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Backgrounder

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"Waters of the United States:" A Case Study in Government Abuse

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Introduction

In a coast-to-coast power play, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have released a rule to revise the definition of "waters of the United States" (WOTUS) for application of the Clean Water Act (CWA or the Act). The new WOTUS definition, with hundreds of pages of explanatory material, defines the "waters of the United States" so generally that federal regulators will have power over almost all of the nation's waters and much of the nation's land around those waters. "Navigable waters" and the lands associated with those waters will now fall under EPA regulatory control and will include all "tributaries" (no matter how small or remote), "adjacent" water bodies," the 100-year floodplain, and, on a case-by-case basis, any water within 4,000 feet of a "tributary" or other covered water.

Under WOTUS, stormwater retention ponds such as this one in Orlando, can be regulated by the EPA. Landscaping, gardening or making changes to one's home could require EPA permission. (Photo courtesy of Lapin Services)

The rule is so broad and vague that federal regulators will be licensed to micromanage property owners who are far away from genuinely navigable waters such as rivers, lakes or the ocean. This move threatens to unleash a flood of federal regulations over people's land and their lives, from one end of the continent to the other.

The agencies contend that the new rule **explains** existing regulations.

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"Waters of the United States:" A Case Study in Government Abuse

(Continued from Front Cover)

But, in fact, it **expands** regulations by completely redefining the scope of federal authority under the Act. The Corps and EPA claim to have found authority under the CWA to regulate virtually all waters, and apparently dry land, in the United States. With absurdly few exceptions, nearly any wet area may now be subject to federal control.

This expansion of federal power may be unrivaled in American federal regulatory history. The agencies' new rule exceeds federal jurisdiction and usurps the power of the States, including Florida's right to manage local land and water resources. It nullifies constitutional limits on federal authority and its implementation puts virtually all waters and much of the land in Florida under the control of the Army Corps of Engineers and the EPA.

The result of this expanded regulatory authority is that property owners must contend with a new federal layer of compliance and permitting bureaucracies before altering or using their property. Since an individual permit typically costs on average more than $270,000, and $28,000[2] for a nationwide permit, this power grab will come at a monumental cost to Florida's economy. If you own property in Florida, you may very well face federal oversight over any changes you seek to make to that property, because of this new rule.

According to the U.S. Supreme Court, sudden and expansive interpretations of long-standing laws are unreasonable and should be met with skepticism.[3] The WOTUS rule certainly fits that bill. Floridians who believe in States' rights and limited government must understand the nature of this power grab and work with others to oppose the federal government's efforts to thwart years of Supreme Court precedent via this unprecedented arrogation of power.

Background of WOTUS

On April 21, the EPA and the Corps jointly released a new proposed rule "Definition of Waters of the U.S." or WOTUS under the Clean Water Act. The proposed rule was published in the Federal Register and public comment was taken nearly until November. The Final Rule was issued on June 29, 2015 and it officially redefined and expanded

" With absurdly few exceptions, nearly any wet area may now be subject to federal control. This expansion of federal power may be unrivaled in American federal regulatory history. "

the definition of jurisdictional WOTUS under the CWA. The rule will begin to be implemented 60 days from publication in the Federal Register; therefore, at the end of August 2015, these changes will begin to take effect unless one of the many lawsuits sees success. WOTUS is critical to the CWA. The CWA, passed in 1977, amended the Federal Water Pollution Control Act of 1972 and is considered to be one of the first and most influential modern environmental laws. The intent of Congress in passing the CWA was expressed in the Act itself: **"to recognize, preserve, and protect the primary responsibilities and rights of the States"** to control local land and water use. It empowered the EPA to have regulatory authority over "navigable waters" and waters with a "significant nexus" to navigable waters.

But, over the years, the Corps and EPA have a history of abusing their power under the CWA. On more than one occasion, the Supreme Court has admonished these agencies for overreaching their authority.

In 2001, the Court held that regulation of remote ponds exceeded the Corps and EPA's statutory authority and raised constitutional questions.[4] In 2006, a plurality of the Court held that the EPA's expansive interpretation of the CWA was overly broad and created unconstitutional intrusions of federal power into state concerns.[5] And in 2012, Justice Samuel Alito noted the EPA's expansive reading of the CWA put private property owners at the mercy of the EPA.[6] Unfortunately, the agencies'

Paynes Prairie in Gainesville, shown here in its normal state, is located in a 100-year floodplain. Under the new EPA WOTUS rule it would be considered navigable water and therefore subject to EPA jurisdiction and regulation. The term "100-year flood" is used in an attempt to simplify the definition of a flood that statistically has a 1 percent chance of occurring in any given year. (Photo courtesy of Visit Gainesville)

decision to implement the new WOTUS rule suggests the agencies will not abide by the limitations that the Constitution imposes on them.

