

A decorative graphic on the right side of the page features three blue, 3D-rendered spheres of varying sizes. The largest sphere is at the top, a medium one in the middle, and the largest one at the bottom. Two thin, light blue diagonal lines cross the page, one from the top-left to the bottom-right, and another from the top-right to the bottom-left, intersecting the spheres.

***Final Report of the  
Discretionary Small  
Entity Outreach for  
the Clean Water Rule:  
Definition of “Waters  
of the United States”  
Under the Clean  
Water Act; Final Rule***

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U.S. Environmental Protection Agency  
Department of the Army

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## Contents

Introduction.....	2
Background on CWA Jurisdiction .....	3
Summary of the Final Clean Water Rule.....	3
Summary of Economic Analysis.....	4
Key Elements of the Analysis.....	5
Evaluation of Jurisdictional Determinations .....	6
Costs and Benefits.....	6
Identifying Small Entities.....	6
Summary of Outreach to Small Entities.....	7
Summary of Outreach in 2011 .....	7
Summary of Comments from Small Entity Participants.....	8
Summary of Outreach in 2014 .....	11
Summary of Comments from Small Entity Participants.....	12
Recommendations and Responses to Comments from Small Entity Participants.....	16
Conclusion .....	22

## Introduction

The Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme court cases, particularly decisions 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 and Carabell v. United States (Rapanos)*. The Clean Water Rule seeks to clarify the extent of CWA jurisdiction established by statute.

Waters, including wetlands that meet the definition of “waters of the U.S.” under the Act and relevant case law are subject to CWA requirements. Waters that do not meet this definition are not subject to CWA provisions. The CWA establishes oil spill prevention programs (Section 311); requires permits for pollutant discharges (Section 402); requires permits for the discharge of dredged or fill material in waters of the United States (Section 404); calls for states to set standards for meeting water quality goals and develop plans to restore polluted waters (Section 303); establishes state roles in certifying that federal permits or licenses will not violate state water quality standards (Section 401); and provide tools for the federal government, states, and communities to enforce the law.

Supreme Court decisions have sparked confusion and increased uncertainty regarding which waters are protected under the Clean Water Act.

As requested by a diverse group of stakeholders including the agriculture community, environmental and conservation groups, state and local governments, and small entities, EPA and Army are seeking to provide clarification as to what waters are and are not jurisdictional and thus protected by the CWA.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Today’s rule is not designed to “subject” any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of “the waters of the United States, including the territorial seas” (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006).

Nevertheless, the scope of the term “waters of the United States” is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, EPA and Army determined to seek wide input from representatives of small entities while formulating the proposed

and final definition of this term that reflects the intent of Congress consistent with the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011, Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development process, about how the agencies should approach this complex question of statutory interpretation.

The agencies conducted outreach meetings in 2011 and 2014 designed to exchange information with small entities interested in this action. This report provides a summary of the following:

- Background information on CWA jurisdiction
- Summary of the final rule
- Summary of potential economic impact
- Summary of the 2011 and 2014 outreach meetings; and
- A discussion of the comments.

## Background on CWA Jurisdiction

Congress enacted the amendments to the Federal Water Pollution Control Act, or CWA, in 1972 to address pollution entering the nation's waters and to complement statutes such as the Rivers and Harbors Act that protect the navigability of waters. As a pollution prevention statute, the CWA extends beyond waters that are navigable in fact to include the headwater streams, lakes, and wetlands that require protection to meet its stated public health, environmental, and water quality goals.

For almost 40 years, the legal test applied in determining the geographic scope of waters protected under the CWA was based on the authority given the Federal government under the Commerce Clause of the United States Constitution. The courts, including the Supreme Court, have consistently agreed that the geographic scope of the CWA should reach beyond waters that are navigable in fact. As a result, the CWA has consistently protected rivers, streams, creeks, wetlands, lakes, the territorial seas, and other water bodies on which Americans rely for clean, healthy, and abundant sources of water. The CWA serves as the nation's single most important statute for protecting America's clean water.

In light of 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)* regarding the scope of "waters of the United States," the agencies are revising their longstanding regulations defining the "waters of the United States."

## Summary of the Final Clean Water Rule

In this final rule, EPA and Army clarify the scope of "waters of the United States" that are protected under the 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].

For this rule, the agencies also prepared an economic analysis that is summarized below.

## Summary of Economic Analysis

The final rule includes eight categories of jurisdictional waters, maintains existing exemptions for certain categories of activities and waters, and adds additional exclusions for categories of waters that are never covered under the Act. It is a definitional rule that clarifies the scope of “waters of the United States.”

Programs established by the CWA, such as the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the section 404 permit program for discharge of dredged or fill material, and the section 311 oil spill prevention and clean-up programs, all 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 and destruction.

