



Clean Water Act

Rulemaking to Redefine "Waters of the U.S." by EPA, Corps of Engineers

Background

When Congress enacted the Clean Water Act (CWA) in 1972 to protect navigable waters, it included a definition of the "navigable" rivers, lakes, streams, coastal areas, wetlands and other water bodies that Congress intended to be subject to the Act's regulations. In the years since, rules and guidance documents issued by the U.S. Environmental Protection Agency (EPA) and Corps of Engineers (Corps) have greatly expanded the original focus on "navigable waters" to also regulate an ever-widening range of other land features, including minor wetlands and generally dry streambeds that only occasionally carry storm water.

Considerable confusion and growing angst resulted from the enforcement, and citizen suits and government litigation followed. Further, three Supreme Court decisions failed to fully clarify the definition, but ruled that to be regulated as tributaries, conveyances must have a "significant chemical, physical and biological nexus" with traditionally navigable waters. Based on that "significant nexus" notion, in 2011 EPA and the Corps developed new guidance to clarify (and greatly expand) the definition of "waters of the U.S." (WOTUS). After languishing at the Office of Management and Budget (OMB) for nearly two years, the draft guidance was withdrawn last year. In its place, the agencies substituted an actual draft WOTUS rule that is proving to be as controversial as the withdrawn guidance. It has been under view by OMB since September, and the EPA and Corps hope to finalize it during the remainder of the Obama administration.

The Issue

The WOTUS definition influences the jurisdictional reach of all programs of the CWA: it is the foundation of federal regulation in the U.S. The WOTUS determination establishes what is subject to direct federal control: what are "wetlands"; where construction permits could be required; where water quality standards and TMDLs could be applied; where National Pollutant Discharge Elimination System (NPDES) permits are enforced; and many other CWA requirements. The WOTUS determination can be enforced and challenged by federal agencies, "delegated" states and third parties through the CWA's citizen suit provision.

The Problem

Based on a leaked draft of the proposal, a coalition of private sector stakeholders learned the proposed rule would greatly expand the definition of WOTUS and alter a huge range of regulations that implement all CWA programs. Further, we believe that EPA's economic purported determination that "benefits outweigh costs" is severely flawed, and the justification for expanding the jurisdictional reach of CWA is not supported by the science. On its face, the new proposed definition appears similar to the existing regulatory definition of WOTUS. However, through inclusion of floodplains, riparian areas, shallow groundwater and ditches, this new regulation would affect all water unless specifically exempted, since all water conveyances in floodplains and riparian areas and most ditches in the U.S. would be regulated, including many waters generally considered to be under state jurisdiction or even private.



The Solution

Congress must conduct meaningful oversight of any new proposed WOTUS rule. And, if needed, insist that EPA make changes to the rule to ensure it comports with Congressional intent and the authorities granted under the CWA.

Pesticide NPDES General Permits

Background

In 2009, the 6th Circuit Court of Appeals overturned EPA's 2006 rule specifically exempting from the CWA NPDES permitting of aquatic pesticide applications. The decision posed a major duplication of performance regulations and recordkeeping, requiring permittees to comply with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) label and CWA permitting requirements. EPA and 46 states with CWA-delegated authority were forced to develop and implement NPDES general permits for aquatic pesticides. Most state permits mirror EPA's permit in form, but differ widely from state to state in specific requirements. All carry the burden of significant legal jeopardy due to potential citizen suits and agency CWA enforcement.

The Issue

Never in more than 40 years of FIFRA or the CWA has the federal government required a permit to apply pesticides for control of pests such as mosquitoes, forest canopy insects, algae or invasive aquatic weeds and animals when pesticides are properly applied "to, over or near" waters of the U.S. State agencies have testified that these permits provide no additional environmental benefits, that they simply duplicate other regulations and impose an unwarranted resource burden on their budgets. As a result, some states simply choose to ignore permit compliance burdens, which creates potential litigation risks.

The NPDES permits contain dozens of recordkeeping and performance requirements, not only posing a significant burden on operators but creating legal jeopardy due to the potential for CWA citizen suits for mistakes or missed deadlines. CWA penalties are severe.

The Problem

Congress has tried for three years to overturn the 6th Circuit requirement for pesticide NPDES permits. Strong bipartisan support exists in the House and Senate for a legislative fix. Despite the fact that conferees to the 2014 Farm Bill considered the fix until the last minutes of negotiations, the language from the House Bill, H.R. 935 (widely known as H.R. 872), was forcibly removed from a provision in the final Farm Bill by Senate Agriculture Committee Chair Stabenow (at the urging of Senator Boxer).

The Solution

Congressional supporters must actively look for opportunities to pass the "NPDES fix for pesticides" to protect users from the permit's duplicative requirements and legal liability.

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