” under the new definition of Waters of the US. [http://www.fb.org/tmp/uploads/FACT\\_or\\_FICTION-Copy.pdf](http://www.fb.org/tmp/uploads/FACT_or_FICTION-Copy.pdf). Photo courtesy of the American Farm Bureau Federation

with the CWA, and the Ag exemption written in the original CWA of 1972 for Section 404 dredge and fill permits only recognizes 56 of the 160 science-based conservation practices recognized by NRCS.

- NRCS conservation practices such as putting up a fence, installing a drainage system, sprinkler systems or water wells are not covered under the normal farming exemption. The new rule may require a 404 permit for these processes. Many pending US District Court cases request clarification on jurisdiction and state law preemption.
- The rule will have particularly more impact on ephemeral washes- roadside ditches used to protect communities despite being dry most of the year, regardless of their proximity to a tributary or “navigable water.” The boundary for the Ag exemption surrounding ditches is unclear. This issue is addressed in many US District Court cases.
- New land or land that has not been farmed in ten years require a CWA Section 404 dredge-and-fill permit. Subsequent years don’t require the permit

under the continuous farming definition for prior converted (PC) cropland. Land returning to production from CRP or summer fallow is considered PC cropland according to NRCS experts Sherre Copeland and Rachel Maggi (personal communication, July 13, 2015)

- Wetlands, streams, ponds, bogs, marshes, swamps, and wet meadows federally regulated under this rule makes any discharge or fill (including soil, sand, gravel, or any other material) into those areas illegal. Expect greater frequency for 404, 402, and 401 permitting requirements and possibly more waters listed on EPA's 303d list of polluted waters that require total maximum daily load (TMDL) or other water quality improvement projects. With these, risk for potential litigation also increases.
- There is a partial preemption for CWA legally, where minimum standards are set nationally and the state is allowed to set higher standards. The question of whether this new rule would preempt existing state and local regulation is presently raised in numerous lawsuits challenging the rule. For Washington, this could mean that "Waters of the State" may now be subject to duplicate regulation. That decision will be determined in the courts.

### ***Additional Water Regulations in Washington***

According to review funded by EPA from Environmental Law institute, Washington is one of 36 states

with relevant limitations provisions and one of 25 that regulate waters more broadly than required by CWA. In Washington, the counties title of the state code contains a provision requiring the Washington Attorney General to establish and annually review and update, a mandatory process to better enable state agencies and local governments to evaluate their regulatory or administrative actions to ensure that they do not result in an unconstitutional taking. Guidelines for local governments matter in the aquatic protection context because Washington counties and local governments have authority over wetlands and other critical areas. (Environmental Law Institute, 2013).

Washington has state law which protects some waters that became uncertain or were no longer subject to federal jurisdiction following Rapanos (Rapanos v. United States, 2006) and SWANCC (Solid Waste Agency of Northern Cook County v. Corps, 2001) cases. Washington has jurisdiction over lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands, and all other surface waters and water courses within jurisdiction of the State. ( WAC 173.201A-010)

- The Shoreline Management Act protects all marine waters, lakes and reservoirs greater than 20 acres in size, streams and river segments meeting minimal flow requirements, and all associated wetlands. (RCW 90.58)
- Washington's Water Pollution Control Act (WPCA) provides protection for all wetlands under the

### **State-by-State Breakdown: Presence of Relevant Limitations Provisions Versus Whether State Waters Are Regulated More Broadly than by Federal CWA**

	<b>States that regulate waters more broadly than required by the CWA</b>	<b>States that do not regulate waters more broadly than required by the CWA</b>
<b>States with relevant limitation provisions</b>	FL, IN, ME, MD, MI, MN, NE, NJ, NC, OH, OR, PA, TN, VA, WV, WA, WI [17 States] (6 have filed suit)	AZ, AR, CO, DE, ID, IA, KS, KY, LA, MS, MO, MT, NV, ND, OK, SD, TX, UT, WY [19 States] (16 have filed suit)
<b>States without relevant limitations provisions</b>	CA, CT, IL, MA, NH, NY, RI, VT [8 States] (none have filed suit)	AL, AK, DC, GA, HI, NM, SC [6 States and DC] (5 have filed suit)

Table from pg.7 of State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, published by Environmental Law Institute, Washington DC. Study funded from GSA funds from EPA.