The agencies prepared an economic analysis to better understand the incremental costs and benefits that may result from any change in the number of positive jurisdictional determinations<sup>1</sup> associated with CWA programs relying on the definition of "waters of the United States." This summary describes the overall approach and presents the key results from the economic analysis. For more detailed information on these analyses, please see *Economic Analysis of the EPA-Army Clean Water Rule* (Docket No. EPA-HQ-2011-0880) in the docket for this rule.

## Key Elements of the Analysis

When determining which waters are covered by the CWA today, the agencies make jurisdictional determinations consistent with the law, existing regulations and policy, and the Supreme Court rulings in 2001 (*SWANCC*) and 2006 (*Rapanos*). This scope of waters currently covered by the CWA is considerably smaller than the scope of waters historically covered prior to the *SWANCC* and *Rapanos* Supreme Court decisions. Based on the reduction in the scope of CWA jurisdiction, the agencies conclude that the new rule would impose no additional costs when compared to historic application of the regulation it replaces.

For purposes of this economic analysis, the agencies evaluated costs and benefits associated with the difference in jurisdictional determinations between the new rule and recent field practice, which is based on the 2008 EPA and Army jurisdiction guidance. This policy guidance has been implemented by the agencies since 2008 and reflects the Supreme Court decisions that limited assertion of CWA jurisdiction for some types of waters. Because of the limited amount of national level data and modeling capability, the agencies are following OMB circular A-4 guidance by conducting a scenario analysis. In the analysis was conducted using three alternate scenarios that illustrate how determinations might be affected and the resultant range of impacts. In one scenario, the agencies combined a series of "high end" assumptions, including that twice as many jurisdictional determinations will be made for "other waters" as indicated in recent U.S. Army Corps of Engineers (Corps) data. The second scenario followed an approach similar to that used in the economic analysis accompanying the proposal. The final scenario assumes the number of "other waters" determinations will be the same as indicated in the recent Corps data. The percentage increase in positive jurisdictional determinations annually under the scenarios ranged from 2.84 to 4.65. Compared to the "recent field practice" 2008 guidance baseline the agencies anticipate the new rule will result in an increase in the number of positive jurisdictional determinations and an associated increase in both costs and benefits that derive from the implementation of CWA programs. Overall, the analysis indicates that for all scenarios of costs and benefits associated with the future implementation of the rule through CWA programs, the indirect incremental benefits exceed indirect incremental costs.

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<sup>1</sup> A "positive jurisdictional determination" is a decision to assert CWA jurisdiction over a particular water. The alternative is a "negative jurisdictional determination" which is a decision not to assert CWA jurisdiction over a particular water. It is important to note that the purpose of the economic analysis is not to estimate the change in the numbers of waters subject to jurisdiction.

## Evaluation of Jurisdictional Determinations

To calculate costs and benefits to CWA programs, the agencies first estimated the potential changes to jurisdictional determinations due to the final rule. The agencies reviewed a sample of negative jurisdictional determinations (JDs) (i.e., determinations of no jurisdiction) completed by the Corps in fiscal years 2013 and 2014 to assess whether or not the JD would change under the final rule.<sup>2</sup> The agencies relied upon JDs covering three categories of waters— streams, wetlands, and other waters as the basis for analysis. Conservative assumptions were applied that have the effect of consistently increasing the number of positive JDs that results from the new rule.

As a result of these the estimates derived for all three categories of JDs in the FY13 and FY14 data, the agencies estimate that there will be an increase in positive jurisdictional determinations annually due to the new rule when compared with recent field practice.

## Costs and Benefits

The agencies made the conservative assumption that the final rule could affect entities regulated under CWA programs in direct proportion to this percentage change in positive jurisdictional determinations. To estimate annual costs and benefits, the agencies uniformly applied the 4.65 percent increment in jurisdiction to the total costs and benefits for the Sections 311, 401, 402 (stormwater, pesticide general permit, Concentrated Animal Feeding Operation permits) and 404 programs to account for an estimated increase in permitting and activities that would result. The agencies relied on existing annual administrative and compliance cost information, and updated cost figures to 2014 dollars.

Overall, the agencies' analysis indicates that for all scenarios of indirect costs and benefits associated with the future implementation of the rule through CWA programs, the indirect incremental benefits exceed indirect incremental costs by a ratio of up to 2:1. The greatest potential for changes in jurisdictional determinations will likely be seen in case-specific determinations of similarly situated and adjacent waters, previously defined as "other waters." Lastly, indirect costs and benefits may be over-estimated because each newly jurisdictional water will not be affected by all CWA programs simultaneously, and a particular activity affecting a water may be exempt from permitting under the Clean Water Act.

