QUESTIONS AND ANSWERS – WATERS OF THE U.S. PROPOSAL

Key Background

Congress enacted the modern Clean Water Act in 1972 to address pollution entering the nation's waters to complement statutes such as the Rivers and Harbors Act written to protect navigation. As a pollution prevention statute, Congress wrote the CWA to extend beyond waters that are actually navigable to include the headwater streams, lakes, and wetlands. Since 1972, the CWA and agency regulations have successfully contributed to the protection of public health and water quality. Federal courts, including the Supreme Court, have consistently agreed that the geographic scope of the CWA should cover such waterbodies: "We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional meaning of that term." (Justice Scalia in *Rapanos, 2006)*

Supreme Court decisions in 2001 and 2006 changed the test for determining which waters upstream of navigable waters should be protected under the Act. The basis for determining jurisdiction under the CWA changed from whether degraded water quality would have an effect on interstate commerce, to a more technical and scientific understanding of water features and their connection and importance to downstream traditional navigable waters. In this rule, EPA and the U. S. Army Corps of Engineers (the agencies) are proposing to apply this principle, and in particular the "significant nexus" test, to clarify the waters – *based on sound peer-reviewed science* – that are vital to protect under the CWA if the CWA is to be successful. The proposal also identifies waters that are not subject to the CWA. The agencies are not expanding the CWA. The proposed rule does not add protection to any new types of waters that have not historically been covered by the CWA, nor does the rule in any way limit current regulatory and statutory exemptions and exclusions. Simply put, if an activity was exempted or excluded before this proposal, it will remain exempted or excluded. If you didn't need a permit for a type of activity before, you won't need one now.

Applying the Decisions of the Supreme Court

In 2008, the agencies issued guidance to interpret and apply the 2001 and 2006 Supreme Court decisions. This guidance was effective in providing agency field staff and the public with the kinds of information needed for permit decisions. However, with improved science and practical knowledge based upon years of experience, the agencies believe that regulatory improvements can and will be made with the proposed rule. Members of Congress, developers, farmers, states and local governments, energy companies, and many others demanded new regulations to make the process of identifying waters protected under the Act clearer, simpler, and faster. In response to the many comments received, the agency's proposed science-based rule is consistent with the Supreme Court's decisions and will improve the process for identifying which waters are and are not subject to the CWA.

The agencies then focused their efforts on proposing this rule to implement the decisions of the Supreme Court. The rule:

- Reduces the scope of waters protected under the CWA compared to waters covered during the 70's, 80's and 90's to conform to the Supreme Court's significant nexus test.
- Limits CWA jurisdiction only to those types of waters that have a "***significant nexus"*** on downstream traditional navigable waters - not just any hydrologic connection.

- Improves efficiency, clarity and predictability for all land owners including the nation's farmers, as well as permit applicants, while maintaining all current exemptions and protecting public health, water quality, and the environment.
- Uses the law and sound, peer-reviewed science as its cornerstones.

"Significant Nexus"

The focus of the agencies' new proposed rule is to interpret and apply the "significant nexus" test established in Supreme Court decisions, based consistently on the law and science. To meet this goal, the new proposed rule must ensure that waters are protected under the CWA in circumstances where science supports an important and identifiable chemical, physical, or biological effect on downstream traditional navigable waters. This protection would prevent downstream waters from pollution upstream. For example, science demonstrates that the upstream headwaters, wetlands, lakes, man-made channels, or other waters act together to significantly influence downstream waters by:

- Protecting downstream water quality
- Contributing clean water for drinking, irrigation, recreation, commercial fishing, and industrial uses downstream, or
- Filtering pollution and reducing downstream treatment costs
- Providing habitat for fish and other aquatic life that live in traditional navigable waters
- Reducing downstream flooding and protecting property and infrastructure

The Proposed Rule

In implementing the Supreme Court's decisions, the proposed rule uses the law and science to clarify that:

- Science demonstrates that waters like tributaries and adjacent waters must be protected under the CWA because they significantly affect the quality of downstream waters.
- Tributaries include only those waters whose volume, duration and frequency of flow is sufficient to create certain well-known and easy to observe and document, hydrologic characteristics that typically take years to form, such as the formation of a clear channel with bed and banks and an ordinary high water mark.
- Ground water, gullies and erosion channels, and features on farm land including swales, farm and stock ponds that are built on dry land, as well as all ditches that do not have the features of tributaries or are explicitly excluded under the proposed rule, all prior converted croplands, and tile drainage systems – are not protected under the CWA.
- The definition of wetlands continues to exclude features that do not have the soil, vegetation, and saturation characteristics that take years to form.
- A group of water features like prairie potholes, vernal pools and playa lakes are identified as warranting a case-specific review to determine if they act as a collective group of similar waters, and may meet the significant nexus test and therefore warrant protection.

Conclusion

America thrives on clean water. It is vital for the success of the nation's businesses, agriculture, energy development, and the health of our communities. The agencies are eager to define the scope of the Clean Water Act that achieves the goals of protecting clean water and public health, and promoting jobs and the economy. Americans should not have to choose among these goals.