authority of the Department of Ecology. If the Corps determines that a wetland is isolated and not subject to federal jurisdiction, landowners still must seek authorization from the Department for proposed wetland impacts. If approved, the Department will issue an administrative order. (RCW 90.48)

- Growth Management Act requires local governments to identify and protect “critical areas” for conservation purposes. ( RCW 36.70) Wetlands are expressly included as among these areas. (WAC 365.190.090)
- State Hydraulic Code regulates construction and other work in state waters for the purpose of protecting fish life. This code applies to all activities that affect the bed or flow within the ordinary high water line of state waters, including wetlands. (WAC 220.660.010)
- Forest Practices Act focuses on maintaining functions important to the forest ecosystems of the state, implementing CWA and WPCA on state and private forest lands. (RCW 76.09)

### ***Contentions***

Twenty-seven states and many organizations have filed lawsuits against EPA and Corps in various US District Courts:

- Alaska, Arkansas, Arizona, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming filed in US District Court in North Dakota. Ohio and Michigan filed suit in US District Court in Ohio. Alabama, Florida, Georgia, Kansas, Kentucky, South Carolina, Utah, West Virginia, and Wisconsin filed suit in US District Court in Georgia. Louisiana, Mississippi, and Texas filed suit in US District Court in Texas.
- American Farm Bureau Federation, American Petroleum Institute, American Road and Transportation Builders Assoc., Leading Builders of America, National Alliance of Forest Owners, National Assoc. of Home Builders, National Assoc. of Manufacturers, National Cattlemen’s Beef

Assoc., National Corn Growers Assoc., National Mining Assoc., National Pork Producers Council, Public Lands Council, and Texas Farm Bureau filed in US District Court in Texas (American Farm Bureau Federation et al v. EPA and Corps, 2015)

- The Chamber of Commerce of the United States, National Federation of Independent Businesses (NFIB), Portland Cement Assoc., State Chamber of Oklahoma and Tulsa Regional Chamber filed suit in Oklahoma (Chamber of Commerce of the U.S. et al v. EPA and Corps, 2015)

### ***Recommended Actions***

- Educate wheat growers through our communication structure on the potential impacts of legislation.
- Support H.R. 1732 which requires the EPA and Corps to withdraw the proposed waters of the U.S. regulation and to rewrite the regulation with more input from states and those impacted by the regulation.
- Support appropriation bills that restrict funding to implement the final rule.

## References

- RCW 36.70. Growth Management Act Revised Code of Washington 36.70A.172.
- WAC 173.201A-010. Department of Ecology Washington Administration Code 173.201A-010(2).
- American Farm Bureau Federation et al v. EPA and Corps, 3:15-cv-00165 (US District Court Southern District of Texas Galveston, Texas July 02, 2015).
- Chamber of Commerce of the U.S. et al v. EPA and Corps, 4:15-cv-00386-JED-PJC (US District Court for the Northern District of Oklahoma July 10, 2015).
- Environmental Law Institute. (2013). *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*. Washington D.C.: Environmental Law Institute.
- Parrish, D. R. (2014). Senior Director, Regulatory Relations American Farm Bureau Federation. *“Waters of the United States” is it a Federal Power Grab?* Washington D.C.: Heritage Foundation.
- Rapanos v. United States, 04-1034 (The Supreme Court February 21, 2006).
- RCW 76.09. Forest Practice Act Revised Code of Washington 76.09.
- RCW 90.48. Water Pollution Control Act Revised Code of Washington 90.48.
- RCW 90.58. Shoreline Management Act Revised Code of Washington 90.58, Washington Administrative Code 173.18, 173.20, 173.22, 173.27, 197.11.
- Solid Waste Agency of Northern Cook County v. Corps, 99-1178 (The Supreme Court January 09, 2001).
- WAC 220.660.010. Hydraulic Code Washington Administrative Code 220-660-010 authority under Revised Code of Washington 77.04.012, 77.04.020, 77.04.047.
- WAC 365.190.090. Washington Administrative Code 365.190.090.
- Waqar, T. (2014). Program Manager, Environmental Policy, Advocacy Group, National Association of Home Builders. *“Waters of the United States” Proposed Rule: Is it a Federal Power Grab?* .Washington D.C.: Heritage Foundation.



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Since 1954, WAWG has been dedicated to the enrichment of the Washington wheat industry. WAWG works for solutions to problems of the farm, the farm home and rural community using united, organized action to represent, protect and advance the social, economic and educational interests of wheat farmers of Washington State.