## Identifying Small Entities

For purposes of assessing the impacts of the Clean Water Rule on small entities, "small entity" is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA)'s size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is

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<sup>2</sup> The information available in the Corps' ORM2 database does not allow the agencies to evaluate the percent of waters currently found to be jurisdictional that will not be under the final rule.

a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

More information about what constitutes a "small business" is available at the Small Business Administration's website: [http://www.sba.gov/sites/default/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf)

## Summary of Outreach to Small Entities

For this rule the agencies sought technical input from small entities at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging small entities in person during key milestones in the rulemaking process, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach in 2014. This section will provide a brief summary of the outreach meetings held in 2011 and 2014 and comments received.

### Summary of Outreach in 2011

In 2011 the agencies, in collaboration with the Office of Management and Budget (OMB), and SBA, conducted an outreach meeting designed to exchange information with small entities on various potential jurisdictional policies.

The agencies developed an initial list of potential participants, identifying small entities to invite from small entity outreach efforts conducted for previous rulemakings and from public comments submitted to the docket for the draft jurisdictional guidance released in May 2011 (Docket EPA-HQ-OW-2011-0409). This initial draft of potential participants was shared with Army, OMB's Office of Information and Regulatory Affairs, and SBA's Office of Advocacy. At the SBA's request, a few additional participants were added to the list of invitees. A complete list of those organizations invited appears below:

#### Oil and Gas Industries

- Gary Williams Energy Corporation

#### Farming/Agriculture

- Water Stewardship, Inc.
- American Farm Bureau Federation
- National Agricultural Aviation Association

#### Construction and Development

- National Association of Home Builders State Representative of LA
- McAllen Construction, Inc., representing the Associated General Contractors of America
- Buckeye Development, LLC
- Terra Verde Associates

- Tropicana Building Corporation
- Four Corners Materials
- National Association of Home Builders
- Association of General Contractors

## Manufacturing

- National Association of Manufacturers

## Municipal Separate Storm Sewer Systems or Publicly Owned Treatment Works

- City of Farmers Branch, Texas
- California Stormwater Quality Association, Monterey Regional Stormwater Program
- Minnesota League of Cities Stormwater Committee

## Small Non-governmental Organizations

- Tip of the Mitt Watershed Council

All invited small entity participants were provided with documents outlining the history of CWA jurisdictional policy and potential jurisdictional policies for various aquatic resources in advance of the meeting.

The meeting took place in Washington, DC, on October 12, 2011, and included representatives from EPA, Army, SBA, OMB, as well as the small entity participants listed below. At the meeting attendees participating in person and via conference call were briefed on the background of the rulemaking and given the opportunity to provide input on the implications of jurisdiction of various aquatic resources for the agencies to consider as the rulemaking is further developed.

At the time the outreach meeting was held, the most recent public statement of policies relating to defining "waters of the U.S." was the agencies' draft guidance, so many commenters referred to that as a reflection of the agencies' likely policy choices and as a general baseline for comments.

The agencies invited participants to give their focused feedback on concerns that they may have regarding a potential change in jurisdiction during the meeting and also accepted written comments following the meeting. Written comments were requested by October 26, 2011, which the agencies later extended to November 17, 2011. Issues discussed during the October 12 outreach meeting and written comments are summarized below.

## Summary of Comments from Small Entity Participants

### General Need for Jurisdictional Clarity

The primary concern raised repeatedly by all participants was the need for clarity as to which

aquatic resources are jurisdictional and which are excluded from jurisdiction. The current approach of determining jurisdiction on a case-by-case basis can be very time- and resource-intensive. One participant noted that when pricing projects where there is jurisdictional uncertainty, this ambiguity is included in the price quote as well. By providing a clearer definition of what is jurisdictional, these time and resource investments could be avoided.

Businesses and property owners may also find themselves in violation of the CWA as they may be unaware that a water they are discharging into is considered jurisdictional. Violators of the CWA are at risk for civil and criminal penalties and providing additional clarity as to which waters are jurisdictional can help companies and landowners minimize their risk.

To help provide jurisdictional clarity participants commonly requested concise definitions for terms that determine jurisdiction such as isolated, adjacent, tributary, and ordinary high water mark. One participant also noted that an erosional feature and an ephemeral stream can have similar characteristics and it is important to have a sharp distinction between the two. Participants also suggested that EPA and Army maintain a list of Traditionally Navigable Waters (TNWs) that are considered jurisdictional to help businesses and landowners determine if an aquatic resource is likely to be jurisdictional.

Participants recommended that the agencies determine general categories of jurisdictional waters, eliminating the need for case-by-case determinations. The list of features identified as generally not jurisdictional should also be very clear and exhaustive; participants advocated strongly for removal of the term "generally" as it creates unnecessary ambiguity.

### **Jurisdictional Status of Groundwater**

The draft jurisdictional guidance released in May 2011 indicated that when determining if a water could be considered "adjacent," EPA and Army could use lateral water flow through a shallow subsurface layer to establish a hydrologic connection to a jurisdictional water. Participants raised concerns that this could be interpreted to mean that groundwater would be considered jurisdictional under the CWA. Several attendees had many concerns as to the implications of groundwater being considered jurisdictional under the CWA as it would impact many of their operations and expose contractors and others to additional CWA liability.