WOTUS: A Question of Authority

The question is not *whether* the country will protect its water. The question is *who* has the constitutional authority to do so. The CWA itself expressly provides that *the states* have the primary responsibility to manage the water assets of the nation:

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

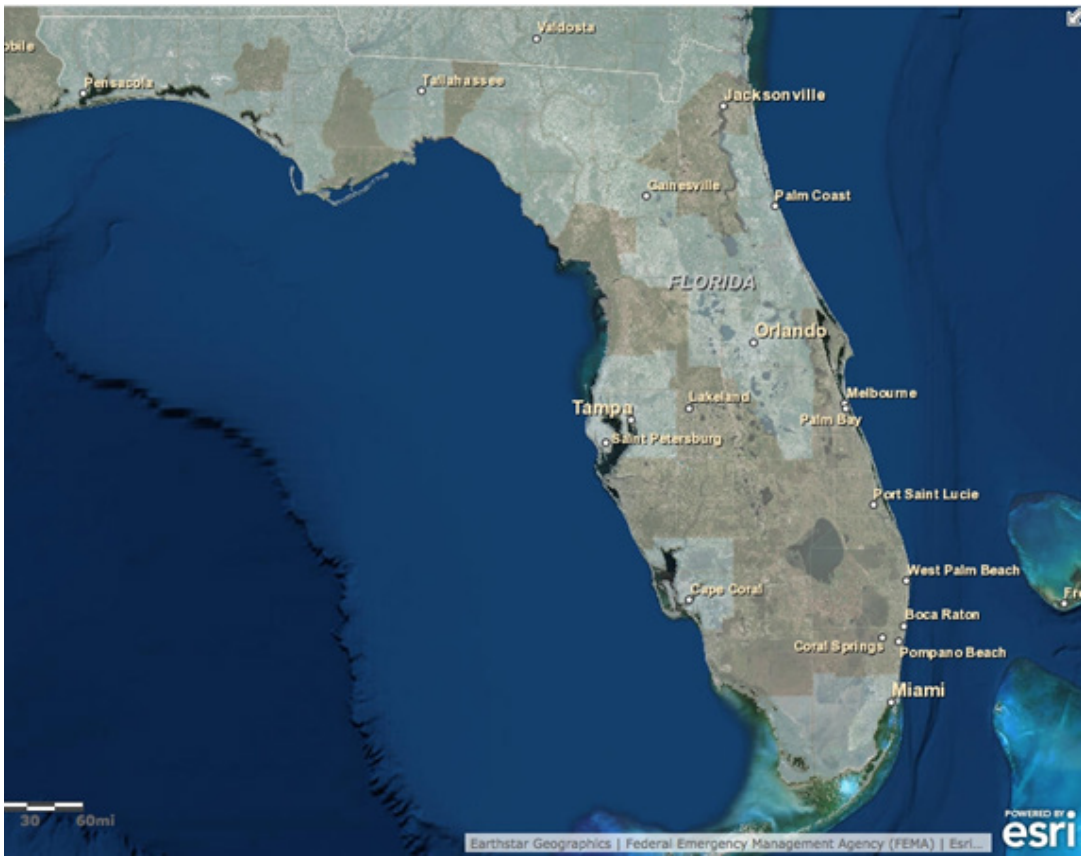
It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.[7]

This congressional recognition of the states' primary responsibility makes sense because regulating ditches, prairie potholes, and the like, exceed the scope of Congress's Commerce Clause authority via the United States Constitution. In defiance of the black letter law of the CWA itself, the newly proposed rule that would be unleashed under the Corps and EPA vastly—and illegally—expands federal regulatory power under the CWA through a practically open-ended new definition of the term, "waters of the United States." Again, although government officials publicly claim the new rule does not enlarge their power over average Americans, and is consistent with Supreme Court decisions interpreting the CWA, this could not be further from the truth.

In the 2006 case of *Rapanos*,[8] for example, the Supreme Court held that the federal government could not regulate all "tributaries" to navigable waterways, and reaffirmed that isolated water bodies are off-limits to federal regulators. But these are the very waters that the new rule purports to regulate.

