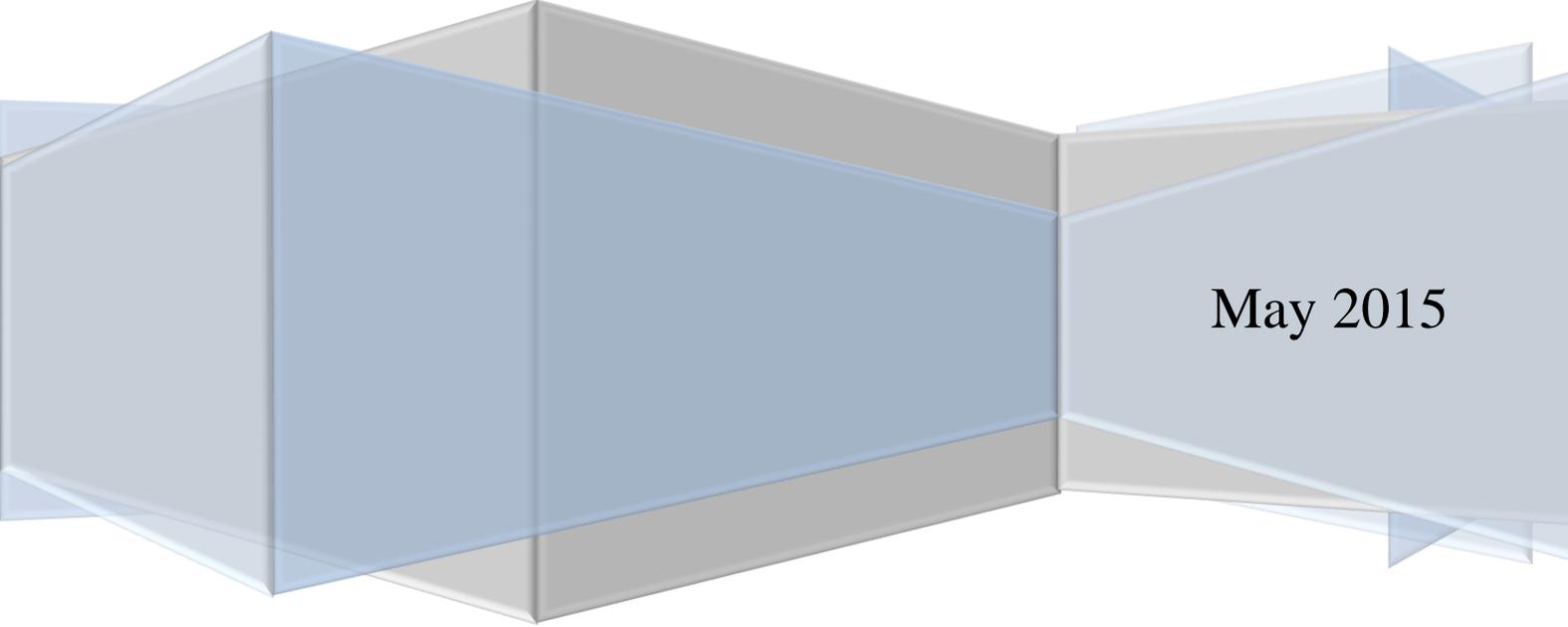


Report on the Discretionary Consultation and Outreach to State, Local, and County Governments for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule

**U.S. Environmental Protection Agency  
Department of the Army**



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## Introduction

The Environmental Protection Agency (EPA) and the Department of the Army (Army) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA). The Clean Water Rule seeks to clarify the definition of the extent of CWA jurisdiction established by statute. State and local governments have well-defined and long-standing relationships in implementing affected CWA programs and these relationships will not be altered. As part of this rulemaking process, the agencies evaluated the potential impact the rule could have on state and local government authority under Executive Order (E.O.) 13132. This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, E.O. 13132 does not apply to this action.

Consistent with EPA and Army policy to promote communications between the agencies and state and local governments, and in recognition of the vital role states play in implementation of the CWA, the agencies voluntarily undertook federalism consultation for this effort and met the terms of E.O. 13132 and EPA guidance for implementing the Order. For this rule State and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous State and local government organizations.

