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Proposed Rule on Clean Water Act Jurisdiction

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Background

- In the Clean Water Act (CWA), Congress granted the US Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jurisdiction over “navigable waters,” defined in the Act as “waters of the United States” without further clarification
- Federal agencies and the courts have long struggled to find a more workable definition of “waters of the United States”

Background

Supreme Court has in several instances tried to clarify EPA and the Corps' jurisdiction under the CWA

- Wetlands adjacent to navigable waters are “inseparably bound up with” navigable waters (*Riverside Bayview Homes* 1985)
 - EPA adopted 1986 regulations (remain current)
- Jurisdiction doesn't extend to waters isolated from navigable waters (*SWANCC* 2001)
 - After *SWANCC*, EPA adopted a broad reading of WOTUS to be “any connection” to a navigable water
- Jurisdiction cannot be based on any connection to a navigable water (*Rapanos* 2005)
 - Scalia: Rejected assertion of jurisdiction over ephemeral streams, ditches, and drains. “Relatively permanent waters” test
 - Kennedy: Joined plurality in rejecting the Government's “any connection” theory, but said a “significant nexus” was required between the navigable waterways and the wetland.

Background

- In 2011 EPA decided they would clarify to their regions what they now thought was their jurisdiction – through Guidance
- Draft Guidance proposed – strong expansion of federal jurisdiction
- Waters Advocacy Coalition worked the Hill and OMB to prevent Guidance from being finalized

Background

- EPA's new plan – define CWA jurisdiction through regulation – complete overhaul of 1986 regulations
- Back up their regulatory reach with extensive science

The Science – Connectivity Report

- Developed on a PARALLEL track with rulemaking
- Draft report concludes that all waters are connected:
 - (1) “All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.”
 - (2) “Wetlands and open-waters in landscape ... are physically, chemically, and biologically connected with rivers” and
 - (3) Isolated waters “provide numerous functions that can benefit downstream water quality and integrity” but “it is difficult to generalize about their effects on downstream waters from the currently available literature.”
- Fails to distinguish “any connection” from “significant connection”

The Science – Science Advisory Board

- Public Meeting Held in Dec
- Over 100,000 public comments submitted – comments considered for 90 minutes of their 3 day meeting
- SAB not given copy of the rule before meeting
- House Science Committee supplementary questions intercepted by EPA
- Don't expect final comments on Report until fall

Rulemaking

- The Proposed Rule replaces the definition of “navigable waters” and “waters of the United States” in the regulations for all CWA programs
- Of particular importance to AGC Members: 311 (Oil Spill Prevention), 402 (Stormwater), and 404 (Dredge and Fill)

Rulemaking

WOTUS under the rule:

1. All waters currently, in the past, or may be susceptible to use in interstate or foreign commerce, including tidal waters;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters otherwise defined as waters of the U.S.;
5. All **tributaries** of waters identified in 1-3 above;
6. All waters **adjacent** to waters identified in 1-5; and
7. On a case-specific basis, **other waters** that, alone or through “**aggregation**” with other waters in the same region, have a **significant nexus**

Rulemaking

- **Tributary:**

- Water body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to waters in 1-3.
- A water **does not lose its tributary status if there are man-made breaks** (such as bridges, culverts, pipes, dams) so long as bed and bank can be identified up and downstream of the break.
- A wetland can be a tributary.
- **A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).**



Rulemaking

- **Tributary:**

- The rule, for the first time ever, categorically defines ditches as jurisdictional tributaries under all CWA programs
 - Roadside ditches
 - Irrigation ditches
 - Stormwater ditches
- Other man-made conveyances that drain or connect would also likely qualify as tributaries
- Huge practical consequences that have yet to be evaluated



Rulemaking

- **Adjacent:** Bordering, contiguous, or **neighboring** waters separated from other WOTUS by dikes, or barriers are adjacent waters
- **Neighboring:** Waters located within a **riparian area** or **floodplain** or waters with a surface or shallow subsurface connection
 - **Riparian area:** Transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area ...
 - **Floodplain:** An area bordering inland or coastal areas that ... is inundated during periods of moderate to high water flows

Rulemaking

- Exclusions:
 - Waste treatment systems **designed to meet the requirements of the Clean Water Act**;
 - Prior converted cropland;
 - Ditches excavated in uplands and that drain only uplands and have less than perennial flow; and
 - Ditches that do not contribute flow, either directly or through other water bodies, to a jurisdictional water

