Waters of the U.S.: Clarifying Misconceptions
Webinar Transcript

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Moderator:

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Speaker:

- Nancy Stoner, Acting Assistant Administrator, Office of Water, U.S. EPA

Slide: Waters of the U.S. Proposed Rule (1 of 2)

Jim Pendergast:
Good afternoon and welcome to today's webcast. This webcast is sponsored by EPA's Office of Water. I'm Jim Pendergast with the Office of Water, and I will be moderating today's webcast. Thank you all for joining us today. Before we begin, we have a few tips to keep your webcast experience running smoothly. If you are hearing an echo, please close all browser windows except for the webcast presentation. If you are experiencing technical difficulties, you can type your issue into the white box on your screen and click the "Ask" a button. The responses from our tech team will appear below the white box. If you cannot see the white box on the bottom of your screen, please change your screen resolution by clicking on "Tools" in your web browser and selecting "Zoom Out." If you'd like to see closed captioning, please make sure you have turned off the pop-up blocker and click on the "Closed Captioning" button at the top of the screen.

Slide: Waters of the U.S. Proposed Rule (2 of 2)

Now for the webcast. The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers jointly proposed a rule in April 2014 to clarify protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. Determining Clean Water Act protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006. For nearly a decade, Members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have asked for a rulemaking to provide clarity. There has been some confusion about the proposal and the agencies want to provide the facts. This webinar will address some of the more common concerns and misconceptions about the proposed rule particularly for the agricultural community.

Without further ado, I want to introduce our speaker for today. Our speaker is Ms. Nancy Stoner who is the acting Assistant Administrator for the Office of Water at the U.S. Environmental Protection Agency where she leads the agency's work to protect the nation's water resources. Ms. Stoner's career in environmental policy and law began in 1987 as a trial attorney in the Environment and Natural Resource Division at the U.S. Department of Justice.

She then served as Director at the Office of Policy Analysis in EPA's Office of Enforcement Compliance Assurance and co-director of the Water Program at the Natural Resource Defense Council. She's a 1986 graduate of Yale Law School and a 1982 graduate of the University of

Virginia. The proposed rule that EPA and the U.S. Army Corps of Engineers put out back in April was put out jointly between EPA and the Corps. We also have on the phone with us today three of the colleagues from the Army Corps of Engineers: Jennifer Moyer, who is the acting Chief of the Regulatory Program, William James, who's the acting Deputy Chief of the Regulatory Program, and Stacey Jensen, who is on staff with the Regulatory Program. And now without further ado I will turn it over to Nancy Stoner, EPA's acting Assistant Administrator for Water.

Nancy Stoner:
Great, thanks, Jim. And thanks, everybody, for joining us this afternoon. It looks like we have more than 1,100 people on the webinar today. So terrific that you are taking the time to join us and to hear this update. For those of you that are on the webinar earlier that we had a couple of months ago, some of this will be familiar to you, but we did add a lot of information to address misconceptions and misinformation so there will be some new material at the end that I hope will be helpful to you. So I am going to jump right in. We will have opportunity and time for questions at the end. So you can go ahead and start sending those in by typing them in and we will also have some time at the end to respond to those questions.

So the first slide, the most important thing right there in the first slide is that this is a joint rule, EPA and the Army Corps work together to develop this in a series of meetings together. It went over not just the concepts, but every aspect of it together. And we are here together on this webinar to talk with you about it and to explain our thinking with you today. So the purpose of it is to clarify protection under the Clean Water Act of the scope of the Clean Water Act. And we will talk about that in more detail as we go through.

Slide: The Objective of the Clean Water Act

So the next slide is about the objective of the Clean Water Act. So as you know, the Clean Water Act was passed in 1972 and then it was reauthorized by Congress in 1987. In both of those cases it was a strong bipartisan effort to pass legislation. I think of it as them thinking at that time of future generations and how they could ensure that we would have water resources that were usable by the public. Very much focused on how people use waters and making sure that they were safe for use. And so the quote there, as you see, restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. Very much focused on pollution and the pollution incidents at that time, the burning of the Cuyahoga, the declaration that Lake Erie was dead and so forth. It was focused on addressing those major sources of pollution to make sure those water resources would be safe for use.

Slide: The Clean Water Act

And the term that Congress used was "waters of the United States." And there is not a definition in the statute about waters of the U.S. And it says the term "navigable waters" and waters meaning -- defined in the statute as waters of the U.S. including the territorial feeds. So again, we will talk about it in a little more detail, the Supreme Court has looked at this question at least three times and indicated that this is not navigability was not the focus. It was not about navigation. We already had the Rivers and Harbors Act in 1899. It was about navigation. This was about pollution and protecting waters that link to the navigable waters. The navigation being or the word "navigable" being the jurisdictional link or the national link, congressional link, but protecting those stream systems and protecting the pollution.

Slide: What is the Current Definition of Waters of the U.S.? (1 of 2)

Again, we will talk a little bit more about it but the basic idea is to protect the entire stream system. It's important to keep in mind that there is already a regulation on the books defining the waters of the United States. And that is on this slide, slide five, it lists all of the elements what is in there now. So this proposed rule would not for the first time define waters of the United States, but instead take the Supreme Court precedents and make sure that the current regulatory definition matches up with what the Supreme Court has told us about what the Clean Water Act means and linking that with the science, which is one of the strong messages we got from the Supreme Court is to look at the science to make sure that what we are doing will be effective in protecting those waters. So that is what we are looking at.