### **Jurisdictional Status of Ditches**

The potential jurisdiction of ditches was of concern to several attendees. In the draft guidance released in 2011 the agencies noted that "ditches that are not tributaries or wetlands" were excluded from jurisdiction. Several entities expressed concern that this policy appears to be a departure from current practice and would significantly expand jurisdiction over ditches, and could make agricultural and roadside ditches jurisdictional. If jurisdiction were to be asserted over these types of ditches there would be significant cost and liability implications.

## Impoundments

Impoundments of waters of the U.S. may be considered jurisdictional, but impoundments constructed wholly in uplands are generally not jurisdictional. For example, farm ponds for stock watering constructed wholly in uplands and fed by groundwater would generally not be jurisdictional. Several participants found the discussion in the 2011 draft guidance regarding the jurisdiction of impoundments to be confusing, specifically when it relates to the jurisdiction of farm ponds. One participant suggested that in order to provide as much clarity as possible, all preamble language related to impoundments should be housed together.

## Implications for Low Impact Design (LID)

LID is being implemented around the country, commonly to control stormwater. Several participants raised concerns that ditches, swales, or other bioretention features may require CWA Section 404 permits for their installation or maintenance. Swales may sometimes utilize wetland plants, which one participant believed makes them more likely to be found jurisdictional, especially over time as they take on more wetland characteristics. The need for multiple permits for the installation and maintenance of LID devices could have significant resource implications for cities and may be a disincentive for their use.

## Similarly Situated Waters Approach

The 2011 draft guidance indicated that similarly situated waters are physically proximate other waters (non-wetland waters that would satisfy the definition of "adjacent") in the same point-of-entry watershed and these waters should be evaluated together to determine whether they satisfy the significant nexus standard. A point-of-entry watershed is all waters upstream of and which drain to a TNW or interstate water through a single point of entry. One participant noted that this could be interpreted to mean that once a jurisdictional determination is completed for one water in a watershed, it could be interpreted to apply to all of the waters in that watershed. The participant noted significant legal concerns with this policy as, in his opinion, other landowners in the area would not be offered the opportunity for due process. If the agencies used such an approach during rulemaking, the participant recommended that the agencies reach out to other landowners in the watershed when completing a jurisdictional determination.

## Interpretation of Supreme Court Cases

Many participants hold strong views regarding how to properly interpret the *SWANCC* and *Rapanos* Supreme Court cases that affect the scope of CWA jurisdiction. There was much discussion during the meeting on this issue and the written comments submitted by participants present their views in detail. Many participants believe the Supreme Court has limited the EPA and Army's ability to assert jurisdiction over waters as tributaries based on the presence of an ordinary high water mark (OHWM) or any hydrologic connection to navigable waters. Additionally, many participants believe that the decisions in *SWANCC* and *Rapanos* limit the jurisdiction of wetlands that are adjacent to tributaries and render isolated, intrastate waters non-jurisdictional.

## Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (SISNOSE). The national industry associations in attendance feel strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel, if the EPA found the rule would have a SISNOSE. In the opinion of the associations, this rule would have a SISNOSE and thus a SBAR Panel should be convened. The associations also believe that a rule to revise the definition of the term "waters of the U.S." would have direct effects on small entities as this change in jurisdiction may require additional small entities to comply with existing CWA programs.

## Summary of Outreach in 2014

Similarly, in 2014 the EPA and Army solicited participation from small entities in a follow up meeting on October 22, 2014. At the time of the meeting, the most recent public statement of policies relating to defining "waters of the U.S." was the proposed rule dated April 21, 2014. A complete list of those invited appears below:

### Farming/Agriculture

- National Cattlemen's Beef Association
- National Cotton Council
- American Farm Bureau Federation

### Construction and Development

- The Associated General Contractors of America (2 reps)
- Terra Verde Associates
- International Council of Shopping Centers
- National Association of Home Builders
- Louisiana Home Builders Association
- Granite Commercial Real Estate
- Buckeye Development, LLC

### Manufacturing

- National Association of Manufacturers

### Municipal Separate Storm and Sewer Systems or Publically Owned Treatment Works

- City of Farmers Branch, Texas
- Carlsbad Soil and Water Conservation District

## Mining

- National Stone, Sand, and Gravel Association
- American Exploration and Mining Association

## Fertilizer and Pesticide Application

- Water Stewardship, Inc.
- Responsible Industry for a Sound Environment
- D.C. Legislative and Regulatory Services

## Power

- American Public Power Association
- The National Rural Electric Cooperative Association

## Other Interests Groups

- Golf Course Superintendents
- Professional Landcare Network
- Small Business Administration, Office of Advocacy

The participants were asked to provide early feedback and recommendations on the proposed rule prior to the close of the public comment period on November 14, 2014. The issues discussed during the outreach meeting on October 22, 2014, and written comments are summarized below.