This report provides a summary the Clean Water Rule, the consultation and outreach provided to State and local governments during the rulemaking process, the comments received, and how the comments were used to develop the final rule.

## The Clean Water Rule - Need for Regulation

In light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)*, the agencies have revised their longstanding regulations defining the “waters of the United States.”

In this final rule, EPA and Army clarify the scope of “waters of the United States” that are protected under the Clean Water Act (CWA), using the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise and experience in implementing the statute. This rule makes the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation’s water resources.

This final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas. This interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades. The rule will clarify and simplify implementation

of the CWA consistent with its purposes through clearer definitions and increased use of bright-line rules.

In this final rule, the agencies define “waters of the United States” to include eight categories of jurisdictional waters. The rule maintains existing exclusions for certain categories of waters, and adds additional categorical exclusions that are regularly applied in practice. The rule reflects the agencies’ goal of providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA. The rule establishes jurisdiction in three basic categories: waters that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, and a narrowed category of waters subject to case-specific analysis.

For more information on the rule, see Clean Water Rule: Definition of “Waters of the United States” in the *Federal Register* [EPA-HQ-2011-0880: FRL-991-47-OW].

The final rule does not itself establish any specific regulatory requirements. With respect to the CWA, State, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs and these relationships are not altered by the final rule. Because the rule does not create any new categories of “waters of the United States,” and puts important qualifiers on some existing categories such as tributaries, the agencies do not anticipate the rule will cause an increase in regulatory responsibilities for states and tribes. Programs established by the CWA, such as the section 311 oil spill prevention and clean-up programs, 402 National Pollutant Discharge Elimination System (NPDES) permit program, and the section 404 permit program for discharge of dredged or fill material, rely on the definition of “waters of the United States.” Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution or destruction.

## Role of States and Tribes Under the Clean Water Act

States and tribes play a vital role in the implementation and enforcement of the CWA. Section 101(b) of the CWA states that it is Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator’s authority under the CWA.

Of particular importance, EPA may authorize States and tribes to administer the permitting programs of CWA sections 402 and 404 in the field. Forty-six states and the U.S. Virgin Islands administer the NPDES program under section 402, while two states administer the section 404 program. Additional CWA programs that utilize the definition of “waters of the United States” and are of importance to the states and tribes include the section 311 oil spill prevention and response program, the water quality standards and total maximum daily load programs under section 303, and the section 401 state water quality certification process.

States and tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly or more fully protect the waters in their state. Under section 510 of the Act, unless

expressly stated in the CWA, nothing in the Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the CWA. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. In fact, providing greater clarity regarding what waters are subject to CWA jurisdiction will reduce the need for permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, to make jurisdictional determinations on a case-specific basis.

This rule recognizes the unique role of states related to water quantity and as confirmed by section 101(g) of the CWA. The rule is consistent with Congressional policy not to supersede, abrogate, or otherwise impair the authority of each state to allocate quantities of water within its jurisdiction, and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

Understanding the important role of States and tribes in implementation of this rule, the agencies sought technical input on this rule. Through voluntary consultation and outreach the agencies gathered extensive input from States and tribes that informed the rule throughout development process. The information received from voluntary consultation and outreach to States and tribes is summarized below.

## Summary of Consultation and Outreach Meetings

For this rule, State and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous State and local government organizations. This section will provide a brief summary of meetings held and comments received during the consultation and outreach conducted in 2011 and 2014.

### Consultation and Outreach in 2011

EPA held a series of meetings and outreach calls with state and local governments and their representatives soliciting input on a potential rule to define waters of the US consistent with the CWA and Supreme Court decisions. The agencies voluntarily undertook federalism consultation for this effort under the terms of E.O. 13132 and EPA guidance for implementing the Order.<sup>1</sup>

As part of this discretionary federalism consultation, early in the rulemaking process, the agencies held two in-person meetings and two phone calls in the fall and winter of 2011. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and

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<sup>1</sup> EO 13132 requires meaningful and timely consultation with elected state and local officials or their representative national organizations early in the process of developing the proposed regulation; a federalism summary impact statement to be published in the preamble to the regulation; and, for the agency to provide to OMB copies of all written communications submitted by state and local officials to the Agency.

