



Waters of the United States Comments (Scalia Opinion)

Ohio Department of Agriculture

June 16, 2017

The Ohio Department of Agriculture (ODA) suggests that the rule for the Waters of the United States (WOTUS) needs to provide more predictability and certainty for state and federal regulators and the agricultural community in determining waters that are under the jurisdiction of the Clean Water Act. Providing additional clarity and further defining the concepts of “relatively permanent” and “continuous surface connection” in the Scalia Opinion will be critical for implementation of this rule.

Specific areas of importance for the Ohio Department of Agriculture are identified below.

- **Maintaining Agricultural Drainage Ditches:** There is a potential benefit in the new WOTUS rule as channels must be considered “Relatively Permanent” Waters for there to be federal jurisdiction. Many of Ohio’s agricultural drainage channels and petition ditches in the northwest portion of the state require maintenance to assure agricultural subsurface drains have adequate freeboard to drain cropland. These ditches fill with sediment and become overgrown, often creating uncertainty about additional maintenance activities. Agricultural drainage infrastructure is critical for most Ohio cropland (approximately 2/3) and providing producers with more predictability and certainty in knowing which waters are jurisdictional would be beneficial.
- **Regulatory Enforcement for Agricultural Pollution to “Waters of the State”:** Ohio’s “Waters of the State” definition is fairly extensive and enforcement actions taken by ODA regarding agricultural pollution are based on Ohio’s definition. If the Scalia approach is utilized to define “Waters of the US,” it would create more disparity between the Ohio and the federal definition. Initially, this could create confusion and additional legal appeals for enforcement actions taken by ODA, but it could also create clearer jurisdiction between state and federal authorities. Overall, the new WOTUS rule should have a minimal impact on regulatory enforcement taken by ODA regarding agricultural pollution.
- **Wetlands:** If the Scalia approach is utilized to define wetlands as those with a “continuous surface connection” to bodies of water of the United States, there will be more reliance on the state to enforce rules related to isolated wetlands. By enrolling in farm bill programs, most agricultural producers are also under the jurisdiction of USDA for wetlands and farmed wetlands on their farms. Since Ohio EPA has regulations to permit impacts to isolated wetlands and the farm bill provides additional restrictions, impacts to wetlands in the State of Ohio from changes in WOTUS can hopefully be minimized.

