

**Environment and Public Works WOTUS Hearing  
February 4, 2015  
Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant  
Secretary of the Army (Civil Works)**

Chairman Senator Inhofe

1. Please respond with a yes or no.

a. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all waters adjacent to a jurisdictional water?

A: **No.**

**Waters of the U.S. (WoUS) include both wetland and non-wetland waters. The 1986 regulations at 33 CFR § 328.3 include as a jurisdictional category of WoUS “wetlands adjacent” to waters identified as navigable waters; interstate waters; intrastate other waters the use, degradation, or destruction of which could affect interstate or foreign commerce; impoundments; tributaries; and the territorial seas. Therefore, the regulations do not include all adjacent waters as a jurisdictional category, only wetlands.**

b. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all waters in a flood plain?

A: **No.**

**Waters of the U.S. (WoUS) include both wetland and non-wetland waters. The regulations include all wetlands that are neighboring, bordering, or contiguous with jurisdictional waters. The term “floodplain” is not used specifically in the WoUS regulations; however, adjacent wetlands are often found within the floodplain. In practice, adjacent wetlands are often located and identified within floodplains because floodplains may neighbor, border, or be contiguous with jurisdictional waters.**

c. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all waters with a subsurface hydrologic connection to a jurisdictional water?

A: **No.**

**Waters of the U.S. (WoUS) includes both wetland and non-wetland waters. Subsurface hydrologic connections could be through groundwater or through shallow subsurface flow where the primary hydrologic interaction is between the surface water and such shallow subsurface flow. The Corps has never interpreted groundwater to be a jurisdictional water or a hydrologic connection**

**because the Clean Water Act (CWA) does not provide such authority. However, shallow subsurface flow, such as in karst systems or in areas with a restrictive impermeable shallow subsurface layer, may result in hydrologic transmissivity on the horizontal plane connecting an adjacent wetland to a tributary. Such shallow subsurface hydrologic connections have been used to provide evidence of adjacency for a jurisdictional wetland.**

d. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all waters with a confined surface hydrologic connection to a jurisdictional water?

**A: No.**

**Waters of the U.S. (WoUS) includes both wetland and non-wetland waters. Confined surface connections include features such as ditches and non-wetland swales. Such confined surface connections have been used to provide evidence to demonstrate adjacency for a jurisdictional wetland. Wetlands with confined surface connections to jurisdictional waters would not be considered to be hydrologically isolated such that they would be jurisdictional under the 1986 regulations.**

e. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all manmade waters that an agency could identify as a tributary or an adjacent water, unless specifically excluded?

**A: No.**

**There is no specific exclusion for manmade waters, although there are specific types of manmade waters that may generally be considered not to be jurisdictional. Furthermore, there is no distinction in the regulations regarding “manmade” waters. Nevertheless, there is a distinction in the 1986 preamble to the regulations for certain waters that are created by excavating dry land.**

**Under the 1986 regulations, the only waters excluded by the rule itself from CWA jurisdiction are waste treatment systems and prior converted cropland. However, as the preamble of the 1986 regulation states, other types of waters were generally not considered to be WoUS, including certain manmade features such as non-tidal drainage and irrigation ditches excavated on dry land, certain artificial lakes or ponds created by excavating and/or diking dry land, and water-filled depressions created in dry land incidental to construction activity unless and until the operation is abandoned and the resulting body of water meets the definition of WoUS. These waters were not specifically excluded under the CWA or in the text of any rule, and EPA had the authority to determine on a case-by-case basis if any of such waters were WoUS.**

**A wetland that met the definition of adjacency and was not one of the generally non-jurisdictional waters described in the 1986 preamble would have been**

**considered jurisdictional prior to the *Rapanos* decision regardless of whether it was manmade. In addition, certain forms of compensatory mitigation under section 404 of the CWA may include the creation of “manmade” jurisdictional wetlands in areas that were formerly uplands. See responses above for discussion on adjacency of non-wetland waters. A tributary or ditch that is “manmade” but is excavated in jurisdictional waters would generally be jurisdictional. However, certain activities conducted in such manmade jurisdictional ditches may be exempt from regulation under section 404 of the CWA, such as the maintenance of irrigation and drainage ditches.**

f. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all ephemeral streams?

