EPA's "Waters of the United States" Rule: Substance and Significance

Summary

Four hundred stakeholder meetings and one million comments later, the U.S. Environmental Protection Agency released the final Waters of the United States (WOTUS) rule on May 27, 2015. Response to the rule has been immediate, vocal, and varied across the political spectrum. Some environmental advocates have criticized the rule for what it explicitly excludes, arguing that the rule leaves out too many streams and wetlands. At the same time, industry and agriculture interests have decried the rule as federal overreach. Understanding the scope, vulnerabilities, and likely implementation of the WOTUS rule is central for practitioners. What does the Clean Water Act (CWA) actually cover under the final rule? Are there activities that may be subject to the CWA for the first time or no longer covered? Where do the uncertainties lie? What legal challenges might advocates bring against the rule? Will the federal government have new tools to extend federal jurisdiction, and how will states react? On June 8, 2015, the Environmental Law Institute convened a panel of experts to explore this vitally important new rule. Below we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Panelists:
Scott Schang (moderator) is Executive Vice President of the Environmental Law Institute.
Ken Kopocis is Deputy Assistant Administrator in the Office of Water at the U.S. Environmental Protection Agency.
Craig R. Schmauder is Deputy General Counsel for Installations, Environment, and Civil Works in the U.S. Department of the Army.
Deidre G. Duncan is a Partner at Hunton & Williams LLP.
Jon Devine is Senior Attorney for Water Programs at the Natural Resources Defense Council.

Scott Schang: The Clean Water Rule, defining the statutory term "waters of the United States" for jurisdictional purposes (often referred to as the WOTUS Rule), was jointly issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) and goes into effect August 28, 2015.[1] It demarcates the limit of federal jurisdiction over waters and wetlands for purposes of the Clean Water Act (CWA).[2] As such, this rule has a significant impact on the kinds of activities that will be required to obtain federal permits, ranging from land development that might impact wetlands to discharges into streams and rivers.

We are bringing you a panel of top experts today to explain the rule, help place it in context, and explore the likely future for the rule and its impact. This is part of the Environmental Law Institute's (ELI's) mission to make law work for better economic, social, and environmental outcomes. Through our research, education, convenings, and publications, we make environmental progress real, whether it's by examining U.S. law as we are doing today, by educating over 2,000 judges in 25 countries, or by working with partners to strengthen Jordan's water management, Liberia's timber management, or Mexico's implementation of water and energy-efficiency measures. Our approach is strictly nonpartisan. As we are doing here today, we believe that we can achieve better environmental results by bringing all perspectives to the table.

The four professionals we bring you today are at the heart of the ongoing effort to clearly articulate the scope of federal jurisdiction over water protection. It is a tough issue, having made three high-profile trips to the U.S. Supreme Court, and we are anxious to discuss it. We'll start by asking agency representatives, Ken Kopocis from EPA and Craig Schmauder from the U.S. Department of the Army, to provide an overview of the rule. Then, Deidre Duncan from Hunton & Williams LLP and Jon Devine from the Natural Resources Defense Council will provide their thoughts from industry and environmental perspectives.

To start, we have Ken Kopocis, Deputy Assistant Administrator in the Office of Water at EPA. Prior to joining EPA, Ken held several senior positions on the staffs of both the U.S. House of Representatives Committee on

1. Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37053 (June 29, 2015).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

Transportation and Infrastructure and the U.S. Senate Committee on Environment and Public Works.

Ken Kopocis: The U.S. Congress created the CWA to protect navigable waters, defined simply as the "waters of the United States including the territorial seas." While the term "territorial seas" is defined in the statute, the term "waters of the United States" is not. The CWA has but one definition of waters protected by all of its programs including those from discharges from cities and industry under §402, permitting for the discharge of dredged and fill material under §404, and oil and hazardous waste spill prevention, cleanup, and remediation under §311, among others. All of these programs further the CWA's stated objective: to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Congress left it to EPA and the Corps to define the term "waters of the United States." Existing regulations define waters of the United States as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries to territorial seas, and adjacent wetlands.

The Supreme Court reviewed the Agency's regulatory definition of waters of the United States three times between 1985 and 2006.[3] As the result of the latter two decisions, protection for about 60% of the nation's streams and millions of acres of wetlands has been confusing and complex. In 1985, in *United States v. Riverside Bayview*, the Court addressed the scope of waters of the United States for the first time in a case that involved wetlands adjacent to traditional navigable water. In a unanimous opinion, the Court upheld the Agency's regulatory definition and talked about the integrated nature of the aquatic ecosystem and the importance of adjacent wetlands to that ecosystem. The Court observed that protecting aquatic ecosystems demanded broad federal authority to control pollution because "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[4] Keep in mind, the CWA is a pollution prevention statute. The Court in 1985 also noted that it found that Congress is concerned for the protection of water quality and aquatic ecosystems and indicated its intent to regulate wetlands inseparably bound up with the waters of the United States, and that it was the significant nexus between the wetlands and navigable waters that informed the Court's reading of the CWA.

In 2001, in *SWANCC*, the Supreme Court in a 5-4 decision held that the use of isolated non-navigable waters on intrastate ponds by migratory birds was not, in and of itself, a sufficient basis to assert jurisdiction under the CWA. The Agency stopped doing so immediately following that decision. While the *SWANCC* decision did not invalidate the Agency's regulations, it emphasized that some type of relationship with waters that were navigable was necessary for jurisdiction. The decision introduced the concept of significant nexus.