## Summary of Comments from Small Entity Participants

### Call for a SBREFA Panel

Several small entity participants suggested that EPA, Army, and small entities would benefit from convening a small business advisory review panel (SBREFA panel), regardless of the determination by EPA and Army that the proposed rule would not impact a significant number of small entities. Two participants asserted that the meeting held on October 22, 2014, did not “meet the letter or spirit” of the SBREFA requirements and did not substitute for a SBREFA panel. It was recommended that EPA and Army follow the recommendations of the Small Business Advocacy office on this matter.

### General Need for Jurisdictional Clarity

The primary concerns raised by small entity participants were related to the need for more clarity in determining which bodies of water are jurisdictional and which are exempted from jurisdiction under the proposed rule. Participants cited several examples of why jurisdictional clarity is important for small entities, including the following:

- Lack of clarity can lead to “legal loopholes” that can be used by some individuals or organizations to stop development or other business activities.
- Land purchasers often have limited time and access to conduct land analyses, so they may not be able to adequately make jurisdictional determinations in the time available. This can make it

difficult to decide on whether to make land purchases and to determine the appropriate land price.

- For some businesses (e.g., gravel excavation), there is a perception that all of their work may be subject to case-by-case determinations, which will add time and expense to projects.
- Uncertainty serves as a deterrent to development, because it adds to potential risk. This will serve to slow down the pace of economic recovery. (States like New Hampshire that rely on property taxes will be particularly hard hit.)

The lack of clarity largely stemmed from definitions and applications of key terms such as tributaries, ditches, adjacency, and aggregated or similarly situated (aggregated) waters. Participants recommended that EPA and Army provide more clear and concise definitions of key terms. They also noted that it would be helpful to have a field-specific guide. The guide could include a list of different aquatic resources as well as pictures to illustrate what is and is not jurisdictional. The more guidance and specificity EPA and Army can provide, the easier it will be to avoid jurisdictional questions and issues.

### Jurisdictional Status of Ditches

A few participants raised questions about the potential jurisdiction of ditches. In particular, participants asked about the concept of seasonal flow. Previously, if a ditch had met the Scalia test (if it was a perennial well or intermittent more than seasonal) it was automatically considered jurisdictional. The new rule moves away from "seasonal" in defining jurisdictional waters and uses the term "perennial" instead. The "seasonal" terminology is also used in the 2008 Guidance, which adds to the confusion.

While discussing ditches, participants also raised questions about exclusions in the context of duration and connection to non-excluded waters. It is unclear whether a ditch that is excluded is always excluded or whether it can become jurisdictional at some point in the life of a project (e.g., a ditch that later becomes a wetland because it is no longer maintained and takes on more natural characteristics). It is also not clear whether an excluded ditch could become jurisdictional if it connects other jurisdictional waters.

### Aggregated Water Bodies

Some participants expressed concern about the impact of aggregated water bodies on different industries. One participant asked about how the concept of aggregated water bodies or common landscapes applies to linear projects that have several crossings of individual water bodies. There was concern about whether or not utilities would still be able to operate under a general permit if these waters are aggregated. In particular, there is a perception that individual water bodies would be combined and considered a single water body.

Other participants were concerned about how this concept might impact development projects. If a developer is buying a property, it is unclear how a developer would know if there are jurisdictional issues associated with other parcels that may impact the purchased property if it is part of an

aggregated feature. This is of particular concern for projects that incorporate new stormwater techniques that lack maintenance and could eventually turn into jurisdictional waters. In addition, developers may not know whether a property that they are developing is part of an aggregated feature even though they may conduct their due diligence.

Finally, one participant asked whose responsibility it is to notify a property owner (who may have owned their land for many years) if a water body on their property is now part of some aggregated feature.

Participants provided the following suggestions in response to the concerns raised about this topic:

- When a jurisdictional determination is made based on similarly situated waters, there should be a communication that goes out to notify those who may be impacted by that determination.
- EPA should develop a Question & Answer document or guidance for specific industry sectors when the final rule is issued.
- There should be a transition period in the enforcement schedule to allow time for affected industries to understand the requirements and move towards full compliance.

## Definition of Tributary

Participants were interested in how EPA defined tributaries. There were concerns that as the definition of tributary expands, it will increasingly affect how people use their land. They see the new rule as expanding the definition, which would create problems especially for small business owners who do not have as many resources as larger companies do. Even if the EPA and a regulated entity are in agreement that a body of water is not jurisdictional, vagueness in defining the term could make room for third parties to find reasons to argue that it is indeed jurisdictional.

