

“Waters of the United States,” including Creeks and Ditches

Obama bureaucrats work to expand their power over waterways, land, and Americans’ lives

By Marita Noon

Summary: Nameless, faceless bureaucrats in the Obama administration are seizing on a loophole—ambiguity in a split Supreme Court decision—in order to vastly expand the federal government’s power to control waterways and land throughout the United States.

The term “Waters of the United States” (WOTUS) refers to the waters regulated by the federal government, with most of that regulation conducted by the Environmental Protection Agency and the U.S. Army Corps of Engineers.

Under the Constitution, the federal government, rather than state and local governments, has jurisdiction over waters that carry goods and people between the U.S. and other countries or between U.S. states. As the power of the federal government has grown, this jurisdiction has come to cover all navigable waters, even lakes and rivers within states.

Surprise! If the Obama administration gets its way, WOTUS will include every pond, creek, stream, and ditch in the country, and the price will be paid by farmers, developers, manufacturers, taxpayers, and consumers—and sweet old ladies hoping to build gazebos.

On August 28, 2015, the definition of the WOTUS changed—not in the dictionary, but in the government’s official journal, the *Federal Register*. The moment passed with little fanfare in the media and among members of the public. Outside a few groups such as poverty rights activists and farmers, Americans had little sense of what was happening. Now, unless the courts decide otherwise, people who learn the importance of the definition of WOTUS will find out the hard way. Just try to plant or build something on your private property, and you could receive tens of thousands of dollars a day in fines!

Have you seen the TV ads for flood insurance in which a woman exclaims, “But I don’t even live near the water!”? If you don’t live near the water, you may think that the new interpretation of WOTUS is nothing you need to worry about. That would be wrong.



If the EPA has its way, there will be a new definition of “navigable waterway.”

You’re not immune

The federal government has great power to restrict one’s otherwise legal activity on one’s own private property, as I learned nearly nine years ago after I assumed the leadership of the Citizens’ Alliance for Responsible Energy.

One of my first activities in that position was to attend a property rights meeting in Washington, D.C. About thirty people were there, mostly average citizens, not professional advocates. Most were people who had experienced the harsh reality of their own government telling them they couldn’t engage in simple activities on their own property. In searching for some help and guidance, these people, this little band of warriors, had stumbled upon the property rights movement,

One of the attendees was a sweet, gentle-spirited woman with qualities any of us would wish for in a grandmother. She told us there was a little creek that trickled through the back edge of her property. To enjoy the setting, she’d embarked upon construction of a little gazebo near the creek where she could sip a cup of

coffee in the morning or a glass of wine in the evening. Maybe her grandchildren would have weddings there. At one point early in the process, when she had just a few boards erected, there was a knock at the door. The folks at the door were from the federal government and they weren’t there to help. They told her that her property was a “wetland” and therefore her gazebo was illegal and had to be torn down immediately. She was forced to comply. At the gathering in Washington, she asked, “How could this happen in America?”

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Another case of EPA abuse involves a Wyoming farmer named Andy Johnson who, as Valerie Richardson reported in the *Washington Times* on August 30, faces more than \$16 million in fines under the Clean Water Act.

His violation? In 2012, Mr. Johnson built a stock pond for his horses and cattle on his 8-acre property in Fort Bridger, Wyoming. Even though the Clean Water Act exempts stock ponds, and Mr. Johnson had obtained the necessary state permits, the EPA ordered him in January 2014 to restore the area to its original condition or accumulate fines of \$37,500 a day. Instead, Mr. Johnson hired a lawyer. “The EPA is out to expand its power, and I’m a test case,” said Mr. Johnson in a statement. “We’re going to fight them all the way.” . . .

[Pacific Legal Foundation staff attorney Jonathan Wood said the EPA is] “threatening Andy Johnson with astronomical fines, for building an environmentally beneficial stock pond that actually purifies the water that runs through it.” Although stock ponds are specifically excluded from the Clean Water Act, the EPA argued that Mr. Johnson had violated federal law by constructing a dam on Six Mile Creek, which runs through his property, in order to fill the stock pond. The creek is a tributary of the Green River, which is a “navigable, interstate water of the United States,” according to the EPA order. As a result, the U.S. Army Corps of Engineers concluded that Mr. Johnson needed a “standard, project-specific CWA permit,” and not just the permits issued by Wyoming, which he had obtained.

The EPA also described the sand, gravel, clay and concrete blocks used by Mr. Johnson to construct the dam as “dredged material” and “pollutants” as described under the Clean Water Act. “Six Mile

Creek filled and disturbed by Respondent’s unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, fish, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics,” said the EPA complaint. . . .

“My family depends on me, and when the EPA came into my life, they didn’t just attack me, they attacked our family and our home,” Mr. Johnson said at a press conference . . .

Mr. Johnson also argues that the stock pond actually benefits the environment by providing water for eagles, heron, moose and other wildlife. He hired a specialist, former U.S. Army Corps of Engineers enforcement officer Ray L. Kagel Jr., who concluded that the pond offered “quite a few environmental benefits.” “It had the added benefit of creating quite a bit of nice habitat for fisheries, wildlife, waterfowl, and wetlands in general that were created because of this pond,” said Mr. Kagel . . . He said the water flowing out of the pond is three times cleaner than the water entering it . . .

