

EPA Connect Blog The proposal does not change the permitting exemption for stock ponds, does not require permits for normal farming

activities like moving cattle, and does not

regulate puddles.

The proposed rule makes the exemption for stock ponds meaningless because it would regulate the low spots where farmers typically build ponds. The rule would only allow farm ponds to be built by diking "upland."

As for normal farming activities, the EPA again misspeaks. Under the rule, Section 402 permits would be necessary for common farming activities such as applying fertilizer or pesticide—or moving cattle—if materials (fertilizer, pesticide or manure) would fall into jurisdictional low spots or ditches. Section 404 permits would be required for earth-moving activity, such as plowing, planting or fencing, except as part of "established" farming ongoing at the same site since 1977.

The rule would not categorically regulate **all** puddles—but it would regulate even the smallest low spots that puddle often enough to meet the broad definition of "wetlands." (79 Fed. Reg. 22218) These low spots would be regulated if they are in a "floodplain" or a "riparian area," and they could also be regulated if agency staff find that they, in combination with similar low spots in the region, have a "significant nexus" to any other "water of the U.S."

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The proposed rule does not regulate new types of ditches, does not regulate activities on land and does not apply to groundwater.

Current rules do not include ditches, but the agencies have informally interpreted rules to include ditches as "tributaries" under some circumstances. The new rule would put this in regulations for the first time and would categorically define almost all ditches as "tributaries." (79 Fed. Reg. 22203-4) What's more, the rule does regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas "ephemeral streams" and "wetlands" and "seasonal ponds"—but to most people they are simply land.

The Clean Water Act protects waters the life blood of communities, businesses,

agriculture, energy

development and

hunting and fishing.

Fortunately, the Clean Water Act created non-regulatory programs to address the water quality impact of land uses such as farming. Those programs have been and continue to be effective.

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For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, and drain only dry lands, are not "waters of the U.S." This includes roadside ditches, and ditches collecting runoff or drainage from crop fields.

The narrow ditch exclusion would not cover most ditches. If water ever flows to a ditch

from nearby "wetland" areas,
"ephemeral" drains or ponds during very
heavy rains, the ditch would not qualify
for this exclusion. If the ditch itself has
"wetland" characteristics— which tends
to happen because ditches do indeed
carry water when it rains—the ditch will
not qualify and would be regulated.
(79 Fed. Reg. 22203)

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Federal agencies are not asserting regulatory authority over land use. We disagree. When federal agencies have the power to grant, deny or voto a federally enforceable permit to plow, plant, build a fence, apply fertilizer or spray pesticide or disease-control products on crops, that is regulatory authority over land use.

A landowner who cannot, without a federal permit, construct a house on, build a fence over or plow through a low spot or ephemeral drain that runs across his or her land is, in effect, faced with land-use regulation.

Don't Leic EPA Puit Your County UNDER-WATER

Earlier this year, EPA and the Corps of Engineers released a proposed rule – Definition of Waters of the U.S. Under the Clean Water Act – that could dramatically expand the range of waters that fall under federal regulation.

Types of county-maintained infrastructure potentially affected

- Roads and Roadside ditches
- Flood control channels
- Storm water sewers
- Green infrastructure (aka Low Impact Development) used to manage stormwater runoff

Visit www.naco.org/wous to find:

- NACo's Analysis of the Proposed Rule Impacts to Counties
- Policy Briefs & Comparison Charts
- Action Items for County Officials, suc
 - o Extension of commenting period
 - o Sample county resolutions
 - o Sample comments
 - o Drafting an Op-Ed
 - o Contacting your Member of Conc

REMINDER:

Comments are due Oct. 20. It is critical that all counties, regardless of how the proposal affect them, weigh in with their analysis. For information on submitting your comments NACo's WOUS website at www.naco.org/wous.

