

# **EPA's Proposed Rule: Waters of the United States**

Michiana Irrigators Meeting

December 15, 2014

# Clean Water Act

- Interstate Commerce
  - Navigable Waters
- Federal vs. State Jurisdiction
  - States manage their own waters
- Court cases
  - *United States v Riverside Bayview*: Adjacent wetlands can be regulated
  - *Solid Waste Agency of Northern Cook County v Army Corps of Engineers*: Migratory Birds cannot establish authority over waters



# Newest Court Ruling: Limits EPA jurisdiction

- *Rapanos v United States*:
  - “In applying the definition to...man-made drainage ditches...the Corps has stretched the term ‘waters of the United States’ beyond parody.” –Plurality opinion
  - “[T]he *dissent* would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.” –Kennedy

# Proposed Rule:

## What happened to those limits???

- Regulates “waters” regardless of how often they have water in them:
  - “Tributaries”
  - “Floodplains”
  - “Riparian Areas”
  - Aggregation of isolated waters across landscape
  - ANY adjacent waters
  - Waters with subsurface connections
- Physical, Biological, Chemical connection—but how do you prove it is significant, and not essentially the “migratory bird rule”?



# Exemptions for Agriculture

- Section 404 (dredge and fill) exemptions:
  - Plowing, planting, cultivating, harvesting, minor drainage
  - Farm ponds, farm/forest roads
- Problems:
  - ONLY for land already cultivated
  - No exemption under Section 402 (point source discharges) for activities like chemigation
  - Recapture provision—no exemption if you change the use, reach, flow, or circulation of Waters of the US (including wetlands)



# Impact

- Permits in “Waters of the U.S.” for:
  - Leveling or earth moving (“fill”)
  - Nutrient or pest management (“point source”)
  - ANY farming on lands not already farmed (“previously subject”)
- Expanding permits means:
  - Long delays and increased denials
  - Expensive mitigation requirements



# Would there be a usable exclusion?

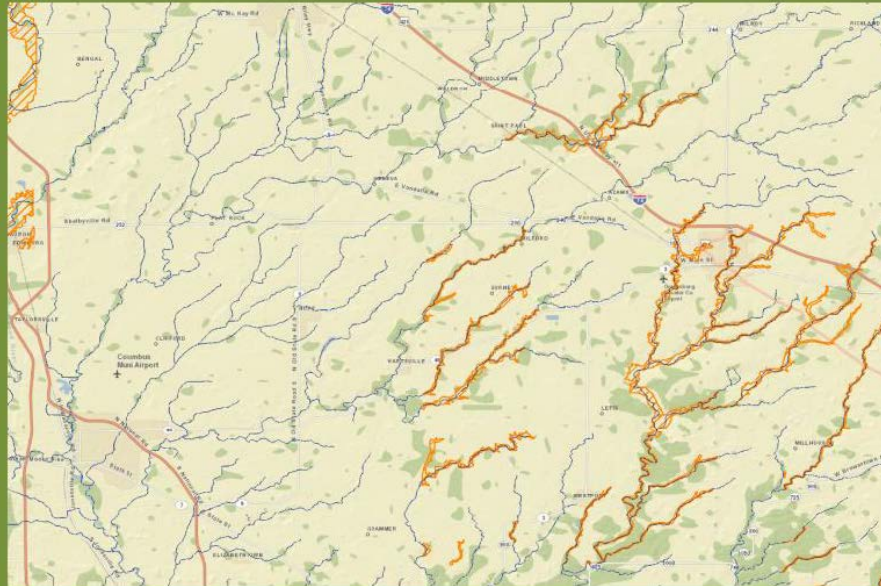
- Not really--Exclusions include:
  - Ditches excavated in uplands and that drain only uplands and have no more than ephemeral flow; and
  - Ditches that do not contribute flow either directly or through other water bodies to another defined water



# We already regulate a lot...

## EPA'S TRADITIONAL JURISDICTION IN INDIANA

Streams that flow all the time or at least seasonally,  
rain or not.



1,399,000 ACRES



31,900 STREAM MILES





# This rule could regulate more

## EPA'S LATEST OVERREACH IN INDIANA

All those streams, plus land where surface runoff channels when it rains.



2,178,000 ACRES ■ 131,000 STREAM MILES

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# Many states have strong environmental programs: do we need more regulation?



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# Voicing our concerns



## Fresh crop of water rules worries farmers

Keith Matheny, Detroit Free Press 1:01 a.m. EDT June 15, 2014



(Photo: Romain Blanquart, Detroit Free Press)

DETROIT -- Proposed revisions to water regulations by the U.S. Environmental Protection Agency and Army Corps of Engineers have Michigan farmers wondering whether they eventually be harvesting more bureaucracy, delays and costs than crops.



- \* 8 Farm Bureau Presidents met with EPA
- \* Thousands of letters and cards delivered





# Action

- H.R. 5078 Passed with Bi-Partisan Support—would prevent EPA changing “Waters of the U.S. definition”
- Omnibus spending bill prevents EPA from expanding Clean Water Act jurisdiction
- Opposition to rule:
  - National Association of Agriculture Departments
  - National Association of Counties
  - Water Advocacy Coalition



# Conclusion

- The proposed rule violates intention of Courts and Congress—it is an overreach
- States should have jurisdiction over their own waters and programs
- The proposed rule expands “waters of the U.S.” to “waters” (even if they have *no water in them*) with uncertain connections downstream
- Farming exemptions do not protect farmers
- Proposed language is vague, uncertain, poorly defined—does not offer clarity
- MFB and many other organizations oppose the rule and believe it is so badly written that it must be pulled back

# Questions?

Thank you!

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