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FACT or FICTION? Shedding the light on EPA's "Facts" about the new "waters of the U.S." rule

It's like déjà vu all over again. Just as with the proposed rule a year ago, EPA's spin machine is in overdrive, promoting the newly released final rule defining "waters of the United States" regulated under the federal Clean Water Act. (EPA has gone to calling it the "Clean Water Rule," because *everyone* supports clean water! But people who've read the rule know it's more about regulating land than protecting water.)

Why work so hard to promote a rule that's already final? Because Congress is looking at legislation to send EPA back to the drawing board—to consult properly with stakeholders and give their concerns the serious consideration they deserve (not just lip service). EPA desperately doesn't want that, so it will say most anything to convince opponents that the rule isn't going to hurt them. That goes double for farmers and ranchers, because EPA's economic analysis hasn't considered *at all* the cost to farm families of the wide-scale, complex and costly permitting obligations the rule will trigger.

EPA and the Corps recently released a bundle of fabrications boldly labeled "The Clean Water Rule FACT CHECK." So we took the opportunity to *check* their "facts." Take a look below, and see if it shakes or strengthens your faith in the agencies integrity in this process. Then call your representatives in Congress and ask them to Ditch the Rule!

EPA "FACT": "The Clean Water Rule does not regulate land use."

The *Real* Facts:

This statement would be funny if the issue weren't so serious. The rule is *all* about regulating land use—except EPA calls the land "water" in the rule. EPA's own press statements claim that the rule will regulate *60% of the nation's streams, and millions of acres of wetland* that otherwise "lack clear protection."[1] "Wetland" is simply *land* that is wet enough to support water-tolerant plants. And the newly regulated "streams" (unlike most of the already regulated streams) actually contain water only when it rains. They don't look at all like streams to most people—they look like *land*.

[1] "But right now 60 percent of the streams and millions of acres of wetlands across the country aren't clearly protected from pollution and destruction." EPA Thunderclap campaign ending Sept. 29, 2014. "The Supreme Court decisions in 2001 and 2006 left 60 percent of the nation's streams and millions of acres of wetlands without clear federal protection, according to EPA, causing confusion for landowners and government officials." http://abcnews.go.com/Politics/wireStory/epa-rules-protect-drinking-water-regulate-small-streams-31332848

The rule defines "waters of the U.S." to include "tributaries"—and defines tributaries to include any landscape feature "characterized by the presence of physical indicators of a bed and banks and ordinary high water mark" (OHWM)—so long as water sometimes flows in that feature and eventually reaches a navigable water, no matter how many miles away. (Final Rule at 204) A bed, bank and OHWM can look like this farm field in Tennessee that the Corps of Engineers previously found to have a bed, bank and OHWM:

You might think you can kind of make out a "bed, bank and ordinary high water mark" in this photo. But even if those things weren't visible, the agencies can *still* find land to be a "tributary" and therefore "waters of the U.S." under the new rule. The agencies claim they can establish the existence of a "tributary" using only "indicators" identifiable to agency staff through "remote sensing or mapping information" or other "desktop tools."[2] There does not need to be any actual or visible bed, bank and OHWM.

[2] Final Rule at 91 (explaining agency staff can establish the existence of the required "physical indicators" through "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling").

This means that distant regulators using "desktop tools" can *conclusively* establish the presence of a "tributary" on private lands, even where the human eye can't see water or any physical channel or evidence of water flow. That's right—*invisible tributaries!* The agencies even claim "tributaries" exist where remote sensing and other desktop tools indicate a *prior existence* of bed, banks and OHWM, where these features are *no longer present* on the landscape today. Final Rule at 94-95. So land will be regulated based on the presence of *invisible* or *historical* tributaries. Tributaries also include ditches that carry only rainwater, if the ditch was built (maybe decades ago) to divert the rainwater flowing in a natural drainage path. Final Rule at 98-99.

