



Legislative Bulletin.....September 9, 2014

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H.R. 5078 — Waters of the United States Regulatory Overreach Protection Act of 2014 (Southerland, R-FL)

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Order of Business: H.R. 5078 is expected to be considered on September 9, 2014, under a [structured rule](#). The rule provides one hour of general debate and makes three amendments in order (summarized below).

Summary: H.R. 5078 would block the Environmental Protection Agency (EPA) and the Army Corps of Engineers from changing the definition of “waters of the United States” under the Clean Water Act (CWA).

Specifically, the legislation would prohibit the EPA and the Corps from developing, finalizing, adopting, implementing, applying, administering, or enforcing the proposed rule “[Definition of ‘Waters of the United States’ Under the Clean Water Act](#),” proposed guidance “Guidance on Identifying Waters Protected By the Clean Water Act,” interpretive rule “[Notice of Availability Regarding the Exemption from Permitting Under Section 404\(f\)\(1\)\(A\) of the Clean Water Act to Certain Agricultural Conservation Practices](#),” or any substantially similar rules or guidance.

H.R. 5078 would require the EPA and the Corps to consult with state and local officials to develop recommendations for a regulatory proposal to identify waters that are and are not covered by the CWA.

Amendments:

1. [DeFazio](#) (D-OR): Substitute amendment that would require the EPA and the Corps to withdraw the proposed rule “[Definition of ‘Waters of the United States’ Under the Clean Water Act](#)” and the ” interpretive rule “[Notice of Availability Regarding the Exemption from Permitting Under Section 404\(f\)\(1\)\(A\) of the Clean Water Act to Certain Agricultural Conservation Practices](#).” The EPA and the Corps are required to develop a revised rule defining “waters of the United States,” taking into consideration public comments and recommendations from state and local officials, and interested parties. This amendment is meant to replace the underlying legislation with a weaker proposal.

2. [Bishop](#) (D-NY): Strikes the underlying provision that blocks the proposed rule from the EPA and the Corps and instead prohibits the EPA and Corps from implementing a final rule that:
 - a. Expands the scope of the CWA beyond water bodies covered prior to Supreme Court decisions in 2001 and 2006,
 - b. Is inconsistent with the opinions of Justices Scalia and Kennedy in 2006,
 - c. Increases the regulation of ditches compared to current regulations,
 - d. Eliminates exemptions for agriculture,
 - e. Increases CWA scope with respect to groundwater,
 - f. Requires regulation of erosion features,
 - g. Requires CWA permits for land-use activities,
 - h. Requires CWA regulation of farm ponds, puddles, water on driveways, birdbaths, or playgrounds,
 - i. Is inconsistent with the latest peer reviewed studies, and
 - j. Is promulgated without public notice or comment.
3. [Bishop](#) (D-NY): Adds a new section that prohibits application of the underlying legislation if the EPA determines that implementation would increase water pollution, increase costs incurred by a state, or cause the impairment of waters of a state.

Additional Background:

The CWA requires permitting for certain activities (including the discharge of pollutants, dredged, or fill material) that take place in “navigable waters.”

[Section 502\(7\) of the CWA](#) defines navigable waters as “the waters of the United States, including the territorial seas.” The term “waters of the United States” is defined [by regulation](#) as:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

In two cases (*Solid Waste Association of Northern Cook County v. United States Corps of Engineers* in 2001 and *Rapanos v. United States* in 2006) the Supreme Court ruled that jurisdiction under the CWA must be limited, although the Court has not agreed on a clear standard for determining jurisdiction. In response to these decisions, the EPA and the Corps under the Bush Administration issued updated regulatory guidance regarding the jurisdiction of the CWA in 2007 and 2008.

In April 2014, the EPA and the Corps published proposed [regulations](#) to change the definition of waters of the United States. The proposed [definition](#) is:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (s)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

(u) Definitions—

(1) Adjacent. The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”

(2) Neighboring. The term neighboring, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) Floodplain. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) Tributary. The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water

identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

This regulation has been criticized by [Heritage Foundation](#) Staff as allowing regulation of “all ditches, except in narrow circumstances... even includ[ing] man-made ditches,” and by the [U.S. Chamber of Commerce](#) that it would “subject farmers, ranchers, manufacturers, home builders, local governments—nearly any property owner—to new layers of reviews and permitting.”