Lastly, in 2006, the Supreme Court considered the scope of waters of the United States in the joint *Rapanos v. United States* and *Carabell v. United States* decisions (jointly referred to as *Rapanos*), which involved wetlands adjacent to non-navigable tributaries of traditional navigable waters. While all members of the Court agreed that the term "waters of the United States" encompasses waters including wetlands beyond those that are navigable in fact, the case yielded no majority opinion. In fact, the nine Justices managed to author five separate opinions. A four-Justice plurality in *Rapanos* interpreted the term as covering relatively permanent standing or continuously flowing bodies of water that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such relatively permanent waters. The plurality opinion, authored by Justice Antonin Scalia, noted that its reference to relatively permanent did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months."[5]

Justice Anthony Kennedy's concurring opinion in *Rapanos* concluded that waters of the United States encompasses wetlands that possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made, and quoted *SWANCC* in support of that position. He stated that wetlands possess the requisite significant nexus if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[6] Justice Kennedy's concurrence notes that such a relationship with navigable waters must be more than speculative or insubstantial. Neither the plurality opinion nor the Justice Kennedy concurrence invalidated any of the regulatory provisions defining waters of the United States. Thus, we have three court cases: one unanimously upholding the Agency's regulation, and two that did not address it. So, why did EPA promulgate a rule defining waters of the United States?

First, we did the rule because for the past 10 years, confusion and uncertainty stemming from *SWANCC* and *Rapanos* have resulted in various stakeholders urging EPA and the Corps to undertake a rulemaking to provide clarity as to what waters are protected by the CWA. There was a lot of confusion over the issue. Note that *Rapanos* had five opinions from nine Justices. Even they were confused and could not agree. Requests for EPA clarification came from members of Congress in both parties and both chambers, state and local agency officials, industry, agriculture, resource extraction, environmental and conserva-

3. United States v. Riverside Bayview, 474 U.S. 121, 16 ELR 20086 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANNC*), 531 U.S. 159, 31 ELR 20382 (2001); Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006).
4. *Riverside Bayview*, 474 U.S. at 133 (citations omitted).
5. *Rapanos*, 547 U.S. at 732 n.5 (emphasis omitted).
6. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

tion groups, developers and builders, scientists, and the general public.

The second reason that the rule was necessary was that one in three Americans rely on seasonal or ephemeral streams for their drinking water, streams that are not clearly protected today. And third, many states have limitations on their ability to fill the gap and protect waters no longer covered by the federal CWA after *SWANCC* and *Rapanos*. An ELI study in 2013 concluded that a little over two-thirds of the states have laws that could restrict their authority to regulate waters affecting streams, wetlands, and other waters not protected by the CWA.[7] And while some state restrictions are easier to overcome than others, the record has been that the states are not taking action.

What does the rule do? The Clean Water Rule protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resource. EPA and the Corps are ensuring that waters protected under the CWA are more precisely defined, more predictably determined, easier for business and industry to understand, and consistent with the law and the latest science. The Clean Water Rule creates eight categories of jurisdictional waters, six that are jurisdictional by rule subject to definitions and limits in the rule, and two that are subject to a significant nexus analysis—the analysis first discussed in *SWANCC* and then repeated in *Rapanos*. The Clean Water Rule continues jurisdiction for traditionally navigable waters, interstate waters, territorial seas, and impoundments. For those waters, there is no change from the existing rule.

What did the rule change? The Clean Water Rule clearly defines and protects tributaries that impact the health of downstream waters. Remember, the CWA protects navigable waterways and their non-navigable tributaries. All of the Supreme Court Justices agreed on that. The rule for the first time says that a tributary must show physical features of flowing water, a bed and banks, and an ordinary high watermark to warrant protection. The rule provides protection for headwaters that have these features and that science shows can have a significant connection to, and effect on, the downstream waters. The rule provides certainty about how far safeguards extend to nearby waters. The rule protects waters that are next to rivers, lakes, and their tributaries because science shows that they impact downstream waters.

For the first time, the rule sets boundaries on covering nearby waters that are physical and measurable. Those are the six areas that are considered jurisdictional by rule. The other two are subject to case-specific analysis. I want to emphasize that today, under the existing rule, there is a case-specific analysis, but it's based on determining whether there is an effect on interstate commerce. The new test from the Supreme Court is whether there is a significant nexus—a connection—between an upstream water and a downstream water, and whether there is an ability to have a significant effect from upstream to downstream.

Science shows that specific water features can function like a system and impact the health of downstream waters. The first waters subject to a significant nexus analysis are five regional waters that we identified in the rule: prairie potholes, the Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands—but only when they impact downstream waters. In determining the impact, the functions of these water features will be evaluated as a system in their watershed, but they will still be subject to a significant nexus analysis.

The second category of waters subject to a significant nexus analysis are those within the 100-year floodplain of a traditional navigable water, interstate waters of the territorial seas, as well as waters with a significant nexus within 4,000 feet of each jurisdictional water.

That's it. Much clearer, much simpler, more bright lines, more transparency, and fewer case-specific analyses. The new rule focuses on streams, not ditches. It provides protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. A ditch that is not constructed in a stream and that flows only when it rains is not covered.

The new rule maintains the status quo for municipal separate storm sewer systems (MS4s). We do not change how those waters are treated and we encourage the continuing use of green infrastructure. As I said, we reduced the number of case-specific analyses that are required. Today, almost any water in America could be put through a lengthy case-specific analysis even if ultimately it would not be subject to the CWA. The new rule significantly limits the use of case-specific analysis by creating clarity and certainty and limiting the number of similarly situated waters. The new rule maintains and expands the exclusions from the old rule to the new, including those for the waste treatment systems and prior converted cropland, but it also adds three types of ditches, groundwater, gullies and rills, and non-wetland swales to the list as excluded. The rule excludes constructed components, municipal separate storm sewers, and water delivery/reuse and erosional features. Finally, other constructed features such as stock ponds, cooling ponds, and settling basins are excluded.

The rule only protects waters that have historically been covered by the CWA. It does not address land use; it protects water. It does not regulate groundwater, shallow subsurface flows, or tile drains. It does not change our policies and regulations on irrigation or water transfers. In the end, we have a rule that is based on solid science. It aligns with the Supreme Court decisions. It is based on the experience and expertise of EPA and the Corps, and it strengthens the CWA for the benefit of the American people.

