

FEDERAL WATER QUALITY PROTECTION ACT S. 1140

MYTH VS. FACT

The truth behind the Obama administration's talking points on the final WOTUS rule and why the bipartisan Federal Water Qualities Protection Act is a must-pass bill

MYTH 1: The WOTUS Rule is needed to protect the drinking water of 117 million (or 1 in 3) Americans.

FACT: All rivers, lakes and streams that are drinking water sources were regulated under Clean Water Act before the WOTUS Rule and would continue to be regulated under a new rule following enactment of S. 1140.

At a May 19 EPW Committee hearing on S. 1140, a Colorado water official told the EPW committee that each drinking water source is not only regulated, it is designated as a source of drinking water, giving it even higher levels of protection.

FACT: The 117 million people statistic was developed by EPA as part of its so-called "Vulnerable Waters" project. EPA used taxpayer dollars to have a contractor create propaganda first to promote the failed Clean Water Restoration Act in 2009 and then to promote the new WOTUS rule.

A 2010 EPA Office of Water PowerPoint Presentation on the project expressly states that the information was used for litigation and lobbying – including use “by Enviro NGOs to support the CWRA [Clean Water Restoration Act]”

Nancy Stoner, Acting Assistant Administrator for Water at the EPA, admitted in a July 2014 letter to the House Science Committee that EPA's analyses have nothing to do with implementing the Clean Water Act.

FACT: EPA's propaganda does not match its analysis. EPA's propaganda claims that 117 million people get their water from ephemeral, intermittent and headwater streams. But, the actual analysis points out that the dataset EPA used to come up with that statistic does not even include ephemeral streams. The dataset also excludes: “streams less than one mile in length, lakes less than six acres in size, and wetlands less than 24 acres in size.”

EPA propaganda fails to include this disclaimer in a blatant attempt to confuse Congress and the American public about the debate over dry channels that hold water only when it rains – called ephemeral waters. This misleads the public to believe that channels that may hold water only a few days a year or a few days in a decade are sources of drinking water.

FACT: S. 1140 expressly calls for regulation of same streams that EPA identified as drinking water sources in its "Vulnerable Waters" project.



MYTH 2: WOTUS Rule protects agriculture

EPA claims that farmers and ranchers are protected from regulation by the exemptions from 404 permits under 404(f)(1) of the Clean Water Act.

FACT: The permitting exemption for ordinary farming and ranching activities is meaningless because, according to EPA and the Corps, you can only be exempt from permits when carrying out ordinary farming and ranching activities if a farmer or rancher does not make any changes after 1977 that disturbs any water – or land that is now considered water.

Under this surreal interpretation, anyone who needs a permitting exemption is not eligible for it.

FACT: Any farmed lands will be automatically regulated if they contain ephemeral drainage paths or ditches that meet the broad definition of a “tributary”

FACT: The 404 permit exemptions do not apply to the application of fertilizer or pesticides.

FACT: Under the new rule, almost all water could be federally regulated. For example, 100 percent of all acres in Virginia and 99.7 percent of Missouri is subject to federal regulation on a case by case basis. This expansion will greatly impact the ability of farmers and ranchers to provide food for Americans.

MYTH 3: WOTUS Rule exempts ditches

EPA claims that its WOTUS Rule exempts ditches.

FACT: The exemption for ditches in the WOTUS rule will apply to very few ditches because EPA puts the burden of proof on local governments and landowners that no part of the entire length of a ditch is located in an area where there used to be a stream.

According to EPA, you don't even need water to create federal jurisdiction. EPA can regulate areas where water used to be located. The final rule specifically says EPA can rely on historical maps and historic aerial photographs, and street maintenance data to determine where streams used to be. Whatever is there today, be it a street, a ditch, or a sewer, can still be regulated as a water of the United States under this remarkable expansion of federal authority.



MYTH 4: The WOTUS Rule is based on science.

EPA claims that the WOTUS Rule is supported by a review of over 1,000 scientific studies.

