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US Food Security and Farmers' Livelihoods at Stake in "Waters of the US" Rule Rewrite

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For decades, federal agencies have incrementally extended their control over agricultural lands by expanding the definition of "waters of the US" (WOTUS) under the Clean Water Act (CWA) and asserting broad legal jurisdiction over WOTUS-adjacent "wetlands." Those efforts triggered intense legal conflicts, facilitated the CWA's growth into a "regulatory hydra," and caused a "reversal of terms [in our unique relationship with government] that is worthy of *Alice in Wonderland*."[1]

President Trump recently issued Executive Order 13778 as the first step aimed at curtailing this government juggernaut. The order directs the heads of the US Environmental Protection Agency (EPA) and the US Army Corps of Engineers (the Corps) to review for substantial revision or rescission their jointly issued 2015 CWA regulation that expanded the definition of "WOTUS." Presumably, EPA's review of this regulation will be undertaken while the October 9, 2015 federal court-issued stay of its implementation remains in place.[2]

The Obama Administration regulation *inter alia* treats all "wetlands" adjacent to WOTUS as "jurisdictional waters" for purposes of enforcing CWA's controversial § 404 (dredge and fill permitting requirements). It does so by dispensing with the traditional case-by-case evaluations used to determine if jurisdiction applies to specific delineated wetlands.

American farmers and other owners of farmland were among the most vocal opponents of the 2015 WOTUS rule, and for good reason. Such businesses and landowners have endured decades of shifting WOTUS definitions and regulatory turf wars between EPA and the Corps, as well as regulators' efforts to curtail the statutory "normal farming activities" exemption from wetland oversight. As illustrated by a 2016 Senate Committee on Environment and Public Works case study, the 2015 rule would codify and expand the agencies' regulatory overreach to devastating effect on farmers and farmland owners. The committee report even noted that farmers could not rely upon the 2015 rule's extension of exclusions from WOTUS jurisdiction, such as the longstanding "prior converted cropland" (PCC) exclusion.

The Trump Administration has an opportunity to refocus American wetlands regulation in a way that preserves waters of the US through rational, clearly composed rules and exemptions. But as the discussion below reflects, stakeholders, as well as the White House must remain vigilant and fully engaged in the rulemaking process to minimize the risk that productive changes are not distorted or ignored by creative environmental bureaucrats.

The Food Security Act's Role in Wetlands Protection

In addition to CWA § 404, Congress also enacted the Food Security Act of 1985 (FSA) to protect wetlands. The FSA's Title XII "Swampbuster" provision, 16 U.S.C. § 3821, helped wetland conservation efforts by limiting and eventually denying US Department of Agriculture Soil Conservation Service (USDA-SCS) funding to those who commenced conversion of wetlands to croplands *after* December 23, 1985. PCCs, which are defined by reference to the USDA-SCS's 1988 National Food Security Act Manual (NFSAM), however, are exempt from and not subject to the FSA's Swampbuster provision.[3]

The FSA defines PCCs as wetlands that had, *prior to* December 23, 1985, commenced being drained, dredged, filled, leveled, or otherwise manipulated for the purpose or effect of making agricultural commodity production possible, where such production would not have been possible but for such action, and prior to that action the land constituted a wetland (land that was neither highly erodible land nor highly erodible cropland). The NFSAM added three conditions required to secure PCC status. First, the claimed agricultural commodity must have been planted at least once prior to December 23, 1985. Second, the area must not have been "abandoned." The NFSAM defined abandonment as "the cessation of cropping, management, *or* maintenance operations on prior converted croplands," including "*repair of drainage system*" (emphasis added). It considered a PCC abandoned "if wetland criteria are present *and*" the PCC "has not been used, managed *or maintained* for cropping purposes for 5 successive years, *and* was not enrolled in a USDA [...] program of conserving use *or* wetland restoration" (emphasis added). Third, it deemed a wetland conversion "commenced" if "any of the construction activities including flood water reductions that would convert [a] wetland were actually started," or substantial funds had been expended or legally committed for the direct purpose of converting the wetland. As long as the USDA Farm Services Agency had issued a commenced conversion by September 19, 1988 designating that "commenced" activities had begun before December 23, 1985, the NFSAM and the USDA's 1987 and 1996 regulations provided that conversion activities could be completed up until January 1, 1995 without compromising PCC status.

