



Trump's Anti-Clean Water Executive Order

Talking Points for Members of Congress

March 8, 2017

Background: On February 28, 2017, President Trump signed an [executive order](#) to begin a series of actions, long sought by industry, that will allow uncontrolled discharges of toxic pollution into our nation's waters. The administrative action is aimed at slashing the number of waterways that are protected against pollution and destruction under the law, and contradicts the intent of the 1972 Clean Water Act (CWA) to broadly protect all waters to the fullest extent of the Commerce Clause, Article 1, Section 8, Clause 3 of the U.S. Constitution.

Minutes after Trump signed the executive order, EPA Administrator Scott Pruitt signed a "[Notice of Intention to Review and Rescind or Revise the Clean Water Rule](#)," and followed it up by [telling attendees](#) at the Farm Bureau Advocacy Conference that "relief is on the way."

The Trump Administration has provided no legitimate reasons for excluding rivers, streams, lakes, and wetlands across the country from the CWA, and is [misrepresenting facts and the law](#) in an attempt to [justify it](#).

- The Administration claims that excluding waterways from pollution prohibitions in the CWA will "[f]ree up our country" and "[c]reate millions of jobs."
 - It is true that industry might be free to discharge uncontrolled levels of dangerous pollutants into waterways across the country for the first time in 40 years, but **it is false to say that this will somehow "free up our country" or "create millions of jobs."** To the contrary, water pollution has a negative impact on our nation's economy and controlling pollution has a positive impact.
 - For example, our failure to control nitrogen and phosphorus pollution [has resulted in](#) exponential increases in drinking water treatment costs, billions in pollution cleanup costs, \$1 billion in annual losses to the tourism industry, millions in annual losses to the fish and shellfish industry, and devaluation of waterfront real estate. In Washington state alone, nitrogen and phosphorus pollution closed the razor clam fishery for part of 2016 resulting in an [estimated \\$9.2 million in lost income](#).
 - By contrast, efforts to clean up nitrogen and phosphorus pollution in the Chesapeake Bay [have resulted in](#) enormous jumps in job creation and "[c]leaner water also will mean more fish, crabs, and oysters, which will translate to more work and income for fishermen, processors, packers, restaurateurs, and people in tourism-related industries."
- The Administration claims that EPA's new definition of "waters of the United States" (WOTUS) is prohibiting farmers, ranchers and agricultural workers "from being allowed to do what they're supposed to be doing." **There is nothing in EPA's rule that prohibits farmers, ranchers or agricultural workers from farming and ranching.**

- The rule only defines which waters are protected against unregulated discharges of pollution under the CWA.
- Even though farming and ranching are [one of the largest contributors of nitrogen, phosphorus and pathogen pollution across the U.S.](#), these pollution discharges are predominantly treated as nonpoint sources that are exempted from pollution discharge permitting requirements of the CWA.
- EPA's new definition [preserved all of the CWA exemptions](#) for farming and ranching, including the exemptions for “normal farming, silviculture, and ranching practices,” “agricultural stormwater discharges,” “return flows from irrigated agriculture,” “construction and maintenance of farm or stock ponds or irrigation ditches on dry land,” and “maintenance of drainage ditches.” Despite all of these exemptions, the EPA also scaled back longstanding jurisdiction over tributaries and created exclusions for certain ditches, erosional features, puddles, ponds, shallow groundwater, lakes, artificially irrigated areas, and adjacent waters used for normal farming and ranching.
- The Administration claims that “navigable waters: can mean nearly every puddle or every ditch on a farmer's land, or anyplace else that they decide -- right? It was a massive power grab.” These statements are false, and are taken [from the strategy developed by a broad coalition of industry lobbyists](#) designed to scare farmers and small-business owners to mobilize them in opposition to efforts by Congress and the EPA to clarify which waters are protected.
 - **The rule was not “power grab”; it protects [fewer waters than have historically been protected, maintains all permit exemptions for agriculture and creates new exclusions waterways typically impacted by agricultural pollution.](#)**
 - EPA, in the nearly 45-year history of the CWA, [has never attempted to regulate puddles](#). Despite this indisputable fact, the American Farm Bureau Federation and other industry advocates mounted a [massive public relations campaign](#) to convince everyone, particularly farmers, that EPA would be out on people's farms inspecting and regulating [mud puddles and tire ruts](#). As a result, EPA explicitly exempted puddles from the definition in the final rule to make it beyond dispute that puddles are not protected under the CWA.
 - The rule did not expand CWA protections to ditches, in fact, it added new, explicit [exemptions for ditches](#): “[t]he rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. Constructed ditches that flow only when it rains are not jurisdictional.”
 - It is important to control pollution discharges into these waters because significant numbers of creeks, streams and rivers have been ditched or channelized across the country, and ditching/channelization increases the flow of water and pollutants to downstream waters.
- The Administration claims: “The EPA's regulators were putting people out of jobs by the hundreds of thousands, and regulations and permits started treating our wonderful small farmers and small businesses as if they were a major industrial polluter. They treated them horribly. Horribly.”

