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WLA Policy Brief¹

EPA/Army Corps Proposed Rule to Clarify "Waters of the United States" (WOTUS) under the federal Clean Water Act

FINAL - 12/02/14

Summary

This Brief consists of five sections and an appendix, as follows:

- **Background and Overview** covers the basics of the federal Clean Water Act and an overview of the proposal.
- **Considerations** includes some topics that helped form the basis of WLA's proposed comments.
- Using WLA Experience to Inform Input is a series of WLA member scenarios and "takeaways" to help inform and bolster WLA input on the rule.
- **Recommendations** includes WLA staff-suggested actions, including draft comments to the agencies.
- **Further Reading** provides additional resources for those who wish more detail and perspectives.
- **Current vs. Proposed Rule** (Appendix A) contains a side-by-side comparison of the current (for 404, last amended in 1993) and proposed rule.

Background and Overview

On April 21, 2014, the U.S. EPA and Army Corps of Engineers proposed a rule to clarify the geographical scope of jurisdiction under the federal Clean Water act (CWA), which prohibits discharge of pollutants to, or placement of dredge or fill materials in, "Waters of the United States" without a permit.

In addition to this Jurisdictional Rule, the two agencies issued an Interpretive Rule which added CWA exemptions for certain soil and water conservation practices, if the practices comported with one or more of 56 NRCS national accepted soil and water conservation practices. The comment deadline for the Jurisdictional Rule is November 14, 2014. Comments on the Interpretive Rule were due July 7, 2014. In contrast to the Jurisdictional Rule, which may be revised based on public comment before implementation (or withdrawn), the Interpretive Rule is already being implemented. This Brief relates to the Jurisdictional Rule and references the Interpretive Rule where relevant.

¹ Please direct questions, comments, and suggestions to Kathleen@westernlandownersalliance.org.

Related WLA Action

Prior to the proposed Jurisdictional Rule being published in the Federal Register, WLA was contacted by groups interested in WLA weighing in on this proposal. WLA staff obtained a pre-publication copy of the proposal and began their research, proposing to use WLA member experiences to shed light on, and interpret, its potential implications. In May, WLA program staff started a list of potential WLA interpretive scenarios by contacting WLA members to determine who had experience with CWArelated proceedings, when they occurred, and their thoughts on the results. In May, WLA posted to their website a video of a Montana Legislative hearing on the Jurisdictional Rule proposal. On June 10th at WLA's summer meeting in Ennis, Montana, staff provided a briefing on the EPA/Corps proposed Clean Water Act Jurisdictional Rule to the WLA Board, Advisors, staff, and partners in attendance. Staff then prepared a Policy Brief and coordinated WLA input on the related Interpretive Rule, with WLA comments submitted to EPA on July 7th. Staff organized an August 7 EPA "Waters of the US" (WOTUS) webinar for WLA members and partners.

Drafts of this write-up served as a vehicle for exploring the proposal and its potential implications, as well as in refining WLA input to the EPA/Corps on the Jurisdictional Rule by the November 14, 2014, comment deadline. We appreciate the involvement of all who provided input, questions, experiences, and review.

About the Federal Clean Water Act

The general objective of the federal Clean Water Act (Act), most of it enacted in 1972, is to "... restore and maintain the chemical, physical, and biological integrity of the Nation's waters...". The Act prohibits discharge of pollutants to navigable waters without a permit.

A discharge of pollutants is confined to point sources. A point source is a confined, discernible, discrete conveyance. Agricultural stormwater discharges and return flows from irrigated agriculture are excluded from this definition, but confined animal feeding operations are not.

"Navigable waters" are defined as the waters of the United States and the territorial seas. No definition is provided in the law for "waters of the United States", but courts have confirmed the extent is beyond the traditional navigable waters. Between agency-developed interpretive guidance, court decisions, and failed attempts to define "Waters of the US" in Congress, there continues to be confusion as to what waters are jurisdictional. This proposed rule is the agencies' attempt to clarify that jurisdiction in a way they believe is consistent with applicable court decisions.

After the law passed in 1972 (as a significant revision of the 1948 Federal Water Pollution Control Act), concerns arose about its potential impact on agricultural practices. As a result, in 1977, Congress enacted a lengthy list of exemptions for "normal farming, ranching and forestry practices". See the lists of exemptions from 404 permitting <u>here</u> and <u>here</u>.

The full Act, as amended and by section, is <u>here</u>. The definitions section is <u>here</u>. The pollutant discharge permit section of the Act is <u>here</u>. The portion of the Act dealing with dredge and fill of Waters of the US, related types of permits, and state roles is <u>here</u>. Current regulations defining "dredged" and "fill" are <u>here</u>, and details on the agricultural exemptions are <u>here</u>. A wetland/404 informational brochure is <u>here</u>.

Why now?

