

MEMORANDUM

TO: Association of Minnesota Counties

FROM: Dennis McGrann // Andy Burmeister // Megan Knight // Emily Tranter // Carlie Waibel // Shannon Anderson // Tyler Hardy

DATE: April 4, 2014

RE: U.S. Environmental Protection Agency “Waters of the United States” Proposed Rule: A Primer

The United States Environmental Protection Agency (EPA) released a proposed rule entitled the *Proposed Rule on the definition of the Waters of the United States*, on March 25, 2014 which seeks to clarify rules and regulations pertaining to the protection of streams and wetlands under the Clean Water Act (CWA). More specifically, the EPA released the rule in hopes that it would assist in reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing, and recharging groundwater.

Although the full impact is yet to be seen, our initial analysis suggests that the rule, if implemented, would have significant impacts on Minnesota Counties. With this in mind, the following memorandum has been prepared to provide a brief background on the issue. Furthermore we have provided a number of recommendations for AMC to consider as this rulemaking process continues. We stand ready to work with you to further evaluate the impact of the rule and assist in the development of actions aimed at relaying your specific interests and concerns to decision makers in Washington, DC.

BACKGROUND – CLEAN WATER ACT:

The Federal Water Pollution Control Act of 1972, known as **the Clean Water Act (CWA)**, is the primary federal law that governs water pollution. The CWA allows the government to regulate the discharge of any pollutant (including dirt or sand) into “navigable waters” which the Act defines as “the waters of the United States”.

The originally defined “waters of the United States” left room for many regulatory loopholes, allowing thirty six states to create legal limitations that prevent the EPA from covering waters not covered by the Clean Water Act.

The United States Supreme Court has issued rulings on the law's jurisdiction three times since 1985, with a split decision in 2006 confusing both regulators and the regulated. In *Rapanos v. United States* 547 U.S. 715 (2006) four of the Court's Justices ruled that the statute could only be extended to cover "relatively permanent, standing or flowing bodies of water". Associate Justice Anthony M. Kennedy agreed but suggested a different test to determine what exactly constitutes "waters of the United States" – whether a body of water or wetland has a "significant nexus" to waters that are or could reasonably be navigable. As such, enforcement officials decide on a case-by-case basis how to apply each judicial ruling to individual waters.

The numerous Court rulings have caused much confusion among judges, regulators, the regulated community, environmental advocates, and conservationists over which waters are covered for the purpose of the federal Clean Water Act. This has allowed the states to fill the gap in federal coverage and protect or otherwise regulate under state law any waters that lie beyond the reach of the CWA, or remain uncertain by the Supreme Court rulings.

Under current regulations the State of Minnesota has in place some regulatory protections and limitations provisions, yet these regulate its waters more broadly than is required by the CWA.

Under the Minnesota State **Public Waters Law**, the Minnesota Department of Natural Resources defines "waters of the state" as

...all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigations systems, drainage systems, and all other bodies or accumulations of water, surface, or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.

The Minnesota State **Wetlands Conservation Act** prohibits wetlands from being drained or filled, unless replaced by restoring or creating wetland areas of at least equal public value under an approved replacement plan. Local government units administer the Act by issuing determinations for projects that result in fill, drainage, or excavation of wetlands. The Minnesota Board of Water and Soil Resources oversees and promulgates regulations in accordance with the Act, including rules for replacement plan standards.