Townships, the International City/County Management Association, and the Environmental Council of the States. Additionally, the National Association of Clean Water Agencies (NACWA) and the Association of Clean Water Administrators (ACWA) were invited to participate. In response, twelve counties, eight associations, and various state agencies and offices from five states (Alaska, Wyoming, Kansas, Tennessee, and Texas) submitted written comments to inform the development of a proposed rule.

The agencies held many additional calls and meetings with state and local governments and their associations in preparation for the development of a proposed rule. While each call was targeted toward a particular audience, they all followed the same format. Each call or meeting was led by either Nancy Stoner, Acting Assistant Administrator for Water; Ellen Gilinsky, Sr. Policy Advisor in EPA's Office of Water; or David Evans, Director of EPA's Wetlands Division.<sup>2</sup> Each meeting opened with a brief background of the issue and discussion of why EPA and Army were pursuing rulemaking. The overview included a summary of the public agency policy proposal and a request for participants to provide individual input on what should be contained in a proposed rule and what areas of the definition of "waters of the United States" needed additional clarity. The meetings were then opened for general input.

Combined, more than 400 people from a variety of state and local agencies and associations, including the Western Governors' Association and the Association of State Wetland Managers, participated in various calls and meetings.

### Summary of Comments from Meeting Participants

State and local governments and their representatives, including national associations, identified a number of issues, including: need for rulemaking; questions about the scope of "waters of the United States"; concerns about expanded jurisdiction; indicated that terms such as significant, relatively permanent, watershed, tributary, other waters, speculative and insubstantial, and similarly situated should be better defined or clarified; need for a definition and identification of adjacent wetlands; identification and regulation of other waters; definition and identification of tributaries; identification of non-jurisdictional waters; a need for clarity regarding ditches and how and when they are regulated; a need for discussion regarding how headwaters affect downstream waters; the elements of a significant nexus analysis and a definition of significant; and interest in the economic analysis.

Participants stated that a lack of certainty regarding the extent of federal jurisdiction was problematic and expressed concern or uncertainty regarding how federal jurisdiction affected state powers. Some were concerned that any expansion of jurisdiction will hamper new growth and maintenance of existing projects. Some participants expressed concerns that policies would regulate all ditches, upland ephemeral swales, and agricultural lands. The agencies requested discussion regarding whether and how state programs changed as a result of court decisions (*SWANCC*, *Rapanos*).

Participants raised questions regarding the identification of adjacent wetlands. Some participants saw discussion of subsurface connections as regulating groundwater, and were unclear what shallow

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<sup>2</sup> All position titles noted in this document reflect the individual's position at the time consultation occurred.

subsurface connections were and whether they too would be regulated. The agencies clarified that this type of hydrologic connection would not be jurisdictional itself. Some participants discussed methodologies for evaluating ecological connections, and some asked for additional discussion in a rule.

Some participants expressed concern that the draft guidance's discussion of aggregation of waters in the watershed meant all waters would be jurisdictional and land use would be regulated. Several requested that the agencies clearly define "similarly situated," "other waters," and continue to exclude some waters from jurisdiction (e.g., manmade ponds, stock ponds, storm water retention ponds).

There was significant discussion regarding identifying tributaries. States, in particular, noted that tributary identification should be regionalized because distinguishing characteristics of tributaries (especially ephemeral streams, washes, and alluvial fans) vary by region. Discussion noted that sometimes it was difficult to distinguish between erosional features and tributaries, but that this was an important marker for federal policy. Likewise, discussion identified a desire for a rule to identify the upper reach of federal jurisdiction. There was general agreement that erosional features such as rills and washes should not be regulated.

Participants requested additional clarity on which ditches are and would be regulated. Counties, in particular, repeatedly stressed this point. Participants were uncertain of the jurisdictional status, under current practice, of ditches receiving water from agricultural return flows and storm water flows. Many called on us to keep current exemptions from CWA permit requirements.

