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Definition of “Waters of the United States” Under the Clean Water Act;
Proposed Rule

Elko County / NACO Summary:

On April 21, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a new proposed rule – *Definition of Waters of the U.S. Under the Clean Water Act* – that would amend the definition of “waters of the U.S.” and expand the range of waters that fall under federal jurisdiction.

The proposed rule, which the agencies released March 25, would bring under federal jurisdiction all tributaries of streams, lakes, ponds and impoundments, as well as wetlands that affect the chemical, physical and biological integrity of larger, navigable downstream waters.

The proposed rule would significantly amend similar regulatory definitions that appear at 40 C.F.R. Section 110.1, Section 112.2, Section 116.3, Section 117.1, Section 122.2, Section 232.2, Section 300.5, Section 300 Appendix E, Section 302.3 and Section 401.11. Water bodies defined as “waters of the U.S.” under these sections are subject to Clean Water Act programs relating to discharges of oil, oil pollution prevention, National Pollutant Discharge Elimination System permitting, dredge-and-fill permitting, and other activities.

The proposed “waters of the U.S.” regulation from EPA and the Corps could have a significant impact on counties across the country, in the following ways:

- Seeks to define waters under federal jurisdiction: The proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA). *The proposed modification aims to clarify issues raised in recent Supreme Court decisions that have created uncertainty over the scope of CWA jurisdiction and focuses on the interconnectivity of waters when determining which waters fall under federal jurisdiction.* Because the proposed rule could expand the scope of CWA jurisdiction, Elko County could feel a major impact as more waters become federally protected and subject to new rules or standards.

- Potentially increases the number of Elko County owned ditches under federal jurisdiction: The proposed rule would define some ditches as “*waters of the U.S.*” if they meet certain conditions. This means that more Elko County owned ditches would likely fall under federal oversight. *Section 404 permits* have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving us vulnerable to civil suits if the federal permit process is not streamlined. (road closures, loss of private property access, etc.)
- Applies to **All Clean Water Act programs**, not just Section 404 program: The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. Among these programs which would become subject to increasingly complex and costly federal regulatory requirements under the proposed rule are the following:
 - Section 402 National Pollution Discharge Elimination System (NPDES) program which includes municipal separate storm sewer systems (MS4s) and pesticide applications permits (EPA Program).
 - Section 303 Water Quality Standards (WQS) program, which is overseen by states and based on EPA’s “*waters of the U.S.*” designations
 - Other programs including storm water, green infrastructure, pesticide permits and total maximum daily load (TMDL) standards

The Clean Water Act (CWA) was enacted in 1972 to restore and maintain the chemical, physical and biological integrity of waters in the United States and is used to *oversee* federal water quality programs for areas that have a “*water of the U.S.*”. The term *navigable “waters of the U.S.”* was derived from the Rivers and Harbors Act of 1899 to identify waters that were involved in *interstate commerce* and were designated as federally protected waters. Since then, a number of court cases have further defined *navigable “waters of the U.S.”* to include waters that are not traditionally navigable.

The Humboldt River and many of the tributaries have already been determined to be under COE jurisdiction, the proposed rule will include all remaining direct and indirect tributaries of the Humboldt River, adjacent wetlands, and potentially adjacent lands or water without due process and without method of appeal short of litigation.

Litigation Leading to Proposed Rules:

*More recently, in 2001 and 2006, Supreme Court cases have raised questions about which waters fall under federal jurisdiction, creating uncertainty both within the regulating agencies and the regulated community over the definition of “waters of the U.S.” In 2001, in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (531 U.S.159, 2001), the Corps had used the “**Migratory Bird Rule**” wherever a migratory bird could land to claim federal jurisdiction over an isolated wetland. **The Court ruled that the Corps exceeded their authority and infringed on states’ water and land rights.***

In 2006, in Rapanos v. United States, (547 U.S. 715, 2006), the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program. In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The opposing opinion stated that waters should be jurisdictional if the water has a “**significant nexus**” with a navigable water, either alone or with other similarly situated sites. Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of CWA jurisdiction. The proposal states that “waters of the U.S” under federal jurisdiction include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands, and “other waters.” It also redefines or includes new definitions for key terms—adjacency, riparian area, and flood plain—that could be used by EPA and the Corps to claim additional waters as jurisdictional.