Will Coggin of the Environmental Policy Alliance wrote that the WOTUS rule is “bad news for farmers, ranchers, small businesses or anyone else who wants to use land under CWA jurisdiction: It costs an average of \$270,000 to obtain the special permit required to do so, according to the National Federation of Independent Businesses.”

Changing the rules

Of course, the cases of both the gazebo lady and Andy Johnson occurred *before* the new WOTUS rule.

The likelihood of a government official knocking on your door is elevated with the new rule. The EPA’s WOTUS Rule—proposed in 2014, finalized June 29 of this year, and effective August 28, 2015—is said to be one of President Obama’s landmark environmental rules. Others call it one of the most controversial environmental regulations in recent years.

Fines could reach \$30,000 a day, or more, for people using their own property in what seem to be standard ways.

Brian Seasholes of the Reason Foundation noted:

Under the Clean Water Act, the federal government can regulate discharge of pollutants into what are known as “navigable waters.” But over the decades the EPA has expanded this to include isolated wetlands and pools of water unconnected to navi-

gable waters, and tiny streams that can only be navigated by a toy boat, not the type of adult-sized boat for which the legislation was originally intended and common sense dictates. This regulatory expansion has caused significant hardships for many landowners who find, among other things, that low-lying areas that only hold a few inches of water when it rains, or seasonal streams that are dry for much of the year, are subject to regulation under the Clean Water Act—all of which is enforced with threats of jail time and huge fines.

Now the Environmental Protection Agency has extended the regulatory reach of the Clean Water Act to encompass even more waters that are not navigable, including: irrigation ditches if any portion was dug from a watercourse that flows eventually, but not necessarily directly, into a navigable water; any watercourse or water drainage so long as it has a bank, bed and high water mark; and any water feature, including those that are not navigable, within ¼ of a mile of a so-called “jurisdictional water” as long as the feature meets any one of nine extremely broad “significant nexus” criteria.

Navigable waters

Those who favor centralized government and more control have, for decades, been trying to change the language of the 1972 Clean Water Act (CWA), which applied to “navigable waters.”

The U.S. Constitution gives the federal government jurisdiction over navigation of U.S. waters, and the Clean Water Act relied on the previous definition of “navigable waters”—based on the 1899 Rivers and Harbors Act—with no effort to change the meaning of the term. The question has become: Is the definition intended in CWA the traditional one, or is it something newly interpreted, by the EPA and its allies, as broader?

It was at that meeting in Washington, D.C., that I first heard about the Oberstar Bill, which the folks in attendance were agitated about. I, like most Americans, had never heard of it. I learned that U.S. Rep. Jim Oberstar (D-Minn.) had repeatedly sponsored legislation based on removing one word from CWA: “navigable.” Eliminating that single word would make all the difference.

Few would disagree that the federal government should have jurisdiction over the Mississippi River or the Great Lakes. It should oversee what goes into or on to such large bodies of water. With “navigable” removed, however, CWA can be applied far more broadly.

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Rep. Oberstar retired in 2011, and died in 2014, without ever being able to get his signature legislation passed—even when his party controlled all three branches of government.

Yet, in the Obama Era, who needs the passage of actually legislation in order to change the law?

First, the bureaucratic/environmentalist axis tried to change the definition by going through the courts. Twice the issue went before the Supreme Court and twice the justices smacked the “greens” down. In both 2001 and 2006, the Supreme Court ruled against the EPA’s interpretation of WOTUS by limiting federal jurisdiction over wetlands and waterways.

The 2001 Supreme Court decision is commonly referred to as *SWANCC*, for *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*. In this case, the justices ruled 5-4 that CWA does not apply to isolated ponds formed by abandoned sand and gravel pits in Illinois that were only connected because they were used by migratory birds.

On January 9, 2001, then-Chief Justice Rehnquist delivered the opinion of the Court, in which he declared:

Section 404(a) of the Clean Water Act . . . regulates the discharge of dredged or fill material into “navigable waters.” The United States Army Corps of Engineers (Corps), has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of §404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause We answer the first question in the negative and therefore do not reach the second.

In other words, the pit did not constitute “navigable waters,” period, and therefore didn’t come under that section of the Clean Water Act.

The 2006 decision, *Rapanos vs. United States*, is less clear because the court split in three different directions, 4-1-4. The main question was whether a Michigan wetland came under CWA.

Justice Antonin Scalia wrote the decision stating that the law only protects waters that are “permanent” and “continuously flowing.” In his view, CWA only protects wetlands “with a continuous surface connection to navigable water”—which effectively excluded seasonal waterways. He was joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito.

The dissent was authored by Justice John Paul Stevens. He was joined by Justices David

Souter, Ruth Bader Ginsberg, and Stephen Breyer. The dissenters agreed that CWA permits the federal government to take upstream actions to prevent downstream degradation of federal water resources.

The Court’s usual “swing justice,” Anthony Kennedy, disagreed with both the conservative/moderate bloc and the left wing. Ultimately, he ruled against EPA by joining the conservatives in remanding the case to a lower court for further proceedings. He declared that wetlands are not under federal jurisdiction when the effect on water quality is “speculative or insubstantial” and that, to qualify, the wetland needs to “significantly affect the chemical, physical, and biological integrity of other covered waters.” Kennedy’s opinion said that a wetland that isn’t adjacent to a traditional navigable body of water must have a “significant nexus” to one in order to fall within the law’s scope. (A nexus is a connection or series of connections linking two or more things.)