THE PROPOSED RULE:

On March 25, 2014 The Environmental Protection Agency released the *Definition of The Waters of the United States* proposed rule which aims to end the confusion and clearly define "the waters of the United States". Under the rule the EPA proposes to define the "waters of the United States" to mean:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
 - A tributary is defined as a water physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow, either directly or through another water, to a water
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;
 - Wetlands are defined as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a *significant nexus* to a traditional navigable water, interstate water or the territorial seas;
 - The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water

EXCLUSIONS:

The proposed rule specifies waters and features that would be excluded from the definition of “the waters of the United States” under the new rule. The waters and features that would not be considered “waters of the United States” are:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
- Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with the EPA;

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow;
- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water;
- Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land for primarily aesthetic reasons;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
- Water-filled depressions created incidental to construction activity;
- Groundwater, including groundwater drained through subsurface drainage systems;
- Gullies, and rills and not-wetland swales

AGRICULTURAL EXCLUSIONS:

Of particular note, the EPA has suggested that agriculture and farming practices will not be significantly affected by the proposed rule, and that any normal farming activity that does not result in a “point source discharge of pollutants” into waters of the U.S. will not require a permit. The EPA has released an [Agriculture Exemptions Fact Sheet](#) that outlines the impact of the new rule on agriculture.

According to this fact sheet the new rule will preserve current agricultural exemptions for Clean Water Act permitting, including:

- Normal farming, silviculture, and ranching practices;
 - including plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products
- Upland Soil and water conservation practices;
- Agricultural storm water discharges;

- Return flows from irrigated agriculture;
- Construction and maintenance of farm or stock ponds or irrigation ditches on dry land;
- Maintenance of drainage ditches;
- Construction or maintenance of farm, forest, and temporary mining roads;

To qualify for these exemptions, the activities must be part of an established farming, forestry, or ranching operation, and will not need a determination of whether the activities are in “waters of the United States”, not will they need site-specific pre-approval from either the U.S. Army Corps of Engineers or the EPA before implementing these specified agricultural conservation practices.

While the EPA has said that this new ruling will not affect farming practices, The American Farm Bureau Federation is openly opposing the proposed rule stating the following in a press release:

*The EPA proposal poses a serious threat to farmers, ranchers and other landowners...[the proposal does] not protect farmers from federal veto power over pest and weed control, fertilizer application, and other essential farming activities that may result in the addition of ‘pollutants’ to ‘navigable waters’.*¹

ECONOMIC ANALYSIS:

The EPA and the Army Corps of Engineers produced an economic analysis² of the proposed rule that shows that the proposed rule would provide an estimated \$388 million to \$514 million annually of benefits to the public through reduced flooding, filtered pollution, recharged groundwater, and support of hunting and fishing. Please see the attached economic analysis document for more detailed information.

MINNESOTA REACTION:

In Minnesota, the proposed rule would seemingly have a significant impact. According to the National Association of Wetland Managers, more than half of Minnesota’s streams are intermittent and have not been protected in the past by federal law.

Nearly a million people in Minnesota get their drinking water from sources that are at least partly fed by intermittent and ephemeral streams. Some Minnesota organizations have made statements on the proposed rules.

Conservation Minnesota, a Minnesota based environmental advocacy group announced its support for the proposed rule saying in a statement that, “this rule would protect the streams that feed into rivers like the Mississippi and the wetlands that filter pollution out of our 10,000 lakes.

¹ See Appendix A at the end of document

² http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf

Minnesotans expect that all our waterways are protected.” Conservation Minnesota has announced that it will host a series of informational events on the newly proposed rule.

NATIONAL ASSOCIATION OF COUNTIES STATEMENT:

Upon the release of the proposed EPA Rule, the National Association of Counties (NACO) released a statement which discusses the main components of the rule and suggests that they will continue to study regulation for its potential impacts on counties and provide additional analysis. NACO reasserted its policy which states that local streets, gutters, and man-made ditches should be excluded from the definition of "waters of the U.S.”³

HOUSE TRANSPORTATION AND INFRASTRUCTURE HEARING ON “WATERS OF THE U.S.” PROPOSED RULE:

Bill Schuster (R-PA), Chairman of The House Transportation and Infrastructure Committee issued a press release following the release of the EPA proposed rule and indicated his displeasure for the rule indicated that the proposal could “lengthen the already long arm of federal agencies, including the Environmental Protection Agency (EPA), into the affairs of practically every U.S. business, farmer, landowner, and local and state government. He indicated that “it is the responsibility of Congress – and only Congress – to change the scope and amend the Clean Water Act. And Congress has determined this to be unnecessary. This massive federal jurisdiction and land grab was the subject of failed legislation in the 110th and 111th Congresses. Strong bipartisan opposition prevented those bills from gaining any traction.”