The [Transportation and Infrastructure Committee](#) has posted additional background on the legislation.

The EPA has established a [website](#) promoting their regulations.

Committee Action: H.R. 5078 was introduced on July 11, 2014. The Transportation and Infrastructure Committee marked up and passed H.R. 5078 by voice vote on [July 16, 2014](#).

The Committee Report can be found [here](#).

Outside Groups:

Associated Builders and Contractors (ABC) is [key voting](#) support.

National Association of Home Builders (NAHB) is [key voting](#) support.

According to the Committee on Transportation and Infrastructure, the following organizations support H.R. 5078:

American Road & Transportation Builders Association	Irrigation Association	Public Lands Council
Agricultural Council of Arkansas	Kansas Chapter Golf Course Superintendent Association of America	Riverside & Landowners Protection Coalition
Agricultural Retailers Association	Kansas Cotton Association	Select Milk Producers, Inc.
Alabama Pork Producers	Kansas Grain and Feed Association	South Dakota Agri-Business Association
Alabama Cotton Commission	Kansas Pork Association	South Dakota Grain & Feed Association
American Exploration & Mining Association	Louisiana Pork producers Association	South East Dairy Farmers Association

<u>American Farm Bureau Federation</u>	<u>Leading Builders of America</u>	<u>South Texans' Property Rights Association</u>
<u>American Forest & Paper Association</u>	<u>Lone Star Golf Course Superintendents Association</u>	<u>South Texas Cotton & Grain Association</u>
<u>American Iron and Steel Institute</u>	<u>Louisiana Cotton and Grain Association</u>	<u>Southeastern Lumber Manufacturers Association</u>
<u>American Petroleum Institute</u>	<u>Maine Hog Growers Association</u>	<u>Metropolitan Golf Course Superintendent Association</u>
<u>American Public Power Association</u>	<u>Michigan Pork Producers Association</u>	<u>Michigan Golf Course Superintendents Association</u>
<u>American Road & Transportation Builders Association</u>	<u>Milk Producers Council</u>	<u>Mid-Atlantic Association of Golf Course Superintendent</u>
<u>American Sugar Alliance</u>	<u>Minnesota Corn Growers Association</u>	<u>Mid-Atlantic Section of the PGA</u>
<u>American Sugar Cane League</u>	<u>Minnesota Pork Producers Association</u>	<u>Midwest Association of Golf Course Superintendents</u>
<u>American Sugarbeet Growers Association</u>	<u>Mississippi Pork Producers Association</u>	<u>Minnesota Golf Course Superintendents' Association</u>
<u>American Society of Golf Course Architects</u>	<u>Missouri Agribusiness Association</u>	<u>Minnesota Section PGA</u>
<u>Arizona Cotton Growers Association</u>	<u>Missouri Pork Producers Association</u> <u>Southwest Council of Agribusiness</u>	<u>NAIOP, the Commercial Real Estate Development Association</u>
<u>Arizona Pork Council</u>	<u>Tennessee Pork Producers Association</u>	<u>National Alliance of Forest Owners</u>
<u>Arkansas Pork Producers Association</u>	<u>Texas Agricultural Land Trust</u>	<u>National Alliance of Independent Crop Consultants</u>
<u>Associated Builders and Contractors</u>	<u>Texas Association of Agricultural Consultants</u>	<u>National Cattleman's Beef Association</u>
<u>Associated Industries of Florida</u>	<u>Texas Association of Dairymen</u>	<u>National Association of Flood and Stormwater Management Agencies</u>
<u>Association of American Railroads</u>	<u>Texas Broiler Council</u>	<u>National Association of Home Builders</u>
<u>Association of Texas Soil & Water Conservation Districts</u>	<u>Texas Cattle Feeders Association</u>	<u>National Association of Manufacturers</u>
<u>Cactus & Pine Golf Course Superintendents Association</u>	<u>Texas Citrus Mutual</u>	<u>National Association of REALTORS®</u>
<u>California Cotton Ginners Association</u>	<u>Texas Deer Association</u>	<u>National Club Association</u>
<u>California Cotton Growers Association</u>	<u>Texas Egg Council</u>	<u>National Cotton Council</u>
<u>California Pork Producers Association</u>	<u>Texas Grain & Feed Association</u>	<u>National Council of Farmer Cooperatives</u>
<u>Calusa Golf Course</u>	<u>Texas Grain Sorghum</u>	<u>National Federation of</u>