Scott Schang: Next we're going to hear from Craig Schmauder, Deputy General Counsel for Installations, Environment, and Civil Works in the Department of the

7. Envt'l L. Inst., State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (May 2013), *available at* http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters.

Army. In this position, Craig provides legal advice and guidance to the Secretary of the Army and other Secretariat officials on matters involving army installations, lands, and facilities, and environmental law, protection of wetlands, and legal issues relating to the Corps' water resource development and regulatory programs.

Craig Schmauder: Today's Dialogue topic is particularly timely and essential. I say essential because it is so critical for everyone, whether you're an opponent of the rule or a supporter of the rule, to have a solid understanding of what the rule does and doesn't do. We were up on Capitol Hill recently, both on the Senate and the House side, explaining the rule. We did this for the preamble, we did it for the 2008 guidance, and it always alarms me a bit when folks have a very strong opinion of the rule, but don't really understand it. On behalf of the Army, we truly believe that this rule is good for the nation. It's timely. It's relevant. It is needed to both restore and maintain—those words are important—one of our most vital resources: an abundance of clean water.

In preparing for today's Dialogue, I came across a 2012 research paper by Prof. William Hines at the University of Iowa's College of Law on the history of the 1972 CWA.[8] The observations Professor Hines made in his paper in 2012 were at the forefront of our discussion here in 2013, 2014, and 2015 as we approached the rule. He notes correctly that these same themes were debated 40 years ago and are still relevant today, and this is so because the need to protect our streams and rivers, our wetlands and our lakes, is just as important today as it was back in 1972.

The Army is a proud partner in the development of the rule. A full and equal partner, the Army participated at every critical stage of this rule's development. My client and colleague, Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works, said in announcing the rule that this is a "generational rule"; it completes yet another chapter in the history of the CWA. The existing rule was written before the science was known, and was based in large measure on constitutional principles involving the lawful reach of the Commerce Clause. And yet in many instances, as Ken alluded to, for the new Clean Water Rule, we left unaltered many of the rules that are in the 1970-era regulations. I cannot emphasize enough the importance of understanding what was changed and what was not changed.

When we embarked on the rulemaking, we had three fundamental goals in mind. I believe we have accomplished those goals. One was that the rule would make commonsense changes. This is not a fundamental swing in rulemaking or the state of the law in the clean water arena, but it makes very important commonsense changes that will benefit both water resources and our economy.

Second, the rule adds clarity. I would ask everybody to lay the 1970 version of the rule side-by-side with the new rule and look carefully at it and tell me that you don't see greater clarity in the new set of rules. The one thing that the old set of rules failed to do was to provide the requisite clarity so that the regulators, the professionals out in the field, in the mud, and in the water, each and every day, have the set of rules whereby they can say with certainty that a water is or is not jurisdictional.

And thirdly, the rule in several important areas (based on the Supreme Court decisions that Ken mentioned) establishes a requisite level of certainty that did not exist before.

The changes that were made are science-based and consistent with the decisions in *SWANCC* and *Rapanos*. Probably equally important, they are responsive to the public and stakeholder comments that we received. I think it's widely known that we received over 1.3 million comments on the rule, many of them substantive comments with particular viewpoints. In announcing the proposed rule and the preamble, we sought public comments. Again, if you lay the proposed rule down alongside the final rule, you will see that the rule has changed fundamentally. In Section B, the rule clearly defines for the first time what is jurisdictional and what is not jurisdictional. Many of the terms that are so critical in implementing the rule are now defined with much greater clarity in Section C of the rule.

As for implementation of the rule, we included a provision that we believe is both reasonable and responsible to help transition from the old rule to the new rule. At any point in time, the Corps has a substantial number of requests for jurisdictional determinations (often referred to as JDs) and applications for permits in the queue, and those applications are in multiple stages of completeness. So, what we did in the rule was establish a grandfathering provision that we think will make for efficient and effective implementation.

Essentially, the grandfathering provision goes like this: As of the date the rule is published in the *Federal Register*, the Corps district commanders can make a determination that if a file for a jurisdictional determination is complete, then that application will be allowed to proceed and be decided upon under the existing rule, notwithstanding the fact that the final Agency decision may come out after the effective date of the rule. If the applicant wishes to be reviewed under the new rule, they can ask that the decision be held until after the effective date. Once the rule goes into effect, then any decisions on applications thereafter (except for the ones that were deemed to be complete and processed out under the old rule) will be rendered under the new rule. The Corps is prepared to effectively and efficiently implement the new rules: Guidance is being drafted and implementation guidance and training are already taking place. We're anxious to get started.

Scott Schang: I think we have a number of people in the audience who may not be as familiar with the CWA as

8. N. William Hines, History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform (Univ. of Iowa Legal Studies Research Paper No.12-12, 2012).

some of us are. Can you explain briefly what the Army's role is in this process and why you were so involved?

Craig Schmauder: The Corps implements one of the key sections in the CWA and that's §404 where the discharge of dredged and fill material is deemed under the CWA to be a pollutant. There's a long history (explained very well in the Hines article, by the way) as to why the Corps is involved. It goes back to the 1899 Rivers and Harbors Act that made the Corps responsible for maintaining the navigability of the inland waterways, basically to remove sunken vessels and debris so that traffic could get up and down the rivers. The Corps implements the CWA §404 permit program. Unlike the §402 program where you're talking about discharge of effluent into a water, the §404 permit program most often interfaces with development of lands, lands that may be wet or wetlands that may be on a particular property that someone wants to do something with. They need a Corps permit to conduct activities in those waters, fill those waters, dredge those waters, drain those waters, or the like, and a lot of those waters as we know are all over the country. The Corps has great visibility on its §404 permit program.

Scott Schang: Let's clarify what a jurisdictional determination is. I think that's when somebody comes to the Corps and says, "I've got this piece of property. I'm going to do something with it. Is this something I need to get a permit from you for?"