- **The rule has not caused anyone to lose their job or result in small farmers or small businesses being treated like a major industrial polluter.** Even if it had been enforced, there is [no evidence to indicate](#) it would do either of these things; It only defines which waters are protected.
- Small farming and ranching operations are not permitted or regulated like a major industrial polluter under the CWA. EPA does have the authority to regulate pollutant discharges from industrial scale CAFOs under the CWA, [but only 33% of the largest CAFOs have CWA permits](#), which further demonstrates how outlandish it is to say that EPA has been permitting and regulating small farmers and ranchers.
- The Administration claims: “In one case in Wyoming, a rancher was fined \$37,000 a day by the EPA for digging a small watering hole for his cattle. His land.” It wasn’t a small watering hole.
 - The [Washington Post worked with FactCheck.org](#) to look into this claim and “found that the Army Corps and the EPA found that the rancher actually constructed a dam on a waterway that was a tributary of the Green River, which is deemed by the EPA as a ‘navigable, interstate water of the United States.’”
 - Despite multiple warnings, he built the dam without a permit required by the CWA to prevent the inevitable downstream water pollution caused by dam construction.

This executive order and rulemaking makes clear that the Trump administration intends to adopt strategies to eliminate human health and water quality protections for rivers, streams, lakes, and wetlands that have been in place for nearly 45 years.

- Eliminating CWA protections will endanger the public and will degrade and destroy our nation’s fisheries, water supplies, recreational waters, and coastal waters.
- The legal definition of “waters of the United States” is critically important to Waterkeepers work and to the ability of states and citizens to stop and clean up pollution.
- When waters are exempted from CWA coverage, industries will be allowed to discharge unregulated pollution into these waterways and endanger public health and the environment. Pollution discharged into upstream waters will be transported downstream and pollute larger waters.
- The EPA rule targeted by the Trump administration is based on EPA’s Office of Research and Development report entitled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence” ([Science Report](#)). The Science Report clearly demonstrates that all tributaries, “including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters.”
 - Protection of headwater streams is [essential to maintaining downstream water quality](#) as “stream networks play an intrinsic role in the delivery of nitrogen and other pollutants to downstream receiving waters from headwater locations throughout watersheds.”

- Permitting and regulating pollution discharges into upstream water bodies is essential to restoring our nation's waters, which are still polluted nearly 45 years after passage of the Clean Water Act.
 - [Recent reports from the states](#) to EPA show that more than 100% of assessed Great Lakes Open Water, 71.3% of assessed lakes/reservoirs/ponds and 54.9% of assessed streams/rivers in the U.S. are unsafe for fishing, drinking, and/or swimming.
 - Lake Erie, the Chesapeake Bay, the Gulf of Mexico, North Carolina's coastal estuaries, Puget Sound, and many other significant water resources across the country are severely polluted. In order to restore these waters, it is necessary to control the discharges of pollutants into the smaller waterways that feed into them.
 - For example, tributary streams in the uppermost portions of the Gulf and Bay watersheds transport the majority of nutrients to the downstream waters.