Participants requested that a rule identify examples for determining how the biological, chemical or ecological effect will constitute a "significant nexus." Participants requested additional clarification on the meaning of "significant," especially whether there was a consistent threshold for identifying significance. Many expressed concerns that the proposed watershed concept would regulate everything, including land use, within a watershed. State and local governments asked whether any modeling showed the relevance of headwaters for significant nexus analyses.

During many calls, the merits of a point-of-entry approach to defining "in the region" were discussed as best matching Justice Kennedy's opinion and the need to show connection to a traditional navigable water (TNW). Some participants expressed concern that in some cases this can result in an extremely large watershed, especially in the arid west. They asked the agencies to identify options to narrow this approach.

Most participants asked the agencies to maintain all current exemptions, for agriculture, forestry, waste treatment, maintenance, and so on. Some asked for additional blanket exemptions (not regulating any roadside ditches, for example). Participants asked that in a rule the agencies be clear about how the exemptions are applied to promote national consistency.

State and local governments expressed concern that impacts on the regulated community and state/local governments were not adequately assessed in the economic analysis accompanying the draft guidance. They asked the agencies to address potential costs to non-404 programs. One

organization (the National Association of Counties) provided studies regarding likely costs of getting a permit. They also expressed a concern that a lack of available data will lead to underestimated costs. Local governments in particular expressed concern that any increase in jurisdiction could delay needed maintenance and repair work, putting homes and people at risk from flooding while counties wait for permits.

Some participants expressed the opinion that clarifying the scope of CWA jurisdiction is a task for Congress, not the agencies. States have expressed concern regarding jurisdictional consistency for 402 and 404 permits, and have asked for clear coordination between state and federal agencies to ensure consistency on determinations.

The agencies heard during the federalism consultation and outreach in 2011 that a rule should be proposed. On April 21, 2014, the agencies published a proposed rule defining the scope of waters protected under the CWA.

### **Consultation and Outreach in 2014**

Similarly to the outreach conducted prior to the development of the rule, the agencies committed themselves to providing a transparent, comprehensive, and effective process for taking public comment on the proposed rule. During the comment period of April – November 2014, the agencies strove to gather all the input possible from a broad range of stakeholders who have critical experience, scientific information, or business perspectives regarding implementation of CWA programs. To meet this goal, the agencies convened over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others to provide an enhanced opportunity to provide input on the proposal.

As part of this discretionary federalism consultation, EPA held a meeting on May 13, 2014, to seek technical input on the proposed rule from the largest national representative organizations for State and local governments. Organizations included the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States (ECOS).

During this process EPA also extended its outreach to include a series of meetings with the Local Government Advisory Committee (LGAC), and ECOS in conjunction with the Association of Clean Water Administrators (ACWA) and the Association of State Wetland Managers (ASWM).

In April 2014 LGAC formed a workgroup to help coordinate intergovernmental strategies, planning, and promote an exchange of information from the local level. The workgroup also provided recommendations to LGAC on advice to give EPA and Army on issues related to the proposed rule. The agencies hosted four joint meeting with LGAC committee members to provide direct feedback to

questions on the proposed rule. The LGAC submitted a compilation of the comments provided during these meetings to the agencies during the public comment period for further consideration.

In September 2014 the agencies agreed to participate in a series of meetings hosted by ECOS/ACWA/ASWM where participants from the EPA and Army would provide requested clarification on the proposed rule and understand state feedback and recommendations for the final rule. Comments provided during these meetings were compiled and submitted to the agencies during the public comment period for further consideration.

The agencies held many additional calls and meetings with state and local governments and their associations, prior to finalizing this rule. While each call was targeted toward a particular audience, they all followed the same format. Each call or meeting was led by either Kenneth J. Kopocis, EPA Deputy Assistant Administrator for Water; Ellen Gilinsky, Senior Policy Advisor in EPA's Office of Water; or John Goodin, Acting Director of EPA's Wetlands Division. Each meeting opened with a brief background of the issue and discussion of why EPA and Army were pursuing rulemaking. The overview included a summary of the public agency policy proposal and a request for participants to provide individual input on what should be contained in the final rule and what areas of the definition of "waters of the US" needed additional clarity. The meetings were then opened for general input.