## Adjacency

Several participants had questions regarding what waters adjacent to a floodplain would be jurisdictional. The rule is currently not clear, and there is no additional definition of an adjacent water or any limit to how far a water resource must be from a floodplain to no longer be considered jurisdictional. Placing limits on the jurisdictional area adjacent to a floodplain or mapping them would clarify exactly which waters would be jurisdictional based on adjacency.

## Rule Seen as Expansionary

While EPA has held that the rule would increase exemptions and free bodies of water from jurisdiction, meeting participants felt that the rule would do exactly the opposite. This perspective is based largely on the definitions of key terms. For example:

- The term water is described in a footnote of the proposed rule in a way that seems broader than in the past. The reference to biological connection in particular could make many more waters jurisdictional.
- The concept of adjacency is not well articulated, and it is unclear what adjacent waters would be jurisdictional under the new rule (e.g., an entire riparian area or just a portion).

- The reference to "shallow subsurface water connection" is also unclear and could force some companies to seek case-by-case jurisdictional guidance on all of their projects.

The conflicting viewpoints could be remedied if the rule was made more specific so everyone can easily determine which waters are jurisdictional and how many new aquatic resources will fall under government jurisdiction after the new rule is in effect.

### Lack of Clarity Related to Municipal Separate Storm Sewer Systems (MS4s)

One participant emphasized that there was significant confusion about what is or is not regulated under an MS4 permit. Small entities are particularly impacted by this. It was recommended that MS4s be included in the waste treatment exemption.

### Possible Effects on Development & Small Businesses

One participant described the proposed rule as "business unfriendly," and many participants expressed concerns about the potential negative impacts on business and development. For example, jurisdictional waters tend to devalue land. This means that developers and business owners may be hesitant to purchase land or build on land because of the risk that property may become devalued because of new jurisdictional determinations.

Businesses that require permits may be reluctant to do their work because of fear and uncertainty related to the proposed rule. Until they get more clarity, they may be reluctant to act. In the case of pesticide applications, this may result in public health impacts if pesticide applicators are reluctant to spray for disease-bearing insects out of concerns over whether or not they are in compliance or concerns about citizen action suits.

There may also be issues with small businesses not being able to secure permits in a timely manner. There is no guarantee that a business can get a CWA permit, and the consequences for failing to have a permit can be severe. For example, golf courses need permits for a variety of activities (e.g., water use, stormwater conveyance, pesticide application, etc.). If a golf course, which usually fits the definition of a small business, cannot procure a permit for these activities, it cannot operate. Because of all of the uncertainties associated with the new rule, small businesses could view the new rule as a "taking" under the Constitution and many properties may go out of business.

### How the Rule will be Implemented

Meeting participants raised concerns regarding whether or not bodies of water would be grandfathered. For example, a water body could have been determined to be non-jurisdictional and then become subject to jurisdiction when the rule is released. The question is whether the jurisdiction will change or if the jurisdictional determination will apply to the life of the determination.

Participants were concerned that this rule would lead to an increase in case-by-case determinations of jurisdiction. This will require some companies to hire consultants and engineers to make these

determinations, but many smaller businesses do not have the necessary resources to acquire these services. This means that small operators may not have the capacity to make these determinations.

Several participants also noted that there is a broad network of organizations and individuals involved in implementing the proposed rule. EPA and Army need to not only make sure it has the resources to implement the rule, but it also needs to provide its state and local partners with the resources they need to understand it and implement it consistently. This is already playing out in one state that has decided to change the point of compliance for one entity's permitted discharge. The change is being made as a result of evolving understanding of the definition of "waters of the U.S."

## Recommendations and Responses to Comments from Small Entity Participants

During the outreach meetings in 2011 and 2014 EPA and Army provided an opportunity for the meeting participants to provide verbal and written comments on the draft documents under review.

As noted above, similar recommendations were provided by the small entity participants during both meetings. The agencies have developed the following responses to the comments received from small entities to address issues raised, and provide feedback on how these recommendations were considered in the development of the final rule.

### General Need for Jurisdictional Clarity

The primary concern raised by all participants was the need for clarity as to which aquatic resources are or are not jurisdictional. The 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 agencies believe continuity with the existing regulations, where possible, will reduce confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies have included, where consistent with the law and science, bright line categories of waters that are and are not jurisdictional. This rule categorically identifies as "waters of the U.S." traditional navigable waters, tributaries, adjacent waters, interstate waters, and impoundments of jurisdictional waters. As requested by many small entities during the outreach meetings, the agencies have clarified some of the terms use, such as adjacent, tributary and significant nexus, in the final regulation. Ordinary high water mark is already defined in regulations (see 33 C.F.R. § 328.3(e)).

The agencies also identified categories of waters and wetlands that continue to require a case-by-case significant nexus evaluation to determine whether they are "waters of the United States" and protected by the Clean Water Act. In these cases, current scientific evidence regarding these waters does not provide a basis for a categorical determination, either positive or negative.