Two US Supreme Court cases have thrown the EPA/Corps CWA jurisdiction into question. Plus, the connection to "commerce" (see Appendix) has always been awkward and required difficult and case-by-case analyses. There are examples of people unsure of whether they need a permit accepting

jurisdiction (and the associated permitting), rather than waiting for a determination. In the 2001 SWANCC decision, the Court found that merely the presence of migratory waterfowl was not sufficient for the Corps to extend regulatory jurisdiction to an isolated wetland. In the 2006 Rapanos case, the Court issued a split decision - four justices felt the Corps was acting within its jurisdiction; four felt there should be a continuous surface connection for waters to be jurisdictional; and one fell between the two, opining that there should be some type of "significant nexus" between the water body subject to the assertion of regulation and downstream navigable waters. The agencies have since pursued the "significant nexus" argument to ensure they are consistent with a plurality of the Court.

The agencies propose that significant nexus be determined categorically for streams with a bed and bank and OHWM, due to the accumulated science supporting the importance of upstream waters to downstream water quality. the EPA's Scientific Review board confirmed that, "the available science supports the conclusion that the types of water bodies identified as waters of the United States in the proposed rule exert strong influence on the physical, chemical, and biological integrity of downstream waters"¹. (They also note that waterways without BB/OHWM may also exert strong influence on downstream waters.) They also recommend the agencies clarify that significant nexus is a legal term not a scientific one.

The Court, Congress, permittees, and others have long encouraged the Administration to clarify CWA jurisdiction and to do it by rule, not guidance. This is their attempt to do so. Post-SWANCC/Rapanos attempts by Congress to clarify CWA jurisdiction have failed.

The Proposal

The first 76 pages of the 88-page <u>proposed Jurisdictional Rule</u> is background information (i.e., the Preamble). The remainder is one set of definitional text (see Appendix A, right column) proposed to be added to eleven sections of the Act, as listed below.

CWA Sections Proposed to be Amended with a Revised

Definition of "Waters of the United States"

33 CFR Part 328 - Definition of Waters of the United States (re Army Corps of Engineers jurisdiction)

40 CFR Part 110 - Discharge of Oil

40 CFR Part 112 - Oil Pollution Prevention

40 CFR Part 116 - Designation of Hazardous Substances

40 CFR Part 117 - Determination of Reportable Quantities for Hazardous Substances

40 CFR Part 122 - EPA Administered Programs - The National Pollution Discharge Elimination System

40 CFR Part 230 - Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material

40 CFR Part 232 - Section 404 exemptions and the "recapture" provisions

40 CFR Part 300 - National Oil and Hazardous Substances Pollution Contingency Plan

40 CFR Part 302 - Designation, Reportable Quantities, and Notification (re hazardous substances)

40 CFR Part 401 - General Provisions (re effluent limitations and regulation of point sources)

¹ D. Allen, EPA Science Advisory Board <u>letter</u> to EPA Administrator, September 30, 2014.

These sections of federal regulations all have some type of definition of "waters of the US" or "navigable waters"; some are very similar, others less so. Most include some reference to the regulation in current CFR Section 328.3(a). Appendix A includes a juxtaposition of the more extensive of the above <u>existing</u> regulations (last amended in 1993, for 404 permitting) with the proposed rule.

Basically, those individuals affected by current and proposed CWA jurisdiction are those that want to discharge a <u>pollutant</u> (or place dredge or fill material) into a <u>jurisdictional water</u> that is not otherwise <u>excluded</u>, with the activity not being otherwise <u>exempt</u>. Pollutants are described above; jurisdictional waters, exclusions, and exemptions are described below.

Jurisdictional Waters, Including Wetlands

Streams currently considered waters of the US (where point source discharges are prohibited without a permit) are those with a bed and bank and ordinary high water mark. Under the proposed rule, perennial, intermittent, and ephemeral (flowing only in response to precipitation events) may all be confirmed as jurisdictional if they meet the above criteria. The EPA differentiates streams from "erosional features" (e.g., swales, gullies, rills, etc.), which are not jurisdictional. If a stream is interrupted by a reservoir, or a section that no longer has a bed, banks, and ordinary high water mark, its upper sections may still be jurisdictional despite the interruption if the other conditions are present.

According to the agencies, water in irrigation ditches that discharge to a jurisdictional water is currently considered jurisdictional.

Wetlands, where placement of dredged or fill material is prohibited without a permit, are areas saturated by surface water or ground water with vegetation adapted for life under those soil conditions, as in swamps, bogs, fens, marshes, and estuaries.

Exclusions from Jurisdiction

According to the EPA, the following <u>features</u> are currently and would continue to be excluded from CWA jurisdiction:

- Prior converted cropland².
- Waste treatment systems (including treatment ponds or lagoons).

The proposed Jurisdictional Rule formalizes current regular exclusions for the following features:

- Artificially irrigated areas that would revert to upland if irrigation stops.
- Artificial lakes or ponds created by excavating and/or diking dry land and used for such purposes as rice growing, stock watering, or irrigation.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.
- Pits excavated in upland for fill, sand, or gravel.

EPA asserts this is no greater jurisdiction as in the 1970s; less, in fact, due to the proposal (for the first time) defining what is NOT a jurisdictional water, as well as the "other" category (see Appendix), which may eliminate some isolated wetlands from federal jurisdiction. They and the Corps have not been regularly and consistently implementing this scope of jurisdiction due to the regulatory uncertainty caused by the recent court cases.

² Defined as converted prior to 1985.

