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MEMORANDUM

TO: **QQ Members**

FROM: **Torie Jarvis**

DATE: **6/24/14**

SUBJECT: **EPA/Corps Joint Rulemaking on "Waters of the United States" and Impact to QQ Members**

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) published a proposed rule for public comment in April of 2014. The public comment period was initially 90 days, with comments due July 21st. The agencies have already extended this deadline to October 21, 2014.

The proposed rule would redefine which waters are protected under the Clean Water Act (CWA or "Act"). This memorandum provides background for why this rulemaking occurred, key changes to the existing regulation, and the potential benefits and consequences to QQ members in anticipation of the discussion of the proposed rule at the June 26 meeting.

The CWA has a number of sections that address water quality. These are the water quality standards and total maximum daily load programs under section 303, the section 402 National Pollutant Discharge Elimination System (NPDES) permit program, and the section 404 dredge-and-fill permit program. Of these, the Colorado Water Quality Control Commission and Water Quality Control Division have primacy over Section 303 and Section 402 programs.[i] In Colorado, the proposed rulemaking primarily would affect dredge-and-fill permits under section 404 of the CWA, issued by the Corps. Federal 404 permits are needed whenever dredged and fill material is disposed of in waters of the United States. Activities that trigger 404 include such activities as development in wetlands, the construction of dams and levees, instream mining and related activities that affect waters of the United States.

1. What are the "Waters of the United States" under the Clean Water Act?

Whether or not an activity is subject to EPA and Corps jurisdiction under the CWA depends on

whether it will affect "waters of the United States." The CWA plays a crucial role in protecting waterbodies through permit programs and water quality standards. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's water."

The Act directs that all "navigable waters," further defined as "waters of the United States," be protected by the Act.[ii] The Act does not define "waters of the United States," leaving that task to the EPA and the Corps.

The EPA and Corps' existing regulations state that "waters of the United States" are composed of traditional navigable waters, interstate waters, impoundments of waters of the United States, tributaries, the territorial seas, all other waters that could affect interstate or foreign commerce, and wetlands adjacent to any of these listed waters.[iii] Any waters that fit under this definition are *jurisdictional*, meaning they are subject to federal jurisdiction under the CWA.

2. Why have the EPA and Corps proposed a new definition?

The proposed rule revises the definition of "waters of the United States" after several decisions from the Supreme Court of the United States created ambiguity about which waters are "jurisdictional." While the EPA and Corps routinely conduct determinations of whether wetlands or other waterbodies are "waters of the United States," recent cases from the Supreme Court of the United States have called Corps and EPA interpretations into question. This has resulted in waters not receiving water quality protection under the CWA, additional burdens on federal agencies, and delayed timelines for permit-seekers.[iv] The proposed rule seeks to clarify which waters are jurisdictional and to reduce the administrative burdens of determining jurisdiction by applying modern guidance and interpretation from the Supreme Court.

a. Case Law

The first recent Supreme Court case interpreting the definition of "waters of the United States" was *United States v. Riverside Bayview Homes* (*Riverside Bayview)* in 1985.[v] The Court looked at whether permits were required before a landowner could discharge fill material into wetlands adjacent to navigable waters, and into tributaries to navigable waters. The Court determined that the definition of waters of the United States includes wetlands adjacent to navigable waters or tributaries, regardless of whether or not the wetlands were subject to flooding directly from waters under CWA jurisdiction. Importantly, the Court pointed out that Congress chose to define jurisdictional waters *broadly,* and that the EPA and Corps' decision to include all adjacent wetlands was proper.

The Court again turned to the agencies' definition of "waters of the United States" in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* (*SWANCC*).[vi] In this case, the Corps had made a determination that disposal of dredged and fill material into a manmade pond that formed wetlands required a § 404 permit solely because migratory birds regularly utilized the wetlands. The Supreme Court disagreed stating that the presence of migratory birds, alone, was not enough to bring otherwise "isolated wetlands" under CWA jurisdiction.[vii] In contrast to the ruling in *Riverside Bayview*, the Court said that the isolated wetlands did not

create the "significant nexus" with any navigable waters or tributaries necessary for federal jurisdiction.[viii] The EPA and Corps issued several iterations of clarifying guidance on "waters of the United States" after *SWANCC* and the case law subsequent to *SWANCC*.[ix]

The most recent Supreme Court decision brought more confusion to the term "waters of the United States." *Rapanos et al. v. United States* (*Rapanos*) consolidated two cases challenging the Corps' determination that several wetlands were subject to the CWA because a series of manmade ditches and drains connected the wetlands to navigable waters.[x] The regulatory definition of "waters of the United States" at the time of *Rapanos* (and today) was:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .[xi]