FACT: The studies EPA reviewed did not analyze impact to navigable waters, which is the basis for jurisdiction under the Clean Water Act and most did not even address water pollution.

FACT: The lack of scientific support was pointed out by the Corps of Engineers before the rule went final.

According to the Corps experts:

“[a]rbitrary limits within the definition of “neighboring” are not rooted in science and beyond the reasonable reach of defining adjacency by rule.”

“The 1500-foot limitation is not supported by science or law and it thus legally vulnerable.”

“non-science-based tests based on distances from [ordinary high water marks/high tide lines] makes the draft final rule legally vulnerable.”

EPA ignored these concerns.



(Myth 4 cont.)

FACT: The lack of scientific support is one of the reasons two courts acted to stop EPA from implementing the WOTUS rule.

According to the District Court of North Dakota: *“The rule asserts jurisdiction over waters that are remote and intermittent waters. No evidence actually points to how these intermittent and remote wetlands have any nexus to navigable-in-fact water.”*

According to the Sixth Circuit Court of Appeals, EPA could not point to scientific studies supporting the final rule saying: *“Nor have respondents identified specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose.”*

MYTH 5: The WOTUS Rule is based on the technical experience of the Corps of Engineers.

EPA claims that the WOTUS Rule is supported by practical experience developed through case specific determinations identifying waters of the United States.

FACT: The Corps denies that its practical experience supports new WOTUS rule. The Corps even asked that its name and logo be removed from the technical support document and economic analysis that are supposed to provide the support for the rule.

According to the Corps:

“Corps data provided to EPA have been selectively applied out of context, and mixes terminology and disparate data sets. In the Corps’ judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies and logical inconsistencies. As a result, the Corps’ review could not find a justifiable basis in the analysis for many of the documents’ conclusions.

“The [Technical Support Document] emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... [T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that ‘the agencies’ did this work or that it is reflective of Corps experience or expertise.”

MYTH 6: EPA addressed the concerns of local governments.

FACT: EPA ignored the concerns of local governments. As a result, according to the National Association of Counties: *“the flawed consultation process has resulted in a final rule that does not move us closer to achieving clean water goals and creates more confusion than clarity.”*

FACT: The U.S. Conference of Mayors, the National Association of Counties, the National League of Cities, and the National Association of Regional Councils all support S. 1140.

FACT: The WOTUS rule fails to protect public safety ditches and sewer systems from regulation.

FACT: The final rule regulates any ditch or sewer system that EPA claims is a “relocated tributary.”

FACT: The final rule allows EPA to look at historic maps to try to find the location of former streams and regulate whatever is now in their place.



MYTH 7: EPA made changes to the final WOTUS Rule to address the concerns of the Corps of Engineers.

According to the political head of the Corps, the assistant secretary of the Army for Civil Works, the following changes were made to the WOTUS rule to address the Corps' concerns: adding the authority to regulate any water in the 100-year flood plain, adding the regulation of ditches that drain wetlands, and adding transition rules to the preamble for people in the middle of the permitting process.

FACT: These changes only address concerns expressed by the Corps that parts of the draft final rule, as sent to Office of Management and Budget after the comment period, were too narrow.

FACT: No changes were made to address concerns about parts of the rule that the Corps called “regulatory overreach.” For example:

- The final rule claims the authority to regulate isolated wetlands that have no hydrologic connection to navigable water even though the Corps said this undermines the legal and scientific credibility of the rule.
- The final rule claims the authority to regulate 1000s of miles of dry washes in the desert that carry water infrequently and in small quantities even though the Corps said they were not part of any analysis that shows these dry washes can affect navigable water.
- The final rule automatically regulates all water within 1500 feet of a navigable water even though the Corps said this was arbitrary and not supported by science or law.

MYTH 8: S.1140 changes the goals of the Clean Water Act

FACT: S. 1140 does not amend the Clean Water Act and does not change its goals. S. 1140 includes a statement that the Clean Water Act is intended to protect traditional navigable waters from water pollution. This should be obvious.