Exemptions from Permitting

If an individual wants to discharge a pollutant via a point-source (e.g., pipe, etc.) into a water, or placement of dredged or fill material into a wetland, that is jurisdictional, that person still may not need a permit to do so, if the related <u>activity</u> is exempt. Current CWA exemptions related to agriculture include:

- Normal farming, silviculture, and ranching practices. Those activities include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products.
- Upland soil and water conservation practices.
- Agricultural stormwater discharges.
- Return flows from irrigated agriculture.
- Construction and maintenance of farm or stock ponds or irrigation ditches on dry land.
- Maintenance of drainage ditches.
- Construction or maintenance of farm, forest, and temporary mining roads.

Details on the current agricultural practices where associated discharges of dredge or fill materials are exempt from 404 permitting are <u>here</u>, and <u>here</u>. Note that the exemptions apply unless the dredge or fill contains toxic pollutants or the discharge eliminates a water, creates significant discernible impairment of flow or circulation, or reduces its reach. These are referred to as the "recapture provisions".

Under the Interpretive Rule currently being implemented, 56 national NRCS practices are included as "upland soil and water conservation practices", the second bullet above, and therefore exempt from 404 permitting if carried out in compliance with the national practice. These are narrative practices; state versions of these practices may be much more detailed. The list of the exempt national practices is here (scroll to Attachment A). You can look up specific exempt national practices alphabetically here. For example, here is exempt national practice #395, Stream Habitat Improvement and Management, and here is exempt national practice #659, Wetland Enhancement. Despite the broad subjects included in these practices, they are only relevant if the related activity is being performed in a jurisdictional water (including a wetland), and involves dredge/fill or point-source discharge of another pollutant.

About Permits

If a water is jurisdictional and an activity will create point-source pollution, the applicant must seek a Discharge ("402") Permit (not common for agricultural activities, except for CAFOs). If EPA has delegated 402 permitting to a state (or tribe), that entity's staff would process the permit application. For non-delegated states (e.g. Idaho) or tribes, EPA retains the permit authority. Only two states have a delegated 404 (dredge and fill) program, so that jurisdiction typically remains with the Corps.

If a project is in a jurisdictional water and a dredge or fill activity is not exempt, the first goal is to avoid affecting the jurisdictional water and related resource values and uses. If negative effect can't be avoided, the process attempts to minimize the effect through the permitting process. In addition to a permit, mitigation may be required for adverse effects.

There are three types of 404 permits - nationwide, regional general, and individual. Nationwide and regional general permits can be issued for projects with minimal impacts and are generally quicker to get. Individual permits are for projects with potentially more impacts. These can take longer to obtain, in many cases because of more detailed review, public notice, and permit conditioning of the project and design to ensure protection of the resource and other users. The current (2012) list of

activities covered under nationwide permits is <u>here</u>. In some cases "<u>emergency</u>" permits can be granted.

Input Requested

The Federal Register notice states that the EPA and Corps are especially interested in public comment on:

- 1. Which waters should be considered jurisdictional
- 2. Which waters should be considered non-jurisdictional
- 3. How to address "other" waters (those not tributaries (or tributaries of tributaries) or adjacent to traditional navigable waters)
- 4. There are many other areas where the agencies seek input, as described in the Rule's Preamble

Considerations

This proposal (and the associated Interpretive Rule) has unleashed dueling public relations campaigns, assertions of over-reach, and counter-assertions of lack of understanding of current regulatory status. WLA has used drafts of this Brief to increase our understanding and potential to provide constructive comment on the proposal. The following topics are relevant to the public dialogue on this proposal and form some basis for our comments.

Pre-Proposal Jurisdictional Baseline

EPA staff state that, since 1977, ephemeral and intermittent streams were considered jurisdictional if they had ordinary high water marks and bed and banks. The court cases in the 2000's added the "significant nexus" test, generating the issuance of somewhat narrowed guidance from the agencies in 2008. According to an economic analysis, the current proposal would increase jurisdictional waters by 1-4%, <u>as compared to</u> the 2008 Guidance, but the agencies state the resulting jurisdiction would be less than the 1977 extent. One group asserted that current jurisdiction excludes ephemeral streams and ditches³, but Corps staff quickly refuted that claim, noting they have and regularly do assert jurisdiction over many types of ephemeral streams and ditches and citing specific permits and projects.⁴ This level of mis-interpretation in the public discourse on this proposal is detrimental to the process and adds to the challenge of generating helpful public comment and adequate protection of resources.

Ditches

EPA staff state that ditches excavated wholly in uplands are not jurisdictional. Upon questioning, they explain that "uplands" in this sense means anything above ordinary high water or beyond a wetland, so diversion works and seasonal canals in riparian areas associated with jurisdictional waters that don't discharge to jurisdictional waters are exempt. There appears to be no definition of "upland" that would lead a reader to this interpretation. In addition, many continue to assert that roadside drainage ditches could now be jurisdictional. If they discharge to a jurisdictional water, it seems they could be.

Agricultural Exemptions, Including The Interpretive Rule

The issuance of the Interpretive Rule created a significant amount of confusion. Some of the NRCSincluded practices are also practices that are exempt from permitting. This created confusion

³ D. Parrish, Senior Policy Advisor, U.S. Farm Bureau, Washington, DC; personal communication, September 25, 2014.

