Responses to Sections of Stoner Blog

EPA's Acting Assistant Administrator for Water Claims	AFBF Response
There's been some confusion about EPA's proposed "Waters of the U.S." rule.	That's because the rule doesn't CLARIFY anything except that almost any low spot where rainwater collects could be regulated. The proposed rule defines "tributaries" and "adjacent" in ways that make it impossible for a typical farmer to know whether the specific ditches or low areas at his or her farm will be "waters of the U.S."—but the language is certainly broad enough to give agency field staff plenty of room to find that they are! (79 Fed. Reg. 22206, 22209)
The rule keeps intact all CWA exemptions and exclusions for agriculture that farmers count on. But it does more for farmers by actually expanding those exemptions.	It has to! Congress provided those exemptions in the statute, and the agencies can't take them away by regulation. However… The categories of exemptions are still there, but because of the expansion of jurisdiction over more small, isolated wetlands and land features like ditches and ephemeral drains, fewer farmers will benefit from the exemptions. The exemptions for activities occurring in "waters of the U.S." have been interpreted by the agencies to be ridiculously narrow (e.g., you can plow and plant in a wetland, but only if you have been farming there since 1977, and only if you do not alter the hydrology of the wetland, and you cannot apply fertilizer or herbicide there without an NPDES permit). *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).
But it does more for farmers by actually expanding those exemptions. We worked with USDA's Natural Resources Conservation Service and the Army Corps of Engineers to exempt 56 additional conservation practices.	These practices were already exempt (for farmers who have been farming continuously at the location since 1977), but now they are exempt with strings (NRCS standards compliance).

Responses to Sections of Stoner Blog

The American agriculture economy is the envy of the world, and today's farmers and ranchers are global business professionals—relying on up-to-the-minute science to make decisions about when to plant, fertilize and irrigate crops.	Yes—and they are also families and small business owners who cannot afford tens of thousands of dollars of additional costs for federal permitting of ordinary farming activities. Which is why they shouldn't have to wait months or years for a federal permit to plow, plant, fertilize or apply pest or disease control.
When Congress passed the CWA in 1972, it didn't just defend the mighty Mississippi or our Great Lakes; it also protected the smaller streams and wetlands…But two Supreme Court cases over the last 15 years confused things, making it unclear which waters are "in," and which are "out."	And yet, Congress chose to authorize federal regulatory power over "navigable waters," which the Supreme Court has said means EPA cannot regulate the entire "vast, interconnected system" of waters. The Supreme Court didn't "confuse things." It ruled that the agencies' pre-2001 regulation of all waters to the full extent of the U.S. commerce power—even based only on the use of waters by migratory birds—was illegal. EPA's proposed rule doesn't make it clear which features are "in" and which are "out," but it does provide a rationale for agency or citizen enforcers to claim that almost any ditch or low spot is "waters of the U.S." This creates confusion and risk—not clarity.
That confusion added red tape, time and expense to the permitting process under the Clean Water Act. The Army Corps of Engineers had to make case-by-case decisions about which waters were protected, and decisions in different parts of the country became inconsistent.	The Supreme Court rulings didn't complicate the permitting process. That was already a morass of red tape. They only made it more difficult for the Corps and EPA to assert jurisdiction over small, isolated waters and "waters" that are dry most of the time. The proposed rule will make it easier for the Corps and EPA to make "desktop determinations" that any wetlands across huge swaths of the countryside are categorically jurisdictional. (79 Fed. Reg. 22195, 22214)

Responses to Sections of Stoner Blog

The proposed Waters of the U.S. rule does not regulate new types of ditches, does not regulate activities on land, and does not apply to groundwater.	Ditches - Current rules do NOT INCLUDE ditches. Agencies have informally interpreted rules to include ditches as "tributaries." We disagree! Now, the new rule would categorically define almost all ditches as "tributaries." (79 Fed. Reg. 22203-4) Activity on land - Yes, the proposed rule would regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas "ephemeral streams," "wetlands" and "seasonal ponds"—but to most people, they look like LAND. Here is what the fine print says about "tributaries" that would be regulated under the new rule: "A tributary is a *longitudinal surface feature that results from directional surface water movement* and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of [ordinary high water mark]." It also says "in some regions of the country where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times." (79 Fed. Reg. 22202) Putting that into plain English: the proposed rule will regulate activities on land where water channels and flows when it rains, so long as the flowing water leaves a mark on the land. It may even regulate land where there is no visible channel or marks left by flowing water.