Craig Schmauder: Correct. They come to the Corps seeking a jurisdictional determination, of which there are two types. One is a preliminary jurisdictional determination, and the other is an approved jurisdictional determination. The preliminary jurisdictional determination is a nonbinding, advisory type determination. For the most part, the applicant just says, "Well, let's assume it's jurisdictional. What will I need?" And then a permit is authorized more or less on the assumption that the land is jurisdictional. But if someone wants to buy a piece of property or invest in a piece of property and they want a more binding jurisdictional determination, one that they can perhaps challenge in court or otherwise, they would come in and seek an approved jurisdictional determination. It takes a significant amount of time to prepare the administrative record, it has an appeal process, and many of them end up in litigation.

Scott Schang: We're going to turn to Deidre Duncan, who's a Partner in the Washington, D.C., office of Hunton & Williams LLP. Deidre represents major parties in this rulemaking, and her experience includes negotiating and obtaining permits for complicated energy and development projects, counseling clients on administrative rulemaking, internal investigations, and policy and regulatory clarifications, and drafting federal and state legislation. Prior to entering private practice, Deidre served as Assistant General Counsel of the Army, advising the Secretary on environmental and land use issues involving the Corps' Civil Works and Clean Water Act §404 Regulatory Program.

Deidre Duncan: I think I am the only person on this panel who has actually been involved in obtaining jurisdictional determinations, both as a regulator when I was at the Army and now in private practice on behalf of regulated entities. From my perspective, this rule unfortunately fails to provide the public the clarity it's been asking for; fails to impose meaningful limits on federal jurisdiction; and will be incredibly difficult for regulators to implement, especially the Corps.

First, the rule's tributary definition is largely unchanged and is as broad as the proposed rule, and in many ways maybe even broader, depending upon some of the language in the preamble. There really were no substantive changes made to the tributary definition itself, even though many commenters urged that the definition be narrowed, or at a minimum clarified. The tributary definition relies on the concept of "ordinary high watermark," but for over 20 years, the public has told the agencies in comment after comment that using the ordinary high watermark standard is very problematic. Instead, the agencies continue to use this term and in fact state that they can use evidence of historic conditions to document an ordinary high watermark. Indeed, even Justice Kennedy's concurrence in the *Rapanos* decision emphasized that the ordinary high watermark standard is problematic. He stated:

> Yet the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.[9]

The agency's use of the problematic term makes almost all the other parts of the regulation equally problematic because the rule's other categories of jurisdiction and exclusions from jurisdiction are now tied to this broad tributary definition and ordinary high watermark standard. For example, many of the threshold distances that we've heard about for adjacent waters and case-specific other waters are measured from the ordinary high watermark. Given the pervasiveness of ordinary high watermarks on the landscape, it will become almost impossible to fall beyond these distances. Moreover, even if a water is outside the adjacent water distance limits, it can still be regulated as long as it is in a 100-year floodplain or within 4,000 feet of an ordinary high watermark. These limits are even less meaningful in light of the Agency's position that if any portion of a feature is within the limits of the distance threshold, the entire feature is jurisdictional.

These problems continue when you try to apply any of the exclusions. For example, everything with a bed and

9. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring).

bank and ordinary high watermark is a tributary. Erosional features are excluded, but only if they lack a bed and bank and ordinary high watermark. This is circular language that in practice is going to be very difficult and not helpful. Similarly, ephemeral ditches are excluded unless they were excavated in a tributary; in other words, unless you can prove that there wasn't an ordinary high watermark there on the landscape when excavation occurred, and that could have been a long time ago. Ultimately, what is the difference between an ephemeral ditch, an erosional feature that is supposedly excluded, and an ephemeral stream that is regulated? You guessed it. It all comes back to the problematic term "ordinary high watermark."

Regulated entities also have concerns with other key exclusions. For example, exclusions for stormwater systems, artificial ponds, and water-filled depressions are all tied to having to establish that the feature was created in dry land, meaning that you will have to prove that at the time of the feature's construction, be it in 1910, it was created in dry land. Importantly, the Agency specifically states that there is "no agreed upon definition" for dry land.[10]

Given this ambiguity, combined with the breadth of the ordinary high watermark concept, the rule simply fails to provide clear exclusions for ditches, waste treatment facilities, onsite industrial waters, and stormwater systems. The aim of the rule, as we've heard, was to provide clarity and make jurisdictional determinations simpler for the regulated public as well as for the regulators. But all of the rule's vague and complicated definitions, distance thresholds, and exclusions will be incredibly difficult for the public and local regulators to implement, especially for the Corps.

To illustrate how complicated application of this rule will be, I want to read an example given by the agencies themselves in a preamble to the rule. The agencies state that:

> Under paragraph A-8, for example, the agencies would evaluate on a case-specific basis whether a low-centered polygonal tundra and patterned ground bog in an area with a small floodplain and located beyond the 1,500-foot boundary but within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000-foot boundary, or a wetland in which normal farming, ranching, or silvicultural activities occur, as those terms are used in section 404(f) after the Clean Water Act and its implementing regulations, has a significant nexus as defined in the rule.[11]

You tell me if that's going to make jurisdictional determination simpler.

Scott Schang: Next, we'll turn to Jon Devine. Jon is Senior Attorney for Water Programs in the Washington, D.C., office of the Natural Resources Defense Council. Jon leads the clean water solutions team where his work focuses on implementing, defending, and strengthening CWA core programs. Prior to joining the Natural Resources Defense Council, Jon was an attorney-advisor in EPA's Office of General Counsel. And prior to law school, he was an environmental protection specialist in the Maine Department of Environmental Protection.

Jon Devine: In general, we at the Natural Resources Defense Council view the Clean Water Rule as a major step forward. We're grateful to the Barack Obama Administration and the people in the agencies, such as Ken and Craig, who not only had to wade through a mountain of scientific and public input on the rule, but also endure comments alleging baseless claims that they were power-mad bureaucrats bent on controlling and destroying the American economy. I imagine most folks here would be able to predict my reaction to many specific parts of rule, given that my view is that the Supreme Court did not mandate anything close to a major retrenchment on the scope of the CWA, and given that our review of the evidence leads us to conclude that all sorts of water resources are important to the overall integrity of the aquatic system.