EPA Administrator Gina McCarthy claims the new rule will clarify which waters are regulated under the CWA without expanding the scope of the Act. Meanwhile, the agencies' economic analysis provides that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea."[9] But in fact, the rule introduces even more vagueness and uncertainty into the regulatory scheme. It leaves all the previously ill-defined terms in place, like "adjacent," "wetland," and "discharge," while adding a handful of equally malleable terms such as "floodplain," "tributary," and "significant nexus."

The new rule leads to unpredictable and subjective enforcement of the law. That is why Judge Jane Kelly of the Eighth Circuit Court of Appeals recently noted "how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction . . . [t]his is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."[10] The new rule exacerbates the problem that Judge Kelly identified as already existing in the Act.



This map of Florida highlights counties (shaded in light blue) located in 100-year floodplains. While many of these areas are clearly located in uplands, the new EPA WOTUS rule will define them as navigable waters. The businesses, homes, or farms located within them will now fall under EPA jurisdiction and subject to EPA regulations. (Photo courtesy of ARCGIS)

WOTUS: Overreach in Nearly Every Way Imaginable

A review of how the WOTUS rule seeks to expand EPA jurisdiction over the current state of the regulatory framework demonstrates why property owners and groups like Pacific Legal Foundation are challenging the rule.

Jurisdiction Over Traditional Navigable Waters

The rule purports to retain its existing definition of "traditional navigable waters" as those waters that "are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce[.]"[11] This emphasis on the use of such channels for commerce is consistent with the long-standing definition of "traditional" or "navigable-in-fact" waters as described by the Supreme Court in *The Daniel Ball*, 77 U.S. 557 (1870), and recently reiterated by the Court,[12] wherein the Court held that the Corps could not regulate isolated water bodies and that, through the CWA, Congress intended to exert nothing "more than its commerce power over navigation."[13]

The new rule may so purport, but that is not what it actually does. The new rule brazenly declares that "traditional navigable waters" under the CWA will include any water for which a federal court has determined that the water

body is navigable-in-fact under federal law.[14] This would include navigability determinations that have nothing to do with interstate commerce or commercial navigation, as the definition expressly requires.

The government attempts to avoid the bar set by the Supreme Court through the new rule in a myriad of ways. A determination of navigability under some other law is not sufficient to satisfy the Commerce Clause requirements of the CWA and transport by boat alone is insufficient to establish a "traditional navigable water."

Jurisdiction Over Interstate Waters

The new proposed rule asserts that the Corps and EPA have authority under the CWA to categorically regulate all interstate waters, even if they are not navigable-in-fact and have no connection to interstate commerce.[15] But, these agencies conveniently overlook the obvious; the CWA is not a general mandate to regulate all waters. Congress does not have that power. The Act is based on Congress's constitutional power to regulate interstate commerce.[16] The Supreme Court has limited that power to the regulation of interstate commerce channels (such as navigable-in-fact waters), objects under the jurisdiction of interstate commerce (such as commodities that are bought and sold), and activities that substantially affect interstate commerce.[17]

By definition, anything regulated under the CWA must have a substantial connection to interstate commerce. That's why the Act prohibits certain discharges to "navigable waters" and not to all waters. Therefore, the regulation of all interstate waters exceeds both statutory and constitutional authority.

Nevertheless, the rule also asserts[18] that the precursor statutes to the CWA always subject interstate waters and their tributaries to federal jurisdiction. But this is not so. As the plurality observed in *Rapanos*, "[f]or a century prior to the [Clean Water Act], we had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable-in-fact' or readily susceptible to being rendered so."[19] In fact, "[a]fter the passage of the [Clean Water Act], the Corps initially adopted this traditional judicial definition of the Act's term 'navigable waters.'"[20]

Based on this understanding, the Supreme Court set out the contours of the CWA in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *SWANCC*, and *Rapanos*. *Riverside Bayview* authorized federal regulation of wetlands "adjacent" to (i.e., physically abutting) "traditional navigable waters." The court did not, however, equate interstate waters with "traditional navigable waters." *SWANCC* prohibited federal regulation of "isolated water bodies" but did not carve out an exception for interstate waters.

