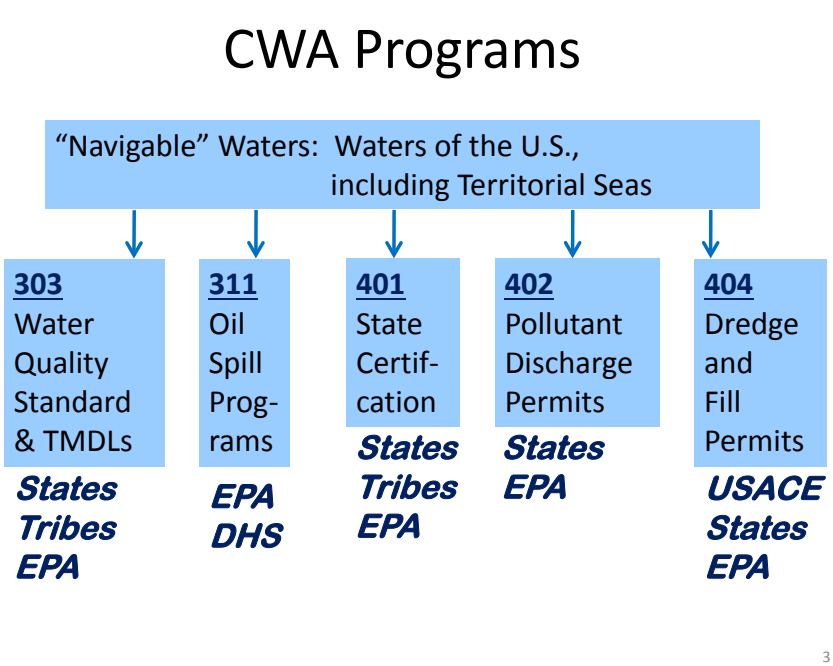
EPA Summary
of the
Discretionary Small Entity Outreach
for
Planned Proposed
Revised Definition of
"Waters of the United States"

INTRODUCTION

The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are currently developing a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme court cases, particularly decisions in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (*SWANCC*); and *Rapanos v. United States and Carabell v. United States (Rapanos)*. The agencies are undertaking this rulemaking with the goals of increasing CWA program predictability, timeliness, and consistency by increasing clarity regarding the scope of "waters of the United States" covered under the Act, and would enhance protection for the nation's aquatic resources consistent with science and the law.

Waters, including wetlands, found to be "waters of the U.S." under the Act and relevant case law are subject to CWA requirements. Waters that do not meet this definition are not subject to CWA provisions. Exhibit 1 identifies the CWA programs that rely on the definition of "waters of the U.S.", along with the government entities that are responsible for administering the programs. The CWA establishes oil spill prevention programs (Section 311); requires permits for pollutant discharges (Section 402); requires permits for the placement of dredged or fill material in waters of the United States (Section 404); calls for states to set standards for meeting water quality goals and develop plans to restore polluted waters (Section 303); establishes state roles in certifying that federal permits will not violate state water quality standards (Section 401); and provide tools for the federal government, states, and communities to enforce the law.

Exhibit 1. Clean Water Act Programs That Rely on the Definition of "Waters of the United States."



Recent court rulings and interpretations of water laws have sparked confusion and increased uncertainty regarding which waters are protected under the Clean Water Act, especially for headwater streams and wetlands.

As requested by a diverse group of stakeholders including the agriculture community, environmental and conservation groups, and state and local governments, the EPA and the Corps are seeking to provide clarification via notice and comment rulemaking as to what waters are and are not jurisdictional and thus under the purview of the CWA. The agencies understand that case-specific decisions concerning whether or not a waterbody is subject to the CWA may affect small entities who may, as a result, need to determine whether or not authorization is necessary to discharge pollutants into waterways. The lack of clarity and case-by-case determinations made necessary by *SWANCC* and *Rapanos* have resulted in delays and confusion which the agencies are eager to address in their rulemaking to reduce impacts on the public, including small entities. Small entities also benefit from the functions provided by intermittent, ephemeral and headwater streams and wetlands, such as purifying water and reducing potential treatment costs, reducing flood flows, and assuring reliable and constant supplies of water.