The true motivation behind revising the rule is to satisfy powerful industry interests that have been lobbying and litigating to gut the Clean Water Act for the right to discharge pollution without any limitations.

- [230 organizations and companies](#) reported lobbying against the rule in 2014-15, including companies that are notorious for creating severe water pollution problems across the country such as [Tyson Foods](#), [J.R. Simplot](#), [Halliburton](#), [BP](#), [Rio Tinto](#), [Chevron](#), and [Duke Energy](#).
- Corporations often discharge their polluted wastewater into small streams, wetlands, or impounded waters that flow into larger rivers, transporting pollution downstream where it can harm fish, wildlife, swimmers, and water supplies if not properly controlled through a CWA discharge permit.
- After the Supreme Court's rulings in SWANCC and Rapanos, corporations and others began misconstruing the decisions to argue that the CWA no longer applied to their pollution discharges into small streams, wetlands and lakes, resulting in years long delay in permitting, legal challenges, and dropped enforcement actions.
 - [EPA reported](#) in 2010 that up to 45% of major pollution dischargers may be unregulated or located where jurisdiction would be "overwhelmingly difficult" to prove, and that over 1,500 major pollution investigations were discontinued or shelved in the preceding four years.
 - Further, "as the number of facilities violating the Clean Water Act has steadily increased each year, EPA judicial actions against major polluters have fallen by almost half since the Supreme Court rulings."

Industry wants EPA, now under the leadership of Scott Pruitt, to redefine WOTUS in a way that severely limits the waters that can be protected.

- Scott Pruitt, who joined with industry in litigation challenging EPA's rule as Oklahoma's Attorney General, [has stated that](#) the CWA is limited to "only large bodies of water capable of serving as

pathways for interstate commerce.”

- **This leaves the majority of our nation’s waters unprotected by the CWA including streams, lakes, and rivers where jurisdiction has never been in legitimate dispute - even radioactive waste could be discharged directly into these waters without being subjected to any of the permitting and treatment required by the CWA.**
 - **This approach could leave intermittent, ephemeral, or headwater streams that [provide a source of drinking water for 117 million people](#) unprotected from pollution under the CWA.**
 - Closed Basins, such as the Lost River Drainages in Idaho that are premier trout fishing waters, 66% of the River Basins in Nevada and 20% of the River Basins in New Mexico, could also lose all CWA protections under this definition because they are not navigable or interstate waters.
- If these waters are not protected by minimum national pollution standards under the CWA:
 - States could weaken or remove pollution standards from waterways to [compete for industrial development](#), leaving states with adequate public health and environmental protections at a competitive disadvantage.
 - This was a common practice prior to the CWA that resulted in severe pollution problems across the country, and is one of the primary reasons for the enactment of the CWA.
 - Industrial polluters could simply relocate their point of discharge to small streams, lakes or other waters upstream from navigable-in-fact and interstate waterways to avoid CWA pollution limits and permitting requirements.
 - These discharges would still pollute water supplies, recreational waters, and fisheries because the pollution would flow downstream, but the CWA could no longer be utilized to prevent, control or clean up the pollution.
- Even if EPA elects to pursue a different jurisdictional rollback, such as the approach the executive order directed the agencies to consider - ie. the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) - it would remove protections for waters across the country that have been historically covered by the CWA.
 - **Justice Scalia’s opinion was characterized by five Justices in the Rapanos decision as being contrary to the text, structure and purpose of the CWA.** *Rapanos*, 547 U.S. at 775, 76 and 768. Additionally, the jurisdictional test set forth in Scalia’s opinion has not been adopted by any court in post-Rapanos jurisdictional determinations as the exclusive controlling test.
 - Both of these approaches are inconsistent with Congressional intent and the plain text of the CWA. **As the Supreme Court held in *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), the CWA established “an all-encompassing program of water pollution regulation” that “applies to all point sources and virtually all bodies of water.”**