

# The Water Gram

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Idaho Rural Water Association, 6065 W. Corporal Lane, Boise, ID 83704

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PERMIT # 14  
LAURA SCHROEDER LAW OFFICES PC  
1916 NE CESARE CHAVEZ BLVD  
PORTLAND, OR 97212-5304



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# Clean Water Act Controversy

In October, perhaps the most vital piece of environmental legislation ever enacted in the United States turned 42 years old. Yet in spite of the indisputable significance of the Clean Water Act (CWA), this particular anniversary was marked less by tribute for what the act has accomplished since being enacted in 1972 than by tumult over how administrators are allegedly attempting to expand its reach.

Prompted by recent U.S. Supreme Court rulings regarding the jurisdictional scope of the CWA, the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) jointly presented an amended definition for the act's underlying principle, 'Waters of the United States' (WOTUS).<sup>1</sup> The agencies hoped the proposed rule "would enhance protection ... and increase CWA program predictability and consistency by increasing clarity" over what qualified as WOTUS. Instead, the proposal ignited a firestorm of controversy centered upon what added terms such as 'adjacent waters,' 'flood plain,' and 'significant nexus' would entail. While the EPA and USACE steadfastly maintain that the proposed rule will not broaden or fundamentally change coverage authorized by the CWA, stakeholders are largely unconvinced.

That is borne out by the more than 250,000 comments submitted during the public comment period, scheduled to conclude November 14 after being extended twice due to the overwhelming response. It is underscored by adamant

opposition like that mounted by the American Farm Bureau Federation, which has championed a 'Ditch the Rule' campaign. And it is substantiated by political resistance nationally – in September the House of Representatives passed a bill called the Waters of the United States Regulatory Overreach Protection Act – as well as within Idaho – Governor C.L. (Butch) Otter and Attorney General Lawrence Wasden have urged the EPA and USACE to withdraw the proposed rule and reinstate the rulemaking process, this time incorporating state involvement.

The concerns of Otter and Wasden resonate with those of the proposed rule's most ardent critics primarily, what effect will it have on exemptions identified in the current law? The CWA expressly exempts activities such as farming, silviculture, and ranching, but those are not articulated in the proposed rule. Further, the proposed definition of 'tributary' could, theoretically, place virtually any ditch, pond, or drainage within the WOTUS classification, therefore subjecting farmers, municipalities, and private landowners to regulatory costs to which they were previously immune. Potentially complicating matters for Idaho is the fact that the EPA and USACE are the respective permitting authorities for National Pollutant Discharge Elimination System (NPDES) and dredge-and-fill activities within the state. "Idaho's water resources are too valuable and integral to simply just hand over to federal authority under a rule that is too broad,

risky, and confusing," Wasden asserted in the letter he and Otter sent agency heads in October.

At the time of publication, the EPA and USACE stated that they hoped to issue a final rule in April of 2015. But considering the staunch opposition and deluge of comments the proposed rule has provoked, not to mention the exhaustive public hearings that are apt to follow, implementation is unlikely to occur any time in the coming year. And even when the administrative process is eventually completed, this contentious issue is certain to be the topic of extensive litigation, and seems destined to find its way back to the Supreme Court. ♦

## About the authors

Laura A. Schroeder is the charter member of Schroeder Law Offices, P.C., a firm that represents water-rights clients in five western states and consults internationally. James Browitt practices water law in Idaho and Washington with his firm, Browitt Law Office, and works with Schroeder Law Offices in its Northern Idaho Division. You can read more about this topic and other water-rights issues at Schroeder Law Offices' Water Law Blog, <http://water-law.com/home/blog/>.

## Endnotes:

- 1 The proposed rule, based on the EPA's draft report, 'Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,' was published in the Federal Register on April 21, 2014.