The overall geographic scope of the proposed regulation is narrower than it was before *SWANCC* and *Rapanos*, when the current rule was written. The agencies recognize and agree that the effect of the Supreme Court decisions was to narrow the geographic reach of the Act and the proposed rule reflects that. The scope of the regulations as proposed is narrower than the scope of the existing regulations. The agencies expect, however, that in clarifying the reach of waters under the Act, the proposed rule is likely to result in a slight increase in waters found jurisdictional compared to current practice under the 2008 guidance. The agencies expect the increase to be small, if at all, and occur in the context of improving the process of making jurisdictional determinations more quickly, more predictably, and with greater national consistency. Overall, small entities (and other regulated groups) have emphasized to EPA the importance of clarity, predictability, and consistency for their businesses and for the American taxpayer. In addition, the proposed rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. § 1362(7)), consistent with Supreme Court precedent.

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

In 2011, the EPA and the Corps of Engineers conducted an outreach meeting designed to exchange information with small entities that may be interested in this action. The outreach effort was led by representatives from EPA's Office of Wetlands, Oceans, and Watersheds within EPA's Office of Water; the Army Corps of Engineers Regulatory Program; the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration (SBA).

This summary includes the following:

- Background information on CWA jurisdiction and relevant case law;
- A summary of the outreach meeting;
- The written comments of the small entity participants; and
- A discussion of the comments.

Once completed, the final summary for this outreach meeting will be included in the rulemaking record. The agencies have developed the proposed rule in consideration of input received as a result of the small entity meeting. We are prepared to make additional changes in response to public comments on the proposed rule, including any comments from small entities.

It is important to note that the findings and discussion in this summary are based on the information available at the time this summary was drafted. The EPA and the Corps are continuing to

conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comments on the proposed rule.

BACKGROUND

Clean Water Act programs are applicable to all "navigable waters" which are defined in the statute as the "waters of the United States, including the territorial seas." The definition of "waters of the United States" is used in the implementation of all CWA programs including Sections 303, 311, 401, 402, and 404. The EPA is charged with overseeing implementation of all Clean Water Act programs, including Section 404. The Army Corps of Engineers administers the Section 404 program for discharges of dredged or fill material into jurisdictional waters, and makes the majority of jurisdictional determinations.[1]

After the Clean Water Act was amended in 1972, the EPA and the Corps promulgated regulatory definitions of "waters of the U.S.," and by 1979 EPA's definition looked substantially similar to what it is today. In 1982, the Corps adopted EPA's definition. The regulations define "waters of the U.S." as including waters that are:

- traditionally navigable
- interstate
- could affect interstate commerce if used, degraded, or destroyed
- territorial seas
- impoundments of jurisdictional waters
- tributaries of jurisdictional waters
- wetlands adjacent to jurisdictional waters.

The agencies' regulatory definition of "waters of the U.S." includes exclusions for waste treatment systems and prior converted cropland.

The U.S. Supreme Court addressed the scope of waters of the United States protected by the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court observed that the broad objective of the CWA to restore the integrity of the nation's waters "… incorporated a broad, systemic view of the goal of maintaining and improving water quality …. Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 133 (citing Senate Report 92-414).

The issue of CWA regulatory jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159* (2001) *(SWANCC)*. In *SWANCC,* the Court (in a 5-4 opinion) held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The Court noted that in the *Riverside* case it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States'" and that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167, 167. *SWANCC* did not directly address other parts of the regulatory definition of "waters of the United States."

[1] States and tribes may be approved to administer the Clean Water Act Section 404 program. Michigan and New Jersey currently implement the 404 program.

Five years after *SWANCC*, the Court again addressed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water. . ." *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *id.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id*. at 732 n.5.

Justice Kennedy's concurring opinion took a different approach than Justice Scalia's. Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167). He stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* The "significant nexus" test for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can and should be applied to other categories of water bodies (such as tributaries to traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

In *Rapanos*, the four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the regulatory provisions defining "waters of the United States." When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices. Thus, regulatory jurisdiction under the CWA exists over a water if either the plurality's or Justice Kennedy's standard is satisfied.

