

# Proposed Rule: Definition of “Waters of the U.S.” Under the Clean Water Act

*Science Advisory Board Review, September 29, 2014*



# Why Does This Matter?



# Protecting America's Waterways and Clean Water



# Clean Water is Important to All

- Protecting downstream water quality
- Contributing clean water for drinking, irrigation, recreation, commercial fishing, and industrial uses downstream
- Filtering pollution and reducing downstream treatment costs
- Providing habitat for fish and other aquatic life that live in traditional navigable waters
- Reducing downstream flooding
- Protecting property and infrastructure downstream

# Waters Protected by Clean Water Act (CWA) “Jurisdiction”

- The scope of CWA jurisdiction affects all CWA programs, including permits for discharges of pollutants, permitting to dredge or fill waters, and oil spill prevention and clean up
- CWA applies to “navigable waters”: waters of the United States, including territorial seas
- CWA does not define “Waters of the United States”
- The current regulatory definition is essentially unchanged since the late 1970s



# What is the current definition of Waters of the U.S.?

- Traditional Navigable Waters
- Territorial seas
- Interstate waters
- Impoundments of waters of the U.S.
- Waters that could affect interstate commerce
- Tributaries of above waters
- Wetlands adjacent to above waters

# Supreme Court Decisions Affecting Water of the U.S.

***Riverside Bayview Homes*** (1985): Unanimous decision upholding agencies' regulatory definition extending jurisdiction beyond navigable-in-fact, including "adjacent wetlands" as waters of U.S.

***SWANCC*** (2001): Majority decision that use of waters by migratory birds not sufficient basis for jurisdiction.

***Rapanos*** (2006): Splintered decision provides relative permanence and significant nexus as standards for determining CWA protection.

**Rulemaking proposed in 2014 to conform regulations to Supreme Court decisions.**



# Proposed “Waters of the U.S.” (WOUS) Rule

- Published on April 21, 2014
- Based on science and law
- Defines “waters of the U.S. consistent with Supreme Court decisions
- Applies to all CWA programs
- Establishes bright line categories for:
  - Waters that are WUS and covered by the CWA.
  - Waters that are not WUS.
- Does not change existing exemptions or exclusions.
- For certain issues, poses questions to solicit public comment on options.



# What is the proposed definition of Waters of the U.S.?

- Traditional Navigable Waters
- Interstate waters
- Territorial seas
- Impoundments of waters of the U.S.
- Tributaries of above waters
- Wetlands and open waters adjacent to above waters
- “Other waters” that have a significant nexus to a TNW, interstate water, or the territorial seas

**“Significant” nexus is a policy determination**

# Draft ORD Connectivity Study:

## Connectivity of Streams & Wetlands to Downstream Waters

- Scientific evidence on connectivity or isolation of:
  - Non-tidal streams, including headwaters
  - Wetlands & certain open waters in riparian zones & floodplains
  - Wetlands outside of riparian zones & floodplains, including “geographically isolated wetlands”



# Translating between Policy and Science

Policy Question	Science Question
What tributaries have a “significant* nexus” to “traditional navigable waters”?	What are the chemical, physical, and biological connections and effects of ephemeral, intermittent, and perennial streams on receiving waters?
What “adjacent” waters have a “significant* nexus” to traditional navigable waters?	What are the connections and effects of floodplain/riparian wetlands and open waters (e.g., oxbow lakes) on receiving waters?
What categories of “other waters” have a “significant* nexus” to traditional navigable waters?	What are the connections and effects of non-floodplain/non-riparian wetlands and open waters on receiving waters?
What is an appropriate level of aggregating waters?	What factors influence connectivity and magnitude of effect at different scales?

**\*“Significance” in this context is a policy determination informed by science.**

# Connectivity Report Conclusions

1. All tributaries, regardless of size or flow duration are connected to, and have important effects on, downstream waters.
2. Wetlands and open waters in riparian areas and floodplains are integrated with river networks; they sustain water quality & productivity of downstream rivers, lakes, and estuaries.
3. Current literature is insufficient to generalize about the connectivity or downstream effects of waters in unidirectional landscape settings (often referred to as “geographically isolated” wetlands and open waters).



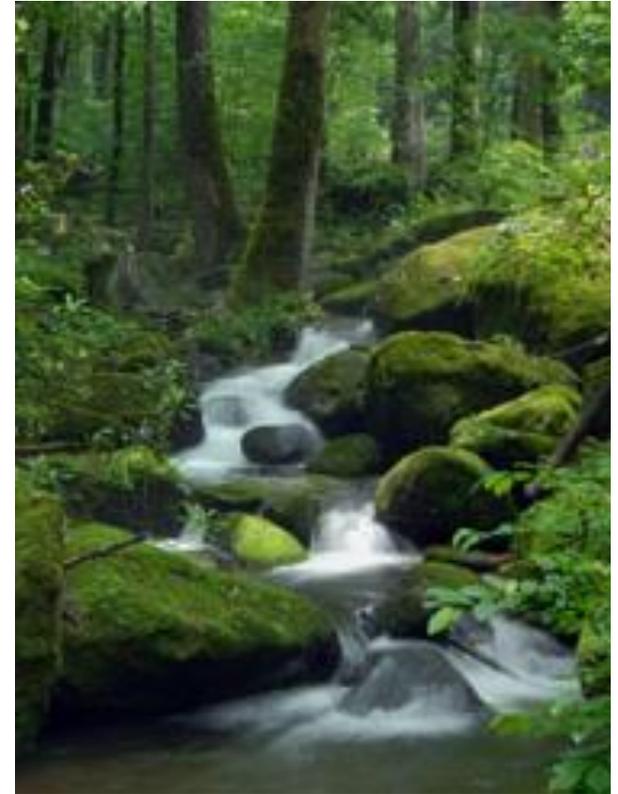
# How Science (and the Law) Informed the Proposed Rule