With this in mind, he indicated that the Committee will be holding oversight hearings to examine the effects of the newly proposed rule. These hearings, which have not yet been scheduled, will provide an additional opportunity for the Association of Minnesota County’s to provide commentary on the impact of this proposed rule on local government.

STAKEHOLDER OUTREACH MEETINGS:

We expect that the Environmental Protection Agency will be holding regional stakeholder outreach meetings to further discuss the implications of this proposed rule. The schedule for these meetings has not yet been released, but we will keep you informed as to the details when they become available and encourage the Association of Minnesota County’s engagement.

PUBLIC COMMENT PERIOD:

This proposed rule has been submitted for publication in the *Federal Register*. Upon its publication there will be a 90 day comment period, allowing the public to submit written comments to the agency. We will keep you advised as to when this comment period begins and, if desired, work with AMC to develop and submit comments based on feedback from individual counties.

³ <http://www.naco.org/legislation/WW/Lists/Posts/Post.aspx?List=7b3c6e0a-dc7d-47e9-a7d7-e3c49b794533&ID=751&Source=%2Flegislation%2FWWW%2Fdefault%2Easpx&Web=5cfea8e1-88b1-4483-824c-7583a8c42009>

CONCLUSION:

Please do not hesitate to contact Dennis McGrann at (202) 544-9840 or dmmcgrann@locklaw.com, Andy Burmeister at (202) 544-9844 or arburmeister@locklaw.com, or Emily Tranter at (202) 544-9896 or ejtranter@locklaw.com if you have any questions, concerns, or would like additional information.

APPENDIX A:

Statement by Bob Stallman, President, American Farm Bureau Federation, Regarding EPA's Proposed 'Waters' Rule

WASHINGTON, D.C., April 1, 2014 – “Last week, the American Farm Bureau Federation carefully reviewed EPA’s March 25 release of the ‘waters of the U.S.’ proposed rule. The results of our review are dismaying.

“The EPA proposal poses a serious threat to farmers, ranchers and other landowners. Under EPA’s proposed new rule, waters – even ditches – are regulated even if they are miles from the nearest ‘navigable’ waters. Indeed, so-called ‘waters’ are regulated even if they aren’t wet most of the time. EPA says its new rule will reduce uncertainty, and that much seems to be true: there isn’t much uncertainty if most every feature where water flows or stands after a rainfall is federally regulated.

“Under this proposed rule, farmers, ranchers and every other landowner across the countryside will face a tremendous new roadblock to ordinary land use activities. This is not just about the paperwork of getting a permit to farm, or even about having farming practices regulated. The fact is there is no legal right to a Clean Water Act permit – if farming or ranching activities need a permit, EPA or the Army Corps of Engineers can deny that permit. That’s why Clean Water Act jurisdiction over farmlands amounts to nothing less than federal veto power over a farmer’s ability to farm.

“EPA accompanied its proposal with a new ‘interpretive rule’ claiming to clarify certain statutory exemptions for agricultural conservation practices, including activities as commonplace and essential to farming as building a fence. But these exemptions apply only to ‘dredge and fill’ permit requirements. They do not protect farmers from federal veto power over pest and weed control, fertilizer application, and other essential farming activities that may result in the addition of ‘pollutants’ to ‘navigable waters,’ – providing one views every ditch and wet spot across the landscape as ‘navigable waters.’

“The American Farm Bureau Federation will dedicate itself to opposing this attempted end run around the limits set by Congress and the Supreme Court. The Supreme Court has ruled repeatedly that Congress meant what it said: ‘navigable waters’ does not mean all waters. This proposed rule shows that EPA refuses to accept those limits.”