### **Summary of Comments from Meeting Participants**

Some State and local government representatives expressed support for the proposed rule and the agencies' oversight, for programs that require federal guidance. These participants viewed the rule as consistent with current practice, and believed that the proposed rule provided clarification of where 404 permits are needed and thus where 401 certification is needed.

State and local governments and their representatives, including national associations, identified a number of issues, including: reasonable regulations for states; concerns about expanded jurisdiction; the impact on agriculture; the impact on electricity transmission; potential mission creep and its unintended consequences; the invasion of property rights; case-by-case determinations; the treatment of manmade and man-altered structures; treatment of ephemeral streams; definition of riparian area; definition of floodplain; definition of significant nexus; definition of reoccurrence levels; and how to educate of the public.

Some participants requested clear categories that identify which waters are considered jurisdictional, and more diagrams to define all terms included in the rule.

Participants raised concerns about significant nexus determinations and the potential delays caused by the interpretation of significant nexus in the proposed rule. Some recommended EPA and Army work with States to predetermine those areas that are waters of the U.S. through mapping, planning tools, etc.

Some participants saw discussion of subsurface connections as regulating groundwater, and were unclear what shallow subsurface connections were and whether they too would be regulated.

Participants expressed mixed opinions on tributaries. Some supported the proposed definition, while others considered the inclusion of perennial, intermittent, ephemeral flows, and manmade ditches as an expansion of jurisdictional scope.

Participants asked for additional clarity regarding ditches -- specifically, when a ditch becomes a tributary, and when a ditch is exempt. Many participants recommended a definition of "ditch" be included in the rule, as well as the clarification of terms like "uplands" and "does not contribute to flow." Some expressed concern with the impact downstream connections could have on current practices used for ditch maintenance. Others requested clarification on the jurisdiction of ditches across state lines, as well as roadside ditches with low flow.

Participants requested clarification on "other waters" that can be enforced consistently across all regions. Some expressed concern with the legal interpretation of the definition, and others questioned if ditches not clearly excavated were included in the category. Several participants, noted that making jurisdictional determinations for other waters based on significant nexus leaves room for interpretation and possible inconsistencies in implementation of the regulation as these water would be subject to case-by-case determinations.

State and local governments expressed mixed opinions on the EPA's draft Connectivity Report (*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*). Some participants stated support for the rule and its scientific underpinning. Others raised concern with the contents of the report and the sequencing with the publication of the proposed rule. Some participants recommended the rule be re-published if the final Connectivity Report caused any change to the proposed rule.

Participants requested clarification in the exclusions section. Many asked the agencies to be explicit about the exclusions provided by the rule to ensure consistent interpretation. Some also asked the agencies to clarify in the rule that maintenance of local streets, gutters, and ditches are excluded. Other requested wastewater treatment systems, specifically MS4s and features like stormwater retention ponds, and green infrastructure used to reduce stormwater impacts, be explicitly excluded by the rule.

State and local government representatives expressed concern with implementation of the proposed rule. Participants stated that costs are likely to be higher than the estimates included in the economic analysis. Some stated the need to focus resources on waters States can afford to address. Participants raised questions regarding the burden on permitting, and of delays. States asked the agencies to clarify their responsibility in implementing the rule.

The agencies also received written comments from the following State and local government organizations whose responses can be found in the response to comment document, available in the docket for this final rule (Docket Id No EPA-HQ-OW-2011-0880): Association of State Drinking Water Administrators, Association of Clean Water Administrators, American Association of State Highway and Transportation Officials (AASHTO), Environmental Council of the States, Groundwater Protection

Council, National Association of Counties, National Association of State Departments of Agriculture, National Association of State Foresters, National Governors Association, Western Governors' Association, Joint Local Governments Association, U.S. Conference of Mayors, National League of Cities, National Association of Counties, National Association of Regional Councils, National Association of County Engineers, American Public Works Association, and National Association of Flood and Stormwater Management Agencies. The agencies also received the final recommendations of the LGAC workgroup.