Responses to Sections of Stoner Blog

The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming activities like moving cattle, and does not regulate puddles.	Stock ponds - The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would *only* allow farm ponds built by diking "upland." This is a farm pond that only a Washington bureaucrat would build. Normal farming activities - This is false. Under the rule, Section 402 permits would be necessary for common farming activities like applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide or manure) would fall into low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting or fencing, except as part of "established" farming ongoing at the same site since 1977. Puddles - The rule would not categorically regulate all puddles—but it would regulate low spots that puddle often enough to meet the broad definition of "wetlands" if those low spots are in a "floodplain" or a "riparian area" or if they, combined with other low spots in the region, have a "significant nexus" to any other "water of the U.S." Clear as mud, right? Read what the proposal says about "puddles:" 79 Fed. Reg. 22218.
The proposed rule does NOT protect any waters that have not historically been covered under the Clean Water Act, and the proposed rule is consistent with Supreme Court decisions.	The Supreme Court said twice that EPA's "historical" scope of regulation was unlawful. Prior to the Supreme Court decisions, EPA used the "migratory bird rule" to regulate nearly all waters. EPA's proposed new rule based on the "connectivity" of all waters is just as broad and just as unlawful. The proposed rule is a cynical attempt to overcome the Supreme Court decisions by finding that virtually all waters have a "substantial nexus" to navigable waters.
The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.	The only way the agencies can believe this is if they believe they already have power over almost every low spot where water flows or stands after rain. We disagree—and so does the Supreme Court.

Responses to Sections of Stoner Blog

• The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The rule does not change or limit any of them.	Congress wrote many exemptions to prevent federal permit requirements for farming. But Congress used language that assumed farming happens on land, not in "waters of the U.S." By defining land to be "waters of the U.S.," the rule would result in federal permit requirements for countless farming activities.
The proposed rule will NOT bring all ditches on farms under federal jurisdiction. • Some ditches have been regulated under the Clean Water Act since the 1970s.	**The CWA DOES NOT regulate ditches as "waters of the U.S."** It defines them as "point sources" that may discharge *to* "waters of the U.S." (33 USC §1362(14)) This means EPA can regulate some discharges *from* ditches, but it cannot regulate ditches as if they were waters. Over the years, EPA and the Corps have informally (not in regulation) treated some ditches as waters on a case-by-case basis. **The proposal would put this into regulations and would go further by defining almost all ditches as "waters of the U.S."** Technically, even mowing the grass in a dry ditch would require a federal permit under the rule.
• The proposed rule does not expand jurisdiction.	This is false. Non-navigable features that do not contain water most of the time are not currently regulated without a case-by-case finding that the particular feature has a significant effect on navigable waters—taking into account the volume, frequency and duration of flow and proximity to navigable waters. The proposed rule will categorically regulate as "tributaries" all non-navigable "ephemerals" that ever carry any amount of water that finds its way to a navigable water—regardless of the volume, frequency and duration of flow and regardless of the distance to actual navigable waters. This alone is a huge expansion. (But there are other examples, too.) Here is just one example of how broad the definition of a "tributary" will be: "These effects occur even when the tributaries flow infrequently (such as ephemeral tributaries) and even when the tributaries are large distances from the (a)(1) through (a)(3) water (such as some headwater tributaries). When all the tributaries in a watershed are considered together, these effects are significant."