Environmentalists quickly seized on the point that the Supreme Court, in that 2006 case, was split. “Clearly the court is not speaking with one voice,” said Joan Mulhern, senior legislative counsel at Earthjustice (formerly the Sierra Club Legal Defense Fund). “Unfortunately, this split decision will likely spur more litigation efforts by industry and polluters to continue to try to strip away Clean Water Act protections for many of the nation’s streams, wetlands, rivers, and other waters. This opinion underscores the need for Congress to step in and reaffirm that the Clean Water Act applies everywhere to keep poison out of our drinking water supplies and all other waters of the United States.”

Supporting the EPA’s view, that the Supreme Court’s split decision needed bureaucratic clarification, was an Earthjustice “backgrounder” on the cases—a combination of talking points and a legal brief, representing the opinion of “eight environmental and public health groups.” The backgrounder emphasized the group’s belief that Congress must “step in and reaffirm that the Clean Water Act applies everywhere.”

Get that? *Everywhere*.

The backgrounder declared that “polluters” wanted to exclude streams from “federal protections”:

Underscoring what is at risk, the U.S. Environmental Protection Agency issued a letter on January 9th [2006] showing that almost 60 percent of all streams in the country could lose federal protections, if, as polluters are asking, the Supreme Court cuts “non-navigable” tributaries and wetlands out of the Clean Water Act. This includes waters that are the source of public drinking water supplies to 110 million people in the United States.

Do the math. If “almost 60 percent of all streams” would be considered non-navigable under the definition favored by so-called “polluters,” that means that Earthjustice and its allies want the number of streams under federal jurisdiction to be *almost two-and-a-half times* what that number would be otherwise.

An excuse for bureaucratic rule

Because there was no majority Supreme Court opinion, there was no precedent that binds the lower courts, the EPA, or the Army Corps of Engineers to a particular course of action. EPA justifies its current WOTUS redefinition as “clarification.” The *Christian Science Monitor* reported last May: “At the heart of this confusion are the so-called temporary waterways: small streams and tributaries that appear and disappear throughout the year due to rain, snowmelt, and other factors.” Note that the word “wetlands” didn’t appear in the original Clean Water Act. It now appears a few times in the current version of the act, but the term still does not appear in the section prohibiting the discharge of pollutants, which is what all of the current ruckus is about and where the regulations are focused.

Opposing the environmentalists on this issue are more than 70 plaintiffs, including 31 states and a variety of agricultural organizations, energy and manufacturing trade associations, and the U.S. Chamber of Commerce, in ten separate lawsuits. The states believe the EPA’s new WOTUS rule is “usurping their sovereignty over intrastate waterways” in violation of the Constitution.

The “greens” and their allies—those who disagree with long-held limits on federal authority under the Constitution—haven’t been able to get their views codified by legislation, even during 2009 and 2010 when their supporters had complete control of Congress and the White House. They’ve been smacked down at the Supreme Court. Now, through a friendly EPA, they’ve resorted to “legislation by regulation,” a hallmark of the Obama administration.

Tellingly, a *Christian Science Monitor* headline referred to the effort as an attempt to “amend” the Clean Air Act, which could only be done constitutionally by going through Congress rather than the bureaucracy.

The *Monitor* reported: “The EPA, after reviewing more than 1,000 peer-reviewed studies on the issue, hopes the Clean Water Rule will finally put those issues to bed by clearly defining the characteristics of waterways that fall under the EPA’s jurisdiction.” [See the editor’s note on the next page.]

In a May press conference, prior to the rule's final release, EPA Administrator Gina McCarthy attempted to turn back criticism of the measure. "Responding to criticisms from farmers, ranchers, developers, manufacturers and others, she took time to list what is not covered by the waters of the United States rule," according to the Washington, D.C. newspaper *The Hill*.

Editor's note: The talk of "peer-reviewed studies" regarding WOTUS is a smoke-screen, of course, since the key issues at hand are not scientific but legal and political—such matters as the meaning of legislation and of language in the Constitution, the question of which level of government has the proper legal authority to deal with an issue, the question of which level of government should deal with an issue, and the circumstances under which people should be allowed to use their own property as they see fit. Just as "The devil can cite Scripture for his purpose," bureaucrats know how to obtain "peer-reviewed studies" that back them up when they seek to expand their power.

For the record, the EPA's science report—"a review and synthesis of the scientific literature pertaining to physical, chemical, and biological connections from streams, wetlands, and open-waters to downstream waters such as rivers, lakes, estuaries, and oceans"—finds this:

All streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters. These streams supply most of the water in rivers, transport sediment and organic matter, provide habitat for many species, and take up or change nutrients that could otherwise impair downstream waters. Wetlands and open-waters in floodplains of streams and rivers and in riparian areas (transition areas between terrestrial and aquatic ecosystems) are integrated with streams and rivers. They strongly influence downstream waters by affecting the flow of water, trapping and reducing nonpoint source pollution, and exchanging biological species.