Slide: What is the Current Definition of Waters of the U.S.? (2 of 2)

The next slide shows that only the last three elements of this are proposed to be changed in any significant way in the proposed rule. So the first four are the same basically and then we are going to talk about what those proposed changes are to that area that is circled there on the slide. Next slide.

Slide: Streams and Wetlands Matter

So we are going to focus in this discussion on streams and wetlands. There's a general agreement on coastal waters, territorial feeds, the Great Lakes and so forth. Everyone recognizes that those are waters of the United States. And what we are focusing on here is the streams and wetlands that are directly related to those and necessary to protect in order to protect those larger, more iconic or charismatic waters.

Slide: Streams and Wetlands Benefit Communities

So this, again, is information that is probably familiar to most of the people on the webinar but the major functions that we know that streams and wetlands provide, trapping flood waters, recharging groundwater supplies, removing pollution, providing habitat for fish. So the basic idea there is that most of the water actually, and most of the stream miles are in those smaller streams and wetlands and those are the functions that we lose if we don't have effective protection of those waters.

Slide: Streams and Wetlands are Economic Drivers

And then, of course, streams and wetlands are economic drivers. In fact, the surface waters in general are huge economic drivers, pretty much every job in the United States is dependent on some way and having access to adequate usable water supplies. So on the slide we identify hunting, agriculture, energy generation, manufacturing, recreation, fishing, pretty much anything, again.

Slide: Upstream Water Impact Downstream Waters

You can't have a business unless you have access to water resources that people can use. And streams and wetlands, again, that is where most of the water is, that is what you need in order to make the economy function.

And then onto the next slide, upstream waters impact downstream waters. This is a pretty basic scientific principle, but very important because 60 percent of stream miles in the United States only flow seasonally or after the rain. They have a huge impact on downstream waters. You really can't effectively protect those bigger rivers, lakes, coastal waters unless you are protecting the waters that flow into them. That's the basic premise of this effort.

Slide: Streams Provide Drinking Water

And of course, one of the things that streams do is provide drinking water. So about one in three Americans get their drinking water from public water systems that rely at least in part on seasonal and rain dependent streams. You can see the map there, you can see where people are getting that surface drinking water. And the dark area, the dark red is 90-100 percent of the population depending in part on these streams. So they are really critical across the country for providing safe drinking water and that is one of the great things that we have in the United States.

Slide: Why Do a Rulemaking

You can go pretty much anywhere in the United States and you have safe tap water to drink. And I am sure many people on the webinar have been to countries where that is not the case and it is, you know, not just an inconvenience, it's a danger. So here in the United States that is one of the things that we get from the Clean Water Act and the Safe Drinking Water Act working together to provide that safe tap water to Americans.

So why are we doing this rule making? So I have talked a little bit about the purposes. Now I'm going to go on a little bit to sort of the background and the context.

Slide: Supreme Court Decisions Affecting Water of the U.S.

The first thing is the three Supreme Court cases. So I mentioned these already. These are the three cases that very clearly indicated that the Clean Water Act is not to just provide waters that are used for navigation but protects adjacent wetlands and other waters, streams, and so forth as well. And the other thing that they did while affirming that broad reach of the Clean Water Act and how it has been interpreted over time, they did, they narrowed the scope from what it was thought previously before 2001. So the Clean Water Act was thought at that time to protect waters based on use and interstate commerce or linked to interstate commerce including use by migratory birds. The Supreme Court said in the SWANCC case that you see there on the slide from 2001 that that was not the right basis and really emphasized the science and the connections between waters as being very important more so than the interstate commerce link. So that narrowed the scope of the Clean Water Act at that time. And one of the main things we are trying to do is to match the regulations with that narrowed scope that the Supreme Court told us was appropriate for interpreting the Clean Water Act. The other thing as you see referenced in the Rapanos case there in 2006 is that we got a bunch of different opinions there and really a lot of -- and we actually got encouraged by the Supreme Court itself to address it due to the different opinions and the confusion that there was that was reflected in those Supreme Court cases about the scope of the Clean Water Act.

Slide: Reduce Confusion about Clean Water Act Protection

So a narrow jurisdiction and a confused jurisdiction. So one of the things that we are doing is to try to reduce confusion about the Clean Water Act protection.

Slide: Rulemaking was Requested by Many Stakeholders

So that is one of the main purposes, really what is in and what are out are the two main purposes, better protection for the waters that are in and more clarity about what is out. And as the slide that is up right now indicates, the rulemaking was requested by lots of different people from different perspectives. Congress, industry, public, state and local government, agriculture, hunters and fishermen, environmental groups and, of course, as I mentioned already, the Supreme Court itself. Justice Roberts urged us to clarify this scope of the Clean Water Act since it was not clear and since that statute is so important to the American public.

Slide: Supported by Latest Peer-Reviewed Science

So following the guidance of the Supreme Court we are looking very closely at the science and we asked the Office of Research and Development to help us to do that. And what they have done is an analysis of more than 1,000 pieces of peer-reviewed scientific literature, published scientific literature. The report is called the Connectivity of Streams and Wetlands to Downstream Waters. You can see it. It's available on our website. It is currently undergoing review by EPA Science Advisory Board, which it is an independent board that advises the agency on science issues. And that process is underway. We've already gotten some initial feedback from the Science Advisory Board. The rule will not be finalized until we received the final feedback from the Science Advisory Board. We revised the science document that the Office of Research and Development has taken the lead on drafting for us. Those will be final by the time that the rule is finalized so we will have that good strong science background for the decisions we make.

