Washington Report

By John Thorne

Identifying Waters Protected by the Clean Water Act: The Impact on Aerial Application

Despite decades of trying, lawmakers continue to struggle to identify which waterbodies are subject to Clean Water Act (CWA) regulations. All agree that rivers, lakes, wetlands and other "waters of the U.S." (WOTUS) supply critical drinking water, irrigation, recreation, storm water control and industrial uses to society, while also providing critical aquatic ecosystems to wildlife. Yet, in the 40 years since CWA enactment, government agencies, Congress and stakeholders still disagree over how best to balance the competing needs of society and nature with regard to regulations implementing the CWA.

Overall, the guidance will likely harm the aerial application business, as federal and state agencies, county and city governments, mosquito control and irrigation districts, natural resource managers and private entities work to sort out the changes to the definition of "waters of the U.S."

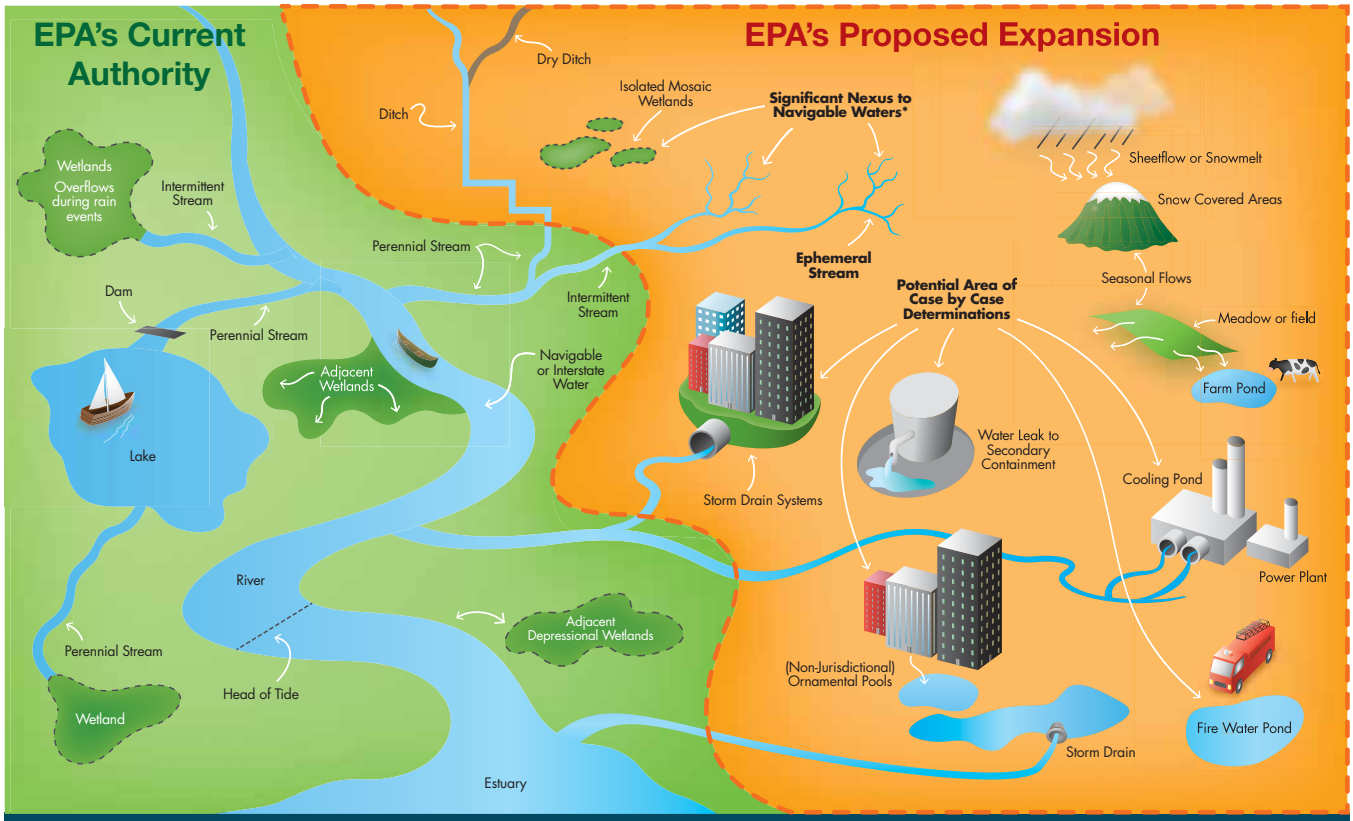
In recent years rather than adopt policy changes through formal rulemaking, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have repeatedly issued informal "guidance" documents to change the definition of WOTUS and the scope of critical CWA programs. The newest draft guidance would expand the WOTUS definition to include many waters never intended by Congress or the courts to be regulated, including small tributaries and man-made conveyances. It also would expand the WOTUS definition to all CWA programs, including wetlands delineation and wastewater treatment requirements, as well as water quality standards and scope of the new NPDES pesticide general permits. The illustration found on the adjacent page highlights some of the principal ways the guidance would affect CWA policies. Agricultural stakeholders and many in Congress are concerned the agencies are attempting to greatly expand the scope of the CWA by modifying existing guidance with still more guidance, without pursuing rulemaking under the Administrative Procedures Act (APA).