In other words, water being water, water in one place eventually ends up in another place. That conclusion is the result of what EPA calls its "review of more than 1000 peer-reviewed publications." The agency could have saved a lot of money by surveying some reasonably intelligent fifth-graders.—SJA

"It does not interfere with private property rights or address land use," she said. "It does not regulate any ditches unless they function as tributaries. It does not apply to groundwater or shallow subsurface water, copper tile drains or change policy on irrigation or water transfer." She said the rule specifically does not interfere with agriculture, nor roll back any of the existing exemptions for farmers, ranchers, or foresters.

McCarthy told reporters: "This rule will make it easier to identify protected waters." To which U.S. Rep. Mark Meadows (R-N.C.) quipped, in an op-ed published in *The Hill*: "Of course it would make it easier—it would make nearly all waters of the U.S. EPA-governed waters."

Caren Cowan, executive director of the New Mexico Cattlegrowers Association, said, "WOTUS is catastrophic to anyone who eats. If the government controls all water, they control how all food is produced, even what is produced." She added: "The government is trying to tell people how and when to use the land."

The *Arizona Republic* editorialized:

Many critics sense the [Environmental Protection Agency] is expanding its mission through grossly overbroad readings of long-standing federal acts intended for purposes far different (and far more limited) than its current grand designs. The sweeping Clean Energy Plan [the "War on Coal" plan], for example, is a rule based upon a newly discovered reading of a formerly little-noticed section of the 45-year-old Clean Air Act.

Until now, the EPA has held that the 43-year-old Clean Water Act holds similar magical powers.

The agency recently concluded its authority to regulate "navigable" waters extended to any water source within 4,000 feet of genuinely navigable waters, which meant countless land uses from farming to mining to gas and oil extraction now would require a whole new set of federal permitting.

Lee Fuller, executive vice president of the Independent Petroleum Association of America, in a discussion about the rule's impact on the oil and gas industry, told me that while the rule will burden the energy industry, it is more devastating to agriculture and communities because it controls the way they can grow.

Fuller explained, CWA's section 404—known as "dredge and fill"—determines what you can and cannot do on your land. For example, oil and gas operations often require the building of roads and berms. In coastal Louisiana, you know you have wetlands and would likely need a federal permit. But now, according to Fuller, a

dry area such as Colorado can be subject to the federal permitting process, which can drag on for years, especially if it encounters opposition. "North Dakota argues that the rule will require additional studies of every proposed natural gas, oil or water pipeline, which is likely a key objective," according to the *Wall Street Journal*.

Karin Foster, executive director of the Independent Petroleum Association of New Mexico feels for her friends in the ag community, who she says "are up in arms," because the new rule expands federal jurisdiction to ditches and drought systems that support agriculture that have previously been under state or local control. But, Foster knows there are impacts for energy too: "Water used in energy production—whether fresh water or water waiting for recycling—is often held in large man-made containers that could now need more regulation; more bureaucracy means less money to reinvest."

Concerns like these—which are valid based on a history of increasing regulations, under this administration, that make it more difficult to operate a ranching, agriculture or energy enterprise—have driven the many lawsuits.

Reed Hopper of the Pacific Legal Foundation (PLF) argued the 2006 *Rapanos* case and has filed one of the suits against the EPA. His plaintiffs include the cattlegrowers associations from New Mexico, California, and Washington state. The PLF website states: "Specifically, the lawsuit seeks invalidation of the new regulatory rule defining the 'waters of the United States' that are subject to CWA jurisdiction."

While Hopper's lawsuit is just one of ten, there are four specific motions for a preliminary injunction, which would shut down enforcement before it begins, to give the courts time to review the matter. A July 28, 2015, letter signed by officials from 31 states, sent to EPA and Corps, requested a minimum nine-month extension of the WOTUS effective date, noting: "the new regulation will also have a significant impact on agricultural, homebuilding, oil and gas and mining operations as they try to navigate between established state regulatory programs and the EPA's and [Army Corps of Engineers]'s new burdensome and conflicting federal requirements. This uncertainty especially threatens those states that rely on revenues from industrial development to fund a wide variety of state programs for the benefit of their respective citizens."

On August 11, 2015, thirteen states—including major oil-and-gas states such as Alaska, Colorado, North Dakota, and New Mexico—became the latest to ask a federal judge to block the controversial rule from taking effect. According to the news service *Natural Gas*

Intelligence, people in the oil and gas industry are “opposed to the regulations because they believe it could stifle development.” A statement from the Independent Petroleum Association of America supports this assertion: “The 297-page rulemaking would require a federal permit for any activity that results in a discharge into any body of water covered by the new definition of ‘waters of the United States,’ including small streams and wetlands.”

North Dakota Attorney General Wayne Stenehjem wrote that the states are entitled to an injunction blocking the rule, at least temporarily, “because implementation of the Rule will cause immediate and irreparable harm and deprive the States of the opportunity to present the merits of their case prior to this unprecedented jurisdictional over-reach taking effect.”

In an editorial, the *Wall Street Journal* referred to the Gold King mine disaster, in which an EPA blunder sent wastewater into Colorado’s Animas River and New Mexico’s San Juan River:

Details continue to trickle out about the EPA miscalculations that led to [August]’s Colorado mine blowout, which spewed three million gallons of toxic waste into waterways from New Mexico to Utah. The latest news is that the agency realized as early as June 2014 the potential for a massive spill but misjudged the risk.