The definition also includes wetlands adjacent to these other waters.[xii] The Corps therefore determined that the wetlands in question were "jurisdictional" because they were adjacent to the listed "other waters," and lower courts agreed.[xiii] The Supreme Court disagreed, finding that the "adjacent wetlands" in question were not subject to the CWA as "waters of the United States." However, a majority did not agree on *why* the wetlands were not under CWA jurisdiction. Four justices determined that the CWA includes "only those relatively permanent, standing or continuously flowing bodies of water."[xiv]

Justice Kennedy wrote the concurring opinion, agreeing with the four justices that the "adjacent wetlands" were not jurisdictional, but for different reasons. Justice Kennedy determined that the CWA did not apply because a "significant nexus" did not exist between the wetlands in question and tributaries or navigable waters. He relied on language in *SWANCC*. He further explained that there would be a "significant nexus" with navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity" of navigable waters.[xv]

In *Rapanos* and *SWANCC,* the waters in question were "adjacent wetlands" and "isolated wetlands" respectively. Because of these facts, the Court did not consider tributaries to navigable waters and their requisite adjacency or connectivity with navigable waters. After these cases, considerable question remained on how to apply these cases to these other types of waters.

b. EPA and Corps Guidance

Without a clear rule for how the definition of "waters of the United States" might be applied post-*Rapanos,* the EPA and Corps issued guidance in 2008 to help their field offices uniformly apply the Court's less-than-clear direction.[xvi] This guidance lists four categories of waters over which the agencies will assert jurisdiction:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that relatively

permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g. typically three months)
• Wetlands that directly abut such tributaries.[xvii]

The guidance then lists other waters that are jurisdictional only if the agencies determine on a case-by-case basis that a "significant nexus" with a navigable waterway exists:

• Non-navigable tributaries that are not relatively permanent
• Wetlands adjacent to non-navigable tributaries that are not relatively permanent
• Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.[xviii]

The guidance instructs agencies to apply the significant nexus standard by assessing "the flow characteristics and functions" of tributaries and adjacent wetlands to "determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters," closely following Justice Kennedy's evaluation in *Rapanos*.

3. What ongoing issues does the proposed rule address?

While the agencies continue to find the vast majority of waters they evaluate to be jurisdictional,[xix] there is still much confusion about whether a particular wetland or non-navigable tributary is subject to the CWA. The agencies have struggled to develop guidance that is legal, useable for field staff, and provides consistent results.[xx] Also, while the guidance provides some evidence of how agencies determine jurisdiction, the guidance is only policy, not law.

In some instances, application of the guidance results in the exclusion of many waters that previously would have clearly been jurisdictional.[xxi] The guidance focuses on "continuous surface connections" to demonstrate a significant nexus between wetlands and jurisdictional waters,[xxii] with "isolated wetlands" being almost wholly eliminated from jurisdiction is some instances.[xxiii] In Park County, for example, the Corps determined a high altitude fen to be outside of CWA jurisdiction because the surface connection with a navigable river was interrupted by a manmade ditch.[xxiv]

The agencies also are experiencing significant increased burdens because of the additional analysis.[xxv] For example, the EPA and Corps now collaborate on complex jurisdictional determinations for waterways called into question by *Rapanos*. The EPA is directly involved in jurisdictional determinations for § 404 permits, normally completed solely by the Corps, without any additional resources or staff to complete this task.[xxvi] In 2009, officials with EPA Region 8 in Denver estimated that it takes their office three times as long to process a case post-*Rapanos*.[xxvii]

The agencies' proposed rule clarifies the regulatory definition of "waters of the United States" to address these U.S. Supreme Court decisions and the ensuing regulatory issues.

3. What does the proposed rule say?

The proposed rule clarifies which waters are jurisdictional as "waters of the United States." Six out of the seven categories of waters are jurisdictional by rule, requiring no additional analysis:

1. All waters that 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; [xxviii]
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in paragraphs [] 1 – 3 and 5 of this section;
5. All tributaries to waters identified in paragraphs [] 1– 4 of this section;
6. All waters, including wetlands, adjacent to a water identified in paragraphs [] 1 – 5 of this section . . . . [xxix]

Categories 1 – 4 are substantially unchanged from the current rule. Several key differences shift the treatment of tributaries and adjacent waters under the proposed rule.

The proposed rule makes all tributaries jurisdictional by rule, whether perennial, ephemeral or intermittent, because the agencies find that all tributaries significantly affect the integrity of navigable waters.[xxx] The proposed rule adds a definition to "tributary" that is not currently in the rule:

> . . . a water physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water, to a water identified in paragraphs [] (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 [] (1) through (3) of this section.[xxxi]

This proposed change would clarify that tributaries without relatively permanent flows also are jurisdictional, eliminating the requisite analysis outlined in the current guidance.[xxxii] Notably, some high altitude headwaters streams may not be considered "tributaries" at their source if they are not characterized by a bed, bank, or high water mark.

