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MEMORANDUM

TO: **QQ Members**

FROM: **Torie Jarvis**

DATE: **8/6/15**

SUBJECT: **EPA/Corps Final 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. QQ prepared a memorandum analyzing the proposed rule's impacts to QQ members in June of 2014. QQ submitted comments to the agencies based on this memorandum by the October 2014 deadline for public comment. The rule was finalized and published in the Federal Register on June 29, 2015.[1] This memo outlines key changes to the existing regulation and explains how the final rule responds or fails to respond to QQ comments on the proposed rule.

This rule redefines which waters are subject to federal jurisdiction under the Clean Water Act (CWA or "Act"). In Colorado, the new rule primarily affects 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. Major transmountain diversion projects from the headwaters such as the Windy Gap Firming Project and the Moffat Expansion Project require 404 Permits because they involve the construction or alteration of dams.

The CWA states that an activity is subject to the CWA if the activity will affect "navigable waters," further defined as "waters of the United States."[2] 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 . . . which could affect interstate or foreign

[1] 80 Fed. Reg. 37054 (June 29, 2015) (amending 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, *et al.*).
[2] 33 U.S.C. § 1252(7).

commerce," and "wetlands adjacent" to any of these listed waters.[3] Any waters that fit under this definition are *jurisdictional*, meaning they are subject to federal jurisdiction under the CWA.

1. Why have the EPA and Corps developed a new definition of waters of the United States?

A series of United States Supreme Court decisions between 2001 and 2006 created ambiguity about which waters fall under CWA jurisdiction.[4] This resulted in waters not receiving water quality protections, less certainty for permit seekers, and an increasingly burdensome and time consuming process for determining CWA jurisdiction. The June 2014 memo to QQ members explains these issues in more detail (see Section 2 and 3).

Clarifying the "waters of the United States" definition will allow federal regulators to better protect water quality and quantity with certainty and clarity. This goal is in line with one of QQ's central policies, which is to strengthen available tools to protect water quality and quantity. For example, this rulemaking more fully addresses 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.[5] The rule also looks more broadly at regional river systems when applying the significant nexus test, which is consistent with the watershed approach taken by many in the QQ region to protect water quality.

The rule does not appear to affect any activities of QQ members that typically fall under nationwide or "general" permits. Nationwide permits are available for small-scale projects such as bank stabilizations, some aquatic habitat restoration, minor road activities and various maintenance efforts.[6] The regulatory status of these activities remained unchanged as this rule does not affect nationwide or general permits.[7]

2. What categories of "waters of the United States" does final rule establish?

The final rule establishes eight categories of "waters of the US," increased from seven categories in the proposed rule. A few of the categories changed substantively from proposed to final rule as described below.

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[3] 33 CFR 328.3; 40 CFR 122.2.

[4] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001); *Rapanos et al. v. United States,* 547 U.S. 715 (2006).

[5] 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>

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

[7] Of note, Corps representatives told QQ on a phone meeting in May that the general and nationwide permits are also being revised next year, which could affect the availability of those permits to QQ members.

1-3. Traditionally navigable waters (TNW). The first three categories remain unchanged from the proposed rule and include 1) "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," 2) "[a]ll interstate waters," and 3) "[t]he territorial seas."[8] This memorandum refers to these three categories of waters as "traditionally navigable waters" or TNW.

4. Impoundments. Category Four is expanded in the final rule to include all impoundments of waters that are "otherwise identified as waters of the United States." The proposed rule included impoundments of category 1-3 waters or tributaries to waters in categories 1-3 only (which is category 5). The final rule adds impoundments of jurisdictional "other waters" to the proposed rule. This change is consistent with QQ comments on the proposed rule that "if waters of the United States are impounded, they should not lose their jurisdictional status," and is consistent with *Rapanos.*

5. Tributaries. Category Five remains unchanged from the proposed rule with the exception of a much more detailed definition of "tributary" and "tributaries," which "mean a water that contributes flow, either directly or through another water (including an impoundment identified in [category 4]), to a [TNW] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark."[9] Tributaries of a TNW that meet the rule's updated definition are jurisdictional.

6. Adjacent waters. Category Six remains substantively the same as the proposed rule. The final rule adds a list of examples of waters that may be considered adjacent, called out in italics below.

> vi. All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this section, *including wetlands, ponds, lakes, oxbows, impoundments, and similar waters*.

7. Regionally-specific waters. The proposed rule would have required a significant nexus evaluation for all "other waters," which many criticized for being overly-broad and potentially overly-burdensome. The final rule splits "other waters" into two narrower categories of waters. The seventh category under the final rule does not pertain to QQ members as it lists five categories of regionally-specific waters that are jurisdictional if they bear a significant nexus with a TNW. None of these waters are located in Colorado.[10]

8. Waters in a floodplain or ordinary high water mark. This section makes waters within a 100-year floodplain of a TNW or within 4,000 feet of the ordinary high water mark of a category 1-5 water (which includes TNW, impoundments, and tributaries) jurisdictional if they bear a significant nexus to a TNW.