The underlying cause is regulatory hubris, which also animates the EPA’s new rule extending federal jurisdiction under the Clean Water Act over tens of millions of acres of private land. The EPA has claimed power over any creek, pond or prairie pothole with a “significant nexus” to a “navigable waterway.”

Significance is as ever in the eye of the regulator. The EPA deems “significant” anything within a 100-year floodplain and 1,500 feet of the high water mark of its claimed waters—or alternatively, within the 100-year floodplain and 4,000 feet of its fiefdom.

Thirty-one states have filed four separate suits against the EPA for usurping their sovereignty over intrastate waterways.

The leftwing website *Think Progress* reported:

Texas, Louisiana, and Mississippi filed a joint lawsuit in a Houston federal court, asserting that the EPA’s final rule is “an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners.” While the EPA has the authority to regulate water quality, the suit says Congress has not granted the EPA the power to regulate water and land use.

The lawsuit claims that “the very structure of the Constitution, and therefore liberty itself, is threatened when administrative agencies attempt to assert independent sovereignty and lawmaking authority that is superior to the states, Congress, and the courts.”

In a separate case, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Dakota, and Wyoming are seeking to have the rule overturned. North Dakota Attorney General Wayne Stenehjem called the rule “unnecessary” and “unlawful,” according to the Associated Press.

It is important to understand, as the PLF’s Reed Hopper wrote in a report for the James Madison Institute, “The question is not whether the country will protect its water. The question is who has the constitutional authority to do so. The CWA itself expressly provides that the states have the primary responsibility to manage the water assets of the nation.”

West Virginia Attorney General Patrick Morrisey explained: “While the Clean Water Act gave the EPA and Corps authority to regulate ‘navigable waters’—defined as ‘waters of the United States’—Congress made sure that states would retain their constitutional, sovereign responsibility over non-navigable, intrastate lands and waters. The U.S. Supreme Court has twice rejected the agencies’ attempts to expand their authority. However, this latest rule [supposedly] written by the two administrative agencies gives them virtually limitless power over these waters.”

Preliminary injunction

As this report was being prepared, an important development occurred. On the eve of the rule’s effective date, District Court Judge Ralph Erickson granted a preliminary injunction requested by North Dakota and a dozen other states. To do so, he had to find that the opponents have a good chance of winning. He wrote:

The court finds that under either standard “substantial likelihood of success on the merits” or “fair chance of success”—the States are likely to succeed on their claim because (1) it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule at issue, and (2) it appears likely the EPA failed to comply with APA requirements when promulgating the Rule. Additionally, the court finds the other factors relevant to the inquiry weigh in favor of an injunction.

Sen. John Thune (R-N.D.) lauded the decision. “The Obama EPA’s WOTUS rule is one of the

largest federal land grabs in recent memory. It will drive up compliance costs for farmers and ranchers and expose homeowners and property owners across the country to massive new fines. The recent ruling by a federal district court in North Dakota shows that the Obama EPA is not only defying common sense, but is also defying the original intent of the Clean Water Act. The EPA should immediately suspend the enforcement of this regulation across the country. The ruling is yet another reason we need to enact a permanent stop to EPA’s overreach.”

The American Farm Bureau Federation reported, “Judge Erickson ‘found strong evidence that the EPA was arbitrary and capricious in its rulemaking.’” AFBF President Bob Stallman continued: “He saw no connection between key provisions of the rule and the science that was presented to support it. Based on evidence presented so far, he ordered that the rule be stopped while the litigation continues to a conclusion. . . . The so-called Clean Water Rule is yet another example of EPA’s reckless and unlawful behavior in the face of science, economics and the law. Whether you’re a farmer, a rancher, a homebuilder or landowner of any stripe, the evidence is clear: This rule simply has to be stopped.”

PLF’s Hopper was optimistic: “This could effectively put the rule on hold until our suit, and nine similar suits, have been fully litigated.”

Not so fast

The Hill reported in August that, in response to Judge Erickson’s decision, “the Obama administration says it will largely enforce the regulation as planned.”

Many experts hoped, and argued, the decision would apply to all litigants. Hopper wrote: “The injunction did not limit the stay to any particular party or geographic region suggesting the rule was stayed nationwide. However, the EPA immediately issued a statement that it would continue to apply the new rule in any state other than those that brought this particular challenge. The court then asked for further briefing on the issue.” A few days later, on September 4, Hopper adds: “the court affirmed the new rule was likely invalid and the court had the authority to issue a nationwide injunction. *However*, the court was reluctant to impose its decision on other states that may support the rule (over 30 states oppose it) and concluded the injunction only applied to the present parties.”

In response to the ruling that limited the injunction on the EPA’s sweeping water rule to 13 states, Texas Attorney General Ken Paxton said, “While we believe this should be a nationwide injunction, the judge was right in seeing the impending damage posed by these new rules and to

enjoin it in 13 states. Texas has filed its own case challenging the EPA's overreaching regulation of state waters. We will continue to fight the EPA's blatant overreach in our own case and will work to protect the state and private property owners from this latest and potentially most invasive attempt by the Obama administration to control our lives and livelihoods."