**A: Yes.**

**The 1986 regulations included tributaries to traditional navigable waters; interstate waters; intrastate other waters the use, degradation, or destruction of which could affect interstate or foreign commerce; and impoundments. There was no limitation on the type of tributary or flow regime; all tributaries were jurisdictional by rule. The ordinary high water mark establishes the lateral limits of jurisdiction for non-tidal tributaries, including ephemeral tributaries, in the absence of adjacent wetlands.**

g. Before the Supreme Court issued its decision in *Rapanos* in 2006, did the Army Corps of Engineers interpret the jurisdictional waters of the United States to include all intermittent streams (current regulations say a commerce clause impact is needed).

**A: Yes.**

**See response (f) above.**

2. The Army Corps of Engineers has stated that the proposed rule will expand federal CWA jurisdiction. In light of the very small thresholds for the streamlined general permits, it is clear that a number of activities that currently qualify for general permits will need to obtain more costly and time-consuming individual permits. How does your Agency intend to address the additional time and resources it will take to process additional individual permits?

**A: The proposed rule provides a definition of “waters of the U.S.” under the CWA and does not modify any statutory provisions or regulatory requirements associated with obtaining authorizations under section 404 of the CWA. The increase in jurisdictional tributaries, other waters, and adjacent waters over the current 2003 and 2008 guidance would correspond to an increase in the number of permits required. However, there may also be efficiencies gained in completing jurisdictional determinations. These efficiencies may result from the additional categories of waters that are determined to be jurisdictional by rule that previously required case-specific significant nexus determinations.**

**The proposed rule does not modify or revoke any of the efficient permit mechanisms currently available including general permits. The general permit thresholds appropriately authorize only those impacts with minimal adverse effects to the aquatic environment, when analyzed individually and cumulatively. In addition, single and complete, separate and distant impact areas can be authorized under separate general permits, thereby not requiring an individual permit for those impacts that do not exceed the general permit thresholds. The Nationwide General Permits will be reissued in 2017, and will include a public notice period during which the public may provide comments regarding the general permit thresholds. Corps districts authorize the majority (~60%) of individual permits within 120 days of receiving a federally-complete application.**

**In addition, the proposed rule does not modify or revoke any of the activity exemptions included under section 404(f)(1) of the CWA for discharges of dredged and/or fill material associated with certain activities such as normal farming, ranching and silviculture, and maintenance of irrigation and drainage ditches.**

3. How does eliminating the use of streamlined permitting comport with President Obama's Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects?

**A: See response (2) above. The proposed rule will not eliminate the use of streamlined permitting mechanisms, such as general permits. The Corps currently ensures that its review of infrastructure projects remains consistent with Executive Order 13604, and will continue to do so under any final rule. The Corps continues to promote the use of best practices such as the use of Section 214 of the Water Resources Development Act of 2000, as amended, and 23 U.S.C. § 139(j) to establish dedicated liaisons to expedite the review of transportation and other infrastructure projects. In addition, the Corps is leading the interagency effort to update the 1988 handbook entitled "Applying the Section 404 Permit Process for Federal-Aid Highway Projects," to promote conducting the NEPA compliance process concurrent with the Corps' review for transportation and other infrastructure projects. The Corps will continue to closely engage in national and regional efforts that help reduce redundancy and improve permit review processes.**

4. The proposed rule for the first time codifies federal jurisdiction over ditches. What mitigation will be required for the filling of a ditch?

**A: The final rule will not be the first time federal jurisdiction over certain ditches is codified. Under the 1986 preamble to the regulations, only certain ditches would generally be considered not to be WoUS, such as irrigation and drainage ditches excavated in dry land. The preamble to the 1986 regulations, however, also provided that EPA could, on a case-by-case basis, assert jurisdiction over such ditches. Other ditches, in particular those that are excavated in jurisdictional waters, may be jurisdictional as a tributary WoUS. Under the 2008 *Rapanos***

**guidance, ditches with no more than relatively permanent flow (in general, ditches with less than seasonal flow, including ephemeral ditches) are generally not considered jurisdictional; however, ditches with at least seasonal flow may be considered jurisdictional.**