The agencies have proposed a new rule for public review and comment. The notice and comment process recognizes that an agencies' thinking can be improved by hearing from by landowners, business people, farmers, scientists, energy companies, conservationists, states and local governments, and others who have valuable experience, clear perspectives, and important information . We will not complete the rule until we have carefully read through all and address the public comments, until our scientific analysis and peer review are complete, and until we have worked to make the rule understandable, technically accurate, and legally correct.

During this public comment period, the agencies are hearing numerous specific and technical questions and have been asked for a clear articulation of the intent and reading of the proposal.

1. What is the purpose of this Q&A document?
ANSWER: This document explains the agencies intent and understanding of the rule text and is based on questions raised so far during the public comment period. We are hopeful that it will help inform the comments we receive and the conversations we are having with stakeholders, to allow the agencies to have a better understanding of how the rule and preamble can be written as clearly as possible when the final version is completed.

2. Is the proposal an expansion of jurisdiction?
ANSWER: No. From the Clean Water Act's enactment, its scope of jurisdiction, included any waterbody that had a connection with interstate commerce. However, the Supreme Court has now focused on a more technical and scientific understanding of water features and their connections to downstream traditional navigable waters. This new focus placed certain waters in a gray area, where case-specific determinations were required in the absence of agency rulemaking. This gray area creates uncertainty, litigation risk for some land owners, and inconsistent application of the CWA. The proposed rule clearly applies the "significant nexus" test as contemplated by Justice Kennedy. It also reduces litigation risk by reducing the amount of waters in this gray area.

3. Doesn't the Economic Analysis indicate jurisdiction would expand by at least 3 percent compared to the existing regulation?
ANSWER: The economic analysis examines the costs and benefits of the proposal. In doing so, the agencies compared the proposed rule to current practices. This analysis indicates that there would be a three percent increase, or roughly 1500 acres nationwide, in cases where the agencies would find waters jurisdictional. This increase is largely a result of clarifying the current confusion and difficulty of assessing "other waters." When the proposed rule is compared to the agencies' existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA as a consequence of recent decisions of the Supreme Court.

4. If a water on my property is jurisdictional, does that mean the federal government controls my use of the water?
ANSWER: No. It is important to emphasize that CWA permitting only applies where someone proposes to dump waste or other pollutants into the nation's streams, rivers, lakes, and wetlands. These are waters where communities get their drinking water, where families swim and boat, and where fish are caught for recreation and for sale to markets and restaurants. If you're not polluting these water bodies, you don't need any sort of permit. Also, normal farming practices that involve dredged or fill material, regardless of jurisdiction, do not need a permit, since the law permanently excludes those practices.

5. Didn't the Supreme Court direct the agencies to only cover waters that are navigable?
ANSWER: No. The Supreme Court has clearly held all three times it has considered the issue that the CWA extends its protection beyond the navigable-in-fact waters. In fact, Justice Scalia makes it clear in Rapanos when he wrote, "the Act's term 'navigable waters' includes something more than traditional navigable waters. We [the Supreme Court] have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional meaning of that term." The courts, including the Supreme Court, have consistently found that the jurisdiction of the CWA extends beyond waters that are navigable-in-fact to include waterbodies such as wetlands and small tributaries. This is important because protecting downstream, navigable waters requires also protecting the waters that feed into them.

6. This proposed rule includes seasonal and rain dependent streams when they meet the definition of a tributary. Would the water that flows on my land only after a rainstorm now become jurisdictional?
ANSWER: Rainwater that flows on top of the land, sometimes referred to as sheetflow, or through an erosion feature is not jurisdictional under the CWA. The proposed rule would only cover features that have a bed and bank and ordinary high water mark. These features take years to develop. An erosion feature is not jurisdictional because it does not have these characteristics. Thus, the proposed rule specifically excludes erosional features, such as gullies.

7. Doesn't this rule make all "other waters," such as prairie potholes jurisdictional?
ANSWER: No. The rule maintains the status quo by treating unique waters like prairie potholes on a case-specific basis. However, pursuant to Justice Kennedy's opinion in the *Rapanos* case, the proposed rule considers the aggregate importance of these waters in a geographic area and their connection (if any) to traditionally navigable waters, when determining whether to extend CWA protections. Aggregation of waters is only appropriate for certain waters, like prairie potholes, that are very similar in specific location, size and proximity to jurisdictional waters.

8. The rule would continue to require a case-specific significant nexus analysis for "other waters", like Prairie Potholes. Does the rule allow the agencies to evaluate an adjacent Prairie Pothole wetland that has a significant nexus together with near-by non-adjacent Prairie Pothole wetlands when doing this significant nexus analysis?
ANSWER No. A case specific significant nexus analysis for an "other water" may only consider additional "other waters" of the same type located in the same region, but the analysis would not combine "other waters" with "adjacent waters" even if they are of the same type and located in the same region.

9. Are there maps that USGS put out showing that nearly all the waters in the United States now come under the jurisdiction of the CWA?
ANSWER: No. There are no maps of CWA jurisdiction from USGS or any other Federal agency. Due to the resolution of USGS maps, they do not distinguish between land and water and thus make waters appear more prevalent than is actual. USGS maps do not depict the scope of waters protected under the Clean Water Act or the scope of waters that would be protected under the proposed rule.

