

**NWRA 83rd Annual Conference
Comments on EPA/Army Corps'
Proposed Rule Redefining
“waters of the United States”**

Erin Bartlett

November 12, 2014

OVERVIEW OF THE PROPOSED RULE TO REDEFINE “WATERS OF THE UNITED STATES”

- EPA and Army Corps proposed to redefine “waters of US” on April 21, 2014
 - Based on Draft Scientific Connectivity Report (9/2013).
 - Would increase federal oversight for work involving streams, lakes, ponds, wetlands, ditches and other waters.
 - Would regulate isolated wetlands for first time since 2001.
 - Would increase review time for most Jurisdictional Determinations (JD).
 - Could jeopardize existing JDs and Army Corps permits.
 - Unclear what role states will play.
- Comment Deadline is November 14th
- Effective Date is Unknown



VAN NESS FELDMAN'S WATERS WORKING GROUP

- Shortly after the release of the proposed rule, VNF established a Waters Working Group to provide comment to the Agencies on the new definition.
 - WWG has a diverse membership that includes public and private interests.
- Throughout the summer, we held weekly calls to vet issues.
- Produced three drafts of a Comment Letter focusing on issues of the most importance to the WWG members.
- Our Comment Letter largely mirrored the structure of the proposed rule.

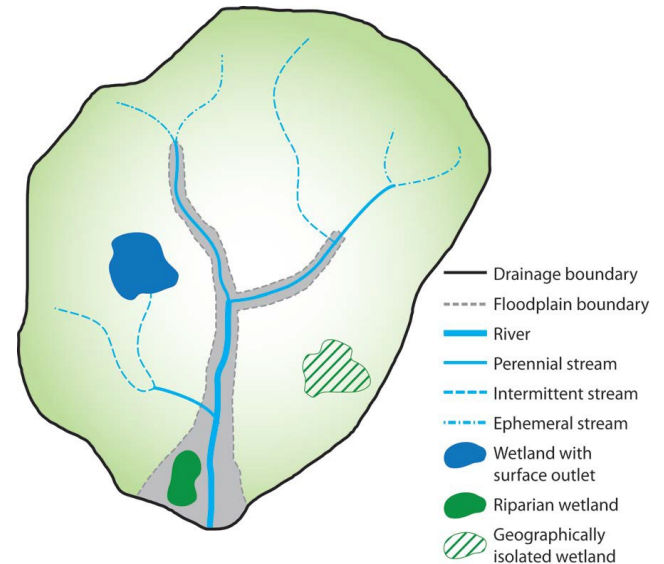
EPA/CORPS PROPOSED RULEMAKING ON “WATERS OF THE U.S.”

▫ Elements of the Proposed Rule:

- 7 categories of “waters of the United States”
- Automatic Jurisdiction for all:
 - All waters used in interstate commerce (TNWs), interstate waters, and the territorial seas (the “Big 3”)
 - All impoundments of these waters
 - All tributaries of these waters
 - All wetlands and other waters “adjacent” to these waters
- “Significant Nexus” test for “other waters”
- List of Excluded Waters
- Interpretive Rule for Agricultural Activities

WWG's ISSUES WITH THE JURISDICTIONAL BY RULE PROPOSAL

- Supported by Science?
- Supported by Law?
- Is there more clarity?
- What Floodplains are covered – 100 yr., 500 yr.?
- Does jurisdiction based on subsurface flow conflict with CWA's exclusion of groundwater regulation?
- Why regulate human-made off-river impoundments?



WWG's ISSUES WITH THE "OTHER WATERS" PROPOSAL

- ❑ Case-specific significant nexus determination → categories of excluded "other waters"
- ❑ Supported by Law?
- ❑ Supported by Science?
- ❑ Would this regulate isolated ponds found non-jurisdictional in *SWANCC*?
- ❑ Would use of Ecoregions effectively bring back the Migratory Bird Rule?
- ❑ Would this violate Due Process Rights for owners in same watershed affected by other owners' Jurisdictional Determinations?