⁴ J. Gipson, Chief, Utah-Nevada Regulatory Branch, U.S. Army Corps of Engineers, Bountiful, Utah; personal communication, September 26, 2014.

whether practices covered in both are "in or out". For example, NRCS Practice #528 covers "prescribed grazing", but grazing and other agricultural practices are already broadly exempt from jurisdiction. Others have questioned whether the NRCS is now drawn into some type of project approval role. An October letter from the agencies (including USDA) notes that the primary goal of the Interpretive Rule was to reduce regulatory burden on farmers and ranchers.

Also related to agricultural exemptions is the increasing trend toward multi-purpose ranches those that involve "normal" farming practices, but potentially recreational uses, outfitted hunting, wildlife conservation, etc. It is unclear whether CWA agricultural exemptions apply to these broader activities that in some cases provide the necessary income to continue the "normal" agricultural activities.

Statutory Construction

In reviewing the various regulatory sections in which the new definitions are proposed to be placed, it appears it may not be as simple as just inserting the language. For example, one current definition refers to "navigable Waters of the US". Another refers not to "Waters of the US", but to "environment", which includes "any other surface water...". Mere insertion of the new definition, could create circular logic and a dysfunctional regulation in some sections.

The Alternative?

The proposal has created a strong amount of confusion, opposition, and calls for withdrawal of the Proposed Rule. Staff have also heard of alternative proposals to clarify CWA jurisdiction - i.e., jurisdiction should just extend to all fourth-order streams (first-order are the smallest headwater streams, which join to form second-order streams, etc.). We continue to seek from the opponents of this rule their suggestions for alternatives. There seems broad agreement that the current lack of clarity in the jurisdictional extent is a problem. What would a lesser jurisdictional extent do to current stream protections or state programs that are based on EPA delegation or jurisdictional extent? In some cases, states have their own authority upon which they can prohibit pollution or wetland destruction; others do not.

Using WLA Experiences to Inform Input

The following are a selection of scenarios gathered from WLA members and others to help assess impacts and craft suggestions. It should be noted that Corps staff could not comment on these scenarios and would be the critical determiners of the accuracy of the interpretations below.

Refugia for Cutthroat Trout, Southern Colorado

This ranch includes a small creek inhabited by imperiled native cutthroat trout. The population was threatened by low flows in the creek limiting spawning potential, as well as predation by brook trout entering the creek from the downstream river. In collaboration with state and federal partners, the ranch worked to clean and convert several abandoned oil field settling ponds to standing water refugia for the cutthroat. The project included diverting water from the stream a short distance, through the ponds, and back to the stream. They also removed brook trout from the creek and installed a migration barrier at its terminus to block this predator species from moving into the creek and project ponds. The ranch sought a 404 permit for the new headgate, the fish barrier, and the return structure to the creek. All the work was done by recognized experts in the field (including channel design by a pre-eminent geomorphologist) and occurred within a small area within the same landholding. The ranch opted against using NRCS practices in the project because staff felt such practices were over-engineered (i.e., lots of concrete).

The Corps staffer assigned to the project initially asserted that the Corps' jurisdiction extended into upland management activities not directly associated with the project. With additional discussion, the permit requirements were narrowed to the original project area but still required elements that

seemed excessive, including tribal consultations, particularly given that the entire project entailed only a minor diversion of the creek through a ¼ mile within the same property. The delay caused by the uncertainty and additional requirements added time and cost to the project and seemed unnecessary. The project was completed in 2004 and is functioning as intended to protect a fragile population of native cutthroat trout.

Take-aways:

• Agency guidance needs to be clear, and staff adequately trained, to ensure timely and practical assertion (or not) of jurisdiction on a project. There should be a clear scale of project (larger than this), or potential effect, to trigger tribal consultation.

Working on Pipes, Southwestern Colorado

In the early 1990s, this ranch manager worked with the Corps to get a 404 permit to install a pipe system which required diverting a river for a short period of time. She needed a permit in the late 1990s to divert the river to again work on the pipes. She did the paperwork, got the permit, and had no problems.

Take-aways:

• Sometimes the process works just fine.

Creative Flood Damage Repair, North Central New Mexico

A residential property flooded in September 2013, with the stream migrating 20 feet laterally to threaten the structure's foundation. The owner selected a well-respected contractor whose log mat type design she felt was progressive, sensible, and cost-effective. She would have been eligible for NRCS financial assistance, except the approach was not an approved NRCS practice, and many feel such practices are over-engineered. She opted to fund the project herself, due to what she thought was a better long-term solution. In the meantime, the 404 permit required several months to get approved, such that she missed the opportunity to get the project built before spring runoff. This could have subjected her home to damage, but low



Figure 1. Flood damage near a home.

spring runoff provided a reprieve. The project was installed in June 2014 and is faring well.

It is unknown whether the owner attempted to obtain an emergency 404 permit.

Takeaways:

• These are the kinds of experiences that lead landowners to try to avoid 404 permits. Clean water, wildlife habitat, and stream health are important, but excessive red tape is a potential deterrent to good projects with private partners.