	"Tributaries that are small, flow infrequently, or are a substantial distance from the nearest (a)(1) through (a)(3) water (*e.g.,* headwater perennial, intermittent, and ephemeral tributaries) are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters, contributing many of the same functions downstream as larger streams." (79 Fed. Reg. 22205-6)
• For the first time, the agencies are clarifying that all ditches that are constructed in dry lands and drain only dry lands are not "waters of the U.S." This includes roadside ditches and ditches collecting runoff or drainage from crop fields.	If water <u>ever</u> flows to a ditch from any "wetland" area (often just a small low spot), or from any "ephemeral" drain, or from any overflow of a pond during very heavy rains, the ditch will not qualify for this exclusion (because it does not drain only "uplands"). Also, if the ditch itself has "wetland" characteristics—which tends to happen because ditches do, after all, carry water when it rains—the ditch will not qualify and will be regulated. Very few ditches will qualify for this exclusion—most ditches will be jurisdictional. (79 Fed. Reg. 22203-4) Here is just one part of EPA's justification for defining "tributary" to include "ditches" and "canals:" "Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." (79 Fed. Reg. 22206)

Responses to Sections of Stoner Blog

• Ditches that are IN are generally those that are essentially human altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.	False. Ditches that are IN are all ditches that flow to any stream or river (through any number of other ditches), except those that contain no "wetland" areas along their entire length, and that drain only "upland" (no stormwater from wetlands or ponds or other waters ever flows to the ditch). The vast majority of ditches are IN. (79 Fed. Reg. 22203-4) The ditches that are "in" are far more than "human altered streams." A ditch that happens to sometimes receive rainwater overflows from nearby wetlands is not a human altered stream. A ditch that displays wetland characteristics due to the presence of water is not a human altered stream. A ditch excavated in a low area that naturally channels rainwater is also not a human altered stream. "Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded, however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow." (79 Fed. Reg. 22203-4)
• Ditches that are OUT are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water.	Again, false. Ditches that are OUT are those that are "upland" (not wetland or water) along their entire length, and that drain only "upland" (no water ever flows to the ditch from wetlands or ponds or other waters). These are mythical ditches. People don't dig ditches along ridges. Any other ditch that ever carries rainwater that ever makes its way (through any number of other ditches) to navigable waters is IN. (79 Fed. Reg. 22203-4)
Farmers, ranchers and foresters are exempt from Clean Water Act Section 404 permitting requirements when they construct and maintain those ditches, even if ditches are jurisdictional.	This is contradicted by Corps' interpretation and enforcement under Section 404. If the "flow" of jurisdictional features is altered, the Corps views the activity as regulated (i.e., permit required). 33 CFR Section 323.4

Responses to Sections of Stoner Blog

The proposed rule does NOT mean permits are needed for walking cows across a wet field or stream.	Technically, EPA could absolutely require a permit for this. Manure is a Clean Water Act "pollutant." If a low spot on a pasture is a jurisdictional "wetland" or "ephemeral stream" under the new rule, EPA or a citizens group could sue the owner of cows that "discharge" manure into those jurisdictional waters without a Section 402 permit. Seriously.
• Normal farming and ranching activities are not regulated under section 404 of the Clean Water Act.	Only partially true. The "normal" farming exemption only applies to discharges of "dredged or fill material" under Section 404. It does not apply to discharges of other "pollutants" (e.g., dust, manure, fertilizer, herbicide) regulated under Section 402. Also, EPA and the Corps have interpreted the normal farming exemption to only apply where farming has been ongoing at the same location since 1977. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).
The proposed rule will NOT apply to wet areas on fields or erosional features on fields. • Water-filled areas on crop fields are not jurisdictional.	So you say now. How will enforcement inspectors later know the difference between a "water-filled area on a crop field" and a "seasonal pond" or "wetland" or "ephemeral stream"—any of which can be regulated? The rule says that even small and temporary waters can be regulated. Isolated waters are categorically regulated if they are in floodplains or nearby ditches. (79 Fed. Reg. 22209)
• The proposal specifically excludes erosional features from being "waters of the U.S."	The proposal also says it can be hard to tell the difference between an erosional feature and an "ephemeral stream," which is regulated. (79 Fed. Reg. 22219) That leaves it for enforcement inspectors and lawyers to decide later!

