

Water Pollution

Impacts of Water of U.S. Rule

The Environmental Protection Agency and the U.S. Army Corps of Engineers promulgated a rule in June seeking to clarify which waters and wetlands are subject to Clean Water Act permitting requirements. The rulemaking responded to several decisions by the U.S. Supreme Court that some said further confused what Congress intended in the Clean Water Act when it defined “navigable waters” as “waters of the U.S.” Here, authors Kevin L. Patrick and Christopher R. Stork argue that the agencies overreached in clarifying the definition of “waters of the U.S.” and discuss the adverse impacts the rule could have on water supply ditches.

New ‘Waters of the U.S.’ Rule Clouds Treatment of Western Water Supply Ditches



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On June 29, 2015, the Environmental Protection Agency and the U.S. Army Corps of Engineers published their “Clean Water Rule: Definition of ‘Waters of the United States.’” Known as the WOTUS rule, it aims to “clarify and simplify implementation of the CWA [Clean Water Act] consistent with its purposes through clearer definitions and increased use of bright-line boundaries to establish waters that are jurisdic-

tional by rule and limit the need for case specific analysis.”

Unfortunately, the opposite has proven to be true. From its publication, the WOTUS rule has met immediate resistance from all directions including legislative bodies, individual regulated parties, states, and industry groups from all sides of the political spectrum. Although the reasoning for this discontent is not necessarily uniform across the board, one consistent theme is

that the new regulation greatly overreaches. This overstepping can most easily be seen in the WOTUS rule's treatment of the term "tributary" and its implication on water supply ditches. While the rule has been stayed by the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, water managers are faced with the potential that nearly all Western water supply and irrigation ditches will now be subject to Clean Water Act regulation.

Over-Inclusive Definition of Tributaries. The WOTUS rule includes an overly broad definition of "tributary." If implemented, the regulation will require many water supply structures, with minimal and impractical exceptions, to be considered jurisdictional and be regulated for all dredge-and-fill activities. Specifically, the final rule states that "[t]he rule defines 'tributary' by emphasizing the physical characteristics created by sufficient volume, frequency and duration of flow, and that the water contributes flow, either directly or indirectly through another water, to a traditional navigable water, interstate water, or territorial seas."

Furthermore, the text clearly points out that "[d]itches are one important example of constructed features that in many instances can meet the definition of tributary." The WOTUS rule states, "[a] tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches." In fact, the WOTUS rule specifically states that jurisdictional ditches include: (1) ditches with perennial flow, (2) ditches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, and (3) ditches, regardless of flow, that are excavated in or relocate a tributary.

The EPA and the corps rationalize this broad definition because "[n]atural, modified, and constructed tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas. The discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural, modified, or constructed." This rationale, however, is fatally flawed and misunderstands the fundamental purpose and actual function of many Western water supply ditches that it aims to regulate—to take water away from "waters of the United States" for beneficial use, not to drain into them.

Significant Impact on Water Supply Ditches. In Colorado and much of the West, ditches are essential to putting water to beneficial use. For example, in Colorado, more than 3,000 ditches have been constructed for beneficial use with countless lateral take-outs on each. Western states and their laws pertaining to water have long recognized water as a scarce and precious resource that often must be transported from its source for efficient use. In fact, the Colorado Supreme Court has stated "[d]itches are important to Colorado. They permit a landscape, economy, and history in which fertile valleys prosper. Without them, properties adjacent

to or distant from watercourses wither . . . [A]s early as the tenure of the territorial legislature, our lawmakers recognized that our arid climate required the creation of a right to appropriate and convey water across the land of another so that lands not immediately proximate to water could be used and developed."

In that same vein, the prior appropriation doctrine itself is predicated on maximizing the beneficial use of this limited resource in the arid West. To this end, many states have mandated that water not immediately required for beneficial use must be returned to the stream for use by other water users without waste. Specifically, Colorado law mandates that "[t]he owners of any ditch for irrigation or other purposes . . . shall make a tail ditch so as to return the water in such ditch with as little a waste as possible into the stream from which it was taken."