FACT: It is the WOTUS rule that the changes the goals of the Act by claiming authority to regulate water based on alleged impacts on chemical, physical OR biological integrity.

In this new rule, EPA claims that a biological connection alone is a basis for federal control and that biological connections can be created when birds and other animals carry seeds and insect eggs (sometimes in their intestines) between isolated wetlands and navigable rivers and lakes. [Yes, this is regulation through bird droppings!]

FACT: The Clean Water Act achieves its objective “to restore and maintain the chemical, physical, and biological integrity of our Nation’s waters” by protecting water quality. This truism is recognized by Justice Kennedy in his *Rapanos v. United States* (2006) opinion. According to Justice Kennedy:

- The Clean Water Act is “a statute concerned with downstream water quality.”
- “When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term navigable waters.
- “Absent some measure of the significance of the connection for downstream water quality, this standard [mere hydrologic connection] was too uncertain.”

FACT: EPA’s new “biological connectivity” test is even broader than the “Migratory Bird Rule” that the Supreme Court struck down in the 2001 *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* decision.



MYTH 9: The WOTUS rule limits jurisdiction.

Under the WOTUS rule EPA can regulate any water that is located 4,000 feet from any other water or in the 100-year flood plain, if EPA decides the water has a “significant nexus” to navigable water.

FACT: These geographic limitations in the WOTUS rule are meaningless. EPA can regulate almost any water that does not meet the precise terms of one of the narrow exemptions. According to EPA: *“the vast majority of the nation’s water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.”*

The geo-environmental engineering consulting firm Geosyntec has confirmed this, finding that 100% of the acres of land in Virginia, over 99% of Missouri, 99% of Montana, 99% of Pennsylvania, 98% of New York, 95% of California, 95% of Oklahoma, and 92% of Wisconsin lies within 4,000 feet of something that EPA now calls a water of the United States.

FACT: The WOTUS rule allows EPA to claim that any water has a “significant nexus” to navigable water. The rule does not define “significant.” As a result, all EPA has to do is claim a water has one of nine functions – three of which can be met almost any water:

- “Runoff storage”: This means if something can hold rainwater, EPA can regulate it. This describes all water bodies.
- “Contribution of flow”: Since this includes seepage into groundwater, this describes almost all water bodies.
- “Provision of life cycle dependent aquatic habitat”: This means EPA can regulate water if it is used by any plant, insect or animal that also can be found in or near a navigable water. This test is even broader than the “Migratory Bird Rule” that allowed EPA to regulate water if it was used as habitat for migratory birds or endangered species.

MYTH 10: Over 90% of commenters supported the WOTUS Rule

EPA claims it received over a million comments on the WOTUS rule and over 90 percent supported it.

FACT: Mass email campaigns, which EPA had a hand in manufacturing, constituted 98 percent of the over 1 million comments received on the rule. If EPA received a general statement of support for clean water and a list of email addresses, it counted each email address as a separate comment.

On May 18, the *New York Times* questioned EPA’s practice in soliciting and collecting these comments. *The NY Times* highlighted that:

“In a campaign that tests the limits of federal lobbying law, the agency orchestrated a drive to counter political opposition from Republicans and enlist public support in concert with liberal environmental groups and a grass-roots organization aligned with President Obama.

“The Obama administration is the first to give the E.P.A. a mandate to create broad public outreach campaigns, using the tactics of elections, in support of federal environmental regulations before they are final.”

If you look at the unique comments – not lists of email addresses – the story is very different. According to the Assistant Secretary of the Army, only 39 percent of the unique comments support the rule, 60 percent opposed it, and 1 percent were neutral.

MYTH 11: The WOTUS Rule does not rely on migratory birds to establish jurisdiction.

EPA claims that it will not rely on migratory birds to establish “biological connectivity” to navigable waters.

FACT: Under the WOTUS rule EPA claims it can rely on insect eggs and plant seeds carried by migratory birds to establish federal jurisdiction. EPA cynically claims that this dodge is not barred by the Supreme Court’s SWANCC decision, which blocked EPA from claiming federal control based on use of water by migratory birds.