Actions to clarify the definition of "waters of the U.S." will increase predictability and minimize the need for case-by-case determinations and are in line with requests from the regulated community, including many small entities.

## Jurisdictional Status of Groundwater

Current practice under the 2008 *Rapanos* guidance is that the presence of an unbroken shallow subsurface connection between a water of the United States and a wetland indicates that the wetland is "adjacent." Participants at the small entity meeting raised concerns that this could be interpreted to mean that groundwater would be considered jurisdictional under the CWA.

The agencies emphasize that groundwater is not subject to regulation under the CWA, and the proposal did not change that longstanding statutory interpretation. This rule clarifies that groundwater is not jurisdictional regardless of its relationship to the floodplain.

## Jurisdictional Status of Ditches

Several entities expressed concern that policies identified in draft guidance of 2011 and the proposed rule of 2014 would significantly expand jurisdiction over ditches and could make agricultural and roadside ditches jurisdictional. They noted that if jurisdiction were to be asserted over these types of ditches, there would be significant cost and liability implications.

The rule continues the current policy of regulating ditches that are constructed in tributaries or are relocated tributaries, or that science clearly demonstrates are functioning as a tributary. These waters affect the chemical, physical, and biological integrity of downstream waters. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, such as ditches that flow only after precipitation.

## Impoundments

The final clarifies that impoundments of jurisdictional waters are jurisdictional by rule in all cases. The existing regulatory language with respect to impoundments, "[i]mpoundments of waters otherwise defined as waters of the United States under this definition", remains unchanged. The Supreme Court has confirmed that damming or impounding a water of the United States does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

## Implications for Low Impact Design (LID)

Several participants raised concerns that swales, or other bioretention features called for by LID may require CWA Section 404 permits for their installation or maintenance. The agencies support the use of LID features. Despite concerns, most LID features, such as rain gardens, are not designed to hold water and would not be considered jurisdictional waters or wetlands.

## Similarly Situated Waters Approach

One participant expressed concern that once a jurisdictional determination is completed for one water in a watershed, it could be interpreted to apply to all of the waters in that watershed, and thus deny other landowners in the area the opportunity for due process. It was recommended that the agencies reach out to other landowners in the watershed when completing a jurisdictional determination using the similarly situated waters approach.

The agencies’ policy for similarly situated waters is based on its interpretation of Justice Kennedy’s opinion in *Rapanos*, which states that a significant nexus exists where a water, either individually or in combination with similarly situated waters in the region, has a more than speculative or insubstantial effect on downstream traditional navigable waters. The rule defines the “in the region” as the “point of entry watershed,” that is, the topographic area draining to the nearest TNW or interstate water through a single point of entry. The agencies believe that the point of entry watershed is an appropriate interpretation of “in the region” for the purposes of applying Justice Kennedy’s significant nexus standard.

In the rule, the agencies also establish that defined sets of additional waters may be determined to have a significant nexus on a case-specific basis: (1) five types of waters that the agencies conclude are “similarly situated” and therefore must be analyzed “in combination” in the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus analysis; and (2) waters within 4,000 feet of the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or covered tributaries. The rule establishes a definition of significant nexus, based on Supreme Court opinions and the science, to use when making these case-specific determinations.

## Interpretation of Supreme Court Cases

Many participants hold strong views regarding how to properly interpret the *SWANCC* and *Rapanos* Supreme Court cases that affect the scope of CWA jurisdiction. There was much discussion during the meetings and in written comments. Some participants believe the Supreme Court has limited the EPA and Army’s ability to assert jurisdiction over waters as tributaries based on the presence of an OHWM or any hydrologic connection to navigable waters. Additionally, many participants believe that the decisions in *SWANCC* and *Rapanos* limit the jurisdiction of wetlands that are adjacent to tributaries and render isolated, intrastate waters nonjurisdictional.

The agencies agree that decisions in *SWANCC* and *Rapanos* combined to reduce the historic scope of CWA jurisdiction, and the final rule reflects a narrower interpretation of the CWA’s scope than did the previous rule. The agencies expect, however, that in practice under the final rule the agencies will assert CWA jurisdiction over some additional waters when compared to the practice under the previous rule as interpreted by the agencies’ 2008 guidance in response to *SWANCC* and *Rapanos*. This is because the final rule is able to provide better clarification of the agencies’ interpretation of the Supreme Court

decisions. The final rule does not, however, extend federal jurisdiction to any waters not historically protected under the CWA and is fully consistent with the law, including decisions of the Supreme Court.

Justice Kennedy explained the *SWANCC* decision in his concurring opinion in *Rapanos*: “In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” The agencies’ application of the significant nexus standard avoids Commerce Clause and federalism concerns because the standard is derived from Justice Kennedy’s opinion, which explicitly addressed such concerns.

