



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 17 2015

OFFICE OF WATER

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Inhofe:

Thank you for your July 6, 2015, letter regarding the EPA/Department of the Army final Clean Water Rule defining the scope of Clean Water Act jurisdiction. EPA worked with Assistant Secretary of the Army Jo-Ellen Darcy's office in preparing this response.

The agencies developed the Clean Water Rule (the rule) in response to requests from a broad range of interests nationwide who recognized the urgent need to make the process of identifying waters subject to the Clean Water Act easier to understand, more predictable, and consistent with the law and peer-reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources. Implementing the final rule will reduce delays in making jurisdictional determinations, save time and money for permit applicants, and improve protection for clean water on which all Americans depend for public health and a strong economy.

Your letter seeks documents and studies used to develop the scientific rationale for the rule. The agencies viewed a strong science foundation as a condition precedent to any revision to the definition of the term "waters of the United States." The EPA report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*" (Science Report) represents the state-of-the-science on the connectivity and isolation of waters in the United States. The Science Report was developed using only peer-reviewed science, and the report itself was subject to multiple peer reviews, including review by the independent EPA Science Advisory Board. It makes five major conclusions, summarized below, that are drawn from a broad range of peer reviewed scientific literature:

- The scientific literature unequivocally demonstrates that streams, regardless of their size or frequency of flow, are connected to downstream waters and strongly influence their function.
- The scientific literature clearly shows that wetlands and open waters in riparian areas (transitional areas between terrestrial and aquatic ecosystems) and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality. These systems act as effective buffers to protect downstream waters from pollution and are essential components of river food webs.
- There is ample evidence that many wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide physical, chemical, and biological functions that could significantly affect the integrity of downstream waters. Some

potential benefits of these wetlands are due to their isolation rather than their connectivity. Evaluations of the connectivity and effects of individual wetlands or groups of wetlands are possible through case-specific analysis.

- Variations in the degree of connectivity are determined by the physical, chemical and biological environment, and by human activities. These variations support a range of stream and wetland functions that affect the integrity and sustainability of downstream waters.
- The literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.

The Science Report and the underlying scientific studies used to develop it contain the information you requested. The Science Report can be found at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414>. The agency can provide your staff with access to the scientific works that support the rule, which are contained in the docket for the rule. Notably, many of the documents you request are also covered by copyright which limits our ability to reproduce and distribute them.

In developing the rule, a major goal was to make the process of identifying covered waters more consistent, easier to understand, and less costly to apply and implement. The agencies have worked hard to reflect this goal in improvements to our regulations and are now eager to apply the rule in making protection of the nation's clean water more fair, clear, and effective.

The Supreme decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* provide critical context and guidance in determining the appropriate scope of "waters of the United States" covered by the CWA. In the rule, the agencies interpret the scope of the "waters of the United States" for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies' technical expertise and experience. As the agencies stated in the preamble, what constitutes a significant nexus is not a purely scientific determination. The opinions of the Supreme Court have noted that as the agencies charged with interpreting the statute, EPA and the Corps must develop the outer bounds of the scope of the CWA, even while science does not provide bright line boundaries with respect to where "water ends" for purposes of the CWA. In addition the agencies responded to the need to make the process of identifying waters protected under the CWA easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

Your letter also seeks maps and tables developed by the agency or under contract showing the extent of waters that are various distances from navigable waters. The final Clean Water Rule establishes "bright lines" that limit potential jurisdiction and respond to public comments requesting greater clarity and consistency in the process of identifying waters that are and are not covered by the CWA. The preamble to the final rule discusses in detail how these limits were determined. As the preamble clearly reflects, the limits are a product of consideration of both science and experience in making jurisdictional determinations after *SWANCC* and *Rapanos*.

As EPA has stated in the past, we are unaware of any national or statewide maps that have been prepared by EPA or any other agency depicting the scope of waters subject to the CWA. The state and national scale maps produced in 2013 relied on USGS data to show various water resources and do not reflect whether the water resources are jurisdictional. Further, due to the resolution limitations of the maps, they are not effective in distinguishing consistently between land and water. The Agency is

providing maps and tables developed in 2005 as well as updated versions from 2013 derived from the USGS National Hydrography Dataset. The tables present the information on various stream types as coded in the NHD, such as intermittent streams, perennial streams, and headwater streams, within each watershed (8 digit Hydrologic Unit Code (HUC) watersheds) relative to total stream length on a state-by-state basis.

The EPA and Corps conducted extensive outreach on the rule and sought input from states, municipalities, industry and nonprofits. This outreach yielded very helpful input that strengthened and clarified the final rule. Your letter mentions meetings held with external environmental groups held after the close of the comment period. A list of meetings with those groups and discussions with a broad range of other stakeholders are included in the docket, under <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20870>.

Your letter poses questions about how significant nexus is determined, including through groundwater, shallow subsurface connection and seed dispersal through the excretion of birds and mammals. The preambles to the proposed and final rule draw from the Science Report and the SAB review to provide information to address the range of connectivity that upstream waters have on downstream waters. In making a final jurisdictional determination for those waterbodies that require individual case-specific analysis, the agencies will consider the individual circumstances of those waterbodies and their effect on waterbodies that are jurisdictional by rule. However, the greater clarity provided by the rule will limit the number of instances where we expect to have to conduct a case-specific analysis.

Agency personnel are available to meet with you and your staff to address your questions. The EPA seeks to respond to your questions in a manner that provides you with the information you need while respecting ongoing legal challenges and copyright restrictions. EPA staff will contact Committee staff to discuss how we can most effectively proceed. I hope you will feel free to contact me if you have questions, or your staff may call Denis Borum in the EPA's Office of Congressional and Intergovernmental Relations at (202) 564-4836.

Sincerely,



Kenneth J. Kopocis
Deputy Assistant Administrator

Enclosures