Likewise, in *Rapanos*, the plurality authorized federal regulation of relatively permanent rivers, lakes, and streams (and certain "adjacent" wetlands) connected to "traditional navigable waters." But the plurality did not equate interstate waters with "traditional navigable waters." Nor did Justice Anthony Kennedy do so in his concurrence. In *Rapanos*, Justice Kennedy authorized federal regulation of wetlands that have a "significant nexus" with "traditional navigable waters." But, like the plurality, Justice

"By definition, anything regulated under the CWA must have a substantial connection to interstate commerce."

Kennedy did not equate interstate waters with "traditional navigable waters."

Both the plurality and Justice Kennedy were quite explicit in defining jurisdictional waters under the CWA. In all cases, the covered water must be, or have a connection or nexus to, a "traditional navigable water." According to the plurality, "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers [and] lakes.'"[21] These, in turn, must be "connected to traditional interstate navigable waters."[22] Under the plurality opinion, therefore, non-navigable interstate waters may not be deemed "traditional navigable waters." And, according to Justice Kennedy: "In [*SWANCC*], the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable-in-fact or that could reasonable be so made."[23] Thus, Supreme Court precedent precludes categorical regulation of all interstate waters and the treatment of non-navigable interstate waters as "traditional navigable waters."

Ditches, such as the one pictured above in Jacksonville, could be controlled under the EPA in light of the new WOTUS rule. Property owners wishing to use or develop their land containing a ditch would be subject to the EPA's permission. (Photo courtesy of www.jaxshells.org)

Jurisdiction Over Tributaries

The Corps and EPA's claim that virtually all tributaries are subject to the CWA—no matter how remote or inconsequential—defies comprehension and is perhaps the most troubling aspect of the new rule. This is the same argument the agencies made in the *Rapanos* case, which was expressly rejected by both the plurality and Justice Kennedy. All five justices concluded that the agencies' "any hydrological connection" approach could not be sustained.

Rather than narrow the agencies' definition of tributaries, as *Rapanos* requires, the new WOTUS rule defines tributaries more broadly than ever, as 'water that contributes flow, either directly or through another water (including any other WOTUS or even non-jurisdictional waters), from any water used currently or in the past, or just susceptible to, use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, all interstate waters, including wetlands, the territorial seas, and impoundments, that is characterized by the presence of physical indicators of a bed, banks, and ordinary high water mark.'[24] Which is to say, the rule goes too far, certainly well beyond the constitutional strictures established by the Court in *Rapanos*. The *Rapanos* plurality limited federal jurisdiction to a limited subset of non-navigable

tributaries. The new federal regulation of virtually all tributaries raises constitutional conflicts that the Supreme Court has cited as a basis for limiting the scope of the CWA.[25] Therefore, the rule in regards to its expansive definition of tributaries directly conflicts with the *Rapanos* plurality and Justice Kennedy's opinion.

The takeaway: The agencies' unrestrained definition of covered tributaries has already been rejected by a majority on the Supreme Court in *Rapanos*.

Jurisdiction Over Adjacent Waters

Here too, the agencies propose an unprecedented expansion of federal authority under the CWA. The rule replaces the limited term "adjacent wetlands" with the unlimited term "adjacent waters" and authorize federal regulation of "adjacent waters" by rule.[26] According to the rule, the Corps and EPA regulate not only wetlands abutting traditional navigable waters, as the Supreme Court authorized in *Riverside Bayview*, but any water that is "adjacent" to any other covered water, which the Supreme Court has not authorized.

In further disregard for judicial precedent, the rule keeps the term "adjacent" but adds a new definition of "neighboring" which in turn covers:

- Waters where any portion falls within 100 feet of an ordinary high water mark of waters ever used or that could be used for interstate or foreign commerce, and all interstate waters, including interstate wetlands, the territorial seas, impoundments, and tributaries
- Waters where any portion falls within the 100-year floodplain of any of the just-listed types of waters and is less than 1,500 feet from the ordinary high water mark of that water
- Waters where any portion falls within 1,500 feet of the high tide line of those just listed waters other than impoundments or tributaries, and waters where any portion of them are within 1,500 feet of the ordinary high water mark of the Great Lakes.