As a result, we're strongly supportive of the aspects of the rule that guarantee protections to those waters that the science shows are critical, namely tributaries and most nearby waters. We had hoped for more certain protection for other water bodies, but the rule leaves many of those decisions to a later evaluation of the watershed-level impacts of those waters to downstream resources. We believe that the proper application of this analysis will eventually lead to water's protection, but we think it will require our significant engagement to be sure.

On the other hand, we were disappointed about those areas where the agencies excluded features categorically from the law, especially in those instances where the agencies' expert science advisors urged them not to provide categorical exemptions. For instance, we strongly pushed the agencies to protect so-called isolated waters where the science showed that they were significant as a category, as well as certain man-made tributaries that had long been protected by the law. But the final rule exempts a number of those features outright. On balance, though, we think that the benefits of restoring guaranteed protections to the waters at the core of this rule are a major improvement. It ensures protection for the kinds of streams that provide drinking water for one in three Americans, to say nothing of the wetlands that prevent flooding, filter pollution, and support all manner of wildlife.

Scott Schang: We have a number of questions from the audience. I'm going to allow the panelists also to pose questions to each other. I'll get us started. Ken, Deidre had a number of comments, particularly about tributaries. In the press, there have been some discussions about tributaries as well. Is there anything you'd like to respond to about ordi-

10. Clean Water Rule: Definition of Waters of the United States, 80 Fed. Reg. 37053, 37099 (June 29, 2015).
11. *Id.* at 37088.

nary high watermark, the categorical exclusion, anything about that comment?

Ken Kopocis: We looked very carefully at the science and what the science told us about the impacts of upstream waters on downstream waters, and we know that from a hydrologist's standpoint waters are connected. But we also know that the Court has made it clear that the CWA does not apply to a water simply because it's connected from an upstream to a downstream water and that you can find that connection. Instead, what we wanted to focus on was where that connection is significant, such that there can be a significant effect on the downstream water from the pollution or destruction of the upstream water. We know that the science indicates that those effects have to be measured, but that also you have to be able to find an indication of sufficient flow for water to get from the upstream area to the downstream area. That is why we use the concepts of bed and banks and ordinary high watermark.

We also understand that the concept of an ordinary high watermark is something that has to have some regional variability to it simply because it is a physical feature and will not appear exactly the same everywhere in the country. But we do have a history of working in this area and we will continue to work in this area. We think that by adding physical characteristics to the definition of tributary for the first time, we've in fact made it more clear, we've taken some of guesswork out. We now know that while Deidre has raised the question of how do you tell if there is ordinary high watermark or bed and banks, we have for the first time put in a rule requirement that those things be present. We will continue to work so that the public and the regulators have an understanding of what is intended by using those features. We think that those are important components of the rule and improvements over the existing rule.

Let me briefly comment on some of the exclusions that are in the rule. Many of those are carried forward from preamble language, so the agencies have practiced, and I would speculate that the regulated public has practiced, in how those exclusions work. Some of them—for example, the waste treatment exclusion—carried forward unchanged. If there are questions going forward as to what the new rule is going to mean, those are the exact same questions that have existed since the 1980s when it was first put in the rule.

Scott Schang: Craig, how should people who are facing this and needing to make their own determination proceed? The idea of the rule, particularly the definition of tributary, was to let people take a look and get a good sense of whether they were included or excluded. Does the Corps have documents that people can consult to try and understand what an ordinary high watermark looks like in various regions? Will there be a guidance put out by the Corps in the future helping to explain what this rule means? Or should they just look at the 200-page long preamble of the rule? What should folks do?

Craig Schmauder: The Corps regulators have a lot of tools available to them. I don't think it's as hard to identify an ordinary high watermark as Deidre would attest to. The industry knows. The one thing in the definition I would point out that wasn't identified in Deidre's comments was that notwithstanding that you have an ordinary high watermark, which has a bed, bank, and physical indicators of a bed, bank, and an ordinary high watermark, it still has to be of a sufficient type that contributes flow to one of the waters that are navigable. As Ken mentioned, these are things that are fairly readily evident. In certain parts of the country, they're different in appearance, but I don't believe that they're that difficult to identify. The Corps regulators are well-prepared. These are experts, people who are experienced in these matters. They use all the tools that are available to them and they do discuss that with the applicant. They go out. They do site visits. And so it's not that difficult to find an ordinary high watermark.

Jon Devine: If I could just add something to that. The agencies' existing definition, the one that is being changed, just protects tributaries without elaboration. This provides further definition as to what that involves. Candidly, in some ways, we had urged the agencies not to go there. In the proposal, for instance, wetlands and ponds that act as tributaries that are the source of water for downstream streams could have been considered tributaries under the rule and protected as such. The agencies opted in the final rule not to do that because those features typically don't have an ordinary high watermark. That's among the ways that we had urged the rule to be stronger and it was not. The agencies chose what they believed was necessary to give greater clarity to the regulated public.

Scott Schang: Deidre, would you like to respond?

Deidre Duncan: First, to claim that the science supports the ordinary high watermark is, I think, a bit disingenuous because I don't think the EPA Science Advisory Board report, or the connectivity report, examined the concept of ordinary high watermark at all.

Second, I think that, as Craig said, it's not hard to find an ordinary high watermark. They're all over the place. They can be found almost anywhere. If water has passed at some point in time over the landscape, a mark can be found. I'm not saying it's hard to find them; I'm saying it's not a reliable indicator of sufficient flow, which is why the science should have looked at the concept of ordinary high watermark. I think that if the substantive public comments, where people were thoughtful in what they were saying, had been reviewed carefully, which I assume they were, then the agencies would have seen that a lot of people gave a lot of thought and comment on the term "ordinary high watermark" being highly problematic.

