Waters of the US (WOTUS)

Discussion from the Western Perspective
Looking at WOTUS: several Western water perspectives

1. EPA Connectivity Report perspectives – Jim Kudlinski
2. Regional Agency perspectives – Jolene Walsh
3. ACWA perspective – Abby Schneider
4. Legal Perspective – Linda Christie
5. Congressional perspective – Hicks-Ray
Western Water – Legal Perspectives

Linda Christie
Chair, WESTCAS Legislative Committee
Attorney, Tarrant Regional Water District
“Waters of the US” Proposed Rule

Congressional Perspectives – Issues & Actions
Hicks-Ray Associates
TIMELINE of MAJOR ACTIONS

- **2001/2007**
  - SWANNC / Rapanos

- **2009/2010**
  - CWRA

- **Apr 2011**
  - CWA Guidance

- **Apr 2014**
  - CWA Rule

- **Late 2015**
  - Rule published?

- **Extend Cmt – Oct 20th**
- **Public Comments (thousands) recvd/addressed**
- **Rule finally published**
- **Race to Courts**
Justice Kennedy, proposed a “significant nexus” test for determining federal Clean Water Act jurisdiction. Under this test, a water body would be subject to federal regulation only if that water body would significantly affect a navigable-in-fact waterway. Justice Kennedy would exclude from regulation remote drains, ditches, and streams with insubstantial flows and reject speculative evidence of a “significant nexus.”

MAJORITY: Justices (Scalia, Thomas, Alito, and Roberts) required limiting federal authority to relatively permanent, standing or continuously flowing bodies of water traditionally recognized as “streams, oceans, rivers and lakes” that are connected to traditional navigable waters. This would also authorize federal regulation of wetlands abutting these water bodies if they contain a continuous surface water connection such that the wetland and water body are indistinguishable.

DISSENT: Four justices in the dissent took the view that the agencies could choose to regulate essentially any waters (and much of the land) to advance the statutory goal of maintaining the “chemical, physical, and biological integrity of the Nation’s waters.”

Pre-2001, CWRA, Guidance & proposed Rule?
Potential Impacts of Proposed Changes to the Clean Water Act Jurisdictional Rule

“It is the responsibility of Congress, and not the Administration, to define the scope of jurisdiction under the Clean Water Act.”

Chairman Bill Shuster (R-PA) Committee on Transportation and Infrastructure

Our goal in revising the rule is straightforward: to respond to requests from stakeholders across the country to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Bob Perciasepe, DEPUTY ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY

“Unfortunately, the “waters of the U.S.” rule, as currently proposed, could serve to impose additional regulatory burdens on local communities and economies without any concomitant environmental benefits. The rule could “federalize” many of the local geologic and man-made water related features common to the arid West....”

Mark Pifher, Colorado Springs NWRA-WESTCAS-WUWC

For the first time we are in this rule excluding ditches,” she said, laying out categories such as ditches carved entirely out of uplands and ditches that do not contribute perennial flow to larger downstream waters

Jo Ellen Darcy, ASA

WESTCAS POSITION?
Attempt at Legislative “Fix”

How A Lack of Congressional Consensus Led to Today's Proposed Rule

Clean Water Restoration Act (2009) S. 787/HR 5088
introduced by Senator Feingold of Wisconsin and Representative Oberstar of Minnesota.

- Took the definition of WOTUS far behind the post SWANCC/Rapanos Ruling
- Passed out of the Senate Environment and Public Works Committee on April 21, 2009 on a 12-7 vote.
- Although that session of Congress ran for an additional 19 months, no further action was ever taken on S. 787.
CWRA

☐ MAJOR EXPANSION
S. 787, the Clean Water Restoration Act, deletes “navigable” and includes its “waters of the US” provision.

☐ STATUS
As of right now, this legislation has passed the Senate Environment and Public Works Committee on a party line vote.

☐ HOLDS
But the bill has not advanced to the Senate floor, partly because several Senators have put holds on this legislation and Majority Leader Reid may not be willing to devote the time necessary to break a filibuster or line up 60 votes.

☐ HOUSE ACTION
Despite the existence of draft legislation in the House, Chairman Oberstar of the House Transportation and Infrastructure Committee has indicated that there won’t be time to consider this bill in the current session of Congress.

Hicks-Ray Associates
HR 5088 was never marked up by the House Transportation and Infrastructure Committee.

Both Senator Feingold and Representative Oberstar were defeated for re-election in November, 2010.

With Democrats holding a majority of the House and Senate and a Democrat in the White House, how the this legislation fail?

- For the simple reason that a number of Democrats joined with Republicans to initially stall and then kill S. 787/HR 5088.
- For the past three years, the WOTUS issue has been controlled by the Executive branch which has played its cards close to the vest.
Can Congress trump WOTUS?

Abandonment of a legislative strategy to secure an expansion of WOTUS, the Legislative Branch has limited cards to play this time around.

- Control EPA/COE spending
- A policy rider prohibits the of FY15 spending to finalize WOTUS Rule.
- Hampers a final Rule on the schedule proposed by the Administration.
- Likely enough votes in the House to pass FY15 Appropriations bills with WOTUS Riders.
- In Senate, depends upon a 60 vote majority to bring a bill to the floor.
- Not clear whether there would be 60 votes for WOTUS Appropriations riders or not.
Will there be the votes?

Depends upon whether enough Democrats decide to unite with their Republican colleagues on support of Appropriations Riders.

If such riders are agreed to in the Senate and are part of the final conference report for the relevant Appropriations bills, the President will have to decide whether to sign them.

If he chooses to veto the bill it would be very difficult to secure 67 votes in the Senate for an over-ride.

In the near-term, the WOTUS issue will be shaped by the number of Democrats who share the concerns of Republicans that the proposed WOTUS Rule is an infringement both of Congressional prerogatives and also intrudes too deeply into local issues.
WESTCAS Input
WESTCAS WOTUS Task Force
Extension letter submitted
Additional 90 days allows more scrutiny
Task Force – outline for preparing comments
- Identify issues of concern to Texas/TWCA
- Examples of potential negative impacts
- More review of economic impacts
Collaborate with other water assoc (ACWA, NWRA, NWC, TWCA, etc)
Questions & Discussion