Slide: Provides More Benefits to Public than Costs

The thing that is important about that is not just that it is good science, but that it means that the effort we are undertaking collectively as a society is likely to work. That where we are putting protections in place, where we require permits and so forth, that is actually going to protect the waters and those dollars will be well spent to achieve the objectives of the act.

And that leads me to cost and benefits, which is upon the current slide. As you see, the analysis of the benefits and the kinds of benefits we looked at on the left and the cost and the kinds of cost we looked at on the right and the benefits are roughly twice the cost even if you look at the highest cost estimate and the lowest benefit estimate we still estimate a benefit to the public in this rule and finalizing this rule and it's protections. And some of the benefits are those same functions that I mentioned earlier, reducing flooding, filtering pollution, providing wildlife habitat, supporting hunting and fishing and recharging groundwater. So this is something that has been of a significant interest already to the public, how we do the benefits analysis and we will be making refinements based on the comments we receive. Over time we will find a final benefit and cost analysis to support the final rule.

Slide: Saves Businesses Time and Money

And then one of the things that we think the rule will do is save businesses time and money. So the clarity from what is in and what is out, businesses knowing what they need to do to comply with the Clean Water Act, but also knowing they don't need a jurisdictional determination if the water is out. That will speed up the whole jurisdictional process and save businesses time and money. Also, save federal government, state government, local governments, all of those of us who work together to implement the Clean Water Act time and money as well so a real benefit to our society in terms of efficiency.

Slide: Helps States Protect Their Waters

So the other thing about the Clean Water Act is that it is based on a cooperative federalism approach where the federal and state governments work together to implement the statutes. For example, 46 states implement the Pollution Permitting Program or the NPDES Program and 2/3s of the states rely on the federal definition to determine which waters to protect. States are allowed to do more than what the Clean Water Act applies to. They can protect additional waters if they choose to do so but 2/3s of them use the federal definition.

Slide: What the Rule Does

So now I'm going to do what the rule does and then we will do what the rule does not do. So this is what the rule does part.

Slide: Stream Systems are Protected

So as I mentioned already, one of the main benefits that we think we get is better protection of stream systems, particularly focused on seasonal and rain dependent streams and I already indicated what a great value they provide and how important protection of those streams is to the downstream waters. So that is one of the main things that we think we get from the proposed rule.

Slide: Proposed Rule Changes (1 of 3)

So let's look at the rule changes here. So what we are protecting, we call them streams here, but tributaries is what they are technically called. The rule has a definition of tributaries. That's the first time we would have such a definition in the federal rule and it is on the slide. Waters with bed and banks and an ordinary high water mark that contribute flow to traditionally navigable waters, interstate waters, or territorial seas. So there are a couple of different elements that are important to look at here. So waters with bed and banks and an ordinary high water mark. That is a limiting definition. It is one that says things that are not that are not tributaries and are not waters of the U.S. That is the first time that we have done that and then they have to contribute flow so they do have to be what we think of as a normal layperson thought of as what is a tributary, one that contributes flow to downstream waters and the one they have to link to are the traditionally navigable waters, interstate waters or territorial seas. So that links up with the commerce clause element and as well as with the science and so forth. That these are waters that have that crossing state borders is part of what I think about the territorial seas, international crossings, state borders or they're used for traditional navigation so that's how we link up with the legal test.

Slide: Waters Near Rivers and Streams are Protected

And then the other thing we get is that waters near rivers and streams are protected. Those specifically located in floodplains and riparian areas and those with a direct connection to those stream systems.

Slide: Proposed Rule Changes (2 of 3)

So again, based on the science, it tells us those waters have an effect, a significant effect or substantial effect on the rivers and lakes and streams. So that is what the rule relies upon. Most of those waters are protected today. Again, these are waters that have been historically protected. This makes it faster to protect them and again, save time and money to do that by saying they are protected as a group instead of having to do with individual case specific analysis of these waters.

A couple of things here in the slide on the rule changes. So adjacent waters are jurisdictional. If you look at the rule today, that's what it says. What this does is clarify that that applies to all surface waters, not just wetlands. And so if you have a surface pond or some other kind of other water like that is jurisdictional or a lake or something like that. And existing regulations, again, have adjacent, bordering, contiguous or neighboring. This rule would add a definition of neighboring and that is where it picks up the reference to the floodplains and the riparian areas. So those would be the areas where they are naturally connected to the stream system.

Slide: Other Types of Waters Will be Evaluated on a Case Specific Basis

And then other types of waters will be evaluated on a case specific or case-by-case basis. That's what we do today and that is what the proposed rule will continue.

Slide: Proposed Rule Changes (3 of 3)

We did ask for comment on this issue of other waters because it does not have as much clarity as the other aspects of the rule because it's case specific determination needs to be made so we asked for comments on that whether there's any way to do that in a way that is also more efficient.

Slide: Protection

And then this is an important slide. I think this is a slide that shows how this works in the landscape. So looking at the top left you will see that seasonal and rain dependent streams. Those are part of what we are protecting. Wetlands or other surface waters there with a surface connection, direct connection to the stream system year-round or perennial streams, rivers of course, and then wetlands and surface waters and floodplains or riparian areas. Not the floodplain in the riparian area itself, I think we have a slide on that later, but the water that's located there. And then on the right you'll see floodplains themselves, not jurisdictional, there's lots of other things that we go over also and then the other waters evaluated on a case-by-case basis. So those other waters, those are the ones that are not either the stream or river itself or in the flood plain or riparian area. Those will continue to be evaluated on a case-by-case basis for the significant nexus to the downstream waters.