EPA & the Corps Vie for Control over Agricultural Wetlands

During the late 1980s and the early 1990s, EPA and the Corps disagreed over whether prior converted cropland that the USDA-SCS deemed as exempt from and not covered by the Food Safety Act were also to be *excluded* from WOTUS and CWA § 404 jurisdictional coverage. The Corps issued regulatory guidance (RG-90-07) granting PCCs an exclusion from CWA § 404 jurisdictional coverage in September 1990, having determined that PCCs were sufficiently physically transformed from former wetlands into drylands capable of and supporting continued actual agricultural use for crop production and/or pasturing (forage) such that they no longer constituted "wetlands" under the Corps' 1987 Wetlands Delineation Manual. EPA, meanwhile, took several years longer to move in that direction, having embraced a more expansive definition of "wetlands" contained in its 1988 wetland Identification and Delineation Manual,[4]

thereafter incorporated into the controversial 1989 interagency "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" which no longer is officially followed.[5]

During this period of regulatory confusion and uncertainty, EPA continued to aggressively impose its CWA § 404 jurisdiction over agricultural wetlands, irrespective of whether the Corps had treated PCCs as excluded from WOTUS and CWA § 404 coverage. Consequently, many small and medium-sized farms and ranches, including the Braces, owners of an Erie, Pennsylvania family farm I am representing in litigation, were rendered unprofitable and/or driven out of business. Indeed, EPA had refused to recognize the Brace farm's 1988 PCC status and exclusion from CWA § 404 jurisdiction. EPA also had effectively compelled my clients to prove (unsuccessfully) in a federal lawsuit[6] that their farming operations qualified under the "normal farming activities" exemption of CWA § 404(f)(1) (which EPA construed very narrowly), and escaped "recapture" under CWA § 404(f)(2) (which EPA construed very broadly).

EPA first recognized PCCs as excluded from WOTUS and CWA § 404 jurisdictional coverage in nonbinding 1992 agency fact sheets. However, it finally accepted this interpretation following the White House Office on Environmental Policy's August 1993 release of the Clinton Administration's wetlands policy. The Clinton wetlands policy acknowledged the regulatory burdens the inconsistent and conflicting CWA and FSA wetlands protection programs had placed on American farmers. To relieve such burdens, it ensured that EPA and the Corps would soon thereafter jointly issue a regulation treating those PCCs that were excluded from coverage under FSA's Swampbuster provision as equally excluded from the definition of WOTUS and CWA § 404 regulatory jurisdiction. The August 1993 joint EPA-Corps regulation effectively codified the Corps' then-current regulatory policy (RG-90-07) that PCCs, as defined by the National Food Security Act Manual, were not waters of the US covered under CWA § 404, thereby amending the definition of WOTUS.

Stakeholder Engagement and White House Oversight Needed to Curtail EPA Wetlands Overenforcement

If the history of EPA's prior disregard for the PCC exclusion and its exploitation of the normal farming activities exemption at farmers' expense is any judge, the Trump Administration's goal of revising the Obama WOTUS rule is unlikely to be easily realized. For example, the 2008 *Transition to Green* report, issued by a who's who of environmental activist groups in early 2009, recommended that EPA, together with the Corps and the US Department of Justice's Environment and Natural Resources Division, doggedly "pursue wetlands enforcement litigation *to the maximum extent* permitted by Supreme Court precedent," to "revitalize enforcement of clean water laws *with a focus on wetlands protection and restoration*," and to establish a toll-free anonymous tip line *to report Swampbuster […] violations* (emphasis added). The 2016 Senate Committee on Environment and Public Works report confirmed that these recommendations became agency practice and revealed that "the assurances given by EPA and the Corps regarding the scope of the WOTUS rule *and* its exemptions to the positions taken by these agencies in jurisdictional determinations and in litigation are[/were] *factually false*" (emphasis added).