In another key change, the proposed rule adds "adjacent waters" to the "adjacent wetlands" considered jurisdictional under the current rule and guidance. Since the Supreme Court has affirmed that adjacent wetlands are jurisdictional.,[xxxiii] the EPA and Corps have applied the same reasoning to extend the definition of jurisdictional waters to adjacent waters.[xxxiv]

The seventh category includes "other waters" that are shown to be jurisdictional after a site specific analysis:

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 water identified in paragraphs [] 1 – 3 of this section.[xxxv]

The proposed rule further explains that a significant nexus is established if:

> . . . 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 [](1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs [](1) through (3) of this section.

The test allows the agency to consider waters in the aggregate, collectively at other "similarly situated waters." Waters are "similarly situated" when they "perform similar functions and are located sufficiently close together" so that agencies may evaluate the waters together.[xxxvi] This significant nexus test is closely based on Justice Kennedy's concurring opinion in *Rapanos* and the existing agency guidance.

The proposed rule preserves existing agricultural CWA exemptions and exclusions. In addition, the EPA and Corps issued a policy statement in tandem with this proposed rulemaking that exempts 56 conservation practices currently utilized by the USDA's Natural Resource Conservation Service if they occur in jurisdictional waters.[xxxvii]

4. How will this proposed rulemaking affect the QQ region?

One of QQ's central policies is to strengthen available tools to protect water quality and quantity. The CWA is one of the most important of these tools because of the Section 404(b)(1) guidelines that protect the aquatic environment when jurisdiction is triggered. Also, the impacts of transmountain diversion projects to the aquatic environment are regulated when CWA jurisdiction is invoked. Recent court decisions have created inconsistency and confusion around scope of CWA jurisdiction, at times eliminating waters from jurisdiction and bogged down permitting agencies. Clarifying the "waters of the United States" definition will allow the EPA, Corps, and states to better protect water quality and quantity with certainty and clarity, especially in the headwaters region.

The proposed rule will affect what activities are required to apply for section 404 dredge-and-fill permits from the Corps. For several reasons the proposed rule clarifying the scope of 404 permit jurisdiction directly benefits QQ members:

- The proposed rule is likely to bring more transmountain diversion projects under CWA jurisdiction. Off-channel reservoirs, more isolated wetlands, or smaller ephemeral tributaries will more likely trigger jurisdiction for water development projects.

• The proposed rule would more fully address the water quality impacts of future residential, commercial and industrial development of the QQ region. The QQ region is projected to face significant pressures from additional population growth and an increased emphasis on resource extraction industries in upcoming years.[xxxviii]

• Many QQ member activities fall under nationwide or "general" permits for ongoing activities such as bank stabilizations, some aquatic habitat restoration, minor road activities and various maintenance efforts..[xxxix]

• The proposed rule looks more broadly at regional river systems when applying the significant nexus test, considering the water alone or in combination with other similarly situated waters. This approach is consistent with the watershed approach taken by many in the QQ region to protect water quality.

6. What are the criticisms of the proposed rule?

a. Agriculture Concerns

The most vocal concerns stem from agricultural users, who claim the proposed rule will bring agriculture under CWA jurisdiction.[xl] However, the proposed rule is clear that none of the existing exemptions, policies, and guidance regarding agriculture will be affected in this rulemaking. Most of the agricultural exemptions relate to types of activities occurring on jurisdictional waters, while the proposed rule is about what waters are jurisdictional.

b. Ditches

One concern of agricultural and other water users is that while the proposed rule provides exemptions for some types of ditches, it may bring certain ditches under CWA jurisdiction. Ditches that drain only uplands and have less than a perennial flow are not "waters of the United States," nor are ditches that do not contribute flow to waters identified as 1 – 4.[xli] Although this language is an expansion of the existing guidance document which exempts "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water," it does not include all ditches that contribute flows to a navigable water.

Under the proposed rule, a ditch may be jurisdictional in three ways: if a ditch drains somewhere other that just "uplands," the flow is perennial, or if the ditch drains to a navigable water or impoundment of navigable water. While including ditches that contribute flow into a navigable water expands on the existing guidance, this addition is an expansion of the rule current in place. The current rule does not exempt any types of ditches specifically; thus any type of ditch could be jurisdictional if its otherwise applies to the existing rule.

c. Lack of Clarity.

In both the existing rule and proposed rule, wastewater treatment systems, including treatment ponds and lagoons are not considered "waters of the United States." This exemption is only listed for wastewater treatment, which means that water treatment systems for anything other than waste could fall under CWA jurisdiction if they fall under one of the seven listed water types.[xlii]

d. Expanded Jurisdiction

Others are concerned about the possible expansion of federal jurisdiction under the proposed rule. All tributaries would become jurisdictional by rule, along with adjacent "other waters" along with wetlands. However, in the EPA and Corps' proposed rulemaking, they explain that under the significant nexus test, adjacent waters and any tributaries will, by definition, significantly affect the chemical, physical, or biological integrity of an already-jurisdictional water. According to the proposed rule, because tributaries and adjacent waters will always bear a significant nexus to navigable waters, making them jurisdictional by rule is not an expansion of jurisdiction.[xliii]

ENDNOTES

[i] Under the Colorado Water Quality Control Act, these programs extend to "state waters,"

[ii] 33 U.S.C. § 1252(7).

