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Three Key Reforms for Federal Water Policy

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For decades, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have been overreaching when it comes to the implementation of the Clean Water Act (CWA). This statute, built on the idea of cooperation between the federal government and states,[1] has instead become a tool to expand federal power and reduce states' ability to manage their water resources.

As the Trump Administration and a new Congress look to rein in regulatory abuses, there are opportunities for major reforms to federal water policy. This *Issue Brief* first discusses some important principles that should govern implementation and enforcement of the CWA and then outlines three specific changes that should be made immediately.

Key Principles That Should Guide Implementation and Enforcement of the CWA

The new era of federal water policy should be governed by several important principles. First, the rights of states and local communities should be respected. Both the EPA and Corps should identify new ways to move authority and decision making down to states and local communities. Many local or regional water issues are unique and are better served by a decentralized approach.

Second, the agencies should create predictability for affected parties. Regulations should be clear and objective, with an emphasis on bright-line rules that eliminate uncertainty. Property owners should know what to expect and should be able to rely on the decisions of the Corps and the EPA. Enforcement should also be consistent across the country, regardless of in what region a property is located. Finally, there should be respect for the rule of law. Both the EPA and Corps should only take actions that are clearly within their authority under the CWA.

Reform 1: Rescind the WOTUS Rule

On June 29, 2015, the EPA and Corps published what is known as the Waters of the United States (WOTUS) rule.[2] This rule seeks to define what waters can be regulated under the CWA. According to the statute, these agencies can regulate "navigable waters," which includes "the waters of the United States, including the territorial seas."[3] While there have been claims that the reach of the CWA needs clarification, one thing is[4] extremely clear: "Navigable" is a requirement that must be met for any water to be covered under the law.

The definition of "navigable waters" is critical because it clarifies the scope of these agencies' jurisdiction under the CWA. Both the EPA and Corps have sought an overbroad definition of "navigable waters." In the current rule, the agencies would regulate almost any type of water, including water that would not be navigable in any normal understanding of the word, such as certain man-made ditches and even dry land that may hold some water only a few days of the year after major rains.[5]

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Since 2001, the U.S. Supreme Court twice struck down their previous overreach.[6] The WOTUS rule is another attempt by the agencies to go beyond what is authorized by statute.

The rule is also both vague and subjective. Property owners may decide not to engage in certain ordinary activities on the land, such as farming and ranching, simply because it is unclear whether such actions would violate the rule. Fortunately, the rule is not being enforced because the 6th Circuit Court of Appeals issued a nationwide stay while litigation is pending.[7]

Recommendation. The Trump Administration should rescind the rule and develop a new one consistent with the language and intent of the statute (and Supreme Court precedent). Congress, for its part, should seek to define the term "navigable waters" in the statute even before a new rule is proposed, generally limiting federal authority to regulating traditional "navigable waters."

Reform 2: Prohibit Retroactive Vetoes of Section 404 Permits

Under the CWA, property owners sometimes have to secure dredge-and-fill[8] permits under Section 404. The EPA has decided that it can retroactively revoke a Section 404 permit that the Corps has issued—regardless of whether the permit holder is in full compliance with permit conditions.[9] In a 2013 DC Circuit Court of Appeals case called *Mingo Logan Coal Co. v. EPA*,[10] the court held that the EPA could retroactively veto such permits; the EPA's veto was four years after the Corps issued the permit.[11]