Even if you think it's a great idea to treat areas like this as "waters of the U.S.," it's hard to dispute that regulating them is regulating *land*. There's also no question that having a part of your property defined as "waters of the U.S." has a devastating impact on a landowner's ability to build, grow or do most anything on that land without the risk of Clean Water Act liability. Landowners or others who conduct any activity on these areas—growing and protecting crops, harvesting trees or building roads, houses or most anything else—and who cause any amount of "pollutant" to fall into these areas will be in violation of federal law (subject to huge penalties) unless they first submit to a cumbersome, complex and often extremely costly permitting process. Most people would agree that's regulating land use.

EPA "FACT": "A Clean Water Act permit is only needed if a protected water is going to be polluted or destroyed."

The *Real* Facts:

If a low spot or other "water" is regulated as a "water of the U.S." under the rule, then *any* "discharge" of any "pollutant," in any amount, into that feature—even if the feature is dry at the time—is *illegal* unless it is authorized under a Clean Water Act permit or some other provision of the Act.[3] "Pollutant" includes soil, biological materials, and rock, in addition to waste materials.[4] Courts have interpreted "pollutant" broadly to include most any foreign substance, and even the disturbance and immediate redeposit of soil in the same spot (regulators call that a "regulable redeposit").[5]

That means conducting *any* activity on land that causes *any* material to be deposited onto a regulated low spot, wetland, or ditch (applying fertilizer, applying pest control products, or even just moving dirt) can trigger CWA permit requirements and "discharge" liability of tens of

[3] (CWA §301(a), 33 U.S.C. §1311(a) ("the discharge of any pollutant by any person shall be unlawful"); CWA §502(12), 33 U.S.C. §1362(7) and (12) (defining "discharge of a pollutant" to mean any discharge of any pollutant into WOTUS).
[4] CWA §502(6), 33 U.S.C. §1362(6) (pollutant definition).
[5] *See National Cotton Council v. EPA* (6th Cir. 2009) (finding intentional application of pesticide for its intended purpose is discharge of "pollutant"); Q&A on Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material".

thousands of dollars per discharge per day.[6] Notice what's missing here? There is NO requirement of any actual environmental or water quality impact from the activity. Just the "discharge" of any amount of "pollutant" into the regulated area is enough to trigger permit requirements, plus potentially devastating penalties—even imprisonment.

EPA "FACT": "The Clean Water Rule does not change exemptions for agriculture."

The *Real* Facts:

The rule doesn't technically "change" the several Clean Water Act exemptions for agriculture. But, by broadening the definition of "waters of the U.S.," the rule works around those exemptions, making many more farmers vulnerable to enforcement lawsuits and liability under the Clean Water Act if they fail to get a permit for their farming. Here's how…

There is no Clean Water Act exemption for the application of fertilizer or products to protect crops from pests or disease in "waters of the U.S." That means, when the rule defines features right in the middle of a farm field to be "waters of the U.S.," putting *any* amount of fertilizer or pesticide onto those features will be an illegal "discharge" unless the farmer gets a permit under Clean Water Act section 402.[7] That's true even at times when the protected "water" (low spot) is *perfectly dry*—and regardless of whether the application would have any environmental effect![8]

EPA's "FACT CHECK" specifically mentions the longstanding exemption for "normal" farming, ranching and forestry activities. But what it leaves out is the fact that this exemption only applies to moving dirt (not applying fertilizer or crop protection products), and it has been interpreted very narrowly by the agencies. For example, the agencies have historically taken the position that "normal" farming only means activities such as plowing and planting at "established" operations that have been "ongoing" at the same location since the exemption was created in *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).