By the time you read this, a multi-district panel will have met to determine if the lawsuits are appropriate for consolidation—as the EPA wants—and if so, what judge and court will hear the case.

Lowell Rothschild, senior counsel with the law firm Bracewell & Giuliani, LLP, told me the rule is likely to go to the Supreme Court in 2016 or 2017.

Lee Fuller of the Independent Petroleum Association agreed, saying the EPA intentionally used the "significant nexus" language from the Kennedy opinion in the *Rapanos* case with the expectation that it would go back to the Supreme Court. "They hope they can show Justice Kennedy that they've responded to his concerns and that they can get a 5-4 decision to sustain whatever the EPA puts forth."

While Congress has legislation pending—for example, S. 1140, the Federal Water Quality Protection Act, which has passed through a Senate committee. Pending measures would require the agencies to withdraw the rule and start over, but any such legislation, if it stood on its own, would be vetoed by the President. Overriding a veto would take a two-thirds vote of both the Senate and the House of Representatives, something that's extremely unlikely.

Barring unforeseen circumstances, the final decision on the rule will come from the courts. Of course, if the rule were upheld, it could still be changed by the new administration that takes over in January 2017—if it had the courage to stand up to the environmentalists and their allies in the news media, who would react with fury and wildly claim that Americans' drinking water was being deliberately poisoned.

The WOTUS scandal

Finally, there's a question about who actually wrote the WOTUS rule. This question goes to the heart of the "regulatory democracy" that has largely supplanted the system laid out in the Constitution.

RegInfo.gov states: "U.S. EPA and the U.S. Army Corps of Engineers proposed a rule for determining whether a water is protected by the Clean Water Act." But that may not really be the case. EPA apparently ignored objections from the Army Corps of Engineers. According to Bloomberg's *Daily Environment Report* in July:

The economic analysis and the technical support documents used in developing and justifying a regulation to clarify the scope of the Clean Water Act are flawed and out of context, the U.S. Army Corps of Engineers said in memos just before the rule was released.

"To briefly summarize: our technical review of both documents indicate the corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate datasets. In the corps' judgment, the documents contain numerous inappropriate assumptions, with no connection to the data provided, misapplied data, analytical deficiencies, and logistical inconsistencies," Maj. Gen. John Peabody, deputy commanding general for civil and emergency operations, told JoEllen Darcy, assistant U.S. secretary for the Army for civil works, in a May 15 memo. The top regulatory and legal corps officials also said the rule would be "legally vulnerable" and "difficult to implement." . . .

"The corps had no role in selecting or analyzing the data that the EPA used in drafting either document," [the Corps' chief economist Paul] Scodari said. "As a result, the documents can only be characterized as having been developed by the EPA and should not identify the corps as an author, co-author or substantive contributor."

Implying or portraying otherwise is "simply untrue," Scodari said. He said the corps merely provided raw data to the EPA, which, in turn, chose to use the data to justify the benefits of the rule, estimate costs for mitigation in states where no mitigation programs exist, account for waters not previously identified by the corps and represent geographical regions that the data didn't support.

The report continued: "Both [chief of the Corps's regulatory programs Jennifer] Moyers and Scodari questioned what they termed the 'arbitrary' use of the 4,000-foot threshold limit to evaluate federal jurisdiction." Here they are referring to the agencies' economic analysis, which provides that "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."

In his ruling on the injunction, Judge Erickson cited the internal agency memos that reflected the "absence of any information about how the EPA obtained its presented results," which means that, as a consequence, "the subsequent results are completely unverifiable," but "Even so, a review of what has been made available reveals a process that is inexplicable, arbitrary,

and devoid of a reasoned process."

Wait. It gets worse. It appears that the EPA collaborated with outside special-interest groups to create the rule and gin up support—and that government officials tossed away countless comments from grassroots Americans who oppose the rule.

Keep in mind that the "public comment" process is a critical part of creating bureaucratic regulations. It's through that process that bureaucrats lay claim to representing the views and interests of the American people, rather than simply writing their own political opinions into the rules governing us all. [See the sidebar by Steven J. Allen on page **.]

Sen. David Vitter (R-La.), chairman of the Senate's Small Business and Entrepreneurship Committee, sent a letter to EPA Administrator Gina McCarthy demanding information regarding "reports that the Agency inappropriately coordinated with outside organizations during the WOTUS rulemaking process":

For decades, the Department of Justice has recommended that federal agencies do not lobby the general public to build political support for policies promoted by the Executive Branch. In 2014, the EPA embarked on an unprecedented public relations campaign, which may have violated anti-lobbying laws, to promote the WOTUS rule by working closely with outside organizations including the Sierra Club and Organizing for Action, which is closely affiliated with President Obama's 2012 reelection campaign.

The *New York Times* exposed the EPA's attempt to manufacture the appearance of public support for the rule.

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.

The E.P.A.'s campaign highlights the tension between exploiting emerging technologies while trying to abide by laws written for another age.

Federal law permits the president and political appointees, like the E.P.A. administrator, to promote government policy, or to support or oppose pending legislation. But the Justice Department, in a series of legal opinions going back nearly

three decades, has told federal agencies that they should not engage in substantial “grass-roots” lobbying, defined as “communications by executive officials directed to members of the public at large, or particular segments of the general public, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive.”