**The specifics of compensatory mitigation stem from the sequence of avoidance, minimization, and compensation dictated by the regulations at 33 CFR § 320.4(r). Compensatory mitigation is the last part of the sequence and is a case-specific consideration in accordance with our Mitigation Rule (33 CFR § 332). Not every authorized project requires compensatory mitigation, and the Mitigation Rule does not dictate when such compensatory mitigation is required but rather provides a process for establishing how compensatory mitigation should be accomplished.**

**Overall, the goal of “no net loss” of wetlands is not a goal requiring all acreage to be compensated for in kind on a project-by-project basis but rather is a goal of no functional net loss on a programmatic basis. The functions lost dictate how much and what type of compensatory mitigation may be required. Many jurisdictional ditches provide similar functions as tributaries, while others may not provide such functions. This can dictate what form of compensatory mitigation may be required, if at all, for certain impacts to aquatic resources.**

**In addition, discharges of dredged and/or fill material associated with certain activities in jurisdictional ditches are exempt under section 404(f)(1) of the CWA. These activities include construction of irrigation ditches and maintenance of irrigation and drainage ditches.**

**5. How will the Army Corps of Engineers ensure that any permits necessary for moving, cleaning, maintaining, and reclaiming ditches are granted in a timely fashion that does not disrupt industrial operations across the country or force industrial operations into non-compliance with other laws?**

**A: See response (4) above regarding jurisdictional status of ditches and exempt activities in ditches under section 404(f)(1) of the CWA, such as maintaining irrigation and drainage ditches. Other aspects of industrial operations may also be exempt under 404(f)(1), such as construction of certain temporary sedimentation basins.**

**Ditches that may be jurisdictional, such as those excavated in jurisdictional waters, may require authorization for certain discharges of dredged and/or fill material if they are not associated with the exempt activities under 404(f)(1). Discharges associated with moving or reclaiming jurisdictional ditches may require authorization under the CWA. Some of these discharges may have minimal adverse effects and may be authorized by the efficient permit mechanisms of general permits. Nationwide general permits (NWP) for discharges associated with ditch activities include NWP 40 for agricultural activities and NWP 41 for reshaping existing drainage ditches. However, if discharges of dredged and/or fill material associated with activities in**

**jurisdictional ditches are proposed with more than minimal adverse effects, those discharges may be authorized by individual permits. Timely submission of materials and submission of a federally complete application by the applicant can ensure a more efficient review and decision-making process.**

6. The concept of ordinary high water mark is absolutely essential to determining the extent of federal CWA jurisdiction under the rule. The Army Corps of Engineers recently released new guidance changing the way the Agency assesses ordinary high water marks in the field. Why was this guidance not included in the proposed rule? Why was the regulated public not alerted to the guidance or provided a chance to comment?

**A: The Corps has been working on guidance for identifying the ordinary high water mark (OHWM) since 2004. A Regulatory Guidance Letter was published in 2005 providing various factors and means to identify the OHWM. The first OHWM Manual Field Guide for identifying the OHWM was published in 2008 for the Arid West Region of the Western United States. The recently released Field Guide was for the Western Mountains, Valleys, and Coast Region in 2014. These OHWM tools were developed prior to and outside of the rulemaking process for WoUS. These documents have been developed and implemented regardless of any rulemaking or guidance efforts for the definition of WoUS. These are technical documents and as such do undergo a technical review; however, they are not considered a “rulemaking” such that public notice and comment would be required under the Administrative Procedures Act. The documents do not represent new guidance pertaining to the definition or application of the OHWM to jurisdictional determinations. Rather, the field manuals are developed to provide procedures for Corps regulators to identify the OHWM in the field. The definition of OHWM has been discussed in regulations since the administration of our 1899 Act program, and the current definition was added into our regulations as far back as 1977.**

7. If EPA – who is not the permitting authority under Section 404 - can at any time retroactively veto the duly authorized specification of a disposal site, can it really be said that CWA Section 404 permits are *ever* final?

**A: Although the Corps has final decision-making authority under Section 404 of the CWA to authorize discharges of dredged and/or fill material into WoUS, Section 404(c) authorizes EPA to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever EPA determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.**

**Under EPA regulations at Part 231 for the 404(c) procedures, EPA may “exercise a veto over the specification by the U.S. Army Corps of Engineers or by a state of a site for the discharge of dredged or fill material. The Administrator may also**

prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state.”