The rule offers several other points of clarification for this category:

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[8] 80 Fed. Reg. at 37104.

[9] 80 Fed. Reg. at 37104. The updates to the definition are discussed in greater detail in below sections of this memorandum.

[10] The listed waters include only prairie potholes, Carolina bays and Delmarva bays, pocosins, western vernal pools "located in parts of California," and Texas coastal prairie wetlands.

- If any portion of waters qualifies under this category, the entire water is considered jurisdictional.

- While the significant nexus analysis (described in detail below) allows for consideration of "similarly situated waters," related adjacent waters are not considered similarly situated for the significant nexus analysis.

- If a water qualifies as an adjacent water under category six and also under this category, then the water is considered adjacent and no significant nexus analysis is required to determine its jurisdictional status.

3. Is the finalized rule responsive to QQ's earlier comments on the proposed rule?

For the most part, the rule improves clarity and addresses QQ's comments on the proposed rule. This section identifies QQ's earlier comments and how they were addressed (or not) in the final rule.

a. Tributaries

QQ supported the proposed rule's approach of aggregating all tributaries to a TNW with a bed, bank and ordinary high water mark as jurisdictional. The important hydrological connection between tributaries and waters of the United States always will provide the physical nexus to navigable waters contemplated by the Supreme Court. The final rule maintains that all tributaries are jurisdictional.

QQ offered several other clarifications to the associated definition of tributaries, some of which were addressed and some of which were not.

1. QQ commented that tributaries interrupted by natural features such as shale fields may have no connection to waters of the United States upstream of such breaks, even with a bed, banks, and ordinary high water mark. QQ recommended that the rule should apply the significant nexus test to these waters to determine whether a connection to TNWs exists. The final rule does not incorporate the QQ recommendation.

In the final rule, any tributary with a bed, banks, and ordinary high water mark that contributes flow to a TNW is jurisdictional, despite any natural or artificial breaks in the tributary. The final rule states:

> 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 constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands 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.[11]

2. QQ recommended more explicitly clarifying that headwaters streams whose flow is due to intercepted groundwater would be jurisdictional. The final rule did not add such additional clarification, but tributaries fed by groundwater springs (with a bed, banks, and ordinary high water mark) are jurisdictional under the final rule like all other tributaries.

3. QQ expressed concern that, under the proposed rule, a natural drainage system with a bed, banks, and ordinary high water mark may be automatically jurisdictional even if it only exists in an uplands area and contributes only a minimal amount of flow to a TNW only during significant rain events. While the final rule does not preclude that possibility, it does make clear that the tributary must "*contribute flow"* to a traditionally navigable water or interstate water. The preamble makes it clear that this metric is in line with Kennedy's concurrence in *Rapanos* and is supported by science.[12] The rule goes on to state that the presence of bed, banks, and ordinary high water mark "demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary."[13]

The calculation of how the Corps will determine whether a tributary "contributes flow" is unclear in the rule.[14] In a phone call QQ held with EPA and Corps representatives, ("EPA/Corps call"),[15] representatives indicated that the Corps will be developing guidance that will include additional information on how much flow from a tributary would be considered "contributing flow."

4. Because QQ members rely on the relatively simple and expeditious nationwide permits (NWPs) for small-scale projects, QQ requested that the proposed rule clarify that this rule change does not affect NWP evaluations under the 404 program. This clarification does not appear to have been made in the preamble or final rule. However, the rule should not change NWP evaluations. This was confirmed during the EPA/ Corps call.

5. The proposed rule exempted tributary ditches and canals that are part of wastewater treatment systems. QQ recommended that the proposed rule similarly should exempt the same parts of stormwater management systems and water treatment systems. The final rule does exempt "[s]tormwater control features constructed to convey, treat, or store stormwater *that are created in dry land*."[16] The final rule also adds an exception for wastewater recycling structures.

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[11] 80 Fed. Reg. at 37104 (emphasis added).
[12] 80 Fed Reg. at 37068.
[13] 80 Fed. Reg. at 37105.
[14] The rule does include some circular reasoning for determining adequate flow, stating that the presence of bed, banks, and ordinary high water mark "demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary."
[15] EPA/ Corps call, Thursday, May 28, 2015. QQ staff present: Torie Jarvis. EPA and Corps Representatives included: Greg Peck, Chief of Staff for Office of Water at EPA, [] Dotson, Dep't of General Council for EPA, Craig Schmauder, Dep't of General Counsel for Army Corps, Dennis Borum, Legislative Liaison for EPA, Rebecca Russo, Legislative Liason for Region 8 of EPA. The phone call was convened with assistance from the office of Representative Jared Polis.
[16] 80 Fed. Reg. at 37105 (emphasis added).

The preamble states that these exemptions simply capture longstanding agency practice to view stormwater and wastewater recycling structures as non-jurisdictional if they are outside of a tributary.[17]

The rule does not exempt water treatment systems from jurisdiction. Ditches and canals for water treatment systems will instead be evaluated like any other ditches to determine jurisdiction. The changes to ditch exemptions are discussed below.