Late last year, the E.P.A. sponsored a drive on Facebook and Twitter to promote its proposed clean water rule in conjunction with the Sierra Club. At the same time, Organizing for Action, a grass-roots group with deep ties to Mr. Obama, was also pushing the rule. They urged the public to flood the agency with positive comments to counter opposition from farming and industry groups.

The results were then offered as proof that the proposal was popular. “We have received over one million comments, and 87.1 percent of those comments we have counted so far—we are only missing 4,000—are supportive of this rule,” Ms. McCarthy told the Senate Environment and Public Works Committee in March. “Let me repeat: 87.1 percent of those one-plus million are supportive of this rule.”

Meanwhile, many people’s comments were ignored. Last March, the *Washington Times* reported on an appearance before a congressional committee by Ken Kopocis, head of the EPA’s Office of Water. He was questioned by Rep. Bob Gibbs (R-Ohio).

Pressed by Mr. Gibbs to divulge the ratio of positive comments to negative comments on the rule, Mr. Kopocis demurred. He said many of the comments both pro and con were part of mass mailing campaigns, and the EPA discarded them.

“You know, we don’t have to read 100,000 of those identical postcards.”

At the EPA, it appears, all American are equal. But some are more equal than others.

Marita Noon is executive director of Energy Makes America Great Inc. and the Citizens’ Alliance for Responsible Energy (CARE). She hosts the radio program America’s Voice for Energy and is the author of Energy Freedom.

GW

Democracy, Washington style

by Steven J. Allen

One of the aspects of the federal government that regular people find mystifying (and, when they learn the details, astonishing) is the bureaucracy’s rulemaking process. The Constitution

puts legislative authority entirely in the hands of Congress, except for the President’s legislative veto and the Vice President’s role, rarely played, as presiding officer and tie-breaker in the U.S. Senate. Yet the powers of the executive branch, which the President heads, have greatly increased over the years, rising to a level far beyond anything in the Constitution. Many legislative powers have been improperly delegated to the President, and various presidents have further delegated those powers to unelected, unaccountable, usually anonymous bureaucrats and their allies (such as the carefully selected scientists who provide a fake-scientific cover for bureaucratic policies).

Part of that bureaucratic process is that bureaucrats, when they announce proposed rules, seek out comments from the general public; that’s supposed to ensure that all interests are fairly represented and that the ultimate rules represent “the public interest.” Wikipedia describes it this way:

Legislation. The U.S. Congress passes a law, containing an organic statute that creates a new administrative agency, and that outlines general goals the agency is to pursue through its rulemaking. Similarly, Congress may prescribe such goals and rulemaking duties to a pre-existing agency.

Advance Notice of Proposed Rulemaking. This optional step entails publishing the agency’s initial analysis of the subject matter, often asking for early public input on key issues. Any data or communications regarding the upcoming rule would be made available to the public for review. . . .

Proposed Rule. In this step, the agency publishes the actual proposed regulatory language in the Federal Register [the government’s journal], in which a discussion of the justification and analysis behind the rule is printed, as well as the agency’s response to any public comment on the advance notice.

Public comment. Once a proposed rule is published in the Federal Register, a public comment period begins, allowing the public to submit written comments to the agency. Most agencies are required to respond to every issue raised in the comments. Depending on the complexity of the rule, comment periods may last for 30 to 180 days.

Final Rule. Usually, the proposed rule becomes the final rule with some minor modifications. In this step, the agency publishes a full response to issues raised by public comments and an updated analysis and justification for the rule, including an analysis of any new data submitted by the public. In some cases, the agency

may publish a second draft proposed rule, especially if the new draft is so different from the proposed rule that it raises new issues that have not been submitted to public comment. This again appears in the Federal Register, and if no further steps are taken by the public or interested parties, is codified into the Code of Federal Regulations.

The public comment part is mostly a sham. Most Americans never even hear about bureaucratic rulemaking, even when that rulemaking greatly affects their lives, and with rare exceptions the “public interest” actually represents the interests of groups that have lobbyists in Washington and are otherwise well-organized and capable of flooding agencies with comments in support of or in opposition to proposed policies.

Often, as happened recently in the case of Waters of the United States, bureaucrats work closely with their left-wing allies to receive the comments they want and, if the comments still don’t turn out the way they want, they declare the contrary comments to be the result of an organized campaign and toss some of the unwanted comments in the trash.

I recently had a conversation with a friend who works in the bureaucracy. She explained to me her thinking and that of her bureaucratic colleagues: American democracy is broken, which she can tell because billionaires like the Koch Brothers are electing Republicans to Congress and state legislatures even though Republicans hate poor black people and are otherwise mostly evil. (“You’re not like that,” she conceded to me.) “Real” democracy, she said, is represented in the rulemaking process, in which “everyone has a say,” and all interests can be weighed fairly before the final rule is issued, which is written by knowledgeable people who have Americans’ best interests at heart.

How lucky we are to have federal bureaucrats looking out for our best interests, rather than having to rely on those members of Congress and other legislators who are so-called “elected” by so-called “voters” but are really controlled by their puppetmaster donors!

