

WATERS OF THE UNITED STATES

WHAT IN THE WORLD IS WOTUS?

by Ramona Huckstep

On May 27, 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) finalized the Clean Water Rule, also known as the Waters of the United States Rule (WOTUS). This is the most recent amendment to the Clean Water Act (CWA). According to the EPA, “the rule ensures that waters protected under the CWA are more precisely defined and predictably determined.” Supporters claim this new rule is supposed to respond to the public’s demand for greater clarity, consistency and predictability when determining who has authority. Municipalities need the clarity of knowing which waters are protected to administer their clean water programs and to build and maintain their infrastructure, such as roads and ditches, water treatment facilities, and storm water systems. According to the EPA, local governments are the largest providers of clean water in the U.S.

In developing the rule, the agencies held more than 400 meetings with stakeholders across the country, reviewed more than one million public comments, and received various perspectives from the different sides. Ultimately, the Clean Water Rule was published in the Federal Register on June 29, 2015, and the final rule became effective on Aug. 28, 2015. While the work that went into the creation of the WOTUS rule is done, the real work now begins with the implementation and interpretation of the rule. The Missouri Municipal League (MML) is active at many levels in this discussion and working to support and assist the municipalities.

What does this mean for municipalities around the United States and specifically here in Missouri? It starts with the premise that protecting water resources is important. We need clean water to drink and we need it for fishing and recreation. Clean water is vital to agriculture, energy production, manufacturing and businesses. The way we get and keep clean water is through clear and implementable rules. This is where things become clear as mud. What is “clear” and “implementable”? According to the EPA and Corps they have created a rule that is just that. However, many state and local groups and associations across the U.S. disagree. At many levels, groups are pulling together to figure out how this new Clean Water Rule will impact local entities. They are joining together to let the EPA and the Corps know about their concerns and taking action to modify the rule or stop it altogether.

WOTUS AT A NATIONAL LEVEL

According to EPA, the new rule does not create any new permitting requirements. It does reduce economic burdens on communities by simplifying and speeding up the process of determining if a body of water is protected. However, the National League of Cities (NLC) has a different opinion on how this rule will impact municipalities. Since before the proposed rule's publication, the NLC made EPA aware of the potential impacts of the rule on localities.

At the national level, NLC joined forces with the U.S. Conference of Mayors, the National Association of Counties, and the National Association of Regional Councils to voice their concerns to members of Congress regarding not only the process, but the specific worries about the rule itself.

In a letter to Congress, the group noted that the EPA and the Corps failed to consult states and localities early and often, especially as they relate to forming practicable and workable rules. The group also believes that the analysis used to support the rule was faulty and incomplete. Federal agencies analyzed economic data from only one section of the permit program. However, with the change to the definition of "waters of the United States," the inference is that it would be applied consistently throughout the Clean Water Act; therefore, it could impact other CWA programs.

In regard to the substance of this rule, this group disagrees with the assumption that the definition in the rule of "Waters of the U.S." provides the certainty and clarity needed for operations at the local level. The rule also includes undefined and confusing new terms with potential for sweeping impacts across all CWA programs. For example, the rule extends the "Waters of the U.S." definition by utilizing new terms, such as "tributary," "uplands," "significant nexus," "adjacency," "riparian areas," "floodplains" and "neighboring," that could increase the types of public infrastructure considered jurisdictional under the CWA.

WOTUS AT THE STATE LEVEL

On Aug. 11 of this year, Missouri Attorney General Chris Koster filed

HISTORY OF THE CLEAN WATER ACT

The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution. Growing public awareness and concern for controlling water pollution led to sweeping amendments in 1972. As amended in 1972, the law became commonly known as the CWA. The 1972 amendments are as follows:

- Established the basic structure for regulating pollutant discharges into the waters of the U.S.;
- Gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry;
- Maintained existing requirements to set water quality standards for all contaminants in surface waters;
- Made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions;
- Funded the construction of sewage treatment plants under the construction grants program; and
- Recognized the need for planning to address the critical problems posed by nonpoint source pollution.

Subsequent amendments modified some of the earlier CWA provisions. Revisions in 1981 streamlined the municipal construction grants process, improving the capabilities of treatment plants built under the program. Changes in 1987 phased out the construction grants program, replacing it with the State Water Pollution Control Revolving Fund, more commonly known as the Clean Water State Revolving Fund. This new funding strategy addressed water quality needs by building on EPA-state partnerships.

a motion on behalf of the state of Missouri for preliminary injunction to block implementation of a new federal rule until the court decides whether the rule violates the U.S. Constitution and other federal laws. In June, Missouri and 12 other states sued the EPA and the Corps over the agencies' new rule defining "Waters of the United States." According to the Attorney General's office, "The new definition expands the scope of clean water regulations to lands that are dry much of the year, and increases

the federal government's authority to control land use in Missouri." The states allege that EPA and the Corps also failed to follow proper procedure before adopting the rule, which is what the National League of Cities and their group insisted as well. They also allege that the rule violates several provisions of the U.S. Constitution.