Corps regulations state that a district engineer-signed permit is a final decision (33 CFR § 325). While a Corps permit is considered “final agency action” such that it can be subject to judicial review under the Administrative Procedure Act, under Section 404(c), EPA can exercise its authority to “veto” a Corps specification of a site for the discharge of dredged and/or fill material. Nevertheless, EPA has used its veto power sparingly.

8. In 1972 during deliberations on the Clean Water Act in Congress, Senator Muskie noted that there are three essential elements to the Clean Water Act -- "uniformity, finality, and enforceability." Do you agree that finality is an important consideration for permits? How do the assertions made by EPA regarding the scope of its authority under Section 404 comport with the notion of permit finality?

**A: See response (7) above. Yes; finality is an important consideration for permits and permittees in light of the resources expended to obtain a permit and begin construction. The EPA has been given authority under Section 404(c) of the CWA to prohibit, restrict, or deny the discharge of dredged or fill material at defined sites in WoUS whenever it determines, after notice and opportunity for public hearing, that use of such sites for disposal would have an unacceptable adverse impact on one or more of various resources, including fisheries, wildlife, municipal water supplies, or recreational areas.**

9. Without any discernible or objective criteria governing EPA’s claimed authority under Section 404(c), EPA’s retroactive revocation of a lawfully issued Section 404 permit has destroyed the essential element of permit uniformity. What impact do you think EPA’s actions will have on investment in U.S. property and natural resource development?

**A: The Corps cannot speculate as to the potential impacts of potential EPA actions on investment in U.S. property and natural resource development. The Corps will continue to review and make decisions on approximately 60,000 proposed projects and actions each year, including those related to natural resource development, in order to protect aquatic resources while allowing reasonable development through fair, flexible, and balanced permit decisions.**

10. EPA’s internal documents have stated that preemptive 404 actions, such as those taken with respect to the Pebble Mine in Alaska, could serve as a means of “watershed planning.” If EPA is granted the authority to undertake such unilateral watershed planning, what would be the impacts on states?

**A: The Corps cannot speculate as to the potential impacts on states from potential EPA actions under Section 404(c). The Corps will continue to review and make decisions on approximately 60,000 proposed projects and actions each**

**year in order to protect aquatic resources while allowing reasonable development through fair, flexible, and balanced permit decisions.**

Ranking Member Senator Boxer

1. Ms. McCarthy and Ms. Darcy, you have taken important steps to solicit public and stakeholder input as part of the rulemaking process. For example, I understand that the comment period was extended twice and lasted over 200 days, which seems like a long period of time compared to most rulemakings. Is this correct?

**A: Yes; most rulemaking efforts include a public comment period of ~60 days. Under Executive Order 12866 and the Administrative Procedures Act rulemaking process, a public comment period of not less than 60 days was established as the standard. The comment period initially established for the proposed rule was 90 days from the date of publication (April 21, 2014). However, in light of comments requesting extensions to the comment period, the ~400 outreach and stakeholder sessions hosted by EPA, and the desire to allow the public to consider submitting comments after the Scientific Advisory Board published its draft assessment and review of the EPA Connectivity Report, the agencies determined that the public comment period would be extended until November 21, 2014. This resulted in a comment period of approximately seven months.**

a. I also understand EPA and the Corps have conducted significant outreach beyond the formal comment period. Can you also elaborate on the types of outreach conducted for this rule?

**A: Please see the attachment for a list of the ~400 outreach and stakeholder events conducted by EPA with local/state governments, various NGOs, businesses, industries, agricultural organizations, etc. The Corps participated in 74 of these events, which are highlighted in yellow on the attached list. In addition, the Corps districts published public notices announcing the availability of the proposed rule for comment and posted them on their websites. The EPA would best be able to speak to the outreach efforts they conducted.**

b. How will EPA and the Corps incorporate the feedback you have received as you work to prepare a final rule?