The two *Rapanos* standards have been difficult to put into practice for both the regulated community who seek permits and for agency field staff. EPA and the Corps proposed draft guidance in May 2011 to provide clearer, more predictable guidelines for determining which water bodies are protected by the Act. Many comments received on the proposed guidance urged the Corps and EPA to update their regulation defining waters of the U.S. Supreme Court justices in the *Rapanos* decision similarly urged rulemaking. In September 2013, the agencies withdrew the draft guidance and submitted a rule to the Office of Management and Budget for interagency review.

OUTREACH MEETING

The EPA, in collaboration with the Corps, OMB, and SBA, conducted an outreach meeting designed to exchange information with small entities on various potential jurisdictional policies. This outreach effort targeted small businesses, small governments, and small not-for-profit organizations (collectively referred to as small entities) classified using the following definitions:

- **Small Business:** Defined under Section 3 of the Small Business Act based on a firm's category in the North American Industry Classification System (NAICS). For each industry classified in NAICS, SBA regulations specify whether an entity qualifies as "small" based on thresholds for the entity's average annual receipts or number of employees. Information about what constitutes a "small business" is available at the Small Business Administration's website: http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

- **Small Not-for-Profit Organization:** Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

- **Small Governmental Jurisdiction:** Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

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

Industry Representatives:

Oil and Gas:

Name and Affiliation
Sally Allen, Vice President, Administration & Governmental Affairs Gary Williams Energy Corporation
Don Johnson Calcasieu Refining Company
Walton Gresham Greshman Petroleum Company

Agriculture:

Name and Affiliation
Karen Scanlon Conservation Technology Information Center
Tom Simpson Water Stewardship, Inc.
Greg Herbruck Herbrucks Poultry Ranch
Ridley Gardner, Chairman Carlsbad Soil & Water Conservation District
Don Parrish American Farm Bureau Federation
John Thorne
Crowell & Moring LLP, representing National Agricultural Aviation Association

Construction and Development:

Name and Affiliation
Jerry Passman, Passman Homes National Association of Home Builders State Representative for LA
Trey Pebley, Vice President McAllen Construction, Inc. Associated General Contractors of America Representative
Larry Kilduff, The Kilduff Company Shopping Centers Trade Association
Ed Smariga Buckeye Development, LLC
Tom Farasy Terra Verde Associates
R.L. "Bobby" Bowling IV Tropicana Building Corporation
Dan Brodeur P.J. Keating Company
Matt Carnahan Four Corners Materials

Eric Stevenson Brox Industries
Susan Asmus, Senior Vice President National Association of Home Builders
Leah Pilconis, Senior Environmental Advisor to Association of General Contractors

Manufacturing:

Name and Affiliation
Mahta Mahdavi National Association of Manufacturers

Mining:

Name and Affiliation
Karl Meyers Mineral Energy and Technology
Adam Whitman Meridian Beartrack Company

Small Government Entities:

Municipal Separate Storm Sewer Systems or Publically Owned Treatment Works:

Name and Affiliation
Stacy Wright, Director of Environmental Health Services City of Farmers Branch, Texas
Heidi Niggemeyer California Stormwater Quality Association Monterey Regional Stormwater Program
Randy Neprash Minnesota League of Cities Stormwater Committee
Jon Klassen, President Douglas County Water Resource Authority

Transportation:

Name and Affiliation
Pete Ringen, Director and County Engineer Wahkiakum County Public Works
Mark Timmerman, Superintendent Fillmore County Roads Dept

Small NGOs:

Name and Affiliation
Suzanne Pittenger-Slear, President Environmental Concern
Jennifer McKay, Policy Specialist Tip of the Mitt Watershed Council

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

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

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

SMALL ENTITY PARTICIPANTS

The small entity participants that participated in this outreach effort included the following:

Industry Representatives:

Oil and Gas:

Name and Affiliation
Sally Allen, Vice President, Administration & Governmental Affairs Gary Williams Energy Corporation

Agriculture:

Name and Affiliation
Tom Simpson Water Stewardship, Inc.
Don Parrish American Farm Bureau Federation
Deidre Duncan Hunton & Williams LLP, representing American Farm Bureau Federation
John Thorne Crowell & Moring LLP, representing National Agricultural Aviation Association

Construction and Development:

Name and Affiliation
Jerry Passman, Passman Homes National Association of Home Builders State Representative for LA
Trey Pebley, Vice President McAllen Construction, Inc. Associated General Contractors of America Representative
Ed Smariga Buckeye Development, LLC
Tom Farasy Terra Verde Associates
R.L. "Bobby" Bowling IV Tropicana Building Corporation
Matt Carnahan Four Corners Materials
Glenn Roundtree National Association of Home Builders
Jeff Augello National Association of Home Builders
Leah Pilconis, Senior Environmental Advisor to Association of General Contractors

Manufacturing:

Name and Affiliation
Mahta Mahdavi National Association of Manufacturers
Sam Boxerman Sidley Austin LLP, Representing National Association of Manufacturers

Small Government Entities:

Municipal Separate Storm Sewer Systems or Publically Owned Treatment Works:

Name and Affiliation
Stacy Wright, Director of Environmental Health Services City of Farmers Branch, Texas
Heidi Niggemeyer California Stormwater Quality Association Monterey Regional Stormwater Program
Randy Neprash Minnesota League of Cities Stormwater Committee

Small NGOs:

Name and Affiliation
Jennifer McKay, Policy Specialist Tip of the Mitt Watershed Council

SUMMARY OF COMMENTS FROM SMALL ENTITY PARTICIPANTS

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

General Need for Jurisdictional Clarity

The primary concern raised repeatedly by all participants was the need for clarity as to which aquatic resources are jurisdictional and which are exempted from jurisdiction. The current approach of determining jurisdiction on a case-by-case basis can be very time and resource intensive. One participant noted that when pricing projects where there is jurisdictional uncertainty this ambiguity is included in the price quote as well. By providing a clearer definition of what is jurisdictional these time and resource investments could be avoided.

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

To help provide jurisdictional clarity participants commonly requested concise definitions for terms that determine jurisdiction such as isolated, adjacent, tributary, and ordinary high water mark. One participant also noted that an erosional feature and an ephemeral stream can have similar characteristics and it is important to have a sharp distinction between the two. Participants also suggested that EPA and the Corps maintain a list of Traditionally Navigable Waters (TNWs) that are considered jurisdictional to help businesses and landowners determine if an aquatic resource is likely to be jurisdictional. Participants recommended that the agencies determine general categories of jurisdictional waters, eliminating the need for case-by-case determinations. The list of features identified as generally not jurisdictional should also be very clear and exhaustive; participants advocated strongly for removal of the term "generally" as it creates unnecessary ambiguity.

Jurisdictional Status of Groundwater

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

Jurisdictional Status of Ditches

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

Impoundments

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

Implications for Low Impact Design (LID)

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

Similarly Situated Waters Approach

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

Interpretation of Supreme Court Cases

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

Regulatory Flexibility Act

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

RECOMMENDATIONS AND RESPONSE TO COMMENTS FROM SMALL ENTITY PARTICIPANTS

The following response to comments represent recommendations for how best to address issues raised by small entities consistent with the law and science.

General Need for Jurisdictional Clarity

The primary concern raised by all participants was the need for clarity as to which aquatic resources are or are not jurisdictional.

The agencies' goal is to promulgate a rule which is clear and understandable and which protects the Nation's waters, consistent with the law and currently available science. The agencies believe continuity with the existing regulations, where possible, will reduce confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies are also proposing, where consistent with the law and science, bright line categories of waters that are and are not jurisdictional. The agencies' practice has been to consider certain categories of waters identified in earlier preambles as not subject to the Clean Water Act, and now this practice will be codified in a rule. This proposal would categorically identify as "waters of the US" traditional navigable waters, tributaries, adjacent waters, interstate waters, and impoundments of jurisdictional waters. As requested by many small entities at this meeting, the agencies are proposing definitions for some of the terms used in the proposed regulation, such as adjacent, tributary and significant nexus. Ordinary high water mark is already defined in regulations (see 33 C.F.R. § 328.3(e)).