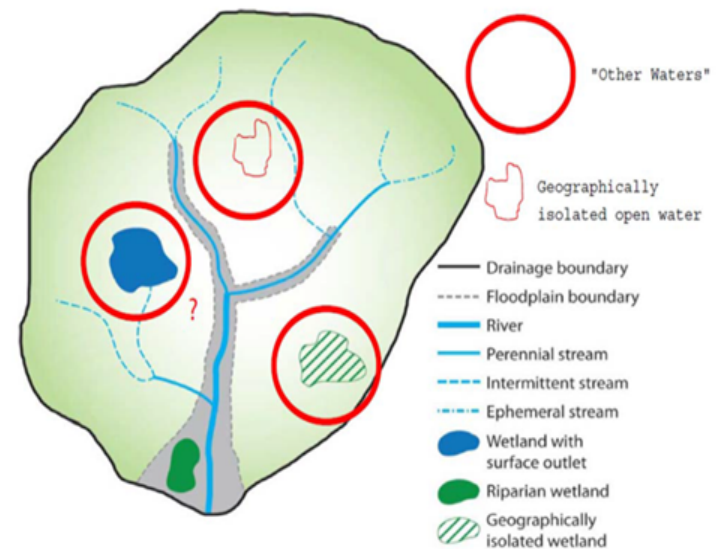


Figure 3-2. Elements of a river system. These elements include: the drainage basin (light green area), river network (rivers and streams), and other water bodies (riparian and floodplain wetlands, lakes, and unidirectional wetlands). Note that the unidirectional wetland that lacks a stream outlet would also be considered geographically isolated.

WWG's ISSUES WITH THE EXCLUDED WATERS PROPOSAL

- What is an upland (undefined in the Proposed Rule)?
 - EPA September Q/A: "Under the rule, an 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CW A jurisdiction."
- What ditch drains only uplands?
- How long after construction does the exemption apply for water filled depressions?
- What is the duration after stopping irrigation for areas to revert to upland?
- Is there inconsistency between groundwater exclusion and shallow surface connection issue?

EPA DRAFT CONNECTIVITY REPORT LARGELY IGNORES CLEAN WATER ACT AND SUPREME COURT PRECEDENT

□ EPA Draft Connectivity Report – 9/2013

- Synthesis of published, peer-reviewed literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters.

□ Conclusions

- Streams, regardless of size or flow, have important effects on downstream waters.
- Wetlands and open waters in floodplains and riparian areas are integrated with streams.
- Infrequency of flow does not negate the “fundamental biogeochemical processes” provided by ephemeral and intermittent streams, particularly since high-flow events will contribute and transmit material into river networks.
- Insufficient information to determine role isolated wetlands and ponds play in downstream waters.

Types of Infrastructure Projects Affected by Proposed Rule

- Water Supply Systems
 - Should not be “tributaries” → categorically excluded
- Water Reuse and Recharge Facilities
 - Recharge ponds/recycled water impoundments → categorically excluded
- Municipal Stormwater Control Facilities
 - MS4 → categorically excluded
- Irrigation Facilities
 - Artificial Irrigation facilities → categorically excluded
- Projects Subject to Nationwide Permits
 - Fewer projects meet threshold → increase in individual permits
- Energy Transmission and Storage Facilities

Summary of the WWG's Major Issues with the Proposed Rule

- The Proposed Rule ignores Supreme Court precedent and adopts an expansive interpretation of the CWA that exceeds the regulatory authority Congress granted to the Agencies;
- The Proposed Rule is inconsistent with the CWA's policy to preserve primary responsibility and rights of the states over land and water resources;
- Expansive jurisdictional-by-rule determination;
- Proposed regulation of “other waters” using EcoRegions;
- Narrow scope of Excluded Waters;
- Proposed Rule based on Draft Science Connectivity Report;
- Faulty Economic Analysis;
- Lack of “Grandfathering Provision”;
- Interpretive Rule for Agricultural Activities

EPA/CORPS PROPOSED RULEMAKING ON “WATERS OF THE U.S.”

▣ Next Steps for Rulemaking

- 9/9/14 - H.R. 5078 Passed House 262-152 prohibit developing, finalizing, adopting, implementing, applying, administering, or enforcing the proposed rule.
- 10/17/14 - SAB Final Comment Letter on Connectivity Report.
- As of 11/6/14 over 250,000 Comments Submitted.
- November Elections: Republicans won Senate Control → 111d Power Plant Proposed Rule.
- 11/14/14 - Comment Deadline.
- 2 years left in the Obama Administration.

For more information:

Brent Carson

206-623-9372
brc@vnf.com

Duncan Greene

206-623-9372
dmg@vnf.com

Joseph Nelson

202-298-1894
jbn@vnf.com

Erin Bartlett

202-298-1812
ekb@vnf.com