



## WOTUS Update

### Issue

On June 23, 2020, the Navigable Waters Protection Rule (NWPR) went into effect to replace the 2015 Waters of the United States (WOTUS) Rule. The Environmental Protection Agency and the United States Army Corps of Engineers (agencies) define federal water jurisdiction while continuing to protect water quality. NWPR was updated based on farmers' comments to provide clarity, predictability, and consistency under the Clean Water Act. NWPR provides a common-sense approach and preserves states' rights over land and water resources.

### Background

In crafting the NWPR, the agencies referred to the Supreme Court precedent of *Rapanos v. United States* (*Rapanos*) to specify the reach of "traditional navigable waters," clarify the regulatory term "adjacent wetlands," and refine the concept of "relevant reach."

In order to better interpret these concepts, the agencies redefined the term "typical year" to mean when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area based on a rolling thirty-year period. Using data from a shorter period could potentially exaggerate the effects of short-term trends of drought or excessively rainy periods.

In the NWPR, there are four categories of jurisdictional waters: 1.) territorial seas and traditional navigable waters, 2.) tributaries, 3.) lakes, ponds, and impoundments of jurisdictional waters, and 4.) adjacent wetlands. These waters must be continuously present, fixed bodies of water and require a regular and predictable surface water connection in a typical year. A change from the prior 2015 WOTUS Rule is interstate waters are not included as its own category. *Rapanos* found the inclusion of interstate waters, regardless of navigability, went beyond the intended jurisdiction of the Clean Water Act.

Territorial seas and traditional navigable waters are large rivers and lakes and tidally influenced waterbodies used in interstate or foreign commerce. This includes waters currently used, used in the past, or susceptible to use for trade. These waters require evidence for physical capacity for commercial use.

Tributaries include perennial and intermittent streams that contribute surface flow to traditional navigable waters in a typical year. Perennial streams have surface water flowing year-round, while intermittent streams flow continuously during certain times of the year not based on precipitation. These waters can connect to a traditional navigable water or territorial sea directly or through artificial or natural features. Ephemeral waters, which only flow or pool from precipitation, are not tributaries and are not jurisdictional under the rule. Ditches are not tributaries unless they are perennial or intermittent, relocate a tributary, or were constructed in an adjacent wetland and contribute perennial or intermittent flow to a jurisdictional water. Ditches constructed for agricultural purposes are not jurisdictional unless they fall into one of these categories.

The burden of proof for tributaries and ditches now lies within the agencies. There are currently no comprehensive datasets through which the agencies can depict federally regulated waters under the Clean Water Act. The agencies rely on stream gage data, elevation data, historic or current water flow records, flood predictions, statistical evidence, aerial imagery, and United States Geological Survey (USGS) maps and models.

Lakes, ponds, and impoundments of jurisdictional waters are jurisdictional where they contribute surface water flow to a traditional navigable water or territorial sea in a typical year directly or through other waters of the United States, through channelized jurisdictional waters, or through artificial or natural features. These waters

are also jurisdictional where they are flooded by a water of the United States in a typical year like certain oxbow lakes that lie along the Mississippi River.

Adjacent wetlands can only physically touch jurisdictional waters, be separated from waters of the United States by a natural feature like a berm, bank, or dune, or be separated by an artificial feature that allows for direct hydrologic surface connection. If a road or similar structure allows for direct hydrologic surface connection through or over, the wetland is adjacent. These waters must be inundated by flooding in a typical year. Wetlands connected to territorial seas or traditional navigable waters through another wetland are not adjacent and therefore are not jurisdictional.

Non-jurisdictional waters are any waterbodies not in the four jurisdictional categories. In this category, there are specific examples of agriculture related waters. Agriculture related examples are groundwater including farm drains, ephemeral features like gullies, farm and roadside ditches, waste treatment systems like lagoons, artificially irrigated areas, farm ponds, and prior converted cropland. Prior converted cropland will cease to apply when cropland is not used for or in support of agricultural purposes in the immediately preceding five years and has reverted to wetlands. Other non-jurisdictional water examples are stormwater run-off and directional sheet flow over upland, stormwater control features, and water-filled depressions used for construction or mining activity.

Prior to NWPR, many of these waters would have been under federal jurisdiction and would require a permit to maintain. This rule does not change the exemptions under Clean Water Act Section 404(f), relieving farmers of the need for authorization for many types of agricultural discharges into waters of the United States. Congress excluded the construction and maintenance of drainage ditches from permitting requirements, and discharges of dredged or fill material into a ditch do not require a permit.