This addition of the word "neighboring" to the word "adjacent" broadens the meaning of adjacent and makes it that much harder to interpret in any reliable way. Plus, as the American Farm Bureau Federation points out, the EPA and Corps' decision to add the 100-year floodplains to the definition of "neighboring" creates further uncertainty since floodplain maps are not always available, may be outdated, or even inaccurate.[27]

The reference to 100-year floodplains is particularly odious because it is immensely broad and undefined. Since the floodplain may only contain water during an actual flood, it appears the EPA and Corps' will assert regulatory authority over the floodplain even when dry, much as they regulate "wetland" areas that are dry but for a few days a year. This alone constitutes the largest land grab in U.S. history, encompassing tens of thousands of miles of typically dry land and extending from the lower Mississippi Delta to the smallest streams. The Corps and EPA have already excised the word "navigable" from the term "navigable waters." They now propose excising the word "waters" from the term as well. This flies in the face of federal law,

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which has held that the Clean *Water* Act gives the EPA jurisdiction over *water* only.[28]

Jurisdiction Using the Significant Nexus Analysis

The rule misrepresents the "significant nexus" analysis in a number of ways, not the least of which is that the "significant nexus" analysis should simply be rejected since that analysis flows from Justice Kennedy's lone concurrence in *Rapanos*, and thus should not be viewed as controlling—it is the plurality opinion that should be considered controlling.[29] The Corps and EPA compound the error by not only relying on a test that they should ignore, but then misapplying it. They do this in a number of ways.

First, they misstate the standard. The rule states that waters have the requisite significant nexus to navigable waters, interstate waters, or territorial seas if they, either alone *or in combination with similarly situated waters in the region*, significantly affect the chemical, physical, *or* biological integrity of waters that drain into those traditional navigable waters, interstate waters, or territorial seas.[30] Justice Kennedy's jurisdictional test, on the other hand, expressly requires the covered water to have a "significant nexus" to traditional navigable waters themselves, *and not just to waters that drain into traditional navigable waters.*[31] The test does not apply to non-navigable intrastate waters as the rule asserts.

Second, Justice Kennedy did not use the disjunctive "or" in describing the effects that must be shown to establish a "significant nexus." According to Justice Kennedy:

"Wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, *and* biological integrity of other covered waters more readily understood as 'navigable.'"[32]

This test is written in the conjunctive with the word "and." On its face, the test calls for a demonstration that the subject water has a significant chemical effect, *and* a significant physical effect, *and* a significant biological effect on a traditional navigable water. By its plain terms, all three effects must be shown. A single significant effect is insufficient to establish federal jurisdiction. The rule does not require this, and is therefore inconsistent with the Kennedy opinion.

Third, the rule misconstrues the level of significance required to satisfy the Kennedy test. The rule states a "significant nexus" will be found if a chemical, physical, or biological effect is more than "speculative or insubstantial." This is incorrect. There is a huge gap between a "speculative or insubstantial" effect and the "significant" effect required by the plain terms of the "significant nexus" test. While Justice Kennedy observed that a "speculative or insubstantial" effect was clearly insufficient to establish federal jurisdiction, a fair reading of the Kennedy opinion reveals that the Justice requires a substantial effect to demonstrate the requisite nexus, and not merely anything more than a speculative or insubstantial effect. A substantial effect on traditional navigable waters, like a substantial effect on interstate commerce, is also required by the Supreme Court in its interstate commerce line of cases. "Absent some measure of the significance of the

connection for downstream water quality, [the mere presence of a hydrological connection] standard [is] too uncertain."[33] Therefore, if the rule is to be true to the Kennedy opinion, it must require a demonstration of a substantial chemical, physical *and* biological effect.

The final rule also provides that to determine "significant nexus" the agencies will assess the following functions: sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life cycle dependent aquatic habitat.[34] The rule states that a water body has a significant nexus if any single function or combination of functions performed by the water, alone or together with similarly situated waters in the watershed, contributes to the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or territorial sea.[35] Once again, we see two federal agencies designing a new rule not in order to clarify its jurisdiction, but to expand it. In other words, the rule is so broad it preordains the outcome. The "significant nexus" test is unconstitutionally too broad.

Waters That Are Not Jurisdictional

The limited scope of excluded waters is so narrow that by contrast, the list serves to underscore just how broad the rule is. Those waters not included as "waters of the United States" include:

- Waste treatment systems;
- Prior converted croplands;
- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary;
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands;
- Ditches that do not flow, either directly or through another water, into a traditional navigable water, interstate water, or territorial sea;
- Artificially irrigated areas (a new addition);
- Artificial lakes and ponds (another new addition);
- Artificial reflecting pools or swimming pools;
- Small ornamental waters;
- Incidental water-filled depressions;
- Erosional features;
- Puddles;
- Groundwater;
- Stormwater control features; and
- Wastewater recycling structures.[36]