Wetland Enhancement, Eastern Central Arizona

A landowner wants to restore what is now a grassy swale (with some hydric soils and remnant salt grasses and rushes) to a wet meadow by removing encroaching pines from the swale bottom and encroaching junipers from the upland. Some of the removed wood would then be used to create a designed detention structure to slow projected surface flow and thereby expand and restore wetland function.

Takeaways:

If the swale does not have a bed and bank and ordinary high water mark (OHWM), it is most likely not a jurisdictional water. If the wood structure is not a discharge of fill into the remnant wetland, it would not need a 404 permit. Additionally, the exemptions in the Interpretive Rule could eliminate the need for a permit if one were required and the national NRCS practices followed. Potential exempt practices include #643-rare/declining habitats, #644-wetland wildlife, #646-shallow water, #647-early successional, #657wetland restoration. or #659-wetland enhancement.

Farm Field Depression, Southwest Colorado

In the 1990s, a landowner was told by the Corps of Engineers that a depression in a farm field was a wetland subject to 404 permitting. The landowner disputed the jurisdictional assertion, and a Corps staffer who only had experience on the East Coast related to dock siting was sent to provide a jurisdictional determination.

Takeaways:

If there were no wetland characteristics, this depression would not be jurisdictional. If its • wetland characteristics would disappear once irrigation were removed, it would not be jurisdictional. If it was a wetland not dependent on irrigation, but was "isolated" (no significant nexus to a jurisdictional water), this is the type of feature the SWANCC Supreme Court decision removed from jurisdiction. Again, staff training and clear direction is key to productive landowner relations.

Arroyo/Wash Rock Flow Detention Installations, Southeast Arizona

A landowner in arid southeastern Arizona has been placing loose rock structures in arroyos and washes in order to slow down erosive runoff events and raise the water table to benefit vegetation, channel stability, and wildlife. Most of these structures are merely piles of rocks at intermittent intervals down the stream channel. Some include concrete with a basal flow bypass. The projects have been successful at soil and water detention. restoration of riparian areas and downstream flow reliability, and are enabling the reintroduction of shrub species long extirpated and critical to hummingbird survival.

Takeaways:

Bed, bank, and OHWM can be difficult to discern in • arrovos and washes in the arid Southwest.

Small Wetland Projects, Various Locations

This ranch representative was a consultant during the mid-1990's. He applied with the Corps for several <1 acre exemptions (nationwide permits) for small projects in wetlands. Most of the applications were successful (especially through the Omaha office), with some difficulty in another regional office due to the leadership there at the time.

Takeawavs:

Differences in approaches between regions can be problematic. •

Stream Improvement Structures, South Central Colorado

This ranch manager had interactions with the Corps during the mid-1990s while getting 404 permits to set up stream improvement structures on a river. The permits were easy to obtain.



Figure 2. Rock structures improve ecology and

downstream water supply

Beaver Pond Enhancement, Southwest Colorado

On the advice of a consultant, a ranch did some work without a permit and was later fined and put on probation. The work turned out well, but staff have been reporting to the Corps during a "probationary" period, which would have been unnecessary if a permit had been obtained.

Takeaways:

• Consultants may not always be correct on jurisdiction, especially if the scope is uncertain or evaluated on a case-by-case basis.

Culvert Replacement, Central Idaho

A WLA member benefitted from the Interpretive Rule's exemption from permitting for projects that use one or more of the 56 NRCS "soil and water conservation practices". This landowner worked to replace three culverts in a stream in order to reduce water temperature, improve sediment transport, and stabilize streambanks degraded by historic livestock practices. This owner would have benefitted further if the exemptions were implemented sooner, as the preparation of a Biological Assessment for consultation with the US Fish and Wildlife Service wouldn't have been necessary (no 404, no federal nexus). In one area, the general feeling was that the conservation exemptions were really helping to unclog some of the



Figure 3. Culvert replacement project, post-construction

paperwork jams that slow down stream restoration work being done on private lands in Montana and Idaho. One stream restoration specialist said that he knew of five riparian projects exempted in Summer 2014, and he was supportive of these exemptions.

Takeaways:

• Some have benefitted from the Interpretive Rule exemptions.

Stream Restoration, Eastern Central Arizona

A series of silted-in stock ponds in a swale are creating a sub-irrigated meadow on this working ranch. A previous owner relocated the related creek away from the nearby crop field. The current owner wants to remove the silted-in ponds, return the stream to its natural location, and restore riparian values to the creek and swale. This project would remove some past agricultural features (in favor of a functioning stream).

Takeaways:

• This project could be exempt if the activities were consistent with "normal" farming, ranching, and silvicultural practices, or exempted through the Interpretive Rule.

Waste Discharge to Irrigation Canal - Southwest Montana

The Town of Manhattan in Montana's Gallatin Valley has arranged to discharge their wastewater to an irrigation canal that then discharges to the Gallatin River, and blue ribbon trout stream. Because the ditch discharges to a jurisdictional water, any waste discharge to that ditch would need to be permitted. In this case, the irrigators and the state appreciate that the Town must have a point-source discharge permit, with the associated water quality requirements and required monitoring.