Slide: Benefits for Agriculture

So we worked really hard to make sure that the proposed rule does not have a negative impact on agriculture, that it actually benefits those involved in farming, ranching, and forestry. We think that is the intent of Congress as reflected in the various exemptions and exclusions that I'm going to talk about that apply to agriculture, but it's also because agriculture is a good land use from a water quality standpoint. Very beneficial to have working lands and to have the stewardship associated with agriculture to protect the downstream waters. So we worked hard to make sure that we thought about those issues, we got input on those issues and that we addressed them as best we can.

Slide: Input from USDA and Agriculture Community Shaped the Proposal and will Shape Final Rule

And that's what the next slide says that we did get input for the past three years, we listened to input from the agricultural community, and we put in a lot of various things that we put in the rule proposal to address the input that we did get. We do hear a lot of concerns in the agricultural community; we are continuing to do a lot of outreach. I believe Alan is in Texas right now on an agricultural tour to do a roundtable there. We have been doing a lot of those with our regional offices and the Army Corps has been involved in a number of those with us so that we can continue to work on it. This is, of course, a proposal so we can continue to work on it to make sure we get these issues right for the final rule.

Slide: All Exemptions and Exclusions Preserved (1 of 2)

And I'm not going to read all the words on this page, but this and the next slide are about all of the exemptions and exclusions being preserved. So every single exemption and we were able to find in the statute, the regulations or the guidance, they are all here. They are all in the proposed regulation.

Slide: All Exemptions and Exclusions Preserved (2 of 2)

If you think there is one that we missed, please let us know about that in the comment period. We think we've got them all. So you can look at them here and the slide that preceded it. These are all of the exemptions that you would find in any guidance document, rule or statute. They are all here.

Slide: Permit not Needed for the Specific NRCS Practices

And then so the next thing is about the interpreter role. So we've been talking so far about the proposed waters of the U.S. rule. In addition to that, the Army Corps and EPA and USDA worked together on an interpretable rule that was announced at the same time as the proposed rule, but it's a separate document. And the idea of it is to incentivize conservation practices. I referenced already the fact that farming and particularly the good stewardship activities that farmer's engage in are beneficial to water resource protection. Conservation activities are particularly beneficial.

Slide: 56 Conservation Practices Exempt from Dredged or Fill Permitting

So what we did with our colleagues at NRCS as well as with the Army Corps is to identify 56 conservation practices that are good for water quality and at least sometimes occur in waters of the United States. And we interpreted an exemption that's already in the statute in 404F which is for normal farming, ranching, and silviculture, or forestry activities. We interpreted that so these 56 practices would clearly be covered by that. So they are added to the normal farming practices, farming, ranching, and silviculture practices that were underway already. These would be clearly exempt from the dredge and fill permitting requirements without any additional paperwork. So the idea was really to incentivize those practices by saying those engaged in the activity, farmers, ranchers or foresters could go ahead and do these conservation activities that would provide water quality benefits. They could do so without consultation in advance with EPA or the Corps or even with NRCS although they could ask the NRCS about their conservation practices. So I think the next slide on that.

Slide: Input is Important

Okay, so that is it on those conservation practices. And we did make it immediately effective so that it would be effective during the farm season this year and we will be taking a close look at that next fall again, with USDA and the Corps to see whether we got the conservation benefits we were looking for and how we would tweak that to make sure that we do get the benefits that we are looking for and to make sure that this is reflective of our intention which again was not to take away any exemptions, but rather to clarify an exemption and make it easier for farmers and ranchers and foresters to obtain.

Slide: Public Input was Considered

Okay, on to input is important. So as I mentioned, we have already gotten a huge amount of input. As you may know before doing this proposed rule we also worked on a guidance with the Army Corps of Engineers, we got input on that as well, so we've had more than four years of dialogue on these basic topics and the substance of these issues, more than 415,000 comments that we have received over the past several years.

Slide: Want Comments and Input on Proposed Rule

But we are not done yet. We have got until October 20 to continue to get comments. We extended the comment period so it is a full 180 days, which is a very long comment period.

Slide: How to Comment on the Proposed Rule

And we did so at the request of lots of different stakeholders who said they wanted more time to look at it and to comment. We gave them that time and we will be considering all of the comments we receive very closely as we move forward to make sure that we have all of your good ideas so that we can make an even better rule when we finalize it.

So this slide is how to comment on the proposed rule. So this is the docket, all of the comments go into a docket in the Federal e-Rulemaking Portal there. You'll see the website and you just follow the instructions, and as I said, you have until October 20th to put those comments in. But you don't have to wait until October 20th. Go ahead and put them in now if you are ready to go in terms of the comments that you have.

Slide: Outreach is Underway Across the Country

We are looking for overall comments, I like it, I don't like it, here is why as well as very detailed comments. I think this word should be changed to that word, I think this concept could be better explained. All of that will be very useful to us and we will be looking at it all very closely with our colleagues over at the Army Corps. And as I said, we are doing a lot of outreach. There have been more than 120 meetings already since the release of the proposal. And then you will see the states there listed. Those are just the agricultural roundtables, headquarters are participating in. The administrator herself was out in Missouri last week. This is a key priority for her as well as for the Army and the Secretary's Office over there. So we are going out, we are talking and focusing particularly on agriculture because we have heard some concerns from agriculture, we want to make sure we understand those and we can address them the best we can.