These exclusions are misleading in that they suggest some waters are excluded but hardly a concession because the list implies virtually all other waters are covered by the Act. The exclusions are too narrow or too uncertain to provide any meaningful limitation on federal authority. Saying the federal government must tell us it will not regulate our backyard pools as a water of the United States tells the American people just how little the government thinks of the limitations placed on its power by the Founding Fathers. Moreover, the agencies have a history of grossly narrowing how they interpret the limitations on their authority. They do so because they know few will ever hold them accountable, since challenging these agencies in federal court is neither easy

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An aerial view of Lakeland. The large number of surface water bodies across Florida will make nearly every part of the state subject to EPA regulation. The impact of these regulations, such as costly permits or mitigation requirements, will be felt by residential owners, farmers, ranchers, industries, etc. (Courtesy of Utah Pictures)

"Unfortunately, both the certainty and uncertainty created by the new rule will negatively impact the way all Floridians—private and public alike—seek to utilize their property."

nor inexpensive.

It is also difficult for the public to rely on these exclusions given the agencies' hostility toward the long-standing exemptions under the Act. For example, the Corps and EPA have routinely limited the farm exemption in the Act to those ordinary farming practices employed on a particular farm rather than those farming practices common to the industry, as a plain reading of the Act requires. And, the agencies have attempted to limit the "prior converted cropland" exemption (which covers approximately 53 million acres) through "internal policy changes," that the courts have invalidated.[37] Limiting exemptions and exclusions is standard practice for these agencies, making the exclusions contained in the proposed rule of little value.

WOTUS Rule's Impact on Florida

Regulations applying to water can greatly impact the use of the land surrounding them. Therefore, private property owners and local governments alike "depend on certainty in knowing which waters are considered jurisdictional under the Clean Water Act."[38] Unfortunately, both the certainty and uncertainty created by the new rule will negatively impact the way all Floridians—private and public alike—seek to utilize their property.

Senator James Inhofe of Oklahoma perhaps put it best: "[the new WOTUS rule] will drastically affect—for the worse—the ability of many Americans to use and enjoy their [private] property."[39] He concludes as much because the new rule provides that the EPA now has the right to regulate any water in a 100-year floodplain, any water within 1,500 feet of a navigable water, any water that is 4,000 feet from a tributary, and any pool or wetland that

the EPA has declared a "regional water treasure" if the agency can identify a significant nexus with a navigable water.[40] Here in Florida, that means private property formerly not subject to federal control is now lined up in the sights of the federal agencies. Much of Florida sits within 100-year floodplains, or within 4,000 feet of tributaries or regional water treasures. All of these landowners must now pursue federal approvals for the simplest work on their property or face the prospect of overwhelming federal prosecution.

Likewise, the new rule will hamper local Florida governments that seek to build and maintain infrastructure, engage in much needed road construction, manage ditches, and manage water treatment facilities and stormwater systems not installed on dry land.[41] The uncertainty created by the new rule, combined with added compliance costs, will amount to a tremendous drain on the public treasury. All of these impending consequences will occur just to comply with a new rule that is unconstitutional and violates the CWA itself, which says that the states are primarily responsible for managing their water resources.

Florida Commissioner of Agriculture Adam Putnam addressed the problems inherent with federal oversight from Washington, D.C., of wet and dry land in Florida:

"Florida is a unique state, and the EPA's one-size-fits-all, power grab to expand federal government's authority robs Florida's leaders of the ability to make the best decisions for our distinct water bodies. There is little clarity or relief for Florida in these regulations, and the expansion of federal jurisdiction stands to threaten the sound environmental programs we currently have in place today."[42]

Likewise, U.S. Representative Tom Rooney, a member of the House Agriculture Appropriations Subcommittee, explained that the costs associated with the EPA's efforts to regulate "ponds and puddles would be laughable if the costs weren't so high. Complying [with the new WOTUS rule] will cost Florida farmers, families, and local governments billions of dollars. It will slow our economic recovery, kill jobs in our state, and hurt our farmers' ability to feed the nation."[43]

Conclusion

Under the new WOTUS rule, a prudent legal practitioner must advise his or her client that the only waters not covered are the few *expressly* exempt. If a water body is not a "traditional navigable water," it is a "tributary." If it is not a "tributary," it is an "adjacent water." If it is not an "adjacent water," it is an "other water." This attempted arrogation of authority extends federal power over local land and water use to an extreme never seen in U.S. history. It is contrary to existing federal law and judicial precedent.