Nevada and Elko County governments will have more regulatory requirement in CWA implementation. As the range of waters that are considered “*waters of the U.S.*” increase, Nevada will be required to expand their current water quality designations to protect those waters. This increases reporting and attainment standards at the state level. Elko County, in the role of regulator, has watershed / storm water management plans (Elko County Water Resources Management Plan 2007) that would have to be modified based on the federal and state changes. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and storm water plans.

Examples of Potential Impact on Elko County

Elko County Owned Public Infrastructure Ditches

The proposed rule could broaden the number of Elko County maintained ditches / roadside, flood channels and potentially others that would require **CWA Section 404 federal permits**. Elko County utilizes public infrastructure ditches to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences. (as per ECC development criteria and Nevada Orange Book Standards)

- The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a “**water of the U.S.,**” regardless of perennial, intermittent or ephemeral flow.
- The proposed rule provides exclusions for certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.” However, under the proposed rule, key terms like ‘*uplands*’ and ‘*contribute flow*’ are undefined. It is unclear how currently *exempt ditches* will be distinguished from *jurisdictional ditches*, especially if they are near to a “water of the U.S., such as the Humboldt River Basin”. (irrigation and other man made drainage ditches). This could also include utility and drainage easements of record.

Ultimately, Elko County could be liable for enforcement regulatory requirement for maintaining the integrity of all ditches within our jurisdiction, even if federal permits are not approved by the federal agencies in a timely manner. The Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the County argued that the Corps permit process did not allow for timely approvals.

At very least concerning this issue the EPA, COE and federal government must clarify that regional and county roads, local streets, gutters, and human-made (including irrigation) ditches are excluded from the definition of “*waters of the U.S.*”

This is a significant potential threat for Elko County and Incorporated Cities of the County with MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their storm water ditches are considered a “water of the U.S.” Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a “*water of the U.S.*,” they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (Carlin, Elko, Wells, West Wendover, Jackpot and other areas)

It is indistinct how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. According to a joint document released by *EPA and the Corps, Economic Analysis of Proposed Revised Definition of Waters of the United States* (March 2014), the agencies have performed cost benefit analysis across CWA programs, but acknowledge that “readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis.”

The nucleus of the proposed definition of the “*Waters of the United States*” are waters that have been traditionally regulated under the CWA and the Rivers and Harbors Act pursuant to Congress’s Commerce Clause authority, i.e., *navigable waters*, including waters that have been navigable in the past or may be susceptible to use in *interstate or foreign commerce*; wetlands that are interstate in nature; territorial seas; and impoundments of these types of waters.

The United States *EPA and Corps defined for the “first time” by the tributaries, in reference to physical characteristics* (presence of a high water mark), and connectivity to traditional waters through contribution of flow to those waters. *Before this proposed rule, the EPA and Corps evaluated tributaries on a case-by-case basis using the significant nexus test. Now, the EPA and Corps are through rulemaking making a determination that there is a significant nexus between these tributaries that meet the proposed definition and traditional waters.* EPA and the Corps argue in the preamble to the rule that this determination will give greater certainty to the regulated community because it will eliminate an entire class of waters that otherwise would have to go through a *case-by-case significant nexus determination. But, the practical effect of this portion of the rule is that it will cement many tributaries as “Waters of the United States” and remove the case-by-case determination of a significant nexus that EPA and the Corps has been performing post-Rapanos.* As a result, this *categorical inclusion* of tributaries arguably broadens the definition of “Waters of the United States.”

Continuing with the “*significant nexus*” theme, the EPA and Corps are modifying the current definition of “*other waters*” in the proposed rule. In the current definition, “*other waters*” are defined based on a test of whether the degradation or destruction of those waters could affect interstate or foreign commerce. The proposed rule imports the “*significant nexus*” test in determining jurisdiction over “*other waters*,” and the EPA and Corps are proposing to make jurisdictional determinations over these waters on a *case-by-case* basis. ***How to define and treat these “other waters” under the CWA is one of the main parts of the rule where the EPA and Corps are seeking feedback.***