Slide: We are Listening to Concerns

And we are really trying to, as I say, not only listen to those concerns, we want to have a real conversation about the real issues. One of the problems that we have had and that this webinar will hopefully help to address is there has been a lot of misinformation that is being -- that is on the airwaves, is in the media, and we do not want to spend all of our time talking about things that are not in the proposal. We want to talk about what is in the proposal. Let's talk about what it really says, what the real issues are, let's make it good by working together. That is our goal.

Slide: Ditch the Myth

So one thing we did is to put up some materials to help dispel the myth. So we are calling it ditch the myth. It includes the speech that Administrator McCarthy gave in Missouri last week that I referenced already. It has Q&As that I hope will help answer questions that you have, responses to some of the misconceptions, puts up editorials, opinion columns and so forth. A lot of good information from you representing our perspective. I understand that some people have different perspectives, that's what we are trying to understand but here is information that we feel confident you can rely on in understanding how we intend the rule to work and what it means to us.

Slide: What the Rule Does Not Do

So then I went over what the rule does do and I went over the Ditch the Myth. Now we will talk about what the rule does not to.

Slide: Remember: Clean Water Act Permitting Requirements Apply Only When There is a Discharge of a Pollutant from a Point Source into a Water of the U.S.

And there is more information like this up on that Ditch the Myth website so that you can take a look at it yourself after the webinar today.

Okay, so the first thing is about the fact that this is a rule about the jurisdiction or the scope of the Clean Water Act, which waters are protected under the Clean Water Act. It is not a permitting rule; it does not change any permitting requirement for anyone. So it is just not about permitting, it's about which waters are protected. But the Clean Water Act does not require anyone to get a permit unless they are discharging a pollutant from a point source into a water of the United States. So that will not change. So the way we think about it is if you are not polluting, you are not

destroying a water, you do not need a permit. And only point sources are required to get permits under the Clean Water Act and that definition, which is in the statute, is not being changed. So in general you are engaged in an activity, it does not require -- not just in general, if you are engaged in an activity that does not require a permit today it won't require a permit tomorrow because we did not change that.

Slide: The Proposed Rule Does NOT Include Any Waters That Have Not Historically Been Covered Under the Clean Water Act

And then the proposed rule does not include any waters that have not historically been protected under the Clean Water Act. So I went over this a little bit already when I talked about the Supreme Court cases. It reflects -- the proposed rule reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court. The current rule that is on the books is broader than that so we are narrowing the regulatory scope to match that statutory scope as the Supreme Court interpreted it. But there is no types of waters that were not protected in the '80s and '90s that would not be protected -- I'm sorry, I said that backwards. There is no waters that were not protected in the '80s and '90s that would be protected here. It's only a subset of the waters that were previously protected. And fewer waters overall than what was protected in the '80s and '90s. That is due to the Supreme Court cases in SWANCC and Rapanos narrowing the scope of the Clean Water Act.

Slide: The EPA and the Army Corps are NOT Going to Have Greater Power Over Water on Farms and Ranches

Now one of the things that I mentioned earlier was inconsistency or confusion about what the scope is. So because of that, sometimes people think that certain waters weren't protected, which were protected, but it's no new types. Just more consistent protection of a subset of the waters that were previously protected. Okay. Sorry, I'm behind.

All right, so another concern has been raised. Is this going to give EPA and the Army Corps greater power over water on farms and ranches. Again, no change to permitting requirements, nothing different there, all of the exclusion and exemptions from jurisdiction and they are also exemptions from the permitting requirements. We talked about the 404 exemptions earlier nor formal farming, ranching and forestry. The proposed rule does not change or limit any of them. What it does do is make sure that all of them are in the rule so that it is very clear that they apply. And then, again, the second part is about the interpretive rule that we worked on with NRCS and those agricultural conservation practices. So we are clarifying exemptions by putting in them in the rule, we are not removing any exemptions.

Slide: The Proposal Will NOT Bring all Ditches on Farms Under Federal Jurisdiction

There is another myth out there about the proposal expanding jurisdiction on ditches. I can't tell you how many times I have heard that. That is just wrong. So some ditches have been regulated since the 1970s. The proposed rule does not expand jurisdiction over ditches. What we are doing is clarifying the ditches that are constructed in dry lands that drain only dry lands and don't have the perennial flow are not waters of the U.S. That is most roadside ditches and ditches collecting runoff or drainage from crop fields. The ditches that are generally in are ones that are essentially streams. They are just human altered or paved over streams, channelized streams is what I'm looking for which feed the health and quality of larger downstream water so they are

essentially streams. So there's not a legal definition of a ditch. The question is what is the ditch, what is a stream. If it functions like a stream then it has historically been protected. The agencies have always protected those kinds of ditches and regulated activities that discharge into them from a point source. Those that are out or those that are dug in dry lands, drain only upland, don't have perennial flow or don't flow into a jurisdictional water. So I've been out on farm fields, people show me something, it does not flow into a downstream water, that's not a tributary, that's not regulated, and in most of the agricultural ditches that are involved, those are ones that are dug in uplands and drain only upland. So those are out. So the main thing to keep in mind is either it is altered or channelized stream, those have always been protected. They would still be protected if they meet the definition of tributary, which is, as I already told you, a limiting definition. And then the ones that were by practiced out, the ones that were in the guidance from 2008, that exemption would now be right in the regulation so that it would be very clear that those ditches would be out.