Superintendent Association	<u>Association</u>	<u>Independent Businesses</u>
<u>Carolinas Golf Course Superintendent's Association</u>	<u>Texas Nursery & Landscape Association</u>	<u>National Industrial Sand Association</u> <u>American Public Power Association</u>
<u>Central Illinois Golf Course Superintendent Association</u>	<u>Texas Pest Management Association</u>	<u>National Mining Association</u>
Club Managers Association of America	<u>Texas Pork Producers Association</u>	<u>National Multifamily Housing Council</u>
<u>Cotton and Grain Producers of the Lower Rio Grande Valley</u>	<u>Texas Poultry Federation</u>	National Oilseed Processors Association
<u>Colorado Pork Producers Council</u>	<u>Texas Poultry Improvement Association</u>	<u>National Pork Producers Council (NPPC)</u>
<u>Corn Producers of Texas</u>	<u>Texas Rice Producers Legislative Group</u>	<u>National Rural Electric Cooperative Association</u>
<u>CropLife America</u>	<u>Texas Seed Trade Association</u>	<u>National Stone, Sand and Gravel Association (NSSGA)</u>
<u>Dairy Producers of Utah</u>	<u>Texas Sheep & Goat Raisers Association</u>	<u>National Water Resources Association</u>
<u>Delaware-Maryland Agribusiness Association</u>	<u>Texas Soybean Association</u>	<u>Nebraska Golf Course Superintendents Association</u>
<u>Delta Council</u>	<u>Texas Turkey Federation</u>	<u>North Carolina Cotton Producers Association</u>
<u>Earth Moving Contractors Association of Texas</u>	<u>Texas Vegetable Association</u>	<u>Northern Ohio Golf Course Superintendent's Association</u>
<u>Exotic Wildlife Association</u>	<u>Texas Wheat Producers Association</u>	<u>Northwestern PA Golf Course Superintendents Assoc., Inc</u>
<u>Edison Electric Institute</u>	<u>Texas Wildlife Association</u>	<u>Oklahoma Cotton Council</u>
Federal Forest Resources Coalition	<u>Turfgrass Producers of Texas</u>	<u>Oregon Golf Course Superintendents Association</u>
Florida Chamber of Commerce	<u>U.S. Cattlemen's Association</u>	<u>Peaks and Prairies Golf Course Superintendents Association</u>
Florida Farm Bureau	<u>Upstate Niagara Cooperative, Inc.</u>	<u>Philadelphia Association of Golf Course Superintendents</u>
<u>Forest Landowners Association</u>	<u>USA Rice Federation</u>	<u>Plains Cotton Growers, Inc.</u>
<u>Forest Resource Association</u>	<u>Utah Pork Producers Association</u>	<u>Portland Cement Association</u>
<u>Foundation for Environmental and Economic Progress (FEEP)</u>	<u>Virginia Agribusiness Council</u>	Professional Golfers Association of America
<u>Georgia Cotton Commission</u>	<u>Virginia Poultry Federation</u>	<u>Public Lands Council</u>
<u>Georgia Golf Course Superintendents Association</u>	<u>Vocational Agriculture Teachers Association of Texas</u>	<u>Responsible Industry for a Sound Environment (RISE)</u>
Georgia Pork Producers Association	<u>West Virginia Pork Producers Council</u>	<u>Rolling Plains Cotton Growers</u>