With respect to the exclusions remaining largely unchanged, like waste treatment, that may be the case, but the real problem is that the definitions have not remained

unchanged. Tributary now has a very broad definition and includes ditches, man-made conveyances, in a very explicit way. And there's a new category of waters called adjacent waters, and, in a footnote, waters are broadly defined. That's why I think a lot of comments raised concerns about these exclusions not being as clear as they could or should be because you now have these very broad new categories of waters that weren't in the existing regulations before.

Scott Schang: We have a question from the audience.

Audience Member 1: I want to step away from tributary for a second and explore the eighth category of waters. These are waters that are within a 100-year floodplain or within 4,000 feet of (a)(1) through (a)(5) water, provided they have a significant nexus to (a)(1) through (a)(3) water.[12] Those would be jurisdictional. So, I want to go through a scenario here and explore the "common sense" that Craig said earlier was used to base jurisdiction in the CWA.

To really understand this, we have to understand significant nexus and we have to explore the science of the common sense behind the 4,000-foot distance. As for significant nexus, I want to pull out two examples of what could in and of themselves prove that a water has a significant nexus. This is in the C.F.R. [*Code of Federal Regulations*] language for the final rule.[13] "E" would be runoff storage and "F" would be contribution of flow. If a water stores runoff, it would have a significant nexus, or if it contributes flow, it would have a significant nexus. So there, waters can function as a source or a sink. They can do one or the other. So effectively, the way I would read this is that if you either contribute flow or if you store flow or water, you have a significant nexus.

Secondly, we need to explore this concept of within 4,000 feet of a (1) through (5) water. And I'd like to point our attention to EPA's own economic analysis for the final rule that says, "The agencies have determined that the vast majority of the nation's water features are located within 4000 feet of a covered tributary, traditionally navigable water, interstate water, or the territorial sea. We believe therefore that very few waters will be located outside 4000 feet and within 100-year floodplain."[14] In other words, it's nearly impossible to find a water—and this is in the Agency's own language—that would not be subject to a significant nexus test. Again, to have a significant nexus, you either have to store water or contribute water, so wouldn't that be all waters? My question is, is that the common sense and the science that's used to provide clarity under this final rule?

Craig Schmauder: These are isolated waters we're talking about in the economic analysis.

Audience Member 1: That's what I would generally refer to them as, yes. Can you name for me a water that either would not store runoff, or contribute flow?

Craig Schmauder: You can have both, but they may have not a significant enough nexus due to their distance. For example, they could be at the outer end of the 100-year floodplain.

Audience Member 1: I would agree with that, but a function of a water that performs a significant nexus is defined in the final rule as providing one of those functions. And it can be just one of the eight or nine that are outlined.

Ken Kopocis: If I may, I think I can provide some clarification on this. As you [Audience Member 1] correctly point out, we've specifically listed functions under the significant nexus test, and that was done in response to the more than 400 public meetings that the agencies conducted and the more than one million comments we received. And in answer to your question, yes, the comments were all looked at. We did a pretty good job of repeating what Justice Kennedy had said in his *Rapanos* concurrence, but people said that didn't provide enough meat on the bones, if you will. Commenters asked whether we could look at other ways to better quantify what is considered to be a significant nexus; could we take these qualitative concepts and turn them into quantitative concepts. And we looked to see whether there was a way to define significant nexus. For example, on contribution of flow, should it be X amount of cubic feet per second, X number of times a year on what average, et cetera? Is there a way to do something that was measurable? We looked at that and determined that the science did not support that. We could not come up with a series of quantitative ways to measure what was significant, but thought that what we could do was be more transparent in the final rule about what were the functions that the agencies would consider in doing the significant nexus analysis. Those are the functions that you see listed in the final rule.

We've tried to make it very clear, and if we haven't been clear, we will continue to make it more clear, that those are functions that will be considered; however, the single presence of a function does not necessarily make it jurisdictional. As Craig said, it has to have the ability to have a significant effect. You're probably correct that whether it contributes flow or holds flow is kind of the entire universe. That's the yes and the no. But I think that we do know that different water features provide those functions and their significance can depend very much on which of those it is. In fact, Justice Kennedy in his opinion even said that sometimes it's the lack of a connection that provides the significance. The prairie pothole region, for example, is a good indicator of that.

12. 80 Fed. Reg. at 37105, 37115 (to be codified at 33 C.F.R. §328.3(a)(8), 40 C.F.R. §122.2(1)(viii)).
13. *Id.* at 37106, 37115 (to be codified at 33 C.F.R. §328.3(c)(5), 40 C.F.R. §122.2(3)(v)).
14. U.S. Environmental Protection Agency & U.S. Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule 11 (May 2015), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/news/final_CWR_eco_analysis.pdf.

I will tell you that the agencies are not going to look at the list and say, "Oh, if I can find one of those, boom, you're in." The agencies will have to find that significance, and as explained in the preamble, it can be a single one of those functions, but it would have to be much more significant and robust if you're relying on one function. It could be a combination of functions, but we're still going to be looking for something that has some significance. It's not going to be, you know, if you can find a scintilla of evidence of that function, then that would get you over the threshold. I hope that helps to answer your question.

Audience Member 1: It does. Can you explain where the 4,000-foot "bright line" came from?

Ken Kopocis: Again, we were trying to be responsive. When we introduced the definitions associated with adjacency in the proposal, commenters said, "Could you draw more bright lines? Could you be clear?" If you recall, we had proposed to use floodplain or riparian area to define adjacency. We were told that, first of all, people were not comfortable with us using the term riparian area because they thought it was too inexact and ill-defined. We heeded that. We said that we would rely on the floodplain, but would not articulate a floodplain because of the variability of the size and the inexact nature of the floodplains that are known out there. We heard overwhelmingly in the public meetings and in comments: Would you pick a floodplain and work off of that?