Slide: The Proposed Rule Will NOT Apply to Wet Areas on Fields or Erosional Features on Fields

Proposed rule won't apply to wet areas on fields, erosional features on fields. You have a wet spot on the field, that is not going to be a water of the U.S. We did not change the definition of wetland. That's one thing that's very important for people to know. So if it was not a wetland already, it is not a wetland now, and it is not a water of the U.S.

Slide: EPA and the Army Corps are NOT Taking Control of Ponds in the Middle of the Farm

And then there is concern about ponds. You see there is the Administrator looking at a pond that is not a water of the U.S. There is exemptions already for farms, stock ponds, there is an exemption from jurisdiction, there is an exemption for permitting. Don't change any of that. Those are exempt.

Slide: EPA and the Army Corps are NOT Regulating Groundwater or "Shallow Subsurface Connections"

And then EPA and the Army Corps are not proposing to protect groundwater or shallow subsurface connections. So again, groundwater and shallow subsurface connections, this has been our practice already not to call those waters of the United States. This was put it right in the rule. That would make it very clear, people would know that they were not being considered to be waters of the U.S. If you have a subsurface connection it can connect up waters of the United States. There can be a connection between surface waters, but those subsurface connections, tile drains is the best example of those, those are not treated as waters of the U.S.

Slide: The Proposed Rule Does NOT Mean Permits are Needed for Walking Cows Across a Wet Field or Stream

And the proposed rule does not mean permits are needed for other kinds of normal farming, ranching, and silviculture activities, walking cows across a wet field or stream was an example we saw out there. You don't need a permit for that.

Slide: The Interpretive Rule Does NOT Redefine Normal Farming as Only Those 56 Conservation Practices

And then I mentioned this earlier, but just to clarify it one more time here, so the 56 conservation practices that we identified with the Corps and USDA as being the conservation practices that we wanted to make it easier for farmers to do, those are not the only normal farming practices, but again, we wanted to make sure it was very easy for farmers to do those practices that we incentivize them by saying you did not need to ask anybody, you don't need to do any paperwork. You can go ahead and do those practices consistent with the NRCS standards and those are normal farming activities you can be confident in that.

Slide: NPDES Permits Will NOT be Required for the Application of Fertilizer or Pesticides to Farm Fields

And then NPDES permits are not required for the application of fertilizer or pesticides to farm fields. As a matter of fact, farm fields there is no permitting requirements that apply to farm fields. So not just fertilizer and pesticides, they're not any permitting requirements. You only need a permit if you are discharging into waters of the U.S. from a point source so they do not apply there. Whatever you do on dry land does not require an NPDES permit. If you apply something directly to the waters of the U.S., and it is from a point source, then you need a permit. And the Pesticide General Permit is an example of where there is a general permit that is available for direct pesticide application to waters of the United States. That is a best management practice based permit, it's very simple to obtain that general permit where it is needed but it's only needed if you are applying pesticides directly to waters of the United States, not to farm fields. It does not apply to run-off for farm fields. Again, nothing applies from a permitting standpoint.

Slide: The Proposed Rule Does NOT Automatically Assert Jurisdiction Over Washes, Erosional Features, and Arroyos

And the proposed rule does not automatically assert jurisdiction over washes, erosional features, and arroyos. Again, these are things that we have addressed. The erosional features I know is the word specifically in there, arroyos are something people have said you might want to put the language in there about that. The Clean Water Act applies to some waters that don't flow all of the time. So I mentioned that earlier, seasonal waters are ones that are ephemeral or occur after a rain event, but only tributaries are jurisdictional. So it has to be a tributary, which has to have a bed and bank and an ordinary high water mark. So if you have a water feature, a surface water feature that does not flow frequently enough or with enough volume to exhibit these characteristics it would not be jurisdictional. So open to any comments you have about those, but we think that the idea that those are all brought in, that is wrong. It has to be a tributary.

Slide: EPA and the Army Corps' Rule Will NOT Regulate Land in Floodplains

So the next one says EPA and Army Corps will not regulate land in floodplains. Actually it does not regulate land anywhere. No land. Only water. Surface water, that's it. So it does not require a permit to engage in some activity involving a point source on a floodplain or a riparian area. The proposal simply recognizes that waters within a floodplain are more likely to affect downstream waters. That is what the science shows us so that's what it reflects. It does not require anything different on the floodplain itself. And the last point is important also the Section 404 permit exemptions such as the one for normal farming and ranching activities, they continue even if

they happen in a surface water that is in a floodplain. So those exemptions apply even to jurisdictional waters but no regulations of floodplains.

Slide: The Proposed Rule Would NOT Result in a Takeover of Private Property

The next one is really just sort of a rhetoric point that people have that the proposed rule would not result in a takeover of private property. Some people says it interferes with private property or property rights or water rights. No, it does not do that. It applies to surface waters, doesn't apply to land, doesn't apply rain gutters, doesn't apply to wetlands, doesn't apply to groundwater, looks like we forgot mud puddles, it does not apply to that, doesn't apply to dry ditches. It does not apply to any of those things. So it's only about waters, surface waters that are part of this tributary system adjacent or have a significant nexus with it. It does not apply to all these other things. Water rights is a whole can of worms and that is state law and this does not affect that at all and it does not affect private property rights. If you're doing an activity that does not require a permit now, it would not require a permit after the rule was finalized.