Furthermore, although the NFSAM, the 1993 EPA-Corps joint regulations, and the 1996 USDA regulations had consistently indicated that PCC status would not be lost even if the land were used for nonagricultural purposes,[7] (*i.e.*, "once a [PCC] always a [PCC]"), in 2009 the Corps surreptitiously endeavored to change this policy. It did so by following the position taken in a Jacksonville, Florida Field Office Issue Paper, later affirmed in a Regional Corps Commander's Memorandum (collectively referred to as the "Stockton Rules"), concluding that a switch in land use from agricultural to nonagricultural use triggered "abandonment" of agricultural activity and loss of PCC status. While a federal district court, in 2013, found the Stockton Rules to constitute final agency action, it held the *national* implementation of such rules invalid because the Corps had failed to utilize "appropriate notice-and-comment procedures" required by the Administrative Procedure Act.[8]

Moreover, the persistent harassment of my clients by EPA and the Corps, since 2009 provides further evidence of the agencies' wetlands recidivism. In fact, on January 9, 2017, only 11 days prior to President Trump's inauguration, EPA filed two new lawsuits against my clients. The suits allege CWA § 404 permitting violations for activities undertaken on two contiguous and adjacent farm fields/properties otherwise qualifying for the PCC exclusion from WOTUS and CWA 404 jurisdiction. The aim of one suit is to enforce alleged violations of an ambiguous 21-year-old wetlands consent decree covering one such parcel, while the likely objective of the other suit is to secure and enforce a more defined and restrictive wetlands consent decree to cover the second, and perhaps, a third contiguous parcel.[9]

Conclusion

The WOTUS "regulatory hydra" has left countless small- and medium-sized farms and ranches throughout the US effectively idle and economically devastated. Uncertainty as to what are the rules for wetlands, combined with zealous overregulation, also compromises US national food security and raises the likelihood of increasing US dependence on unsafe and unsecure third world food imports.

Targets of CWA oversight, especially farmers and farmland owners, have rightly applauded the Executive Order 13778 and the administration's goal of clearer, more targeted wetlands rules. To turn the hope of reform into reality, CWA regulatory stakeholders must be fully engaged and vigilant. And if the administration is truly serious about reining in EPA bureaucrats (especially holdovers whose sympathies lean toward regulatory activism and non-transparency), ongoing White House oversight of a new rulemaking and subsequent EPA wetlands enforcement will be indispensable.

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Notes

1. *United States v. Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993) (referring to "the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act," and to the CWA as a "regulatory hydra.").

2. *See State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.*, Civil Case Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015), *cert. granted* Jan. 17, 2017 *sub nom National Association of Manufacturers v. Department of Defense*, Docket No. 16-299.

3. *See* United States Department of Agriculture Soil Conservation Service, *National Food Security Act Manual*, Title 180 Second Edition (Aug. 1988), at § 512.31.

4. *See* Environmental Protection Agency, *EPA Wetland Identification Delineation Manual* (W.S. Sipple, ed., Wash., D.C. 1988), discussed in *Wetlands Characteristics and Boundaries*, Committee on Characterization of Wetlands, National Research Council (1995), at 71 ("EPA stated, as had [the Army Corps], that it was following the 'three-parameter' definition of wetlands found in [Corps] and EPA regulations and based on hydrology, soils, and vegetation. The 1988 EPA manual, however, allows delineators to rely on vegetation alone for routine delineations and when obligate wetland or upland species are dominant.").

5. *See* Energy and Water Development Appropriations Act, 1992, P.L. 102-104, 105 Stat. 510, 518 (prohibiting the Corps from using funds to identify jurisdictional waters using the Federal Manual); Energy and Water Development Appropriations Act, 1993, P.L. 102-377, 106 Stat. 1315, 1324-25 (mandating that the Corps use the 1987 Manual until a new manual was published after public notice and comment).

6. *See United States v. Brace*, 41 F.3d 117 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995); US Department of Justice Environment and Natural Resources Division, Environment Defense Section, *Notice of Lodging of Consent Decree Pursuant to Clean Water Act*, 61 Fed. Reg. 42055 (Aug. 13, 1996).

7. *See United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1040 (N.D. Ill. 1998).

8. *See New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fl. 2010).

9. *See* The Kogan Law Group, P.C., United States v. Brace, *Summary of Facts & Findings of 30-Year 'WOTUS' Case*.