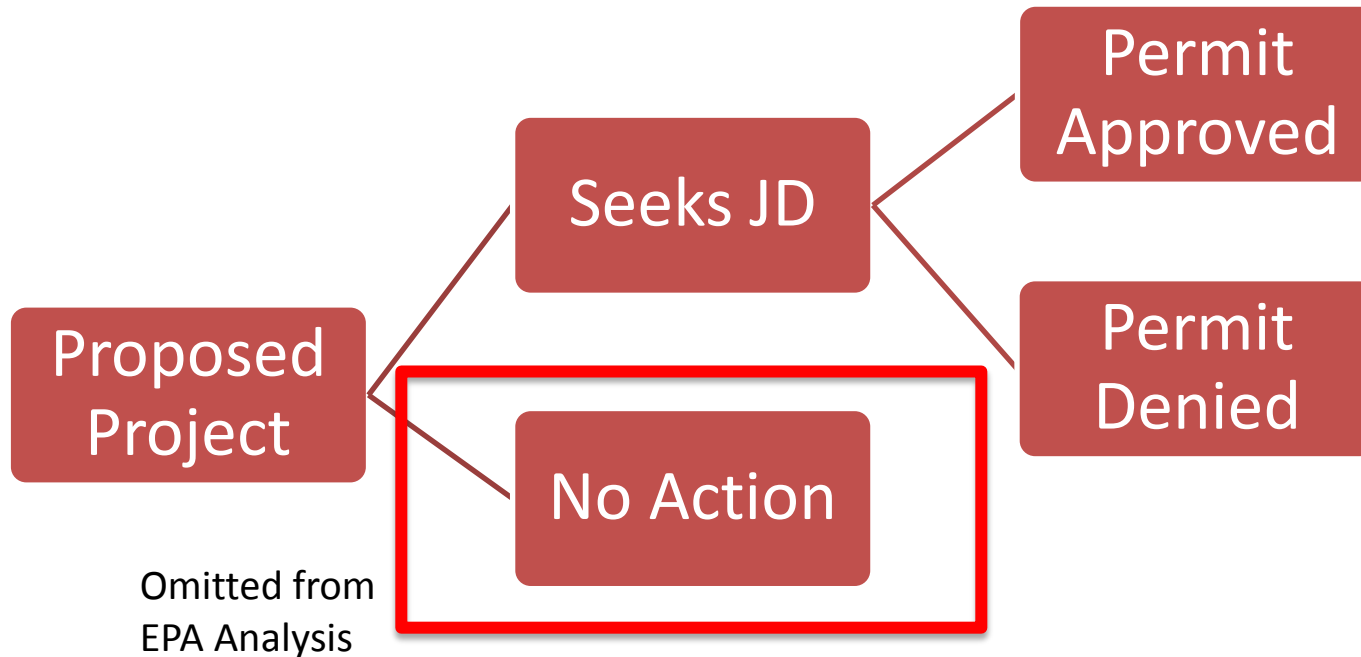
EPA's Cost-Benefit Analysis

- **“The errors and omissions in EPA’s Study are so severe as to render it virtually meaningless. The agency should withdraw the economic analysis and prepare an adequate study of this major change in the implementation of the CWA”**

EPA's Cost-Benefit Analysis

- **4 Categories of Errors**
 - **Change in number of permits**
 - **Acres affected**
 - **Cost Calculations**
 - **Benefits Calculations**