Under the WOTUS rule however, each of these ditches, which are mandated by state water law to have a tail ditch, would be subject to Clean Water Act jurisdiction as they would fall under the overly broad definition of tributary because they return water diverted back to the stream. Including ditches within the definition of tributary exhibits a lack of understanding of the nature and purpose of water supply structures, which is to divert water from a stream for uses and return it to the stream if not required for a beneficial use. These ditches do not contribute *new* flows to a stream.

Extended regulation of these structures does nothing to further the Clean Water Act's goal of protecting the quality of navigable waters, interstate waters, and the territorial seas through the elimination of pollutants; it only further burdens water users through extensive and unnecessary regulation.

Rule Would Require Permits for Ditch Maintenance. To compound the issue, most Western states by statute require ditch owners to maintain the ditch by clearing water-consuming and flow-restricting vegetation from water supply structures. The WOTUS rule would require a permit for these "dredging and filling" activities due to the designation of ditches as "waters of the United States."

Essentially, water supply structure users would be required to seek permitting each and every time they clean or make improvements or maintain to their ditch, which in a practical sense occurs no less than annually.

This requirement also directly conflicts with Clean Water Act language that expressly exempts construction or maintenance of irrigation ditches in section 404(f)(1)(C). But the flaw in the irrigation ditch "exemption" is that most water supply ditches in the West are decreed for multiple beneficial uses, not just traditional irrigation (carrying water for municipal, domestic, lawn irrigation, golf courses, filling of ponds, livestock, etc.). Thus, the so-called exemption is lost.

The looming, continuous permitting requirements that would result from the WOTUS rule will become an excessive burden on ditch owners as pointed out in *Rapanos v. EPA* (547 U.S. 715, 62 ERC 1481 (2006)).

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There, the U.S. Supreme Court addressed the stark reality of this burden, finding that “[t]he average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes.”

Importantly, if water users cannot comply or secure the necessary permitting, either practically or economically, they may be prevented from exercising a valid water right. This result is unjust and probably would prevent the conservation and maximum beneficial utilization of this precious resource—the bedrock of western U.S. prior appropriation doctrine.

Ditches are an important tool used by people of all walks of life to make beneficial use of water in the West by taking water away from waters of the U.S. The WOTUS rule’s attempt to label these structures as jurisdictional due to compliance with state water law and a general misunderstanding of their function greatly overreaches the original bounds of the Clean Water Act.

There is a long-standing tradition of federal deference to state law in terms of the allocation and administration of water use. In fact, the Clean Water Act itself states “[t]he authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter.” Implementation of the WOTUS rule, however, stands to do just that by subjecting virtually all water supply and irrigation ditches to Clean Water Act jurisdiction and permitting requirements. This will result in

unnecessary and severe burdens on state water law and unprecedented hurdles for lawful water users.

Rule Muddies Water of Clean Water Jurisdiction. The Clean Water Act is a landmark and remarkable piece of environmental legislation that has resulted in greatly improved water quality throughout the U.S. The newly proposed WOTUS rule, however, despite its laudable goals of lessening uncertainty, offering clarity and reducing economic costs for permitting, only serves to further muddy the waters of Clean Water Act jurisdiction and greatly increase permitting and the associated costs. If implemented, the WOTUS rule and its expanded definition of tributary would encompass a great majority of ditches in the West.

Defining ditches in such a way will open a proverbial Pandora’s box in which thousands of ditches and the activities required for their upkeep would be subject to continual permitting and enforcement. This would result in unnecessary burdens and frustrate water allocation, use, and administration by rendering such activities cost prohibitive. Congress has historically recognized federal deference to state laws to allocate and administer water use. Implementation of the ill-conceived WOTUS rule will do nothing but upset the comprehensive legal scheme for efficient water use that Colorado and each Western state relies upon and abrogate and intrude upon this long tradition of federal deference resulting in further confusion and uncertainty for Western water supply managers.