<u>Golf Course Builders Association of America</u>	<u>Western Peanut Growers Association</u>	<u>San Diego Golf Course Superintendents Association</u>
<u>Golf Course Superintendents Association of America</u>	<u>Western United Dairymen</u>	<u>San Joaquin Valley Quality Cotton Growers Association</u>
<u>Golf Course Superintendents Association of America</u>	<u>Wisconsin Pork Producers Association</u>	<u>Sierra Nevada Golf Course Superintendent Association</u>
<u>Golf Course Superintendents Association of New Jersey</u>	<u>Wyoming Ag Business Association</u>	<u>South Dakota Chapter of Golf Course Superintendents Association of America,</u>
<u>Golf Course Superintendents Association of Northern California</u>	<u>Wyoming Crop Improvement Association</u>	<u>South Texas Golf Course Superintendents Association</u>
<u>Golf Course Superintendents Association of Southern California</u>	<u>Wyoming Wheat Growers Association</u>	<u>Southeastern Lumber Manufacturers Association</u>
<u>Greater Cincinnati Golf Course Superintendents Association</u>	<u>Missouri Dairy Association</u>	<u>Southern Crop Production Association</u>
<u>Guadalupe-Blanco River Authority in Texas</u>	<u>Missouri Pork Producers Association</u>	<u>The Associated General Contractors of America</u>
<u>Gulf Coast Golf Course Superintendent Association</u>	<u>National Alliance of Forest Owners</u>	<u>The Fertilizer Institute</u>
<u>Hardwood Federation</u>	<u>National Alliance of Independent Crop Consultants</u>	<u>The Florida Golf Course Superintendents Association's</u>
<u>Heart of America Golf Course Superintendents Association</u>	<u>National Cattleman's Beef Association</u>	<u>Heritage Foundation</u>
<u>Hi-Lo Golf Course Superintendent Association</u>	<u>National Council of Farmer Cooperatives</u>	<u>The Independent Petroleum Association of America (IPAA)</u>
<u>Idaho Dairymen's Association</u>	<u>National Pork Producers Council</u>	<u>The Intermountain Golf Course Superintendents Association</u>
<u>Illinois Pork Producers Association</u>	<u>National Sorghum Producers</u>	<u>The National Cotton Council</u>
<u>Independent Cattlemens Association of Texas</u>	<u>National Turkey Federation</u>	<u>The Pennsylvania Department of Environmental Protection and Department of Agriculture</u>
<u>Iowa Pork Producers Association</u>	<u>Nebraska Pork Producers Association, Inc.</u>	<u>Treated Wood Council</u>
<u>Industrial Minerals Association – North America</u>	<u>New Hampshire Pork Producers Council</u>	<u>U.S. Chamber of Commerce</u>
<u>Inland Empire Golf Course Superintendent's Association</u>	<u>North Carolina Pork Council, Inc.</u>	<u>United Egg Producers</u>
<u>International Council of Shopping Centers</u>	<u>Northeast Dairy Farmers Cooperatives</u>	<u>Virginia Golf Course Superintendents Association</u>
<u>International Council of</u>	<u>Ohio AgriBusiness</u>	<u>Water Advocacy Coalition</u>

Shopping Centers (ICSC)	Association	
Iowa Golf Course Superintendent Association	Ohio Pork Producers Council	

Administration Position: The [SAP](#) states that “Administration strongly opposes H.R. 5078,” and that “if the President were presented with H.R. 5078, his senior advisers would recommend that he veto the bill.”

Cost to Taxpayers: According to [CBO](#), H.R. 5078 “would have no significant effect on discretionary spending by EPA or the Corps,” “would not affect revenues,” and “would have an insignificant effect on direct spending over the 2015-2024 period.”

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No, according to [CBO](#).

Does the Bill Contain Any Federal Encroachment into State or Local Authority in Potential Violation of the 10th Amendment?: No.

Does the Bill Delegate Any Legislative Authority to the Executive Branch?: No.

Does the Bill Contain Any Earmarks/Limited Tax Benefits/Limited Tariff Benefits?:

According to the [Committee Report](#), “H.R. 5078 does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits.”

Constitutional Authority: “Congress has the power to enact this legislation pursuant to the following: Article I, Section 8 of the United States Constitution, specifically Clause 3 (related to regulation of Commerce among the several States).”

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NOTE: *RSC Legislative Bulletins are for informational purposes only and should not be taken as statements of support or opposition from the Republican Study Committee.*

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