6. QQ recommended that the final rule clarify that the existing drainage ditch maintenance exemption under Section 404(d) and existing agricultural activity exemptions in the Act are unaffected by this rulemaking. The final rule did add additional language in the preamble clarifying that the existing statutory exemptions from the Act are not affected by this rulemaking.[18]

b. Adjacent waters and wetlands

QQ supported the proposed rule's approach of making all waters that are adjacent to jurisdictional waters categorically jurisdictional. Because tributaries that contribute flow to a TNW are jurisdictional, wetlands and other waters adjacent to those tributaries should also be considered jurisdictional without going through a case-by-case analysis. QQ stressed that continuing to include the characteristics of adjacent waters within the definition of adjacency is essential.

The final rule continues to make adjacent waters jurisdictional without any additional case-by-case significant nexus determination, in line with QQ's comments. The final rule also adds additional clarity to the definition of adjacency, which will help ensure that permit seekers have a clear understanding of what waters are adjacent.

"Adjacent" is defined as "bordering, contiguous, or neighboring a [TNW, impoundment, or tributary] water," explicitly including headwaters.

The rule also adds additional parameters to the definition of "neighboring" as the term is used to describe adjacency. The proposed rule defined neighboring as being located within the floodplain or riparian area, which raised questions on how to define the types of riparian areas and floodplains. The final rule explains two ways in which waters may be considered "neighboring:"

> 1. Any water that is within 100 feet of the ordinary high water mark of a TNW, impoundment, or tributary, even if only a portion of the water is within 100 feet.
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> 2. Any water that is located within the 100-year floodplain of a TNW or tributary and not more than 1,500 feet from the ordinary high water mark of such water, even if only a portion of the water meets this standard.[19]

[17] 80 Fed. Reg. at 37100.
[18] *See* 80 Fed. Reg. at 37080.
[19] A third part of this definition applies exclusively to the Great Lakes.

c. Other Waters

QQ supported evaluating other waters as jurisdictional based on a "significant nexus" to a TNW, impoundment, or tributary, but acknowledged concerns from QQ members and others that potentially evaluating *all* other waters for jurisdiction based on a significant nexus to a TNW could be costly, time consuming, and inefficient.

The final rule narrows the scope of the proposed rule by narrowing which waters the Corps will evaluate for a significant nexus to a TNW. The only "other waters" that the Corps will evaluate to determine a significant nexus are waters found in the 100-year floodplain or within 4,000 feet of the ordinary high water mark of jurisdictional waters. This is considerably narrower than the proposed rule, which would have employed the significant nexus test for "all other waters." This change is explained in more detail above in the section describing the jurisdictional categories (see pages 3-4).

This bright line adds clarity as requested by QQ. The final rule also created a scenario where waters outside of the 100-year floodplain or outside of 4,000 feet of the ordinary high water mark will not be jurisdictional under any circumstances, even if there is a hydrological connection to a TNW.

This narrower rule is not likely to affect the headwaters region, as most small, ephemeral headwaters streams in the QQ region with a bed, banks, and ordinary high water mark will be either within 4,000 feet of jurisdictional waters or qualify as adjacent waters. Other waters in Colorado and the southwest are more likely to be affected and possibly excluded from CWA jurisdiction, such as eastern Colorado playas that are usually non-discharging as well as some closed basins and range landscapes outside of Colorado.

QQ recommended amending the definition of "significant nexus" to explain what type of nexus would be considered "significant" during a jurisdictional determination. The final rule responds to this comment by adding a list of functions that agencies will use in the significant nexus evaluation:

> A) Sediment trapping, (B) Nutrient recycling, (C) Pollutant trapping, transformation, filtering, and transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section. [20]

QQ also commented on its support for including "similarly situated waters" in the significant nexus evaluation to look more broadly at regional river systems. This element of the significant nexus evaluation remains in place in the final rule.

[20] 80 Fed. Reg. at 37106.

d. Exemptions

i. Wastewater systems

As explained above, QQ recommended that tributary ditches and canals associated with stormwater treatment systems and water treatment systems be exempted from jurisdiction like wastewater systems. The final rule exempts stormwater management features built in dry land, but does not add any such exemption for water treatment features. Water treatment features will instead be evaluated under the exemption for certain ditches as explained below.

ii. Ditches

Much of the criticism surrounding the proposed rule focused on the jurisdictional status of ditches. Under the proposed and final rule, all ditches that are not explicitly exempted are jurisdictional. QQ supported the ditch exemptions in the proposed rule, but also recommended additional clarification. The final rule completely rewords the exemptions to reduce ambiguity.

The final rule exempts:

> (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
>
> (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
>
> (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this section.[21]

The ditch exemptions in the final rule add clarity as to what ditches are exempted from CWA jurisdiction.

[21] 80 Fed. Reg. at 37105.