The First 40 Years

Congress originally identified waterbodies subject to the then-new CWA as "navigable waters"—meaning those forming interconnected highways (e.g., large rivers and lakes) for waterborne travel, recreation and transport of interstate and foreign commercial goods. Today, in addition to the traditionally navigable waters identified by Congress in the enactment of the CWA in 1972, CWA regulations (and guidance) also covers a very long list of regulated waterbodies, yet there are still many other situations and thousands of waterbodies where the agencies, the courts and Congress cannot agree. Despite 40 years of policy tinkering and lawsuits, there is still major disagreement over the scope of CWA jurisdiction today. A series of conflicting lower court decisions led the Supreme Court to twice address the definition of WOTUS with respect to wetlands policy. In 2011 the EPA and Corps decided to incorporate all of the Justices' opinions in sweeping, new draft guidance[1] that would greatly increase the number and type of waters regulated by the CWA. Such changes would likely effect state water policies, since about half of state water laws are written to protect "waters of the U.S." instead of "waters of the state." Of key importance to NAAA members, they would expand the waters regulated by NPDES pesticide

1 http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf

The EPA's Proposed Guidance Would Expand the Definition of Navigable Waters of the U.S.



The Environmental Protection Agency's (EPA) most recent proposed guidance expands the definition of the "waters of the United States," and by extension the EPA's and the Army Corps of Engineers' jurisdiction over these bodies of water. Under the new guidance, the EPA would be able to regulate things such as fire ponds, ornamental pools, dry ditches, ephemeral or seasonal streams, cooling ponds, isolated mosaic wetlands, snow melt and storm drainage ponds. In essence, the EPA would have the subjective authority to define, on a case by case basis, any and all waters as "navigable" to deviate from the spirit of current law which applies specifically to "navigable waters." The result would be increased uncertainty and greater incentive for groups to seek court intervention. Because the EPA is pursuing this approach as a guidance, it need not follow public notice and comment rulemaking safeguards before the Agency and 10 regions apply it.

*The EPA interprets the Clean Water Act to apply to non-navigable tributaries and their adjacent wetlands that have a "significant nexus" to navigable waters. The EPA defines significant nexus as waterways that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable or interstate waters."

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general permits, Total Maximum Daily Loads (TMDLs) and other CWA requirements.

2011 Proposed Guidance

Despite the agencies' repeated assertions that the draft guidance lacks the force of law, it supersedes existing law and will have substantial, binding impact on the agencies and public. The proposed draft guidance would not only change federal policies for wetlands delineation under CWA but also for the NPDES permitting programs. For all of the various CWA programs, the proposed guidance would expand the scope of CWA regulations by defining WOTUS to include many previously unregulated headwaters, tributaries and conveyances. It would reinterpret Congressional intent and court decisions, and apply broad jurisdictional principles such as the aggregation of all waters in a watershed and the regulation of agricultural, irrigation and roadside ditches to the entire CWA structure (water

quality standards, TMDLs, etc.). It would do more than fill in the details of pre-existing regulations, as the agencies state. It would essentially reinterpret court opinions, apply specific tests for establishing jurisdiction and effectively revise those CWA regulations. This represents much more than simply "guidance."

Potential Impact on Aerial Application

The guidance would greatly increase the number and types of waters subject to the CWA's requirements, as well as enforcement and potential citizen suit risks. Government agencies and states will struggle to apply water quality standards, TMDLs, permitting and many other CWA programs to thousands of newly jurisdictional "waters." These waters could include seasonally dry swales, roadside and irrigation ditches, culverts, wetlands or minor tributaries. The complexity of the guidance will cause delays, increase water program costs and reduce pest-control budgets, as funds are directed to other programmatic areas. Such clients may want to share some of the added risks and legal liability with contracting pest-control applicators. Overall, the guidance will likely harm the aerial application business, as federal and state agencies, county and city governments, mosquito control and irrigation districts, natural resource managers and private entities work to sort out the changes.

Policy Status

Despite industry calls for EPA and the Corps to pursue formal rulemaking, EPA and the Corps continue to pursue finalization of the guidance before undertaking what they expect would be a protracted rulemaking and multiple legal challenges. But the widespread controversy generated by the draft guidance has stalled its approval by the White House Office of Management and Budget (OMB) since February 2012. As is a common practice when such controversy exists, OMB may require changes to the draft guidance before approving it.

Despite Republican efforts, however, it is unlikely legislative efforts to block the WOTUS guidance will be successful. The end result being that if OMB approves the draft guidance, we will likely have to live with it until EPA and the Corps undertake formal rulemaking.

WOTUS Guidance and NPDES Permits

The requirements for NPDES general permits for pesticide applications into, over or near jurisdictional waters are

the result of a 2009 Sixth Circuit decision in the case of National Cotton Council et al, vs. EPA. While many in Congress have tried unsuccessfully to overturn this decision and the subsequent EPA rule to require NPDES permits of pesticide applicators and others, efforts thus far have been unsuccessful. In the most recent attempt, the House of Representatives approved July 11 a 2013 farm bill that included language that would overturn the Sixth Circuit decision. However, the provision to remove the need for NPDES general permits could be lost when the Senate and House work to reconcile their much different versions of the farm bill. Regardless of WOTUS guidance and/or potential NPDES exemption legislation, NAAA will continue to work with our ag/pesticide user stakeholder coalition to ensure the regulatory guidelines governing waters of the U.S. impact the aerial application industry in a manner least disruptive to performing the essential application of crop protection products critical to high-yield agriculture. ■

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Aerial applicators affected by the NPDES Pesticide General Permit requirements could be impacted even further by the EPA's proposal to expand the definition of "waters of the U.S." The number and types of waters subject to Clean Water Act requirements would increase greatly under the proposed changes.