Koster said the agencies' new definition of "Waters of the U.S." extends the agencies' regulation far beyond what a reasonable person

considers to be a waterway. For example, the rule defines tributaries to include ponds, streams that flow only briefly during or after rainstorms, and channels that are usually dry. The definition extends to lands within a 100-year floodplain, even if they are dry 99 out of 100 years.

Gov. Jay Nixon engaged the EPA by sharing the accomplishments of the citizens of Missouri and the Missouri Clean Water Commission that adopted modifications strengthening state water quality standards pertaining to classified waters. This state rulemaking was lengthy and highly contentious. However, the outcome was positive in that Missouri's water quality standards better protect more waterways and have the support from citizens. Now, the newly minted WOTUS rule overrides state jurisdiction and imposes extreme standards with disregard for ongoing efforts by state regulatory authorities and stakeholder groups in Missouri to advance water quality goals.

WOTUS AT THE LOCAL LEVEL

The Missouri Municipal League has teamed up with 22 other associations to voice their concern of the WOTUS Rule. This coalition of associations, including the Missouri Association of Counties and various farm and agriculture associations, stress that the rule extends EPA's regulatory reach farther than originally thought. According to the coalition, the rule will "subject citizens to land use restrictions and enforcement action in situations that always have been and should rightly remain the purview of state and local government." This has serious implications because the CWA

is a strict liability statute that imposes both civil and criminal sanctions. This could mean that any discharge into a WOTUS could lead to criminal or civil penalties of thousands of dollars per day and possible prison time.

The Missouri Municipal League

The Missouri Municipal League will continue to monitor how Waters Of The U.S. is interpreted and will keep members informed. In the meantime, members need to be aware of the rule and the possible implications that may come from it.

continues to be part of the discussion of the overall fate of the WOTUS rule. There are a number of strategies under study and refinement. The MML will continue to monitor how the rule is interpreted and will keep its members informed. In the meantime, members need to be aware of the rule and the possible implications that may come from it.

MAJOR ISSUES WITH WOTUS

The three main overarching concerns that seem to permeate throughout the various levels of

government (federal, state and local) as it relates to WOTUS are:

- 1) Insufficient stakeholder engagement by EPA and the Corps;
- 2) Lack of clarity and increased regulatory uncertainty; and
- 3) The overreach of the federal government's authority on land in Missouri.

The WOTUS Rule will bring with it a host of additional environmental regulations and requirements that will impact municipalities of all sizes. There could be increased permitting requirements. For example, a temporary stream might now be under the jurisdiction of the EPA and will have to meet water quality standards that were not previously in place.

With the increased permitting requirements, there are increased costs. Trying to determine if a water body falls under EPA jurisdiction can be costly and take years. There is a predicted increase for mitigation requirements that, in turn, stresses an already strained mitigation banking system and makes it very expensive to preserve or create sites. Also, there is a potential for increased risk in general to project proponents and landowners due to the WOTUS permit process that may be difficult to obtain and keep. There is an increased risk of citizen lawsuits when it comes to challenging jurisdictional determinations and unpermitted discharges. Finally, with WOTUS there is an increased regulatory uncertainty and implementation challenge.

Although an aim of the rule is to provide increased regulatory certainty, the WOTUS rule does not achieve this goal. Instead, it may lead to: further



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confusion that could lead to landowners not knowing their obligations under the law; citizen lawsuits; inconsistent regulatory application; businesses halting their operations to ensure compliance; and an increase need to ask the Corps for a jurisdictional determination before using a piece of land.

It appears what started out as a federal rule with positive intentions by the EPA and the Corps has caused a firestorm of concern from many local and state agencies and associations. We all want clean drinking water and safe places to swim and fish. The question is, what is the best way to make this happen and is the WOTUS rule the way to accomplish this? □

Ramona Huckstep is a Policy and Membership Associate with the Missouri Municipal League. Prior to MML, she worked for the Missouri Department of Natural Resources in the Hazardous Waste Program. Her position as an Environmental Specialist/Community Involvement Coordinator for more than 16 years allowed her to work with communities impacted by hazardous and radioactive waste. In coordination with the Department of Defense and the Department of Energy, she informed and provided opportunities for communities to be part of the decision-making process. Contact Ramona at (573) 635-9134 or Rhuckstep@mocities.com.

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