Slide: Federal Agencies are NOT Asserting Regulatory Authority Over Land Use

And the federal agencies are not asserting regulatory authority over land use either. Again, these are just activities that involve discharges into waters, not land use. The Clean Water Act does not tell you what you can do on your land. And the rest of this is about what the Clean Water Act is about and I think I've covered that already how important it is to the economy.

Slide: Non-navigable Waters Have Been Regulated Under the Clean Water Act Since it Was Passed in 1972

I've mentioned this point already, but just to reiterate it here, so the law was passed in 1972. There was litigation about the scope of the Clean Water Act in the 1970s, but it has been clear since then that non-navigable waters, non-navigable, in fact, waters that have been used in navigation they have been protected since the 1970s and the Supreme Court has three times looked at that issue and indicated that is correct. And it has to be correct if we're going to actually protect waters from pollution, which is the whole point.

Slide: The Proposed Rule is Consistent With Supreme Court Decisions

And then some say that the rule is not consistent with Supreme Court decisions. We tried very hard to make sure that it was and have involve the General Counsel's Office both at the Army and here at EPA in trying to make sure that we looked very closely what the Supreme Court said and that we can conform the regulations to the Supreme Court cases and to the Supreme Court's interpretation of the Clean Water Act. That is our intent. So if you have comment on that, again a good time to comment on that but that is what we are trying to do including that more narrow reading of the Clean Water Act that the Supreme Court gave us than the previous -- actually the current rule, the rule that is in effect today does not -- is not limited to match the Supreme Court cases. That's what we are trying to do in this rule.

Slide: The Rule Would NOT Infringe on Private Property Rights or Hinder Development

And I sort of feel like I've covered this already, private property rights or hinder development, the Clean Water Act is not a barrier to economic development. Water fuels economic development

all across this country. But if there is an activity that requires a permit because it involves a point source discharge into a water of the U.S., there are permits available and they are given out every day by states mostly and the Army Corps to allow for property development, to allow for economic activity and to do so in ways that protect the environment. So by providing clarity we think the proposed rule once finalized will help improve the efficiency and the jurisdictional determinations. Those determinations will be done more rapidly and then people can move onto permitting and get the permits more rapidly as well.

Slide: EPA and the Army Corps are NOT Rushing Ahead With a Rulemaking Before any Peer Review of the Science

So we think that this is good for the economy and we are working very hard to make it as efficient as possible so that people get those determinations. We know people want to comply with the Clean Water Act so they need clarity so they know what they need to do, whether they get a permit or not and they can get one promptly.

Almost done here for those looking ahead. The EPA and the Army Corps are not rushing ahead with a rulemaking before any peer review of the science. So first of all, keep in mind that the report on connections between waters, the one that the Office of Research and Development is doing for us is already based on peer reviewed scientific journal articles. So all of it was peer-reviewed once already, no new science, no new sampling. All we did was analysis. That's what our Office of Research and Development did. But to make sure that was good solid foundation for the rule, we did ask the Science Advisory Board to take a look at it. They are doing that now. The SAB, or Science Advisory Board sets its own schedule. But we will not be finalizing the rule until after we get those final recommendations and ORD has a chance to finalize the report. We anticipate the SAB will have completed its work before the comment period now through October 20 closes. So the public will be able to look at that as well and comment on that.

Slide: The Clean Water Act Gives States Tools to Protect Their Waters and Does not Take Away Their Flexibility

And then, of course, the Clean Water Act has a cooperative federalism approach. The whole idea that Congress had, these are very important waters all across the United States, they flow across state lines, they are very important to the economy and to public health and we need to have the federal and state governments work together to protect those waters. So that is the system of the Clean Water Act. This does not change that. So it does not change the balance between the federal and state governments in terms of our roles in implementing the Clean Water Act. As I mentioned, already, water laws and water rights, those are state water rights; they are in charge of that. They have their own laws including ones governing water supply, does not change that. And it allows the flexibility for states to decide how to protect the waters. So the idea is the Clean Water Act is a baseline that says these are waters that we need to protect all across the country to make the Clean Water Act work, states can do more, but they also can take the waters, for example, waters that are not flowing all of the time, that are not deep enough for people to swim in, they don't have to be protected for swimming uses. States do that all the time. They set standards that are based on what the waters are actually used for. This would not eliminate their flexibility. It would retain that balance between the federal and the state governments. We recognize that the states are best equipped to decide what the standards should be, what are the waters used for, what standards are needed to make them usable in the state. And again, this proposal would not change that.

Slide: www.epa.gov/uswaters

Okay, here we are at the end. So the last slide shows you where to get more information. This is the general website for U.S. waters. And it links to everything else that we've been talking about. It links to the interpretive rule, it links to the ORD report, it links to the Corps' website, it links to everything that you would need, where to comment, everything that you would need in order to comment and understand the proposed rule. And I urge you to take a look at the rule itself. When I've been meeting with people in person I've been handing it out. On one piece of paper front and back it's a very short row. The preamble is long, but the rule is short. And you could easily read that and see for yourself what it says. And I really encourage you to do that.

All right, we still have a few minutes for questions so let's see what we have. Jim.

Jim Pendergast:
Thank you, Nancy. And we have a number of questions on here and we will get to them. And the first question on here is, bear with me if I stop speaking because the screen keeps moving on me. How will the SAB review outcome be communicated with the general public? Will it be through a normal Federal Register notice and if so, when can we anticipate the notice?