1. The Clean Water Act (CWA) expressly says that states are supposed to play the leading role in protecting water: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." Federal Water Pollution Control Act, Public Law 107–303, 107th Cong., November 27, 2002, Sec. 101(b).
2. U.S. Department of Defense, Department of the Army, Corps of Engineers, and U.S. Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" *Federal Register*, Vol. 80, No. 124 (June 29, 2015), http://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf (accessed November 16, 2016).
3. See 33 U.S. Code § 1362(7), https://www.law.cornell.edu/uscode/text/33/1362 (accessed November 16, 2016).
4. In his concurrence in Sackett v. EPA, Justice Alito noted, "Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act." See *Sackett v. EPA*, 132 S. Ct. 1367, https://www.supremecourt.gov/opinions/11pdf/10-1062.pdf (accessed November 16, 2016).
5. For more discussion on the details of the rule see U.S. Department of Defense, Department of the Army, Corps of Engineers, and U.S. Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" and Daren Bakst, *Farms and Free Enterprise: A Blueprint for Agricultural Policy* (Washington:The Heritage Foundation, 2016) http://thf-reports.s3.amazonaws.com/2016/Farms_and_Free_Enterprise.pdf.
6. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. Code 159 (2001), https://www.law.cornell.edu/supct/html/99-1178.ZO.html (accessed November 16, 2016), and *Rapanos v. U.S.*, 547 U.S. Code 715 (2006), https://www.law.cornell.edu/supct/html/04-1034.ZS.html (accessed November 16, 2016).
7. U.S. Environmental Protection Agency, "Clean Water Rule Litigation Statement," https://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement (accessed November 16, 2016).
8. Discharge of dredged material refers to material excavated or dredged from waters of the U.S. and discharge of fill material refers to "material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes." U.S. Environmental Protection Agency, Office of Compliance, "Managing Your Environmental Responsibilities: A Planning Guide for Construction and Development," April 2005, http://www.epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/ (accessed November 16, 2016). See also the EPA regulations at 33 U.S. Code §323.2, http://www.law.cornell.edu/cfr/text/33/323.2 (accessed November 16, 2016). The regulations provide more specific definitions of dredged material, fill material, and discharge of dredged or fill material. The precise definitions of terms such as "fill material" are a matter of controversy. See Claudia Copeland, "Controversies Over Redefining 'Fill Material' Under the Clean Water Act," Congressional Research Service *Report for Congress*, August 21, 2013, http://fas.org/sgp/crs/misc/RL31411.pdf (accessed November 16, 2016).
9. Robert Gordon and Diane Katz, "Environmental Policy Guide: 167 Recommendations for Environmental Policy Reform," The Heritage Foundation, p. 8, http://www.heritage.org/research/reports/2015/03/environmental-policy-guide.
10. *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, (D.C. Cir. 2013), https://www.cadc.uscourts.gov/internet/opinions.nsf/DBEEA1719A916CDC85257B56005246C4/$file/12-5150-1432105.pdf (accessed November 16, 2016).
11. Ibid.

For anyone required to secure a permit, this retroactive power is chilling.[12] If the EPA continues to retain such power, it will create uncertainly and undermine investment and property values. This unpredictability is both unfair to property owners and harmful to economic growth.

Recommendation. The EPA should clarify that Section 404(c) in which this power is derived[13] does not authorize such retroactive action. Congress should also clarify this in statute.

Reform 3: Properly Interpret the Normal Farming Exemption under the CWA

Under Section 404(f)(1)(A) of the CWA, dredge-and-fill permits are not required for normal farming activities.[14] The EPA and Corps, however, narrowly interpret this exemption, inconsistent with the plain language of the statute.

This exemption, on its face, should apply to farming activities that would normally occur on farms.[15] To both agencies, "normal" appears to mean normal for a specific farm—not to farming generally.[16] As a result, this exemption only applies to activities at operations that have been ongoing since 1977 (when the law was passed).[17] If farming or ranching has stopped temporarily, the exemption may no longer apply because the operation is no longer "ongoing."[18] Even ongoing operations may be required to secure a permit if a new crop is grown on the land.[19]

In addition, the CWA does have one exception to this normal farming exemption: the "recapture provision."[20] As explained in American Farm Bureau Federation congressional testimony, this provision clarifies that "where discharges of dredged or fill material are used to bring land into a new use (e.g. making wetlands amenable to farming) and impair the reach or reduce the scope of jurisdictional waters, those discharges are not exempt."[21] The EPA and Corps broadly