## Responses to Comments

The agencies committed themselves to providing a transparent, comprehensive, and effective process for taking public comment on the proposed rule. In addition to the focused consultation and outreach meetings discussed above, the agencies convened over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others to provide an enhanced opportunity to provide input on the proposal. The agencies also received over one million public comments that informed this rule.

The comments received from consultation and outreach for federalism identified a number of areas where the proposed rule could be more effective in protecting clean water, could be clearer and easier to understand, and more responsive to the needs of states and local governments. Below are some of the major comments the agencies heard during the consultation and outreach meetings and in public comments submitted to the agencies:

- Protect and enhance the key role given to states and tribes under the statute to implement CWA programs.
- Understand potential indirect effects on cities, counties, and other municipalities that must comply with the requirements of the CWA.
- Define the scope of CWA jurisdiction consistent with decisions of the Supreme Court.
- Recognize the role of farmers in conserving the nation's vital aquatic resources.
- Address potential burdens on the small business community.
- Ensure the CWA remains effective in protecting the clean water on which the nation depends for our health, the economy, and the environment.
- Make the rule less complicated, easier to understand, and more predictable to implement.

The agencies listened carefully, and this input is reflected in a number of key revisions of the rule:

- **Protect Tributaries and their Adjacent Waters:** Science clearly demonstrates that tributaries and their adjacent waters, as defined in the rule, must be protected from pollution and destruction under the CWA. The nation's streams, creeks, rivers, and their adjacent waters are not just connected to downstream traditional navigable waters, interstate waters and the territorial seas, they are integral to protecting the chemical, physical, and biological integrity of these downstream waters.

- **Provide More Bright Lines:** Science shows that certain additional wetlands contribute to downstream waters by holding flood waters, filtering pollutants, and trapping sediments. The rule identifies the places where these wetlands are found and where appropriate establishes them as similarly situated for conducting case-specific determinations of whether they are “waters of the United States.”
- **Simplify Definitions:** The final rule establishes that only those waters that have the physical indicators of sufficient flow – bed and banks and an ordinary high water mark – are protected tributaries. Some commenters also raised concerns that the definition of “neighboring” was unnecessarily complicated and confusing. The agencies revised the rule by removing some terms that caused confusion and providing clearer lines identifying protected waters.
- **Reduce Potential Burdens on Farmers:** The rule makes clear that current farming practice remains unchanged. Features such as tile drain systems; grassed waterways on farms; ditches with either ephemeral flow through dry land or those that do not connect to the tributary system; gullies and erosional channels; and features on farm land including non-wetland swales, farm and stock ponds that are built on dry land, as well as all features that do not have the physical indicators of protected tributaries; and prior converted cropland – are not protected under the CWA.
- **Exclude Many Stormwater Control and Water Recycling/Reuse Structures:** The rule makes clear that many municipal separate storm sewer system structures and water recycling structures including retention and detention basins, infiltration structures, curbs and gutters, and water delivery systems constructed on dry land are not protected under the CWA.

## Conclusion

Executive Order 13132, “Federalism”, was issued by President Clinton to guarantee the Constitution's division of governmental responsibilities between the federal government and the states (64 FR 43255, August 10, 1999). This action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Recognizing the significant role of State and local governments in implementing affected CWA programs, the agencies voluntarily consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

The feedback received from State and local governments informed the development of a rule that is not only based on sound peer-reviewed science and the law, but also easier to understand and implement. In addition, it protects jobs dependent on clean water, saves time and money for the regulated community and agencies implementing the CWA, and ensures that the nation will continue to have abundant and safe supplies of clean water for businesses, farming, communities, fishing and swimming, and drinking water. The rule reflects important improvements identified in hundreds of meetings with stakeholders and over one million public comments.

America thrives on clean water. The rule is vital for the success of the nation's businesses, agriculture, energy development, and the health of our communities. The agencies have defined the scope of the CWA in a regulation that protects clean water and public health, promotes jobs and the economy, and ensures the agricultural community has clarity needed to continue to produce the food, fuel, and fiber upon which we rely.