10. Doesn't this rule expand the opportunity for legal challenges under the CWA?
ANSWER: No. The regulated community has long been concerned that ambiguity in jurisdiction of the CWA would allow for third party lawsuits regarding where the CWA applies. The proposed rule reduces the grey area and reduces the opportunity for third party challenges.

11. Do I need a CWA permit when I am applying pesticides or herbicides to any farm fields?
ANSWER: No. A permit is only needed when pesticides are applied to waters that are jurisdictional. For example, if wetlands protected under the CWA are being farmed, activities such as plowing, seeding, and harvesting do not require a CWA permit. Applying pesticides or herbicides ***in*** jurisdictional wetlands, however, would generally require a permit, and may be satisfied by a general permit. In addition, neither agricultural stormwater nor return flows from irrigation need permits.

12. Do I need a CWA permit to fill puddles on my property?
ANSWER: No.

13. Will stormwater management systems permitted under the CWA, commonly called MS4s, become "waters of the US" under the proposed rule?
ANSWER: No. The proposed rule does not change the status of an MS4 under the CWA. The proposed rule does not regulate any types of waters that are not regulated under the current rule. We are eager to work with stakeholders and the public to ensure the final rule reflects this intent.

14. Will I need a Clean Water Act permit to fill in the wet area in my back yard?
ANSWER: No. Wet areas in your back yard, like puddles on your lawn that hold water temporarily following rainfall or snowmelt, are not subject to the CWA.

15. Would the proposed rule protect, as tributaries, all "channels" regardless of how often they flow or how much water they carry?
ANSWER: No. The agencies proposed, consistent with the Supreme Court decisions, to protect those flowing waters that significantly affect downstream navigable waters. Simply establishing a connection does not mean that the connection creates the required significant effect. The agencies have defined tributaries based on physical indicators of flow – bed and banks and ordinary high water mark – and many "channels" will not meet this definition. The agencies are eager to review public comments on the proposed rule to ensure that the definition of tributary is clear and reflects this.

16. While the proposed rule says groundwater is not jurisdictional, the proposal considers subsurface flows when deciding if a water is adjacent. Isn't this another way of making groundwater jurisdictional?
ANSWER: No. Although shallow subsurface flow can be used to establish a connection to Waters of the U.S. under the definition of "neighboring," it is not itself jurisdictional, and the proposal specifically excludes groundwater.

17. Why doesn't the definition of "floodplain" in the rule include a single frequency interval?
ANSWER: The proposed rule does not define floodplain because there is no scientific consensus on how to do so. However, the agencies want to hear specific comments on how this is possible to do.

18. Is all land and water in a floodplain subject to CWA jurisdiction?
ANSWER: No. The CWA does not apply to uplands. Only water features such as streams, wetlands, and ponds in floodplains are potentially covered by the CWA. It is important to keep in mind that normal farming practices can, do, and will continue to occur in waters in floodplains without the need for a 404 permit.

19. Will the proposed rule expand CWA jurisdiction over ditches, canals, and similar man-made channels?
ANSWER: No. The proposed rule would reduce jurisdiction over ditches currently covered by the CWA. For example, the rule would exclude ditches constructed on dry land and that flow less than year round. This would exclude from CWA protection, for example, many roadside ditches and irrigation ditches. Simply put, if a ditch is not constructed through a wetland or a stream, and if it doesn't flow year round, it would not be included in the jurisdiction of the CWA. Where a ditch is constructed though a wetland or a stream and connects to a navigable water, it will be treated the exact same way it was treated before this proposal.

20. How is the term "upland" used in the proposed rule?
ANSWER: Under the rule, an "upland" is any area that is not a wetland, stream, lake or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.

21. If a ditch listed as excluded from jurisdiction is also located in a floodplain, does it become jurisdictional?
ANSWER: No. A ditch excluded from the CWA under the proposed rule would remain excluded even if located in a floodplain. For example, upland areas exist in floodplains. If a ditch drains upland areas, even in a floodplain, and it flows less than 365 days a year, the ditch is not jurisdictional. None of the water features excluded in the proposed rule can be brought back under CWA jurisdiction. Once a water feature qualifies for the exclusion, it is out.

22. Is my rain garden regulated as a "water of the US" under the proposal?
ANSWER: No. Rain gardens and similar green infrastructure would not be regulated under the proposed rule because they are not wetlands or built in waters protected by the CWA.

23. If I have a water listed as "excluded" under the proposed rule, can it become jurisdictional if it also falls into the category of "adjacent waters" or some other category of jurisdictional water?
ANSWER: No. In the proposal, where a water meets a criterion for being excluded from the definition of waters of the U.S., it remains excluded regardless of any other considerations.

24. Will the proposed rule change the current exclusion regarding waste treatment systems constructed in waters of the US?
ANSWER: No. The proposed rule would not change, in any way, existing application of the waste treatment system exclusion.

25. Will the proposed rule change the current exclusion for prior converted cropland?
ANSWER: No. The exclusion from jurisdiction for prior converted cropland is carried forward unchanged from the current rule.