In 2001, the Supreme Court held in *SWANCC* that the Corps and EPA could not regulate isolated water bodies because that would read the term "navigable waters" right out of the Act and raise constitutional questions. But, both groups continued to do so. In 2006, the Supreme Court held in *Rapanos* that the Corps and EPA could not regulate all tributaries with a so-called "ordinary high water mark" because that definition could not be consistently applied and extended to remote ditches, drains, and sewers. But, both groups continued to

"Much of Florida sits within 100-year floodplains, or within 4,000 feet of tributaries or regional water treasures. All of these landowners must now pursue federal approvals for the simplest work on their property or face the prospect of overwhelming federal prosecution."

do so. Now, through this new rule, the Administration has adopted essentially the same definition of jurisdictional waters the Supreme Court rejected in *SWANCC* and *Rapanos*.

Moreover, the Administration deceptively argues that due to these decisions, millions of people have been denied clean water protections, a point so obviously false in light of state regulation that it fails the straight face test. The Administration then argues that the new rule is necessary to close the regulatory gap while simultaneously claiming the new rule is fully consistent with Supreme Court precedent. The Administration does not seem to grasp this inconsistency.

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Instead, the Corps and EPA disingenuously blame the Supreme Court for the agencies' own ineptitude in clearly defining and enforcing their own CWA regulations for more than 40 years. Now the agencies are at it again—seeking to expand their power with even broader regulations not supportable under the plain language of the CWA, Supreme Court precedent, and even constitutional constraints.

It must be understood that, unlike a local or state regulation, which can be postponed with a court order until legal proceedings result in a court ruling, this EPA rule is now in the Federal Register and goes into effect on August 28, 2015 regardless of opposition. This leaves two paths open for opposition: legislative and judicial.

On June 29, 2015, the Congressional Research Service issued a report entitled: EPA and the Army Corps' "Waters of the United States" Rule: Congressional Response and Options. Here are the four options available to oppose or change the new rule:

- The Congressional Review Act. If Congress passes a joint resolution disapproving a covered rule under procedures provided by the act, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.
- Appropriations bill limitations. A provision in an appropriations bill can be a mechanism to block or redirect an agency's course of action by limiting or preventing agency funds from being used for the rule.
- Standalone targeted legislation. Other legislation can take several forms, such as a bill similar to limits in an appropriations bill to prohibit EPA and the Corps from finalizing, implementing, or enforcing the proposed rule. Another approach could be legislation to address substantive aspects of the rule that have been criticized.
- Broad amendments to the Clean Water Act. Legislation to affirm or clarify Congress's intention regarding CWA jurisdiction would have broad implications for the CWA, since questions of jurisdiction are fundamental to all of the act's regulatory requirements."

In fact, action has been taken by U.S. Congressman Smith of Nebraska employing the option of a joint resolution. H. J. Resolution 59 was filed July 7, 2015.

However, it must be remembered that any legislation, which might weaken the new rule, will be opposed by the administration. That would mean two-thirds of the House and Senate would be

required to override a likely veto.

With the legislative option highly unlikely, the remaining option is to oppose it judicially. Already the Pacific Legal Foundation (PLF), numerous business and agricultural groups, and 27 states have filed suits against the EPA and the Army Corps of Engineers seeking to shut down enforcement of the new rule before it begins. If the implementation does begin as scheduled at the end of this month, Floridians should remain watchful and report negative impacts of the new rule to organizations like The James Madison Institute and PLF.

About the Authors

M. Reed Hopper is a principal attorney in Pacific Legal Foundation's Environmental Law Practice Group. He oversees the foundation's Endangered Species Act Program that is designed to ensure that species protections are balanced with individual rights, the rule of law, and other social values. Mr. Hopper also oversees PLF's Clean Water Act Project that targets illegal federal regulation of wetlands and other waters.

PLF represented John Rapanos, in *Rapanos v. United States*, 547 U.S. 715 (2006), one of the most important wetlands decisions decided by the Supreme Court. Mr. Hopper argued that case and serves as the environmental project director of PLF. He has litigated numerous cases addressing federal jurisdiction under the CWA.

Prior to joining PLF in 1987, Mr. Hopper served as both an environmental protection officer and hearing officer in the U.S. Coast Guard enforcing the Clean Water Act in the Gulf Coast. Mr. Hopper has managed large industrial waste programs and established a consulting firm for hazardous waste compliance. Additionally, Mr. Hopper has been part of national and state committees to draft and revise numerous environmental laws and regulations, including NEPA, CEQA, ESA, and CESA, and state and federal timber harvesting guidelines.