Nancy Stoner:
So I think it will be communicated online. That would be how we would provide that information. We certainly will put it out so people have that information on the various different vehicles we have like water headlines and so forth so people have information and can look at what the FAB had to say.

Jim Pendergast:
Okay. There's a question about upland draining agricultural ditches that drain into jurisdictional waters. The questioner asked: Does the exemptions still pertain to the upland agricultural ditch?

Nancy Stoner:
So we are not extending any jurisdiction over ditches. So if you look at the words there on ditches and upland ditches, so -- I'm looking for it here Jim. Do you have it?

Jim Pendergast:
It's one of the exceptions in paragraph B for the upland ditches.

Slide: The Proposal Will NOT Bring All Ditches on Farms Under Federal Jurisdictions

Nancy Stoner:
Yeah, there we go, right here. Ditches, excavated-only and uplands draining only upland and having less than perennial floods. So if it meets those three criteria then it would be exempt. It also would be exempt if it does not contribute to flow to one of the downstream waters. So either one of those ways it would be exempt and would not be a jurisdictional water.

Stacey Jensen:
Nancy, this is Stacey from the Corps. I want to point out that paragraph B. is for exclusions, not for the exemptions. People could get those confused on the activity exemptions.

Nancy Stoner:
Okay, thank you.

Stacey Jensen:
I also want to clarify, too, that we are not changing the statutory exemptions so the exception 404F-1C for the maintenance of those drainage ditches and irrigation ditches is also still in play.

Nancy Stoner:
Good point. Thank you for adding that, Stacey.

Jim Pendergast:
There is also a question here about ephemeral streams that flow into closed basins. Are those ephemeral streams jurisdictional?

Nancy Stoner:
It has to be a tributary for it to be jurisdictional. So if it goes into a closed basin and does not link to those traditionally navigable waters, territorial seas, or interstate waters then it is not jurisdictional.

Jim Pendergast:
Okay. There is also a question here about the interpretive rule. Does a farmer need a contract with NRCS to take advantage of the 56 exemptions we talked about?

Nancy Stoner:
No. A farmer does not need a contract. A farmer does not even need to speak with NRCS before taking advantage of that. The farmer, of course, can speak with NRCS if he or she chooses to do so, but just all the farmer would need to do is to follow the practice standard and that activity would be exempt from the dredge and fill permitting requirement.

Jim Pendergast:
Okay. There's a question here about floodplains. Which level floodplains will be considered the proposed rule, 100-year floodplain, 500-year floodplain, or what?

Nancy Stoner:
So we did not use those 100-year, 500-year, we did not use that approach in the proposed rule. So instead we have a definition of floodplain that's based on science. And I welcome comment on that if you have suggestions on things that you think would be better and why you think they would be better, but it does not rely on any particular size of floodplain like that.

Jim Pendergast:
There was a question about when we talked about the exemption for the upland ditches. Do we have a definition for upland?

Nancy Stoner:
Yes, so I'm glad you asked that question because people seem to think that upland means like on top of a mountain or something. All it actually means is that it is not a water. So it is not a wetland, it's not a pond, it's not a lake, it is not a river. So that is an upland. So in some ways it is

really more land. But upland is the term that is used currently in the program so it is familiar to some.

Jim Pendergast:
Okay. And we have a question about what agency does the land owner consult to determine if an isolated body of water and other water under the proposed rule is jurisdictional or not?

Nancy Stoner:
The answer to that would be the Army Corps and so I don't know if the Army Corps wants to answer anything about that but that would be the answer for that.

Jennifer Moyer:
That is correct, Nancy. This is Jennifer from the Army Corps. And we have 38 district offices around the country that implement the Clean Water Act Section 404 program on a daily basis.

Jim Pendergast:
I have a question here that is a comment, first of all, in the presentation that you did not mention lakes. You talked about tributaries, other waters, adjacent waters. Does this mean that lakes are not jurisdictional?

Nancy Stoner:
No. So lakes are jurisdictional and for example, you could have an oxbow lake I mentioned, you could have an a lake that is in the floodplain or the riparian area, that would be protected as an adjacent water. A lot of lakes are big enough that they are actually used for navigation and boating. Those are protected as well.

Slide: www.epa.gov/uswaters

But I was focusing really on the smaller surface waters that most of the questions have been about. But lakes would be protected.

Jim Pendergast:
One of the things we keep in mind is that in the proposed rule one of the things we do not change is that impoundments are continued to be waters of the U.S. and impoundments are sometimes called lakes, too.

Nancy Stoner:
That's a good point. Sometimes impoundments create lakes; those are most frequently the kinds of lakes that you find are actually impounded waters.

Jim Pendergast:
We have time for one more question. And this one is a little bit long. The discharges of dredged or filled material associated with construction of irrigation ditches or the maintenance of ditches have historically been exempt from Section 404. Will these exemptions be maintained?

Nancy Stoner:
Yes, every single exemption and exclusion is maintained including that one and that is a very important one that people are very interested in and, yes, of course, it will be maintained.

So we are out of time so I want to thank everyone for joining us for the webinar today. I am sorry, that I talked so long that we did not have more time for questions, but, of course, we are happy to follow up with you on questions. Feel free to contact us if you have questions and this is your time to comment. This is your opportunity to comment so please do so.

Jim Pendergast:
Okay. At this time we will conclude the webcast. Thank you, Nancy Stoner, and also thank you, Jennifer and William and Stacey from the Army Corps of Engineers. And thanks to everyone who joined us. This ends our webcast for today.