**A: The agencies are reading the over one million comments received on the proposed rule. The public comments help identify suggested language improvements, unintended issues, specific concerns to particular constituencies, and implementation issues that should be addressed. These comments will be considered and used to inform the final rule language. A preamble to the final rule will provide a response to comments document that explains how the agencies considered and incorporated those comments into the final rule.**

2. Ms. Darcy, a confusing Supreme Court decision has made the permitting process more costly and confusing. How will the new Clean Water rule help make permitting more efficient and reduce the amount of time and the cost necessary to obtain a permit?

**A: See response to Question #2 above.**

**The proposed rule provides a definition of “waters of the U.S.” under the CWA and does not modify any statutory provisions or regulatory requirements associated with obtaining authorizations under section 404 of the CWA. The increase in jurisdictional tributaries, adjacent waters, and other/isolated waters over the current 2003 and 2008 guidance would correspond to an increase in the number of permits required under the proposed rule. However, there may also be efficiencies gained in completing jurisdictional determinations from the additional categories of waters that are jurisdictional by rule that previously required case-specific significant nexus determinations. With the additional clarity and certainty provided by the rule, the agencies predict that the regulated public will better understand CWA jurisdiction.**

**The proposed rule does not modify or revoke any of the efficient permit mechanisms currently available, including general permits. The general permit thresholds appropriately authorize only those impacts with minimal adverse effects to the aquatic environment. In addition, single and complete, separate and distant impact areas can be authorized under separate general permits, thereby not requiring an individual permit for those impacts that do not exceed the general permit thresholds. The Nationwide General Permits will be reauthorized in 2017, and will include a public notice during which the public may provide comments regarding the general permit thresholds. Corps districts also authorize the majority (~60%) of individual permits within 120 days of receiving a federally-complete application.**

3. Ms. Darcy, some at the hearing claimed that the proposed rule will impose greater burdens on farm practices and is more expansive than existing law. Isn't it true that the proposed rule expressly preserves all of the existing exemptions for agriculture?

**A: Yes; the proposed rule does not modify or revoke any of the agricultural activity exemptions included under section 404(f)(1) of the CWA for discharges of dredged and/or fill material associated with certain activities such as normal farming, ranching and silviculture, and maintenance of irrigation and drainage ditches.**

Senator Sullivan

1) The current 404 program administered by the Corps and EPA does not allow a landowner to judicially appeal an affirmative federal wetlands jurisdictional determination. If the Corps says it's a wetland under federal jurisdiction, the landowner cannot appeal and must go through a lengthy and very expensive permit application process before they can file a lawsuit challenging that determination. With this proposed rule, potentially requiring the Corps to issue even more 404 permits for projects in wetlands, and requiring compliance for a myriad of other Clean Water Act provisions beyond Section 404 permitting, will the procedures be revised so that jurisdictional determinations can

be appealed by a landowner, potentially saving them, and the federal government, significant money?

**A: As a general rule, an applicant must receive a permit or permit denial before seeking judicial review of a jurisdictional determination. However, an applicant may administratively appeal an approved jurisdictional determination in accordance with 33 CFR Part 331. The applicant may again challenge the Corps' jurisdictional determination in a federal court as part of a challenge to the permit or permit denial.**

**Because a majority of federal courts have held that a Corps jurisdictional determination is not a "final agency action" under the Administrative Procedures Act, the Corps does not consider approved jurisdictional determinations to be final agency actions and has required applicants to follow the permitting process established by law and regulation. In light of the U.S. Supreme Court's 2012 decision in *Sackett v. EPA*, a limited number of federal courts have departed from the overwhelming consensus of the federal judiciary and held that approved jurisdictional determinations are final agency actions. The Corps plans to work with the Department of Justice to adjust its permitting process as required in those jurisdictions.**

2) In your view, will this proposal result in fewer citizen lawsuits?

**A: The agencies predict that the proposed rule will serve to clarify which waters are jurisdictional. The Corps cannot predict whether this clarification will result in fewer lawsuits.**

3) What assurances can you provide the public, state and local governments, tribes, and regulated industry, that this rule will not cause skyrocketing costs of compliance, including mitigation costs?

**A: EPA prepared a draft economic analysis for the proposed rule, dated March 2014, which is posted to the docket on [www.regulations.gov](http://www.regulations.gov). The draft economic analysis concluded that compliance costs are not expected to change under the rule. The EPA is preparing a revised economic analysis that will be published with the final rule.**