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Mr. Miller has been published in both the Stetson Law Review and the Florida Bar Journal. Martindale-Hubbell has rated him an AV Preeminent attorney, the highest ranking Martindale-Hubbell offers and one that reflects the opinion of other members of the Florida Bar about Mark's ethical standards and legal ability. He is a member of the appellate section of the Florida Bar, chairs the Professionalism Committee for the Martin County Bar Association, and is a Master in the Major B. Harding American Inn of Court.

Endnotes

1. Pacific Legal Foundation represented John Rapanos, in *Rapanos v. United States*, 547 U.S. 715 (2006), one of the most important wetlands decisions decided by the Supreme Court. Mr. Hopper argued that case and serves as the environmental project director of PLF. He has litigated numerous cases addressing federal jurisdiction under the CWA. Mr. Miller is the managing attorney of PLF's Atlantic Center in Palm Beach Gardens, Florida. He is board-certified in appellate practice.
2. *Rapanos v. United States*, 547 U.S. 715 721 (2006).
3. *See Utility Air Regulatory Group v. E.P.A.*, __ U.S. __, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy . . . we typically greet its announcement with a measure of skepticism.").
4. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (known as *SWANCC*).
5. *Rapanos v. United States*, 547 U.S. 715 (2006).
6. *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring).
7. 33 U.S.C. § 1251(b) (emphasis added).
8. *Rapanos*, 547 U.S. 715.
9. U.S. Environmental Protection Agency, *Economic*

Analysis of the EPA-Army Clean Water Rule at 11, May 2015, *available at*: http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf (last visited June 19, 2015).

10. *Hawkes Co. v. United States Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring).
11. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37056 n.4 (June 29, 2015).
12. *See SWANCC* at note 1.
13. *Id.*
14. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37074 (June 29, 2015).
15. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37056 (June 29, 2015).
16. *See SWANCC* and *Rapanos*.
17. *See United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).
18. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37074 (June 29, 2015).
19. *Rapanos*, 547 U.S. at 723.
20. *Id.*
21. *Rapanos*, 547 U.S. at 739.
22. *Id.* at 742.
23. *Id.* at 759 (emphasis added).
24. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37056 n.4 (June 29, 2015).
25. *See Rapanos* and *SWANCC*.
26. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37058 (June 29, 2015).
27. American Farm Bureau Federation, *Comparison of Final Rule Defining "Waters of the United States,"* June 11, 2015 at 8-9, *available at*: http://www.fb.org/tmp/uploads/Final_Rule_Comparison_Chart-Copy.pdf (last visited June 19, 2015).
28. *Rapanos*, 547 U.S. at 716.
29. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds. . . .").
30. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37056 (June 29, 2015).
31. *See Rapanos*, 547 U.S. at 779 ("Consistent with *SWANCC* and *Riverside Bayview* and the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.") (Kennedy, J., concurring).
32. *Id.* at 780.
33. *Rapanos* at 784 (J. Kennedy, concurring).
34. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37067 (June 29, 2015).
35. *Id.*
36. *Id.* at 211-13.
37. S*ee New Hope Power Company v. Corps of Engineers*, 746 F. Supp. 2d. 1272 (S.D. Fla., 2010) (Holding change in policy constituted new legislative and substantive rules but are improper because they were not subject to notice and comment).
38. Florida League of Cities, *Waters of the United States: Implications for Florida's Local Governments*, published June 3, 2015, *available at*: http://www.floridaleagueofcities.com/Assets/Files/Legislative/WOTUS_update_June3.pdf (last visited June 19, 2015).
39. James Inhofe, *Why every property owner should fear EPA's "waters of the United States" rule*, Fox News, June 2, 2015, *available at*: http://www.foxnews.com/opinion/2015/06/02/why-every-property-owner-should-fear-epas-waters-united-states-rule.html (last visited June 19, 2015).
40. *Id.*
41. *See* footnote 7.
42. Susan Salisbury, *Putnam, Rooney criticize new "waters of the U.S." rule released today*, Palm Beach Post, May 28, 2015, *available at*: http://protectingyourpocket.blog.palmbeachpost.com/2015/05/27/putnam-rooney-criticize-new-waters-of-the-u-s-rule-released-today/ (last visited June 19, 2015).
43. *Id.*