### Regulatory Flexibility Act

The national industry associations in attendance felt strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel, if the agencies found the rule would have a significant economic impact on a substantial number of small entities (SISNOSE). In the opinion of the associations, this rule would have a SISNOSE and thus a SBAR Panel should be convened. The associations also believe that a rule to revise the definition of the term “waters of the U.S.” would have direct effects on small entities as this change in jurisdiction may require additional small entities to comply with existing CWA programs.

The agencies disagree with this interpretation. The final rule is not designed to “subject” any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of “the waters of the United States, including the territorial seas” (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction will be informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006). OMB concurred with the agencies’ determination.

Nevertheless, the scope of the term “waters of the United States” is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, EPA and Army determined to seek early and wide input from representatives of small entities while formulating the proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court’s decisions.

EPA and Army worked with SBA and other key agencies to discuss whether or not SBREFA would be triggered and determined that it would not be. Given the vital role small entities play in implementation of the CWA, the agencies decided to solicit technical input through outreach. Such outreach, although voluntary, is also consistent with the President’s January 18, 2011, Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, at a preliminary stage, about how the agencies should approach this complex question of statutory interpretation.

The public comments identified a number of areas where the rule could be more effective in protecting clean water, could be clearer and easier to understand, could help to reduce potential burdens on farmers and small businesses, and could be more responsive to the needs of states and local governments. Below are some of the major comments the agencies heard during meetings with stakeholders 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.

These and other comments received were considered in the development of the final rule.

## Adjacency

Representatives from the agencies agree that not placing a limit on floodplain adjacency would be problematic. The final rule establishes a definition of "neighboring" for purposes of determining adjacency. In the rule, the agencies identify three circumstances under which waters would be "neighboring" and therefore "waters of the United States":

- (1) Waters located in whole or in part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary.
- (2) Waters located in whole or in part in the 100-year floodplain that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment, or a tributary ("floodplain waters").
- (3) Waters located in whole or in part within 1,500 feet of the high tide line or the ordinary high water mark of a tidally-influenced traditional navigable water, including the Great Lakes, or territorial sea.

The agencies emphasize that the rule covers as adjacent waters only those waters that currently available science demonstrates possess the requisite connection to downstream waters and function as a system to protect the chemical, physical, or biological integrity of those waters. The agencies recognize that the establishment of "bright line" thresholds in the rule for adjacency does not in any way restrict states from considering state-specific information and concerns, as well as emerging science, to evaluate the need to more broadly protect their waters under state law. The CWA establishes both national and state roles to ensure that states specific-circumstances are properly considered to complement and reinforce actions taken at the national level.

## Aggregated Bodies of Water

The concept of aggregation is not about aggregating impacts. Rather, this concept is about looking at water features to determine if they can be treated similarly. This is intended to help streamline determinations, because water bodies that exhibit common features will either be jurisdictional or not. Even if a body of water is determined to be jurisdictional as part of an aggregate, it will be regulated individually.

## Rule Seen as Expansionary

EPA reiterated that the rule is not meant to expand waters covered by the Clean Water Act, but rather was meant to clarify how EPA defines "waters of the U.S." The scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries.

## Effect on Development & Small Businesses

From a legal standpoint, the scope of regulatory jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. Consequently, this action will not affect small entities to a greater degree than the existing regulations.

The Clean Water Rule does not directly establish any specific regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" that are protected under the 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.

## How the Rule will be Implemented

Under existing Corps' regulations and guidance, approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant or, consistent with existing Corps' guidance, unless new information warrants revision of the determination before the expiration period. Similarly, consistent with existing regulations and guidance, approved jurisdictional determinations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization.

In addition to the feedback received from the outreach meetings summarized 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. For information on the written comments received on RFA during the public comment period for the proposed rule, a detailed

response to comments document was prepared by the agencies and is available in the public docket for this rulemaking (Docket EPA-HQ-OW-2011-0409).

## Conclusion

The comments received from outreach with small entities identified a number of areas where the proposed rule could be more effective in responding to the concerns raised by small entities. Below are some of the major comments the agencies heard during the outreach meetings and in the written comments submitted to the agencies:

- Address potential burdens on the small business community.
- 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.
- Make the rule less complicated, easier to understand, and more predictable to implement.

The agencies listened carefully to recommendations provided by small entities through the rulemaking process, and what the public had to say and their 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.

The agencies' final rule is based on sound peer-reviewed science and the law, and is 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 hundreds of thousands of public comments.

The final rule does not itself establish any specific regulatory requirements. Instead, it is a definitional rule that clarifies the scope of "waters of the United States" consistent with the CWA, Supreme Court precedent, and science. Programs established by the CWA, such as the section 311 oil spill prevention and clean-up programs, the section 402 NPDES permit program, and the section 404 permit program for discharge of dredged or fill material, all 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 and destruction.

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 we rely upon.