12. For more information on the impact of this retroactive veto, see, for example, "AGC Testifies at Hearing on EPA's Expanded Clean Water Act Permit Veto Authority," The Associated General Contractors of America, July 19, 2014, https://www.agc.org/news/2014/07/19/agc-testifies-hearing-epa%E2%80%99s-expanded-clean-water-act-permit-veto-authority (accessed November 16, 2016).
13. See 33 U.S. Code § 1344 (c), https://www.law.cornell.edu/uscode/text/33/1344 (accessed November 16, 2016), and "Clean Water Act Section 404(c) 'Veto Authority,'" https://www.epa.gov/sites/production/files/2016-03/documents/404c.pdf (accessed November 16, 2016).
14. See 33 U.S. Code § 1344(f)(1)(A), https://www.law.cornell.edu/uscode/text/33/1344 (accessed November 16, 2016). The "normal farming exemption" covers both normal silviculture and ranching activities as well. The language exempts "the discharge of dredged and fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." There is an exception to the normal farming exception called the recapture provision 33 U.S. Code § 1344 (f)(2), which is discussed in the text of the paper.
15. It would likely be proper statutory interpretation to clarify that normal farming activities are those that are specifically listed in 33 U.S. Code § 1344 (f)(1)(A) or activities that are similar in nature.
16. This narrow and improper interpretation of "normal" can be seen in U.S. Environmental Protection Agency, "Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CAA Prevention of Significant Deterioration; CWA National Pollutant Discharge Elimination System; and Section 404 Dredge of Fill Programs," Federal Register, Vol. 44, No. 116 (June 14, 1979), p. 34263, and through the current regulations that maintain the "ongoing" requirement, 33 C.F.R. 323.4(a)(1)(ii), https://www.law.cornell.edu/cfr/text/33/323.4 (accessed November 16, 2016). This narrow interpretation can also be seen in the courts as early as in *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525 (1979).
17. See, for example, letter from Craig Hill, President, Iowa Farm Bureau, to Ken Kopocis, Deputy Assistant Administrator, U.S. EPA Office of Water, September 29, 2014, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-7633 (accessed November 16, 2016); American Farm Bureau Federation, "Clarifying EPA's Muddy Waters," http://www.fb.org /newsroom/nr/nr2014/07-16-14/Clarifying_EPAs_Muddy_Water.pdf (accessed November 16, 2016); and Ellen Steen, testimony before the Subcommittee on Conservation, Energy, and Forestry, Agriculture Committee, U.S. House of Representatives, "Regarding: The Definition of 'Waters of the United States' Proposed Rule and Its Impact on Rural America," Statement of the American Farm Bureau Federation, March 3, 2015, http://agriculture.house.gov/uploadedfiles/steen_testimony.pdf (accessed November 16, 2016). An operation that has not been ongoing will need a permit, but once it is "established," a permit may no longer be required. See, for example, Steen, "Regarding: The Definition of 'Waters of the United States,'" footnote 8.
18. Ibid.
19. "From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act," U.S. Senate Committee on Environment and Public Works Majority Staff, September 20, 2016, http://www.epw.senate.gov/public/_cache/files/7b469fe4-62c3-4ea9-9ce2-bedbf5179372/wotus-committee-report-final1.pdf (accessed November 16, 2016).
20. 33 U.S. Code § 1344 (f)(2), https://www.law.cornell.edu/uscode/text/33/1344 (accessed November 16, 2016).
21. See Steen, "Regarding: The Definition of 'Waters of the United States.'"

interpret this exception which further narrows the scope of the normal farming exemption; for example, even changing crops could trigger this provision.[22]

Recommendation. The EPA and Corps should both rescind the current narrow interpretation of the normal farming exemption[23] and the overbroad coverage of the recapture provision. Normal farming activities should cover any activity that is normal for farming in general, regardless of whether such activity has been ongoing. A high standard should be set for the application of the recapture provision, and Congress should pass legislation to this effect.

Conclusion

The Trump Administration and Congress have a real opportunity to make these three reforms (among many other necessary reforms) and usher in a new era of federal water policy based on federalism, regulatory predictability, and the rule of law. These principles are not obstacles to achieving improved water quality, but requirements for success.

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22. Ibid.
23. For some good examples of the narrow interpretation, see "From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act," U.S. Senate Committee on Environment and Public Works Majority Staff, September 20, 2016, http://www.epw.senate.gov/public/_cache/files/7b469fe4-62c3-4ea9-9ce2-bedbf5179372/wotus-committee-report-final1.pdf (accessed November 16, 2016); Tony Francois, "US Senator Grassley Speaks on PLF Client John Duarte's Fight with Federal Wetland Enforcers," Pacific Legal Foundation Liberty Blog, February 26, 2016, http://blog.pacificlegal.org/us-senator-grassley-speaks-on-plf-client-john-duartes-fight-with-federal-wetland-enforcers/ (accessed November 16, 2016); and hearings, *Erosion of Exemptions and Expansion of Federal Control–Implementation of the Definition of Waters of the United States*, Committee on Environment and Public Works, U.S. Senate, May 24, 2016, http://www.epw.senate.gov/public/index.cfm/2016/5/erosion-of-exemptions-and-expansion-of-federal-control-implementation-of-the-definition-of-waters-of-the-united-states (accessed November 16, 2016).