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## ENVIRONMENTAL REGULATIONS BACKGROUNDER

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### ASA Position

- ASA opposes the EPA and Army Corps' Clean Water Rule and supports legislative or judicial action to prevent enactment.
- ASA supports maintaining science-based processes for consideration of pesticide and environmental issues by EPA. Existing statutes including FIFRA must be followed and consultation with production agriculture stakeholders must be included in policymaking.

### Background

#### **Clean Water Rule (also known as the Waters of the United States Rule)**

The Environmental Protection Agency (EPA) and the Army Corps of Engineers published the final new Waters of the United States (WOTUS) rule under the Clean Water Act (CWA) which took effect August 28, 2015. EPA's justification for the new rule was to reassert and clarify the scope of regulatory jurisdiction on CWA after Supreme Court decisions rebuked EPA and the Corps for an expansive WOTUS definition and need for clarification (*SWANCC v. U.S. Army Corps* and *Rapanos v. United States*). The new rule expanded the jurisdiction of the federal government's regulations on WOTUS from "navigable" waters to also include upstream waters and intermittent and ephemeral streams like those that farmers use for irrigation and drainage. The rule also included land and waters that were adjacent to those waters.

Right after the rule was finalized in August 2015, a [federal district court in North Dakota granted a preliminary injunction](#) blocking implementation of the rule in a suit filed by 13 states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming). The suit claimed that the WOTUS was a threat to state sovereignty in part because it claims federal jurisdiction over wetlands and waters that should be subject to the control of state governments.

After numerous lawsuits from industry, the agriculture community, states, and activists were filed around the country, in October 2015 the Sixth Circuit Court of Appeals placed a preliminary injunction or stay on implementation and enforcement of the WOTUS Rule in all 50 states pending litigation, preventing the rule from taking effect. That stay remains in place today. In November, 2016, numerous agriculture groups submitted briefs to the 6th Circuit arguing that the rule is arbitrary and capricious, that the agencies promulgated it without following federal rulemaking procedures, that that it exceeded their authority under the Constitution and the Clean Water Act. Just before leaving office, the EPA under the Obama Administration filed a brief with the court in defense of the rule.

In February 2016, the Sixth Circuit Court of Appeals sided with the government and determined that federal appeals courts and not federal district courts have exclusive jurisdiction to hear WOTUS cases. The Sixth Circuit's ruling was challenged by more than 20 states and interest groups and is now being brought before the Supreme Court of the United States in the case *National Association of Manufacturers v. Department of Defense*, an appeal of the Sixth Circuit's decision of where challenges to the rule should be filed. It has halted action in the lower courts and the Supreme Court is expected to hear oral arguments in its fall 2017 term and could issue a decision by the end of the year.

ASA believes the rule represents an expansion of jurisdiction. ASA specifically cites the nexus test—language in the rule that EPA says its new rule will use to determine the level to which a smaller body of water connects to a larger one for the purposes of establishing jurisdiction under the Clean Water Act—as exceeding both the intent of Congress and the rulings of the Supreme Court.

Congress has thus far been unsuccessful in preventing implementation of the Clean Water Rule, and refused to prohibit funding in the FY 2016 Omnibus Appropriations Act. For FY2017, both the House Interior-Environment Appropriations Subcommittee and the Senate Interior, Environment and Related Agencies Subcommittee bill included provisions to block funding for the WOTUS rule but Congress instead passed a short-term Continuing Resolution (CR) appropriations bill extending FY16 funding levels through April 28, 2017.

On February 28, 2017, President Trump and EPA Administrator Pruitt announced their intent to withdraw the 2015 rule and open the rulemaking process to revise the WOTUS rules. The order includes instructions to use the standard set out the late Supreme Court Justice Antonin Scalia's opinion arguing that the CWA only applied to “navigable waters” connected by a surface flow at least part of the year in the 2006 *Rapanos vs. United States* case.

### **NPDES Permits**

New permitting requirements took effect in 2012 requiring persons who spray pesticides on or near water to obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. The permit does not cover terrestrial application to control pests on agricultural crops.

In February 2017, ASA joined numerous agriculture organizations in supporting H.R. 953, the Reducing Regulatory Burdens Act introduced by Congressman Bob Gibbs of Ohio. Congressman Gibbs has introduced this bill in previous years with ASA's support. The legislation aims to reduce burdensome regulations by eliminating duplicative permitting requirements for pesticide applications. Pesticide applications are already federally regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). However, a 2009 Federal court decision requires entities to also obtain a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act when pesticides are sprayed on or near waterways. This legislation would remove that requirement.

ASA continues to support action to eliminate this permit requirement in the 115<sup>th</sup> Congress.