Questions and Answers about Waters of the US

The EPA and the Army Corps are NOT going to have greater power over water on farms and ranches.

- The Clean Water Act and its regulations have multiple exclusions and exemptions from jurisdiction and permit requirements. The proposed rule does not change or limit any of them.
- The agencies also worked with USDA to develop and publish through an interpretive rule, a list of NRCS agricultural conservation practices that will not be subject to CWA permitting requirements. These practices encourage conservation while protecting and improving water quality.

The proposed rule will NOT bring all ditches on farms under federal jurisdiction.

- Some ditches have been regulated under the Clean Water Act since the 1970s.
- The proposed rule does not expand jurisdiction.
- For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, and drain only dry lands, are not "waters of the U.S." This includes roadside ditches, and ditches collecting runoff or drainage from crop fields.
    - **Ditches that are IN** are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.
    - **Ditches that are OUT** are those that are dug in dry lands and don't flow all the time, or don't flow into a jurisdictional water.
- Farmers, ranchers and foresters are exempt from Clean Water Act Section 404 permitting requirements when they construct and maintain those ditches, even if ditches are jurisdictional.

The proposed rule does NOT mean permits are needed for walking cows across a wet field or stream.

- Normal farming and ranching activities are not regulated under the Clean Water Act.

The proposed rule will NOT apply to wet areas on fields or erosional features on fields.

- Water-filled areas on crop fields are not jurisdictional.
- The proposal specifically excludes erosional features from being “waters of the U.S.”

EPA is NOT taking control of ponds in the middle of the farm.

- The proposed rule does not change jurisdiction over farm ponds.
- The rule does not affect the existing exemption Congress created for construction and maintenance of farm or stock ponds.
- The proposed rule would for the first time specifically exclude stock watering ponds from jurisdiction.

The interpretive rule does NOT redefine normal farming as only those 56 conservation practices.

- If a permit was not needed for a particular practice before, a permit won't be needed now.
- These 56 practices **clarify and add to** all of the practices that are being implemented in the field today and currently considered normal farming and exempt from permitting. The interpretive rule **adds to** what is exempt.
- The "normal farming" exemption is broader than these 56 practices. So if farmers implement other practices, or don't use NRCS funds, they would continue to be exempt in the same way they are now.
- This rule is self-implementing, which means that a farmer is not required to seek approval from or consult with any agency (including USDA, EPA, and the Corps) to implement a conservation practice and be exempt from permitting.

NPDES permits will NOT be required for the application of fertilizer to fields or surrounding ditches or seasonal streams.

- All ditches constructed in dry land and that drain only dry land, and flow only part of the year, are not jurisdictional and thus would not need a permit for any action.
- The pesticide general permit only requires an NPDES permit where pesticides are applied **directly to** a water of the U.S.
- Pesticide applicators can avoid direct contact with jurisdictional waters when spraying crop fields.

Federal agencies are NOT asserting regulatory authority over land use.

- The Clean Water Act only regulates the pollution and destruction of waters.
- The Clean Water Act protects waters, the life blood of communities, businesses, agriculture, energy development, and hunting and fishing across the nation.

EPA and the Corps are NOT regulating groundwater or "shallow subsurface connections."

- The proposed rule specifically says groundwater is not regulated.

The proposed rule would NOT result in a takeover of private property.

- The proposed rule does nothing to change private property rights.
- The Clean Water Act applies to surface waters, not to land or to rain gutters, wet lawns, groundwater, or a host of other kinds of waters.

The proposed rule does NOT mean highway ditches are going to become jurisdictional.

- Instead, the proposed rule would narrow Clean Water Act jurisdiction over thousands of miles of upland ditches that have water in them only seasonally.

- Highway ditches that are made from dry land, that drain dry land, and that don't flow year-round, are not jurisdictional, nor are ditches that don't connect to waters of the United States. That is true in current practice, and it's true under the proposed rule.

The proposed rule does NOT automatically assert jurisdiction over things like dry streambeds, washes, erosional features, and arroyos.

- As the Supreme Court has recognized, The Clean Water Act applies to some waters that don't flow 100 percent of the time.
- The agency's proposed rule includes definitions for various Clean Water Act terms to make it easier to figure out what's in and what's out.
    - The proposed rule says that all "tributaries" are jurisdictional.
    - The rule includes a definition of "tributary," and says a tributary is something with a **bed and bank** and an **ordinary high water mark**.
- A waterbody needs to flow at a reasonable frequency to have these two characteristics. Features that flow extremely rarely would not exhibit these characteristics and would not be jurisdictional.

EPA will NOT be regulating rainwater that falls on lawns, farm fields, or playgrounds.

- This is misinformation and simply not true.

EPA's rule will NOT require permits for all activities in floodplains.

- The Clean Water Act does not give authority to regulate land, and the agencies are not asserting jurisdiction over floodplains.
- The agencies' proposed rule simply recognizes that **waters** within a floodplain are more likely to affect downstream waters than those that are not. It does not say the entire floodplain would be jurisdictional.
- Farming and ranching activities are exempt from needing a 404 permit *even if they happen in a floodplain*. The proposed rule will not change a farmer's ability to farm his or her fields within a floodplain.