Responses to Sections of Stoner Blog

EPA is <u>NOT taking control of ponds in the middle of the farm</u>. • The proposed rule <u>does not change jurisdiction over farm ponds</u>. • The rule <u>does not affect the existing exemption Congress created for construction and maintenance of farm or stock ponds</u>. • The proposed rule would for the first time <u>specifically exclude stock watering ponds</u> from jurisdiction.	We've already seen EPA enforcement claiming farm ponds were built illegally because they were built in low spots where water naturally channeled. (EPA couldn't wait until the proposed rule becomes final to go ahead with these enforcement actions.) • Maybe that's because EPA has already started illegally enforcing jurisdiction over farm ponds built in low spots. • False. The rule makes the farm pond exemption meaningless, because the exemption does not apply to impoundments of "navigable waters." By regulating low spots as "navigable waters," the rule would prevent building a farm pond on a low spot without a Section 404 permit. 33 CFR Section 323.4(a)(3) • Like the farm pond exemption, this exclusion would only apply if the watering pond is built "by diking dry land." It also has to be used "exclusively for" stock watering. What if it is also used for other purposes? Can a row crop farmer have one of these ponds?
The interpretive rule does NOT redefine normal farming as only those 56 conservation practices.	By suggesting that "clarification" was needed to exempt these 56 practices because they are not listed in the Clean Water Act, the interpretive rules casts doubt over the exempt status of all other farming practices that are not listed in the statute. The statute lists only "plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices." Normal farming, ranching and forestry practices that are regularly implemented on the farm are classified as conservation practices by the IR. For example, building a terrace or a fence, planting cover crops and prescribed cattle grazing are all normal farming activities that have not been subject to permits or NRCS standards until now. The IR does not distinguish between these normal farming activities and the same activities conducted solely for conservation purposes – making them subject to compliance with NRCS standards.

Responses to Sections of Stoner Blog

• If a permit was not needed for a particular practice before, a permit won't be needed now.	False. The 56 listed conservation practices will now only be exempt from permit requirements if they comply with NRCS standards. For other farming practices, most will require either a Section 402 or 404 permit under the proposed rule if they occur in or near a newly regulated "ephemeral" or ditch or low spot ("wetland"). (If Ms. Stoner truly believes this statement, it may be because she already thinks most farming in or near any ditch or ephemeral or small isolated wetland already requires a Clean Water Act permit. We disagree.)
• These 56 practices clarify and add to all of the practices that are being implemented in the field today and currently considered normal farming and exempt from permitting. The interpretive rule adds to what is exempt.	That is not clear from the interpretive rule.
• The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices, or don't use NRCS funds, they would continue to be exempt in the same way they are now.	The "normal" farming exemption does include more than these 56 practices, but according to longstanding Corps and EPA interpretations, it only exempts farming that has been ongoing at the same site since 1977. That's true for these 56 practices and other practices. That is why regulating land as if it were "waters" under the proposed rule will result in federal permit requirements for many commonplace and essential farming practices. Nothing in the interpretive rule says that the requirement to meet NRCS standards is limited to farmers using NRCS funds.
• This rule is self-implementing, which means that a farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting.	Farmers have never had to seek pre-approval from any federal agencies to conduct exempt farming practices. The difference is that now farmers are more likely to be sued by the government or citizens groups claiming they did not fully comply with NRCS standards or that their practices are not all listed in the statute and in the interpretive rule.