We remained concerned about establishing adjacency jurisdiction in a floodplain when the floodplain could be very large in certain areas of the country. We then looked at whether there were ways for us to translate what is effectively an inexact science into something that is more predictable and clearer on its face. Relying on what the science told us, relying on the expertise and experience of the two agencies as to where we felt we were likely or not likely to find a water that had a significant nexus, we then spent some considerable time figuring out whether there was a place for us to land. We knew that once we drew a line, we were going to create something inside and something outside and that it was not going to be perfect. But we think it's largely substantiated by the evidence that we had in our record and over the many years of the agencies' work in this program.

Craig Schmauder: I just want to clarify for everybody's benefit that, for the most part, we believe that the 4,000-foot distance will cover the 100-year floodplain. In certain large river systems, the 100-year floodplain may be on the outside of the 4,000-foot, but in most cases, particularly in the smaller rivers, the 4,000-foot limit will be the outer limit of the jurisdiction.

Scott Schang: I have a question submitted by an audience member. Please discuss the significance of the new exclusion language for stormwater control features. The exclusion language appears to be quite broad. Is that so? Please provide examples of stormwater control features that are not created in dry land. I think the questioner also is interested in more explanation of what dry land is.

Ken Kopocis: When we set out to do this rule, we intended to not affect the jurisdictional status of water features inside a permitted MS4. We heard from working with communities around the country, the permitted entities, that there were concerns that we may have affected the CWA jurisdiction of these permitted entities, and the reason for that was that unlike most §402 permits, which are a pipe or a ditch or something like that, while a municipality in their MS4 does have outfalls, they are also permitted on a geographic basis.

For example, the District of Columbia's stormwater permit covers the District of Columbia, and within the District of Columbia, you have natural water features that are actually carrying stormwater and are part of their general and overall MS4. For example, we have Rock Creek, which carries stormwater when it rains. The question that communities raised with us was: Are you saying that Rock Creek, because it would be a jurisdictional tributary to the Potomac River, would it then be a jurisdictional water in and of itself such that the stormwater would have to be treated somehow before it got into Rock Creek, even though Rock Creek is part of the overall system that controls stormwater in the District of Columbia? So, the exclusions that we put in were designed to address the ability for communities to look at the totality of their storm system and look at things such as retention ponds, green infrastructure components, those kinds of things that were being built as part of the system and make sure that we were not bringing all of those things into the permitted §402 system.

We believe that what we've done is retain the status quo so that water features that are within the geographic bounds of a community that is permitted under the MS4 program, if they're jurisdictional today, then they will stay jurisdictional, but if they're not jurisdictional today, then they will not become jurisdictional under the new rule. That's what's behind that. As I said, we set out to not change things, and we believe that in the final rule, we've not changed things.

Jon Devine: So, Ken, as an example, a rain garden that a municipality decides to install to capture and infiltrate stormwater, if that took on wetland characteristics over time, that would not be covered water?

Ken Kopocis: That's correct. In fact, we would hope that it would take on those wetlands characteristics over time because then it would do a better job of filtering pollutants. They're very common features that are used around parking lots, residential development, commercial development. You see these features all over the place. The use of green infrastructure is something that our agencies strongly support. We want to encourage it. We do not want to cre-

ate a fear in a regulatory environment that we're somehow taking away a tool that we believe is extremely valuable and has proven to be very popular, not only with communities and local governments, but also with the development community that makes use of green infrastructure all over the country.

Deidre Duncan: I'd like to raise a question about the rain garden example and maybe talk from a practical experience perspective. Let's say that the entity has created the rain garden, and wetlands have developed. Now, fast forward 20 years, and it's a wetland. Relying on the exemption for green infrastructure created in dry land, trying to tell a regulator that the rain garden, which is now functioning as a wetland, was created in dry land becomes very difficult from a practical point of view. I don't see anything in this rule on the face of the C.F.R. language that gives that entity a lot of comfort that, were they to go out and undertake this activity now, they will have certainty 10 or 15 years down the road that they can point to rule language ensuring they are exempt.

Ken Kopocis: First, we're talking about areas that are subject to the permitting program in §402, and I'm expecting that 20 years from now that community is still going to have a §402(p) permit. So, it's not as though anybody is going to completely lose track of where these rain gardens are. Secondly, if this rain garden was put in and it takes on the characteristics, as we hope it will, of a functioning wetland, keep in mind that the CWA is only going to be implicated if somebody wants to either dump pollutants into it or fill it in.

Deidre Duncan: Can I just stop you there? Because I also heard you say that in outreach. However, often municipalities, local governments, or other entities simply have a facility that have these features on their property and they want to improve them, change them in a way that may be beneficial for the overall management of water on the site, and that then raises the concern of triggering permit requirements. It also raises the concern that other elements of the CWA will apply, such as water quality standards, even if they aren't undertaking the destruction of that feature. The fact that something is a water of the United States limits—I think that's the goal—limits the ability to do things, regardless of whether you're trying to destroy the area or change the area.

Ken Kopocis: I find it to be a little overly speculative to anticipate that in a 20- or 30-year time frame that somehow both the regulated entity and the regulators are going to completely lose track of the fact that this rain garden was put in as part of their stormwater permit program. It's not inconceivable that people could lose track of it. But if you're living in a world where your permit is renewed every five years, I find it's stretching it a bit to expect that in 20 or 25 years or whatever everybody is going to forget. I also would point out that it was exempt when it was put in. If a community wants to make changes or improvements to it, you haven't outlined a factual situation that would cause its exclusion from the Clean Water Program to change.

I realize that what you're raising is a hypothetical that I can't say definitively cannot happen, but I do think your hypothetical is raising a set of facts that I find a little overly speculative, that such a problem could result when you're living in a world of an already regulated entity.

Deidre Duncan: The whole notion of an exclusion being tied to whether a feature was "created in uplands or draining uplands or created in dry lands" is problematic, regardless of whether it existed in prior preamble language. I have been involved in jurisdictional determinations where the fact pattern scenario that we're talking about was presented. A feature that was created for an industrial use was created in a water of the United States before the CWA, and now 20 or 30 years later, you're being forced to assess whether it was created in uplands or dry land, and you're looking at all kinds of historic evidence. The fact of the matter is the feature is an industrial facility now, regardless of what it used to be in the early 1900s.