Takeaways:

• Regulatory jurisdiction for others can help protect irrigators from upstream waste in their waterways.

Various Situations - Southern Colorado

Several locations and questions related to one ranch are combined in this scenario from a ranch located in a mountain valley:

Numerous small tributaries on the ranch intersected the nearby river. These streams typically had some small level of flow but were very flashy and carried tremendous volumes of water during rain and snow melt events. Often, the flows exceeded the banks and went into many smaller channels/gullies that were otherwise dry. Where the roads crossed these creeks, there were large culverts. Ranch personnel did not maintain culverts in every little rain gully, however. During the bigger flashflood events, the flows in these little gullies washed out sections of the road. Staff routinely used heavy equipment to restore the road across these gullies. Clearly, this put sediment into the gullies that would be washed down into the river with the next flood event. However, the small amount of sediment involved was vastly overwhelmed by enormous flows of sediment that naturally came off the mountains and through these gullies in heavy rain events.

Takeaways:

• Road maintenance on a working ranch is typically exempt from 404 regulation. streams.

With all the little streams intersecting the river, there were many alluvial fans along the valley floor. Again, these were covered with little gullies that ran periodically during flood events because they served as overflow channels for the main channel. Whenever ranch staff needed to build a road, create a flat building site, etc., they often had to fill in portions of these gullies. Surface water was managed by creating drainage ditches or a grading design that would channel runoff away from the site.

Takeaways:

• If the gullies didn't have OHWM and bed and banks, they would be "erosional features", not jurisdictional streams.

One of the flashy intermittent tributaries on the ranch ran so full during rain events and contributed so much sediment to the river that the landowner decided to install sediment catch ponds in the stream. These didn't work and almost immediately blew out.

Takeaways:

• If the tributaries had bed, banks and OHWM, they may be jurisdictional. In some cases, the permit process can help with appropriate design by involving people familiar with stream function.

There was a stock pond in the top of a little watershed. It had been there for a very long time and maintained water naturally via connection to shallow groundwater. The stream at the top of the headwaters was located less than 100 yards away and was intermittent but was a tributary to a larger perennial stream and river. The old stock pond had developed wetland vegetation over time and was used occasionally by waterfowl. The manager may need to dredge or otherwise alter the pond in the future.

There was a large pasture that was irrigated by a relatively large (10 cfs) ditch that was connected to a perennial stream at one end. Ranch staff routinely created and eliminated stock ponds and smaller feeder ditches that connected to this ditch. Many of them eventually developed wetland vegetation around the edges and attracted salamanders, etc.

There were several small ponds fed partly by natural springs and partly by irrigation ditches that came off perennial streams. The ponds had originally been small, spring-fed depressions and had been excavated and enhanced with small earth dams in the 1950s or 1960s. These ponds would fill with sediment and require periodic dredging. The ponds had return flow channels that connected directly to the main river.

Takeaways:

• If these activities were performed as part of ordinary farming practices, alteration of the ponds would be exempt from permitting.

Recommendations

WLA submitted the comments below on November 14th, 2014. In addition, staff recommended WLA undertake other activities to encourage informed and civil public dialogue and solutions regarding this proposal and protection of our nations' water quality and wetland resources.

We thank all the WLA members and resource experts that helped us understand the proposal and develop our comments.

WLA Comments to EPA/Corps

Water Docket U.S. Environmental Protection Agency Mail Code 2822T 1200 Pennsylvania Avenue NW Washington, DC 20460 Attention: Docket ID No. EPA-HQ-OW-2011-0880

To Whom it May Concern:

The following comments are hereby submitted by the Western Landowners Alliance, an organization of conservation-minded landowners in the North American West that advances policies and practices that sustain working lands, connected landscapes, and native species. Our members represent the ownership and management of millions of acres in the North American West.

WLA supports efforts to protect clean water, fish and wildlife habitat, and intact ecosystems. We support activities that foster private landowner involvement in effective means to conserve nature while making a living on the land. We also value effective government, that fulfills its purpose while not over-regulating the public. We appreciate the agencies' efforts to clarify the jurisdictional extent of Waters of the US, and their doing so in a public forum. It is from this perspective that we provide the following comments on the proposed jurisdictional rule related to "Waters of the US" and related EPA and Corps of Engineers jurisdiction under the Clean Water Act.

- 1. **Statutory Construction** The agencies should evaluate whether adding the same definitional text for "Waters of the US" to eleven sections of Code may need to be further refined for some of those individual sections. For example, 40 CRF 302.3 does not have a WOTUS element, but defines "environment" as "any other surface water, groundwater, drinking water supply ... within the US". It is unclear how the new definition would be integrated. Also 40 CRF 401 has a definition of "navigable waters" as "navigable waters of the U.S.. Simply placing the new definition in would seem to create circular logic in the result.
- 2. **Documentation** It would be helpful if, whatever jurisdictional extent is determined, if that could be mapped and made available online. Granted, there may be some ongoing determinations for certain waters, but the certainty for some would outweigh the uncertainty for others. And the online information could clearly instruct viewers to contact the Corps on jurisdiction for higher-order or "other" waters, or include information such that landowners can do as much of a self-determination as possible.
- 3. **Define Upland and Other Terms** We understand the interpretation of "upland" is, basically, not water or wetland. So, an irrigation ditch excavated "wholly in upland" can still have its diversion works in a jurisdictional water, and not be jurisdictional unless it discharges to a jurisdictional water. This is a somewhat different interpretation than scientists or lay people use, which might consider "upland" to be above the riparian zone or

floodplain. The WOTUS definition should include the "non-water, non-wetland" definition of "upland" to avoid confusion. Further definitional clarification is also needed for "dry land", "through another water", "erosional feature", and others. See the National Cattlemen's Beef Association/Public Lands Council input for details on definitional needs.