EPA has refused to publicly discuss this limitation during this rulemaking process, because it exposes the fact that many farmers will face permit requirements for plowing a field if that field contains low spots that are jurisdictional under the rule. However, in private meetings during the comment period, EPA officials have admitted their position that farming that started after 1977 in a jurisdictional feature, and new farming today in a jurisdictional feature, *does require* a section 404 permit—but "only for the first year" (after that, it would be an "established"

[6] CWA §309, 33 U.S.C. §1319 (enforcement provisions).
[7] *See* CWA §§301(a) and 402(a), 33 U.S.C. §1311(a) and 1342(a).
[8] *See* Pesticide General Permit for Discharges from the Application of Pesticides (U.S. EPA 2011) at A-8 ("Delineated Waters of the United States may or may not be wet at the time of discharge; however, discharges to such are still considered discharges to Waters of the United States.")

operation).[9] These same officials as recently as June 3, in meetings with agricultural stakeholders in Washington, have taken the position that farmers who started farming after 1977 without a Clean Water Act section 404 permit, in wetlands or ephemeral stormwater paths that the rule now defines as "waters of the U.S.," were not "established" and therefore *violated the Clean Water Act by farming without a permit.*

Want the truth? Under EPA's interpretation of the agricultural exemptions, many farmers will not qualify for an exemption and *will* face permitting requirements and potentially devastating enforcement liability as a result of this rule.

EPA "FACT": The rule "expands regulatory exclusions from the definition of 'waters of the United States' to make it clear that this rule does not add any additional permitting requirements on agriculture."

The *Real* Facts:

The first part of this statement is "kinda" true, but the last part is false. The agencies *did* add a provision in the final rule that says, "Waters being used for established normal farming, ranching, and silviculture activities … are not adjacent." (This appears on page 199 of the pre-publication copy of the final rule.) But that does not mean that farmed lands won't become "waters of the U.S." Remember how narrowly the "normal" farming exemption has been interpreted (see above)? Only those lands are excluded—and only from regulation as "adjacent" waters. Any farmed lands will still be automatically regulated if they contain ephemeral drainage paths or ditches that meet the broad definition of a "tributary"[10] (see photo above), or if they contain wetlands or other features found to be "waters of the U.S." under the agencies' expansive "significant nexus" test. For all the reasons described above, farmers with lands like these—and farmers with "adjacent" wetlands but who fall outside the "normal" farming exemption—*will* face additional permitting requirements (not to mention the threat of lawsuits) under the rule.

EPA "FACT": "The Clean Water Rule does not regulate most ditches."

The *Real* Facts:

In reality, we have no idea how many ditches, or exactly which ditches, will be regulated under the rule. Neither do the agencies. And unfortunately, neither do the people, businesses and state and local governments whose lands include ditches. That's because under this rule, you can't tell a regulated ditch by looking and you can't tell an excluded ditch either. There is no getting

[9] *See* Letter from Craig Hill, President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water (Sept. 29, 2014) (http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-7633).

[10] As stated in the official notice accompanying the rule (page 106), "It is important to recognize that 'tributaries,' including those ditches that meet the tributary definition, are not 'adjacent' waters and are jurisdictional by rule."

around the fact that ditches are expressly defined as tributaries (Final Rule at 204), and the agencies state that "ditches are one important example of constructed features that *in many instances* can meet the definition of tributary" (Final Rule at 97).

The rule excludes: (1) ditches with ephemeral (after rainfall) flow that "are not a relocated tributary or excavated in a tributary" and (2) ditches with intermittent (e.g., seasonal) flow that "are not a relocated tributary, excavated in a tributary, or drain wetlands." (Final Rule at 201). So whether you have an excluded ditch or a "tributary" rests entirely on the broad and unknowable definition of "tributary" described above. If a landowner *cannot know* through on-the-ground observation which land features would, according to remote sensing and other desktop tools, be found to meet the definition of a "tributary" (or to have historically met the definition of "tributary"), how can he determine whether a ditch historically relocated a "tributary" or was excavated in a tributary? He can't. It is insufficient for only agency staff—and not the farmer, rancher, or other landowner—to be able to identify a regulated ditch, particularly where the landowner will face *strict liability* for any "discharge" of any amount of "pollutant" (including biological materials, weed control products, or dirt) into that ditch.

Wow—that's not really what you'd call "straight talk" from the agencies. What else are they getting wrong? Ditch the Rule!