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

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

Jurisdictional Status of Groundwater

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

The agencies emphasize that groundwater is not subject to regulation under the CWA, and the proposal does not change that longstanding statutory interpretation. Although groundwater may be relevant as a connection in a significant nexus determination, the current policies do not assert that the groundwater itself is a water of the US. To help clarify this point, the agencies have added language stating that shallow subsurface flows may be the basis for establishing a connection to waters of the United States without themselves becoming jurisdictional, and that groundwater is never a jurisdictional water. Indeed, the proposal specifically excludes groundwater, including groundwater drained through subsurface drainage systems, from the definition of "waters of the US."

Jurisdictional Status of Ditches

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

In keeping with long-standing policies, the proposal attempts to more clearly identify which ditches are jurisdictional and which are not. Some agricultural and roadside ditches will continue to be jurisdictional. Tidal ditches are jurisdictional by definition. Ditches excavated in waters of the US continue to be jurisdictional. Non-tidal ditches that meet the definition of tributary and meet certain criteria will be

considered tributaries for the purposes of this rule and will be evaluated as tributaries. Ditches that do not meet the criteria for tributaries specified in the proposal are not considered to be tributaries and therefore cannot be subject to Clean Water Act jurisdiction. Ditches that are excavated wholly in uplands or drain only uplands or non-jurisdictional waters and have less than perennial flow are specifically excluded from jurisdiction. Likewise, ditches that do not connect to the tributary system are explicitly excluded regardless of flow regime.

Impoundments

Impoundments of waters of the U.S. may be considered jurisdictional, but impoundments constructed wholly in uplands are generally not jurisdictional. The agencies do not propose to make any changes to the existing regulatory language with respect to impoundments, "[i]mpoundments of waters otherwise defined as waters of the United States under this definition." The Supreme Court has confirmed that damming or impounding a water of the United States does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

However, for the first time by rule, the agencies are proposing to exclude some waters and features that the agencies have by longstanding practice generally considered not to be waters of the United States. Under the proposal, farm ponds for stock watering excavated wholly in uplands would be specifically excluded from jurisdiction. Specifically, the agencies are proposing that 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 are not waters of the US. Likewise non-jurisdictional would be artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; and water-filled depressions created incidental to construction activity.

One of the agencies' goals in this proposed rule is to provide clarity and certainty about the scope of waters of the United States. To that end, they are proposing not simply that these features and waters are "generally" not waters of the United States, but that they are expressly not waters of the United States by rule. Under this proposal, the agencies would not retain the authority to determine that one of these waters was a water of the United States by, for example, finding that the water had a significant nexus pursuant to the other waters provision at (a)(7).

In cases where stock ponds or farm ponds have been excavated from already existing waters of the US, such an impoundment would continue to be a water of the US.

Implications for Low Impact Design (LID)

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

Similarly Situated Waters Approach

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

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

appropriate interpretation of "in the region" for the purposes of applying Justice Kennedy's significant nexus standard.

The rule establishes categories of waters that meet this standard, such as tributaries and adjacent wetlands. Case-by-case significant nexus determinations would be necessary only for "other waters," and thus include only similarly situated "other waters" within a region. A significant nexus evaluation considers only waters, never uplands. The agencies will continue to make decisions on a case-by-case basis; however, previous determinations for similarly situated waters will have a bearing on the outcome.

Interpretation of Supreme Court Cases

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

The agencies agree that decisions in *SWANCC* and *Rapanos* combined to reduce the historic scope of CWA jurisdiction, and the proposal reflects these decisions. The proposed rule does to a small degree assert CWA jurisdiction over some additional waters when compared to the previous *SWANCC* and *Rapanos* guidances by providing clarification of the agencies' interpretation of the Supreme Court decisions. The proposal does not, however, extend federal jurisdiction to any waters not historically protected under the Clean Water Act and is fully consistent with the law, including decisions of the Supreme Court.

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

Regulatory Flexibility Act

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

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

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

proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions.

Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, at a preliminary stage, about how they should approach this complex question of statutory interpretation.