- 4. **Interpretive Assurances** EPA staff have informed us that they refer to preambles for guidance in other rule-making, and would likely do so here. The proposed definition itself is fairly short, but it's implications are difficult to assess throughout all CWA programs. The assurances that EPA has provided should be documented in the preamble. If there is any potential for the preamble to not encapsulate regulatory intent in these regards, and usable as such in the future, it should be expanded to do so. That said, "normal practices" should not allow pollutant dumping associated with exempt activities.
- 5. **Relationship to Other Programs and Factors** The agencies should investigate the effects and potential of other programs and factors to be more protective or destructive of wetland resources than can be effected by a regulatory program. For example, ethanol mandates have driven up prices of commodities such that producers are being driven out of programs that protect wetlands and other habitat, as well as being incentivized to break into ground that previously produced other habitat, soil, and water benefits.
- 6. **Regulatory Burden and Agency Resources** There is an important prohibition in the CWA against discharging pollutants into our waters and destroying valuable wetlands. It is appropriate for that to be illegal. Where it can't be avoided however, the permitting process should not be onerous, and staff should be sufficiently available and knowledgeable so as to not create an undue burden on permittees.
- 7. **Opportunities for Incentives** The Agencies should evaluate where incentive programs, rather than regulatory programs can be effective in conserving habitats sought to be conserved through this proposal, including whether Sodbuster and Swampbuster programs are effective and could be enlisted (if not already) to protect "other" waters, including isolated wetlands. These are valuable resources, but may be more effectively managed through USDA programs.
- 8. **Relationships with States** The Agencies should assure that individual states are prepared and not over-burdened as a result of the Proposed Rule, and that this proposal truly improves resource protection. The Agencies should provide assistance and resources for each state to assess their own statutory authorities over waters and wetlands, and whether this Rule or a related one affects or could improve protections of these resources in these states. For example, Wisconsin feels they are completely capable of protecting their resources irrespective of where CWA jurisdiction extends, while some feel Idaho needs more encouragement to protect water quality. Each state must assess their jurisdiction and its relation to the WOTUS definition and related protections.
- 9. **Functional Equivalent and Deferral Period** Regulatory implementation should ensure a "functional equivalent" for states and/or localities that are implementing resource protections at or above CWA standards, and a deferral period where they are not, to encourage local jurisdiction.
- 10. Accommodate Multiple Uses for Operating Ranches Management of many ranches in the West is moving toward diversification of income sources, meaning that some water features may no longer be "solely" used for agriculture. WLA suggests evaluating whether activities associated with a property taxed in agricultural status would provide needed

water resource protection, while accommodating this increasing diversification of agricultural activities.

- 11. **Encourage Innovation** Where possible, the rule should encourage innovation in water resource protection and conservation, including not tying funding or permitting to over-engineered practices that can harm resources rather than protect them.
- 12. **Illustrate Benefits to Agriculture** There have been some strong concerns expressed about this proposal from some segments of the agricultural community, despite the broad exemptions granted to agriculture in the CWA. These perspectives would benefit from illustration of the number and effect on downstream waters of CWA-related actions. Many 404 permit actions related to development, oil and gas, and CAFO activities benefit downstream water quality, water supplies, and stream health. Broader and more specific examples of these benefits would be beneficial to the dialogue on this proposal.
- 13. **Interpretive Rule Elements Possibly as Nationwide Permits** The agencies should consider whether converting the Interpretive Rule practices to practices approved under a nationwide 404 permit. This would, unfortunately, eliminate the 'no-nexus' benefit noted above, but could clear up some jurisdictional confusion created by the IR. Converting only those directly water- or wetland-related could also reduce confusion.
- 14. **Get This Discussion Out of The Beltway** The Jurisdictional Rule had problems from the roll-out. The Corps and the EPA regional offices have not been sufficiently involved to make these proposals real and relevant to the varied geographies and resources across the nation.

WLA appreciates the opportunity to provide comments, and stands ready to assist the Agencies in further evaluating federal Clean Water Act jurisdiction and potential impacts and opportunities related to agricultural landowners.

Sincerely,

Lesli Allison, Executive Director

Further Reading

In addition to the Preamble of the Rule, the following may be helpful to those interested in further information on the proposal and related regulatory context:

Copeland, C. (2014). *Clean Water Act: A Summary of the Law.* Washington DC: Congressional Research Service. 10 pp. *Includes a history of the Act and a listing of each major section.*

Copeland, C (2014a). <u>EPA and the Corps' Proposed Rule to Define "Waters of the United States"</u>. Washington, DC: Congressional Research Service. 18 pp. A detailed congressional staff review of the proposal, including reference to the Economic Analysis estimate of 3% increase in jurisdictional area.