The proposed rule does NOT protect any waters that have not historically been covered under the Clean Water Act.

- The proposed rule specifically reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court.
- Waters that have never been protected remain outside the scope of the Clean Water Act, and the rule protects fewer waters than prior to the Supreme Court cases.
- The proposed rule includes a definition of "significant nexus" yet the Agencies welcome comments on how the definitions can be improved, or whether additional terms should be defined.

Non-navigable waters have been regulated under the Clean Water Act since it was passed in 1972.

- Supreme Court decisions, including the one authored by Justice Scalia in *Rapanos*, and the legislative history of the Clean Water Act, make clear that the law applies to more than just waters that are "navigable."
- The Supreme Court said the Clean Water Act should cover navigable waters as well as those with a "significant nexus" to navigable waters, and based on the science. That's exactly what this rule would do.

The proposed rule is consistent with Supreme Court decisions.

- The proposed rule is being updated specifically to comply with Supreme Court decisions.
- The EPA and the Corps are responding to calls from Congress and the Supreme Court to clarify their regulations.
- The proposed rule reflects the more narrow reading of Clean Water Act jurisdiction established by the Supreme Court.
- Chief Justice Roberts called for the EPA and the Corps to do rulemaking to provide clarity regarding Clean Water Act jurisdiction.
- The preamble to the proposed rule, and an appendix, fully explain this.

EPA is NOT dramatically expanding jurisdiction.

- The agencies expect that a very small number of additional waters – 3.2 percent - will be found jurisdictional compared to current practice because of greater clarity regarding whether waters are protected or not.
- These waters are jurisdictional today, but because of the complexity and confusion, asserting jurisdiction was too resource-intensive.

The proposed rule does NOT mean that previous decisions about jurisdiction will have to be revisited.

- Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations. (Jurisdictional determinations are valid for 5 years.)
- With the proposed rule, we are providing additional clarity for industry, developers, farmers, and others about which waters are covered by the Clean Water Act and which are not.
- The Agencies welcome comments from all interested parties to make sure our rule does this.

EPA is NOT rushing ahead with a rulemaking before it has done any peer review of its science.

- EPA's "connectivity report" has **already been through two rounds of peer review** and is based entirely on **previously peer-reviewed and publicly available literature**.
- The proposed rule will not be finalized until the Science Advisory Board's review is complete.

- While the SAB sets its own schedule, EPA anticipates that the SAB will have completed its work before the extended comment period closes, so that the public can review the SAB's final report.

EPA is NOT refusing to allow its Science Advisory Board to review the draft rule.

- EPA agrees that the Science Advisory Board has an important role in reviewing the science that underlies our regulatory decisions.
- The SAB will be reviewing the rule, and we're working right now with the SAB to decide how they can best do so.

The proposed rule is NOT going to federalize state waters and make states set water quality standards for them.

- The proposed rule will not affect state water laws, including those governing water supply and use. And the proposed rule does not protect any new types of waters not previously protected.
- EPA agrees that the standards applicable to different types of waters can differ – whether they are wetlands, streams, rivers, or lakes.
- States are best equipped to determine what these standards should be, based on the uses of those waters.
- Many states in fact have more stringent requirements for their state waters, and state water quality protections often depend on federal protections.

EPA consulted early with states when developing the proposed rule.

- The agencies are specifically working with state and local officials on the proposed rule.
- The agencies will conduct additional conversations with states and local officials in developing the final rule.

The proposed rule will NOT limit states' ability to assume the 404 program.

- The definition of waters of the US and which waters may be assumed by states are separate definitions, and this is clear in the preamble to the proposed rule.
- The EPA is working with state associations to clarify what waters are assumable by states to help the states assume the Section 404 program.

This proposal is beneficial for the economy.

- Protecting water is important to the long-term health of the economy. Streams and wetlands are economic drivers because of their role in fishing, hunting, agriculture, recreation, energy, and manufacturing.
- The potential economic benefits of the proposed rule are estimated to be about double the potential costs – $390 to $510 million in benefits versus $160 to $278 million in costs.

- The economic analysis indicates that these benefits from protecting waters from pollution and destruction (e.g., flood protection, pollutant filtration, habitat/biodiversity provisioning, hunting and fishing support, groundwater recharge, biogeochemical cycling) greatly outweigh the costs.

The rule would NOT infringe on private property rights and hinder development.

- The Clean Water Act is not a barrier to economic development.
- The Clean Water Act stops the unlimited discharges that could pollute and destroy waters across the U.S. EPA, the Army Corps, and states issue thousands of permits annually that allow for property development and economic activity in ways that protect the environment.
- By providing additional clarity, the proposed rule will help reduce regulatory confusion and delays in permitting determining which waters are or are not regulated under the Act.

The rule will NOT have a negative effect on small businesses.

- The agencies sought early and wide input from small businesses while developing the proposed rule, including meetings as far back at 2011.
- EPA and the Corps' proposed rule includes the required certification under the Regulatory Flexibility Act regarding the rule's impact on small businesses. This reflects the fact that the proposed rule's jurisdiction would be narrower than under our existing regulations.
- EPA recognizes the interests of the small business community in the proposed rule and continue to meet with them and other stakeholders to help inform the rule moving forward.