# Draft ORD Findings Regarding Streams

## Strong evidence for downstream connectivity and effects of streams of all sizes and flow classes

- Streams are “hydraulic highways” transporting materials, chemicals, organisms.
- Streams are the dominant source of water in most rivers.
- Ephemeral/intermittent streams shape river channels by gradually or episodically releasing sediment.
- Material transformations (e.g., nutrient processing) in small streams have large effects on downstream water quality.



# Tributaries in the Proposed Rule

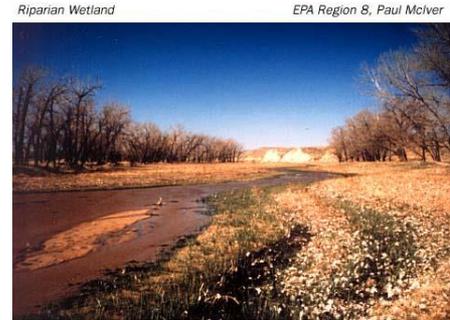
- Like current rule, tributaries are jurisdictional
- Proposal adds a definition of “tributary” to establish physical characteristics
- Wetlands, lakes and ponds can be tributaries
- Scientific literature supports policy conclusions of a significant nexus



# Draft ORD Findings Regarding Riparian/Floodplain Wetlands and Open Waters

**Strong evidence that wetlands and open waters (e.g., oxbow lakes) within riparian areas and floodplains of streams, rivers, lakes, bays ...**

- Attenuate flooding
- Export food resources
- Trap and transport sediments
- Store and modify potential pollutants
- Provide refuge and habitat for riverine plants and animals



**... thereby sustaining water quality and productivity of downstream rivers, lakes and estuaries .**

# Adjacent Waters, Including Adjacent Wetlands in the Proposed Rule

- Like current rule, adjacent wetlands are jurisdictional
- Definition of wetlands does not change
- Modifies regulation to include open waters in addition to wetlands
- Retains definition of adjacent to be “bordering, contiguous, or neighboring”
- Defines neighboring for the first time



Scientific literature supports policy conclusions of a significant nexus

# Draft ORD Findings Regarding Non-riparian/Non-floodplain Waters

**Current literature is insufficient to generalize about the connectivity or downstream effects of waters in unidirectional landscape settings (often referred to as “geographically isolated wetlands” or open waters)**

- These wetlands and open waters exist along a connectivity/isolation gradient.
- Connectivity varies within a watershed and over time, and within wetland classes.
- Additional information could allow identification of classes based on connectivity and effect on downstream waters.

# Draft Findings (cont)

## Aggregating streams, wetlands, or open waters to determine magnitude of downstream effects

- Strong scientific support for case-specific analysis on groups of streams, wetlands, or open waters that perform similar functions, in the same watershed.
- Individual effect might be small, but combined effect can be great.



# “Other waters” with a Significant Nexus in the Proposed Rule

- Case-specific analysis must find that “other waters,” either alone or in combination with similarly situated waters located in the same region, have a significant nexus
- Do not fall in one of the other categories of waters
- Available science does not support a policy conclusion that all “other waters” as a group have significant nexus
- Agencies are also accepting comments on several different policy options:
  - “Other waters” are similarly situated only in certain areas of the country (e.g. in certain ecoregions)
  - Certain subcategories of “other waters” as a class have a significant nexus
  - No “other waters” are similarly situated and all “other waters” must be evaluated individually
  - All “other waters” in the watershed are similarly situated



# Waters That Are Not “Waters of the U.S.” Under the Proposed Rule

- Waste treatment systems (including treatment ponds and lagoons).
- Prior converted cropland
- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow
- Ditches that are not tributaries
- Artificially irrigated areas that would revert to upland if irrigation stops
- Artificial lakes or ponds created by excavating and/or diking dry land and used for purposes such as rice growing, stock watering or irrigation.
- Artificial reflecting pools or swimming pools created on dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.
- Groundwater, including groundwater drained through subsurface drainage systems
- Gullies and rills and non-wetland swales



# How to Comment on the Proposed Rule

- Submitting comments on the proposed rule, identified by Docket ID No. EPA-HQ-OW-2011-0880, can be done by one of the following methods:
  - Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
  - Email: [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include EPA-HQ-OW-2011-0880 in the subject line of the message.
- 180-day comment period closes October 20, 2014

# Questions?



[www.epa.gov/uswaters](http://www.epa.gov/uswaters)