Responses to Sections of Stoner Blog

NPDES permits will NOT be required for the application of fertilizer to fields or surrounding ditches or seasonal streams.	False. If there are jurisdictional "wetlands" (low spots) or ephemerals (drainage areas) within farm fields or ditches beside or within farm fields, and if even miniscule amounts of pesticide or fertilizer fall into those features (intentionally or not), this would be an unlawful "discharge" of "pollutant" that would trigger liability of up to $37,500 per discharge per day without an NPDES permit.
• All ditches constructed in dry land and that drain only dry land, and flow only part of the year, are not jurisdictional and thus would not need a permit for any action.	See above—the vast majority of ditches will NOT qualify for this exclusion. Most ditches will be deemed "tributaries" and therefore "waters of the U.S.," even at times when they are completely dry.
• The pesticide general permit only requires an NPDES permit where pesticides are applied directly to a water of the U.S.	False. If areas in and around farm fields are regulated as "waters of the U.S." under the rule, then any pesticide—even a molecule—that falls into those "waters" from nearby crop protection spraying would require a permit (or risk huge penalties). (See *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009)) Plus, if low spots in farm fields are defined as "waters of the U.S.," farmers will need to apply weed, insect and disease control products "directly to" those spots in order to protect their crops. In other words, under the proposed rule, a federal permit *will* be required for farmers to protect their crops.
• Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields.	Sounds like EPA doesn't have much experience with farming! In much of our most productive farmlands (areas with plenty of rain), it would be extremely difficult to entirely avoid the small wetlands, ephemerals and ditches in and around farm fields. Any accidental spray—of any amount—into these features (even at times when the features are completely dry) would be an unlawful discharge (with penalties of up to $37,500).

Responses to Sections of Stoner Blog

Federal agencies are NOT asserting regulatory authority over land use.	False. When federal agencies have the power to grant, deny or VETO a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease control products on crops, that IS regulatory authority over land use. If a landowner cannot build a house on, build a fence over or plow through a jurisdictional wetland or ephemeral drain that runs across his or her land, then that is regulating land use. If a farmer cannot redirect a ditch to improve drainage on his soybean farm, then that is regulating land use. In addition, note the following quote from Secretary Darcy during a hearing on June 11 before the House Transportation & Infrastructure Water Resources and Environment Subcommittee – *"Once implemented, this rule will enable the Army Corps of Engineers to more effectively and efficiently protect our nation's aquatic resources while enabling* ***appropriate*** *development proposals to move forward."* Congress did not give either EPA or the Army Corps the authority to determine "appropriate" land uses.
• The CWA only regulates the pollution and destruction of waters.	Actually, it is "navigable waters" or waters so closely connected to navigable waters that they have a significant effect on those navigable waters. Whether you like it or not, the Supreme Court has said this does not mean all waters (even "waters" that are usually dry). But once something is deemed to be a "water" within CWA jurisdiction, the law prohibits *any* discharge of *any* amount of "pollutant"—which includes dirt or dust. That's why regulating low areas on land as a CWA "water" is a problem: It results in the regulation of *any* activity on that land that moves dirt or applies any product to that land.
• The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation.	Yes—and the Clean Water Act created non-regulatory programs to address water quality impacts of land uses like farming. Those programs have been and can continue to be very effective. We don't need to require a federal permit for everything in order to protect waters.

• The agencies expect that a very small number of additional waters—3.2 percent—will be found jurisdictional compared to current practice because of greater clarity regarding whether waters are protected or not.	Actually, EPA's poorly done economic analysis concludes that the new rule will result in regulation over an additional 2.7 percent of waters; the 3.2 percent figure Stoner cited wasn't used in the final calculations. Either way, the figure is absurdly low and according to EPA will only lead to an additional 1,332 acres under EPA's control. EPA arrived at this figure by analyzing permit information for the Section 404 (dredge and fill) program exclusively and by focusing on FY09/10, a period of significant economic contraction. EPA looked at the number of acres evaluated by the Corps that year that were determined *not* jurisdictional, and then estimated how many of those acres *would become* jurisdictional under the proposed rule. EPA did not even attempt to determine the number of acres of ephemeral drains, ditches and isolated wetlands nationwide that will be newly regulated under the rule. If it had done so, the agency's numbers would have been much larger. After all, more than 106 million acres of wetlands are currently being used for agricultural purposes. Even if only 2.7 percent of those acres become newly regulated under this rule, that would be more than 2.8 million additional regulated farm acres.