Also included in the proposed rule are changes to the definition of “adjacent” waters, i.e., waters defined by the geographic relationship to traditional waters. The previous rule referenced adjacent wetlands only, and the new rule in response to a judicial interpretation of the old rule now includes in its scope both adjacent wetlands and other water bodies. Functionally, this sweeps into CWA jurisdiction waters beyond adjacent wetlands such as the one analyzed in Rapanos. Once again, the significant nexus test is what the EPA and the Corps relies upon in bringing these other water bodies within CWA jurisdiction. They do so by “clarifying” the issues of adjacency, i.e., ***when is a water or wetland considered to be a “Water of the United States”*** based on its geographic relationship to traditional waters, by applying the *significant nexus* test and through a series of definition changes. ***The proposed rule defines an “adjacent” water as one that is bordering, contiguous, or “neighboring” traditional waters, and then includes within the term “neighboring” waters located in “riparian” areas or “floodplains” adjacent to traditional waters.*** This nesting of definitions may have the convenient effect of expanding the reach of CWA into floodplains or riparian areas that contain what may be isolated water bodies, and once again reflects the *categorical inclusion* of classes of waters based in a determination of *significant nexus* through this rulemaking. This is another instance of how the proposed rule expands CWA, EPA, COE and Federal Government jurisdiction.

Questions and Concerns:

1) The EPA/COE proposed rules intent is to streamline the permit process by ***defining “Waters of the U.S., Tributaries, Other Waters and Adjacent Waters”***. The EPA/COE states that jurisdictional classification process based on case-by-case is time consuming and costly. However, the proposed rule created the “***significant nexus***” test that will also require a case-by-case review and determination. This appears to provide the COE another opportunity for further control of un-classified waters under the Clean Water Act and the EPA. It would appear that the “Significant Nexus” test would also be time consuming and costly to the potential permittee.

For instance, Pole Canyon / Franklin Creek Bridge, the COE under the significant nexus test would be required to determine if waters from the Franklin Creek provide any significant impact or flow on and to the Humboldt River basin. It seems to me that this type of analysis is just as time consuming and costly as the current requirement for a determination of jurisdiction that took almost a year. However, it will give the COE ultimate and supreme authority because it will cost the local entities or private property owners more money and time to appeal the findings and in many 404 permit cases it will not be worth the additional cost.

2) The EPA/COE proposed rules includes for the first time defined “***tributaries***” to “***Navigable Waters***” and thus included many perennial, intermittent or ephemeral flow water ways that provide watershed drainage for a very short period, normally in late winter and early spring seasons. This will broaden COE requirements for development and maintenance under the 404

permit process. Under the significant nexus test this potentially could also include many watershed irrigation ditches and pipelines that provide water to low land fields throughout the irrigation / growing season.

3) The EPA/COE proposed rules is very **unclear** of the exclusions to the rules concerning agricultural uses including pesticide and herbicide uses and how the water user will be affected. It appears that it will be very easy for the COE to enforce many of the provisions of the 404 permit for agricultural uses under the “**other waters and adjacent waters**” definitions. The proposed EPA/COE rule tends to implement the Federal Government policy that one size fits all and has written the exclusions and inclusions of jurisdiction accordingly.

4) The agencies particularly intend to review the rule provisions related to "**other waters**" in light of this record, and are **soliciting comment on several alternative approaches** to applying the science and the law for determining whether "other waters" are similarly situated and have a "**significant nexus**" to “traditional navigable water”, interstate water, or the territorial seas. Question arises that other waters is a term that could be all encompassing if not specifically define to exclude carbonate aquifers, underground waters, glaziers, subterranean sources or other source not defined.

5) The proposed rules are ambiguous concerning grading and storm water drainage in rural or open areas that are not MS4 rated storm systems. This could place the county in very awkward positions in existing subdivisions and future development along with county road maintenance. The proposed rules provide for exclusions but does not provide for specific definitions.

6) Final comments are due July 21, 2014. I will be preparing the Elko County Comments for your review and approval within the next few weeks. Please provide any comments or questions to me for inclusion.

EPA / COE Proposed Rules Definitions:

Waters of the United States: (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; (3) The territorial seas; (4) All impoundments of waters identified in paragraphs (a) (1) through (3) and (5) of this section; (5) All tributaries of waters identified in paragraphs (a) (1) through (4) of this section; (6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a) (1) through (3) of this section.

Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters,¹ or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional "waters of the United States" **by rule-no additional analysis would be required.**

Tributary: a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a) (1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a) (1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b) (3) or (4).

Wetlands: means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Significant Nexus: means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (Le., the watershed that drains to the nearest water identified in paragraphs (a) (1) through (3)), 6 significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a) (1) through (3). For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3).

Adjacent: means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters."

Neighboring: The term neighboring, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

Other Waters: The proposed rule provides that "other waters" can be jurisdictional where there is a case-specific showing of a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. "Significant nexus" is not itself a scientific term. The science of connections and effects on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas informs an analysis of the facts and circumstances of the waters being considered under a "significant nexus" analysis.