In an effort to overturn the NWPR, there have been lawsuits filed against the agencies by states and cities, environmental groups, and agricultural groups. *State of California et al v. Wheeler* sought to overturn NWPR and revert to the 2015 WOTUS Rule, but it was thrown out based on its merit. Environmental groups including the Chesapeake Bay Foundation, Conservation Law Foundation, and South Carolina Conservation League have filed lawsuits saying the agencies ignored scientific analysis. The New Mexico Cattle Growers Association, Oregon Cattlemen's Association, and Washington Cattlemen's Association each filed lawsuits arguing the definition of "navigable waters" is too broad and seek to overturn the rule. These three groups are state affiliates of the National Cattlemen's Beef Association (NCBA), but the NCBA strongly supports NWPR. American Farm Bureau Federation President Zippy Duvall says, "Farmers and ranchers care about clean water and preserving the land, which are essential to producing healthy food and fiber and ensuring future generations can do the same. That's why we support the Navigable Waters Protection Rule."

A key component of NWPR is federalism. Waters determined to be non-jurisdictional to the federal government are, or can be, regulated by the states. States now have the authority to decide if a water is under state jurisdiction.

On July 7, the Environmental Protection Agency (EPA) awarded the Tennessee Department of Agriculture (TDA) \$2,611,000 to address nonpoint source pollution. EPA will support implementation of activities intended to eliminate or prevent Tennessee's water quality problems due to the discharge of pollutants from nonpoint sources. The grant is expected to fund a variety of structural and non-structural best management practices like watershed planning, monitoring, and technology demonstrations along with a variety of education and outreach programs. The grant is part of EPA's 2020 Nonpoint Source Implementation Grant Program. Congress enacted Section 319 of the Clean Water Act in 1987 to control nonpoint sources of water pollution. Tennessee's law addresses waters of the state in six key areas: 1.) The Water Resources Act of 1957 directs the Commissioner of the Tennessee Department of Environment and Conservation (TDEC) with responsibility of protecting, conserving, and developing water resources of the state. All provisions of this act have never been fully implemented due to funding limitations. 2.) The Water Quality Control Act (WQCA) of 1977 gives

TDEC broad power over waters of the state. TDEC enforces measures of the WQCA by administrating different permits, such as the Aquatic Resource Alteration Permits, National Pollutant Discharge Elimination System permits, and other state operating permits like concentrated animal feeding operations (CAFO). Agriculture is largely exempt from WQCA, other than CAFOs which are considered point sources by federal law if there is a discharge. 3.) In 2002 the General Assembly passed the Tennessee Water Resources Information Act (WRIA) which developed a registration system for water withdrawals in the state. WRIA states that; "no person shall withdraw ten thousand or more gallons of water per day from a surface water or a groundwater source unless the withdrawal is currently registered with the commissioner." This law excludes withdrawing water for agricultural uses. The state has historical records of water withdrawal amounts for all types of water usage except agriculture. 4.) The Inter-Basin Water Transfer Act (IBWTA), passed in 2000, established ten separate water basins in the state and developed the process for which a person or entity would want to move water from one basin to another. 5.) the Tennessee Safe Drinking Water Act (SDWA) governs the construction and operation of public water supply systems. SDWA also provides regulatory authority to TDEC to protect aquifers and surface water bodies used as a water supply source. 6.) The Tennessee Water Well Act of 1963 requires all persons drilling a well for beneficial use to obtain a license from TDEC.

### **Questions**

1. Is there knowledge of the Navigable Waters Protection Rule and its impacts among farmers?
2. What do you feel are the potential positives and negatives in the Navigable Waters Protection Rule?
3. Should Tennessee water laws be updated to adhere to the Navigable Waters Protection Rule?

### **TFBF Policy**

#### **Water (Partial)**

The regulatory reach of "waters of the state" is greater than "waters of the United States." Truly navigable waters should be protected in order to ensure water quality. However, the definition of "waters" in Tennessee law needs to provide a regulatory exception for surface waters which are not "navigable waters" as defined in the federal Clean Water Act. This would provide consistency between state and federal law and assure that Tennessee will not lose its primacy or delegation under the Clean Water Act. It also would eliminate much of the guesswork and permitting that property owners currently must go through. Jurisdictional waters by the Federal government should be constrained to navigable waterways. Expansion of regulatory authority by the state or federal agencies without approval by the appropriate lawmakers should be strictly prohibited and swiftly enforced by the judicial branch.

#### **AFBF Policy**

Multiple policies address this issue including **546 / U.S. Army Corps of Engineers' Authority, 547 / Water Quality, 548 / Water Use, 549 / Waterways, 550 / Wetlands.**

*Produced in 2020 by the Tennessee Farm Bureau Federation  
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