US EPA and US Army Corps of Engineers. (2014). *Economic Analysis of Proposed Revised Definition of Waters of the United States.* Washington, DC. 60 pp.

Estimates of the costs and benefits of the proposed rule.

Kearns, J. (2014). *Cry Me a Nexus: Eight Years and Counting After Rapanos* <u>In</u> National Wetlands Newsletter, 36(5). Washington, DC. 8 pp.

Traces four recent court cases regarding jurisdiction and the high complexity of meeting the "continuous surface connection" and "significant nexus" tests resulting from the SWANCC and Rapanos court cases.

U.S. House of Representatives, Committee on Transportation and Infrastructure. (2014). <u>Committee</u> <u>Report 113-568</u> accompanying H.R. 5078, Waters of the United States Regulatory Overreach Protection Act of 2014.

Contains pros and cons of the proposed rule as debated by the Congressional Committee considering a bill to restrict the agencies' proposal.

U.S. Environmental Protection Agency. (2013). <u>Connectivity of Streams and Wetlands to</u> <u>Downstream Waters: A Review and Synthesis of the Scientific Evidence</u>. (External Review Draft). 300+ pp.

Also known as "The Connectivity Report", this summarizes the peer-reviewed science the agencies relied on to show the connection between waters they propose as Waters of the US.

Appendix A - Current/Proposed Definitions of "Waters of the United States"

<u>Current⁵</u> (1993) Corps Regulatory Definition of Waters of the United States	<u>Proposed⁶</u> Regulatory Definition of Waters of the United States
The following text is found in 33 CFR Part 328 - Definition of Waters of the United States, dated 1993.	
 § 328.1 - Purpose § 328.2 - General scope § 328.3 - Definitions 	No changes are proposed to Purpose, General Scope, Limits, or Changes, only to § 328.3 - Definitions, as shown below. The proposed definition language is proposed to be added to ten additional sections of the Act.
 § 328.4 - Limits of jurisdiction § 328.5 - Changes in limits of waters of the United States AUTHORITY: 33 U.S.C. 1344. 	The Proposal references relevant authority as 33 U.S.C. 1251 <i>et seq</i> - the full
Section 328.1 - Purpose. This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by Section 404 of the Clean Water Act includes "navigable waters" which is defined at Section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320-330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).	Clean Water Act, while the 1993 regulations reference the dredge and fill section of the Act. The main definitions section of the Act does not include a specific definition of "Waters of the United States".
Section 328.2 - General scope.	

⁵ Source: http://www.law.cornell.edu/cfr/text/33/part-328.

⁶ Source: http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.

Waters of the United States include those waters listed in Section 328.3(a) below. The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).	
Section 328.3 - Definitions.	Section 328.3 - Definitions.
For the purpose of this regulation these terms are defined as follows:	a. For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 et.
a. The term "waters of the United States" means	<i>seq.</i> and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:
1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;	1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;	2. All interstate waters, including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie	3. The territorial seas;
potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign	4. All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;
 Which are or could be used by interstate or foreign travelers for recreational or other purposes: or 	5. All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
ii. From which fish or shellfish are or could be taken and sold in	6. All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and
iii. Which are used or could be used for industrial purpose by industries in interstate commerce;	7. On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a
4. All impoundments of waters otherwise defined as waters of the	water identified in paragraphs (a)(1) through (3) of this section.
United States under the definition;	b. The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs $(a)(1)$ through (7) of this section—
5. Tributaries of waters identified in paragraphs $(a)(1)$ - (4) of this section;	1. Waste treatment systems, including treatment ponds or lagoons, designed
6. The territorial seas;	to meet the requirements of the Clean Water Act.
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs $(a)(1)$ - (6) of this section.	2. Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the
Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40	purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.	3. Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted	4. Ditches that do not contribute flow, either directly or through another

cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

b. The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

c. The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

d. The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

e. The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

f. The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

[51 FR 41250, Nov. 13, 1986, as amended at 58 FR 45036, Aug. 25, 1993]

water, to a water identified in paragraphs (a)(1) through (4) of this section.

5. The following features:

i. Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

ii. Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

iii. Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

iv. Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

v. Water-filled depressions created incidental to construction activity;

vi. Groundwater, including groundwater drained through subsurface drainage systems; and

vii. Gullies and rills and non-wetland swales.

c. Definitions—

1. *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

2. *Neighboring*. The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

3. *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

4. *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

	5. <i>Tributary</i> . The term <i>tributary</i> means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.
	6. <i>Wetlands</i> . The term <i>wetlands</i> means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
	7. Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.
Section 328.4 - Limits of jurisdiction.	
a. Territorial Seas. The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)	No proposed changes.

b. Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:	
1. Extends to the high tide line, or	
2. When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.	
c. Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:	
1. In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or	
2. When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.	
3. When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.	
Section 328.5 - Changes in limits of waters of the United States.	
Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.	No proposed changes.