[iii] 33 CFR 328.3; 40 CFR 122.2. The rule reads:

> (a) 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;
>
> (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 potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

[iv] Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation, Report No. 09-N-0149 at 1- 2 (2009) <http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf>. This issue is discussed in more detail in Section 3.

[v] 474 U.S. 121.

[vi] 531 U.S. 159 (2001)

[vii] In 1986, the Corps issues a policy statement interpreting "waters of the United States" to extend to any waters which could be used as habitat for birds protected under the Migratory Bird Treaties. See *531 U.S. at 164*.

[viii] *Id.* at 167.

[ix] *For example, see* 68 F.R. 1995 (2003). Available at <http://www.epa.gov/owow/wetlands/pdf/Joint_Memo.pdf>

[x] 547 U.S. 715 (2006).

[xi] 33 C.F.R. § 328.3(a)(3)(2014). Whether one of these other waters was used in interstate commerce requires a demonstration that the water is or could be used by interstate or foreign travelers for recreational purposes, used in interstate or foreign commerce, or used in interstate or foreign industrial purposes. 33 C.F.R. § 328.3(a)(3)(i – iii).

[xii] 33 C.F.R. § 328.3(a)(7).

[xiii] 547 U.S. 729.

[xiv] *Id.* at 739.

[xv] *Id.* at 780.

[xvi] EPA and Army Corps of Engineers Guidance Regarding Identifications of Waters Protected by the Clean Water Act ("Guidance"). 72 Fed. Reg. 67304 (Nov. 28, 2007). Available at: <http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf>

[xvii] Guidance at 1.

[xviii] *Id.*

[xix] Congressionally Requested Report at 1- 2.

[xx] *Id.*

[xxi] Dennis Buechler, Five Case Studies on the Effects of the *SWANCC* and *Rapanos* Supreme Court Rulings on Colorado Wetlands and Streams (Feb. 2010), available at <http://www.tu.org/sites/default/files/201002_ColoradoWaterways_Report.pdf>

[xxii] *See* Guidance at 6.

[xxiii] Congressionally Requested Report at 10, stating:

> Another staff member of the Ecosystems, Wetlands, and Watersheds Unit, EPA Region 8 noted that the Army Corps of Engineers has been in the habit of calling waters "isolated" simply because there is no surface connection. However, some of these waters may still have a sub-surface connection.

[xxiv] Buechler at 5.

[xxv] Congressionally Requested Report at 1.

[xxvi] *Id.* at 8.

[xxvii] *Id.*

[xxviii] Commonly called "traditionally navigable waters." 79 Fed. Reg. 22260 (April 21, 2014).

[xxix] 79 Fed. Reg. 22263. Adjacent waters and wetlands are those "bordering, contiguous, or neighboring" waters listed as 1 – 5 above, which is the same definition currently in place. "Neighboring" would be defined in the proposed rule as located within the riparian area or floodplain or with a surface or shallow subsurface hydrological connection of waters 1 – 5.

[xxx] 79 Fed. Reg. 22201.

[xxxi] 79 Fed. Reg. 22263.

[xxxii] Guidance at 8.

[xxxiii] *Riverside Bayview,* 474 U.S. at 133; *Rapanos,* 547 U.S. at 775 (Kennedy concurrence) and at 778 (dissent).

[xxxiv] 79 Fed. Reg. 22260.

[xxxv] 79 Fed. Reg. 22262.

[xxxvi] 79 Fed. Reg. 22263.

[xxxvii] The list of NRCS Conservation Practice Standards is available at <http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_404_exempt.pdf>.

[xxxviii] CDM, Colorado Basin Consumptive Needs Assessment, 4.2.1.2 (2010), available at: <http://cwcb.state.co.us/water-management/basin-roundtables/Documents/Colorado/ColoradoBasinNeedsAssessmentReport.pdf>

[xxxix] Summary of 2012 Nationwide Permits, available at <http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_sumtable_15feb2012.pdf>

[xl] *See, e.g.,* EPA Rule Will Upend Farming and Livelihoods, Farm Bureau Says, Press Release, June 19, 2014, available at http://www.fb.org/index.php?action=newsroom.news&year=2014&file=nr0619.html.

[xli] 79 Fed. Reg. 22264.

[xlii] 79 Fed. Reg. 22263.

[xliii] 79 Fed. Reg. 22201.