



Why Congress Should Act Now on the “Waters of the United States” (WOTUS) Rule

The rule proposed by the U.S. Environmental Protection Agency and the Army Corps of Engineers (the agencies) should concern Congress. The agencies stated purpose is to provide clarity and certainty regarding federal jurisdiction over water consistent with the limitations set by Congress and affirmed by the U.S. Supreme Court. Instead, the proposed rule uses undefined terms and new definitions with familiar terms in a way that creates confusion and new regulatory liabilities, while providing the agencies with almost unlimited authority to regulate at their discretion. As a result, it has drawn significant opposition from state and local officials and the regulated community throughout the country.

The rule will apply to every Clean Water Act (CWA) program and, if finalized without substantial revision, will adversely impact the nation’s construction, real estate, mining, agriculture, transportation, forestry, manufacturing and energy sectors as well as wildlife conservation and recreation. Increased permitting requirements and costs, and the potential for delayed decisions and third party litigation, will burden the economy and raise consumer costs without advancing the objectives of the CWA. It is therefore imperative that the agencies craft a practical rule that clearly defines the scope of federal CWA jurisdiction without stretching the limits set by Congress.

EPA asserts that the proposed rule will not have significant economic impacts; but EPA vastly underestimates permitting and compliance costs, the impacts on state and local programs, and the chilling effect on economic activity that the rule will cause. The agencies promise they will fix many of the concerns identified by stakeholders during the public comment period, even as EPA has repeatedly asserted those concerns are spurious. EPA says the rule will not be re-issued for comment, leaving state and local officials and businesses with little recourse should the agencies final decisions inadequately address their many concerns.

Additional time, outreach, oversight and transparency are needed to ensure that all concerns are properly addressed in a final rule that achieves the regulatory clarity vital for a thriving U.S. economy. Congress must act now to guide agency action. Acting before a rule is final provides the best opportunity and path to ensure that a final rule is practical, reflects Congressional intent, and achieves environmental benefits along with the clarity and balance necessary for robust economic activity.

Reasons to Act Now:

- Gives Congress a constructive voice and oversight role in development of final rule
- Provides a path to refine and reform a controversial regulatory proposal
- Assures a robust consultation with state and local officials and stakeholders
- Prevents EPA from unilaterally broadening the scope of the CWA
- Once the agencies issue a final rule, there is no opportunity for further public comment. The only recourse is litigation, with Chevron deference providing limited opportunity to redress overbroad assertions of CWA jurisdiction or to correct disputed interpretations of regulatory text. Congress could avoid this litigation cost by acting before, rather than after, the final rule.
- Allows a policy debate before a final rule picks “winners and losers.” Congress can give the agencies reasonable direction without “weakening” environmental protection.
- Congress can guarantee transparency and national consistency. The proposed rule contains significant ambiguities. Corps districts/EPA regions may interpret the rule differently, favoring some US regions and disadvantaging others. By acting now, members of Congress can better ensure a level playing field for their states and districts.
- Once a rule is issued, the effect on agriculture and development is almost immediate. Indeed, an EPA official recently stated the final rule will be fully implemented by October 1, 2015. Projects needing approval under NEPA will be delayed. Financing organizations may curtail loan applications and funding until the final rule’s uncertain provisions are resolved. Congressional action before the final rule would eliminate this immediate effect on jobs and economic development.
- Once a rule is final, the judicial branch plays a greater role. Even if Congress acts and overturns the rule, EPA’s preamble and legal rationale can become germane in any future litigation.

Congress should not wait until the rule is finalized to exercise its will. The Congressional Review Act (CRA) is a blunt tool:

- CRA has only been used successfully once in its entire history
- CRA limits the ability of Congress to guide the agencies rulemaking
- CRA prevents the agencies from ever proposing an alternative regulation until explicitly authorized by Congress; Congress and the Agencies would lose rulemaking flexibility. Congress would then need to pass another law to begin the rulemaking again; instead of passing two bills in the future, Congress should just pass one now.