

# THE JOURNAL RECORD

## Ripple effects: New 'waters of the U.S.' rules still murky

By: Sarah Terry-Cobo The Journal Record May 28, 2015 1 Comment



Cattle wade through flooded farmland in northern Canadian County. (Photo by Brent Fuchs)

OKLAHOMA CITY – A decision about a controversial water pollution law may have ripple effects across the nation and in Oklahoma. Yet water law attorneys disagree about whether the new rules, published Wednesday, will improve or worsen water quality.

The U.S. Environmental Protection Agency and the Army Corps of Engineers updated the definition of "waters of the United States" to include tributaries that flow into larger bodies. The agencies are making good-faith efforts to ensure the new rules closely follow the original intent of the Clean Water Act, University of Tulsa law professor Gary Allison

said.

The 1972 federal law was intended to restore and maintain the chemical, physical and biological integrity of the nation's waters, according to the EPA. In the years leading up to the law's passage, several dramatic water pollution events caught the country's attention: The Gulf of Mexico and Great Lakes were becoming dead zones, and Ohio's Cuyahoga River was burning.

The federal law was intended to ensure water could support fish and wildlife habitats. It regulated direct pollution sources into major rivers and left states to control indirect pollution sources into smaller creeks and tributaries that didn't cross state lines.

Two U.S. Supreme Court decisions, including one from 2006, created uncertainty about what was considered a tributary under the Clean Water Act. So in fall 2014, the EPA and Army Corps issued draft rules to clarify what could be considered wetlands or tributaries. The rule is controversial because it includes man-made irrigation canals, among other things.

Aspen, Colorado-based attorney Kevin Patrick said his initial interpretation of the 423-page rules is they increase the EPA and the Army Corps' jurisdiction. That means his clients in several Western states will have to spend more time and money getting permits for man-made ditches and irrigation canals. Some clients, such as ranchers, divert water away from rivers and use it for aesthetic purposes, and some irrigators use water for farming.

Larger permits can cost an average of \$300,000 and take four to six years to receive, because the applications are complex scientific land use interpretations, Patrick said. Smaller permits, in which irrigation canals or tributaries have less of an effect on large rivers, cost about \$30,000 and take about 300 days to receive.

"Imagine applying for a permit that takes nearly one year to obtain, then you have to turn right around and apply for next year's permit," Patrick said.

Allison, director of TU's Sustainable Energy and Resources Law Program, agreed that the new definition considers irrigation ditches as river tributaries. Both Patrick and Allison are partners at the firm Patrick, Miller & Noto, which has offices in Colorado, Arizona and Oklahoma. The two agree the Clean Water Act is one of the most important, successful and valuable laws to protect water resources.

Adding water to streams isn't the only way to increase pollution in a river, however. Sometimes diverting water away from rivers for irrigation can contribute to poor water quality, Allison said.

Many water quality rules are dependent on water quantity. Because the Clean Water Act is designed to protect aquatic life, how much water that flows through a river is critical to determining pollution. If a river or stream has less flowing water, pollution is more concentrated.

Major water pollution disasters – such as when the people of Toledo, Ohio, couldn't drink water from Lake Erie in 2014 – wouldn't occur if individual states did a better job of regulating indirect pollution sources, Allison said. The mostly Republican-led opposition to federal regulation is based on a flawed premise, he said.

"A good part of what is happening here is colored by virulent opposition to the federal government and the notion states should be allowed to do whatever they want to and feds should dry up and go away, and not have impact at state or local level," he said. "If it were true that states took care of all this, we wouldn't have these environmental disasters."

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