Government by bureaucrats you’ve never heard of? As leftist mobs chant, “This is what democracy looks like!”

Dr. Steven J. Allen (J.D., Ph.D.) is editor of Green Watch.

GW

Please remember CRC in your will and estate planning.

**Many thanks,
Terrence Scanlon
President**

GreenNotes

Given **Pope Francis's** recent visit to **Washington, D.C.**, it's important to note that many U.S. **Catholics** are actively fighting energy poverty—that is, policies that deny the benefits of inexpensive energy to working-class and poor people in the U.S. and around the world. Last year, **Gary R. Heminger**, president of **Marathon Petroleum**, wrote a letter to the Pope noting that carbon-based fuels “provide power to hospitals, schools, homes, and businesses . . . enable farmers to till, irrigate, plant and harvest crops to feed themselves and their communities . . . [make it possible for people to go to] markets, schools, medical facilities and community events . . . [and facilitate the transportation of] raw materials, manufacturing of goods, and transporting goods to those who need them.” Due to energy poverty, however, “1.2 billion people have no electricity, and 2.8 billion rely on wood and other biomass fuels for indoor cooking, causing an estimated 3.5 million deaths each year—primarily among women and children—from respiratory illnesses. . . . For people suffering energy poverty today, access to energy is a real, daily concern that can have life-or-death consequences.”

As *Green Watch* readers will recall, **President Obama** promised during the 2008 campaign that, under his energy plan, “electricity rates would necessarily skyrocket.” (In a similar vein, his first Energy Secretary said shortly before being nominated that “Somehow we have to figure out how to boost the price of gasoline to the levels in **Europe**,” about \$9 to \$10 a gallon.) Today, the President's **Expensive Electricity Plan**—or, as the administration terms it, the “Clean Power Plan”—is projected to increase the price of electricity by more than 250 percent. To what end? Even if you believe the **Environmental Protection Agency's** own computer model, the Obama plan would reduce the temperature by the end of the century by less than one-fiftieth of a degree—an amount that's too small for science to measure—and would reduce the sea-level rise by a whopping one one-hundredth of an inch. Meanwhile, countries that couldn't care less about Global Warming theory—**Communist China**, for example—would gain a tremendous competitive advantage over the U.S. as we deliberately impoverish ourselves.

Meanwhile, the Obama administration is moving ahead with plans to put \$3 billion of U.S. taxpayers' money into a “Global Climate Fund” that would supposedly make it up to “developing” countries for the harm we've done to them by warming the planet with our capitalist, consumerist ways. In reality, of course, such a fund will serve mainly to prop up dictatorships and enrich so-called “crony capitalists” cashing in on the opportunity afforded them by the Warming panic.

David Kreutzer of the **Heritage Foundation** reported on the **Energy Department's** subsidized loan program that lost some \$500 million backing **Solyndra**. Did the department announce prosecution of those responsible? “No, instead, DOE announced they were restocking their loan fund with another billion dollars to support government loans for solar panels. The DOE loan program funds those who can't succeed on their own, and many others who have more than enough money to finance their own projects. In addition to the Solyndra losses, taxpayers lost millions more with bad loans to **Beacon Power**, **Abound Solar**, **Nevada Geothermal**, etc. Perhaps even more galling is the billions in government subsidized loans made to projects owned by the likes of **Goldman Sachs** (\$90 million), **Exelon** (\$646 million), **BP** and **Chevron** (\$3.8 billion), hardly the most needy companies in America.” (“We are proud to be the President's utility,” Exelon's chief lobbyist said in 2009.)

Increasingly, the Warmers' argument boils down to *shut up, shut up, just shut the heck up!* **Alan Robock** of **Rutgers University** and 19 other Warmer scientists sent a letter to President Obama, Attorney General **Loretta Lynch**, and White House Science Advisor **John Holdren** [about whom, see the August *Green Watch*]. In the letter, they called for a federal investigation of their adversaries under RICO, the Racketeer Influenced and Corrupt Organizations Act. That's the law that was written to fight organized crime such as the **Mafia**. Skeptics of Global Warming theory, they wrote, “knowingly deceived the American people about the risks of climate change, as a means to forestall America's response to climate change,” and the feds should go after skeptics just as they went after the tobacco industry. “A RICO investigation . . . played an important role in stopping the tobacco industry from continuing to deceive the public about the dangers of smoking.”

Actually, for decade after decade, the tobacco industry had the support of the scientific consensus (doctors advised pregnant women to smoke to control their weight) and of the federal government (the feds subsidized the growing of tobacco, delivered cigarettes to servicemen—many of whom got hooked—and used regulations to make it hard to market safer cigarettes). Today's counterpart to the tobacco industry is the trillion-dollar Global Warming complex, from the solar, wind, and biofuel industries to tenure-seeking academics to “environmental correspondents” to bureaucrats and extremist politicians who see the Warming panic as their last, best chance to kill capitalism.



What ideology lies behind the pro-censorship letter? Consider: On his website, Robock wrote about his three trips to **Cuba** during the U.S. embargo, bragged about his get-togethers with **Fidel Castro**, and posted, on his Rutgers website, a picture of himself joking around with the mass-murdering, terrorist-sponsoring dictator. (That's the photo at left.)