EPA's Cost-Benefit Analysis



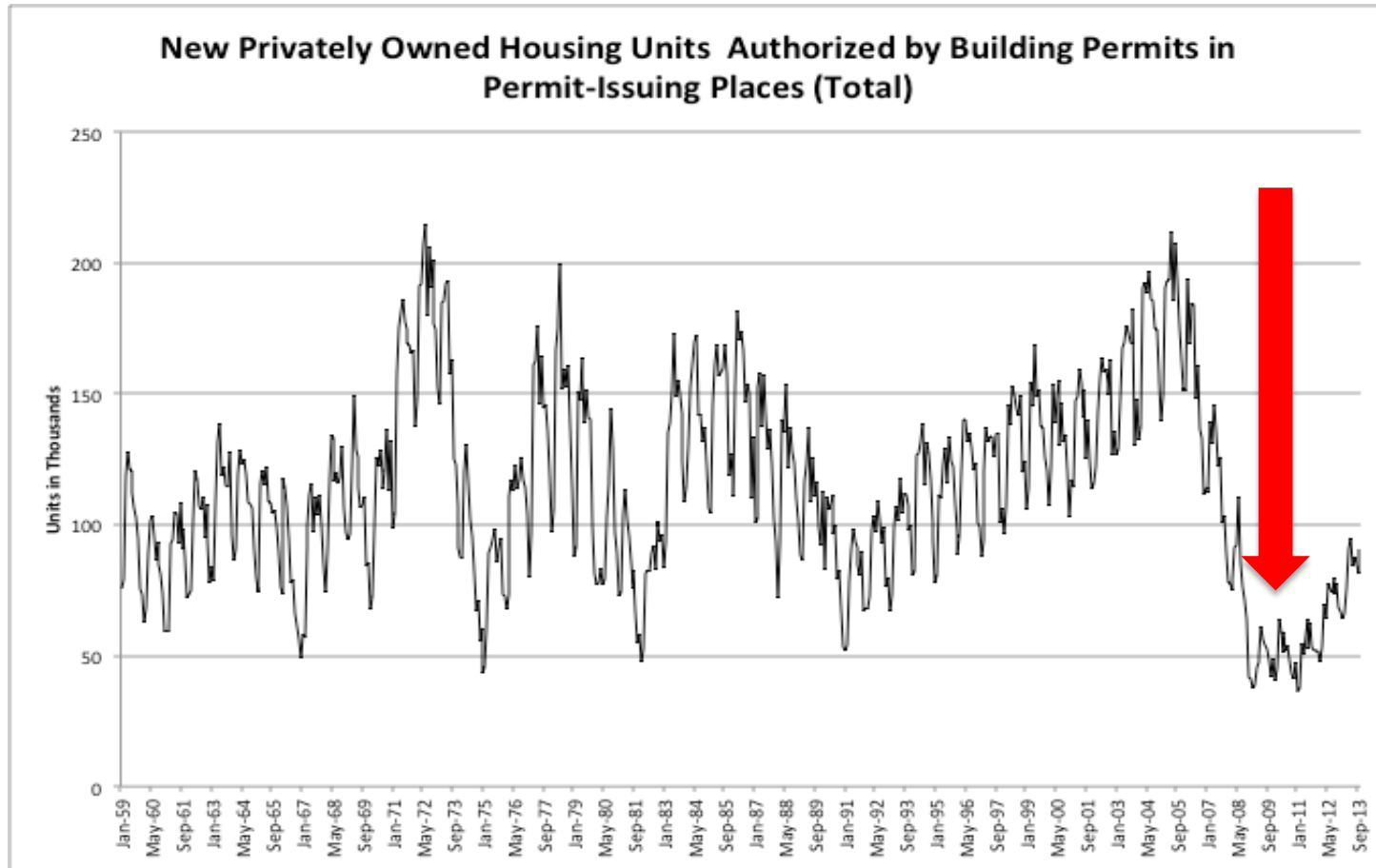
- Statistically invalid procedure that likely underrepresents impacts
- **2.7% increase** in number of permits

EPA's Cost-Benefit Analysis

- **Change in affected acres**
 - Take that **2.7% increase in permits**
 - Multiply it by a **baseline number of permits issued per year (FY2010)**
 - Factor in **average number of acres per permit**

- **1,337 additional affected acres**

EPA's Cost-Benefit Analysis



Source: US Census Bureau

EPA's Cost-Benefit Analysis

- **Change in affected acres**
 - **Improper baseline**
 - **Averaging acres affected per permit disregards incredible amount of difference in acres affected from permit to permit**
 - **Post-SWANCC EPA and Enviros repeated over and over how 20 million acres of wetlands were now no longer protected vs. 1,337??????**

EPA's Cost-Benefit Analysis

- **Cost Calculations**

- **Section 404**

- Permit Application Costs
 - Compensatory Mitigation Costs
 - Permitting Time Costs (omitted from EPA analysis)
 - Impact Avoidance and Minimization Costs (omitted from EPA analysis)

EPA's Cost-Benefit Analysis

- **Cost Calculations**

- Impacts to some programs omitted due to lack of data
- Other programs assumed to be cost neutral without explanation
 - Example: Section 303 (state water quality standards and implementation plans) and Section 402 (NPDES permits)
- Estimates of Section 404 impacts (+2.7%) not applicable to non-404 programs

EPA's Cost-Benefit Analysis

- **Benefit Calculations**

- Selection of WTP studies arbitrary and not representative
 - 9 of 10 studies more than a decade old (oldest ~30 years old)
 - Several studies not published in peer-reviewed journals
- Studies designed to measure benefits of top-tier wetlands, which are already regulated, not the peripheral ones
- Unreasonable presumption of transferability of results
 - Localized benefits assumed to accrue to all members of wetland region
 - No adjustment for changes in economic trends, recreational patterns, stated preferences over time

EPA's Cost-Benefit Analysis

- **Conclusions**

- Underestimation of Change in Acreage
- Flawed calculation of Cost Increases
 - Focus on Section 404 costs, other sections ignored
 - No consideration of permitting time costs and impact avoidance/minimization costs
- Flawed calculation of Benefit Increase
 - Benefit transfer analysis not consistent with best practices in environmental economics
- Analysis poorly documented and contains multiple inconsistencies with previous analyses

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