Ken Kopocis: What we're hearing, what we're being criticized for doing, is taking language out of a preamble that has no real operable effect, that preserved the right for the Agency to change its mind anytime it chose to do so. Then, we put it in a final rule that binds the Agency so we no longer have the discretion to change our mind, and we put in the very same concept that's been around for well over 20 years. We formalize it and make it legally binding—and then we're criticized for it. So, the option for us would have been to go back and take the exclusions that we proposed in April 2014 and simply take them out and then that would have left everybody with far fewer rights than they have today. While I hear that you would like to have had more clarity and perhaps more specificity, I don't want to lose sight of the fact that what we have done here is create exclusions from the CWA that did not exist in the rule—they exist mostly in practice but not in the rule—we put them in the rule and we're being criticized for it.

Jon Devine: I'd like to build on that. It is impossible to describe with specificity all of the kinds of water resources that exist in the United States. In a rule of length that isn't biblical, it is impossible. So, there are going to remain questions in the future about how the specific language in this rule applies to factual situations, and that's just part of the deal here. With respect to things that might be marginal, might have been created in waters originally, might not have been—looking at those closely in the future—doesn't trouble me because what we're talking about here is whether or not we're going to allow their destruction or pollution without regulatory oversight. Having that check-in before those kinds of things happen to such features is often very much appropriate.

Audience Member 2: I have a question for Deidre. At the end of your talk, you quoted an example from the preamble and suggested that it wasn't a model of clarity. My reaction was different. I thought it was really clear. I thought it contained a number of detailed criteria, but that having that kind of detailed criteria was what was necessary to make it clear. I'm wondering, from your perspective, is there a single criterion that could designate all the jurisdiction of the CWA? That's a little reductionist. What does clarity look like if it doesn't look like a detailed set of criteria? What do you think would be clarity on the jurisdiction of the CWA and what would that look like if it wasn't trying to write down all the conditions?

Deidre Duncan: I would love it if you diagrammed the example I referred to in the preamble. For a Corps regulator in the field, working through this example will be challenging. I don't know if you've ever worked on a jurisdictional determination with somebody at the Corps, but it's challenging, and an example like that would be difficult.

In terms of clarity, I would go back to the term "ordinary high watermark." For as long as I've been a lawyer (I graduated in 1996 and first worked with the Army), it's been a term that people have longed to have clarified. The word "ordinary" would seem to apply to some form of ordinary flow, but in practice, it becomes a mark on the landscape that bears no resemblance to ordinary flow. A lot of the comments have asked for clarity and criteria for determining what frequency or duration of flow is necessary to create an ordinary high watermark. That information would have been very helpful and beneficial to the regulators and to the public in defining what a tributary is, but the agencies punted on that. That's one example.

Next term: water. What is a water under the CWA? Is an industrial water that holds industrial byproduct a water that was meant to be protected by the CWA? If it's next to a ditch, is it then an adjacent water? These are the kinds of questions that a lot of commenters raised and asked for clarity on. The rule tip-toes up and around those, but doesn't really take them on; instead, the rule leaves a lot of the definitions vague, like dry land, for example.

Audience Member 2: To me, changing the definition of ordinary high watermark would be saying, we're going to take what is a technical term that has an established meaning and give it a completely different meaning. That strikes me as a little odd. Each of the things you talk about, though, involves a question of setting out an additional criterion, an additional exclusion or definition or whatever, so it's necessarily going to be complicated. That was why I was wondering whether you think there is a way to write the rule so that it's not complicated, because you're suggesting that this fails on the clarity test because it's complicated.

Deidre Duncan: That's not necessarily why it fails to be clear. I think there are a lot of terms that are undefined that are going to be very subjective and lead to inconsistent results. Those are problems in the field. Ordinary high watermark and dry land, those are some of the chief offenders. Something can be complicated and detailed and yet be very clear. And I don't think this is that.

Craig Schmauder: Let me just throw in a comment to defend the Corps regulators. I said earlier that I don't think it's that difficult to understand, if you're a professional biologist or hydrologist, to go out into the field and look and be able to identify through field research and being on the ground, an ordinary high watermark. It's a technical term. It's not something we concocted out of whole cloth. This is a technical term that has long been used in this business. The Corps regulators don't have difficulty finding and identifying ordinary high watermarks.

In context, one of the things that could have been done, perhaps, as an alternative to ordinary high watermark is to require gauging, putting in gauges all over the place. However, that would raise a whole host of other issues and we would have been criticized for requiring people to put gauges in their streams: Are the gauges properly maintained, are they accurate, are they being read properly? This is a commonsense surrogate. Clearly, for anybody who reads the *Rapanos* case, Justice Kennedy's concurrence recognized that it was a term of art. He didn't come up with anything himself that could be better, but he did identify that the breadth could be used for unlimited capabilities. Both in the 2008 guidance that we did after *Rapanos*, and the follow-up in this rule, we say and identify the things that Justice Kennedy said, which is that they've got to be of significance to represent the type of duration, volume of flow, that one would expect that ordinary high watermark to contribute the requisite flow, that one would probably find to be in an area where you would have a significant downstream effect. I don't find it all that complex, difficult, or problematic, to be perfectly honest with you.

Audience Member 3: Craig, you mentioned earlier, and I just want to hear it again, about when this rule will take effect on permits—when they're filed, the sequencing of how this will all play out once the rule is published in the *Federal Register*, just for those of us who have folks and field clients, stakeholders. The second part of my question might be for Deidre. This is a little speculative, but I assume there will probably be some folks who file suit on this rule. Can you walk through a possible scenario in terms of how you can challenge a rule with standing issues and all those types of things, whether it has to be a permit filed the day it takes effect, kind of walk through what that would look like in a hypothetical sense?

Craig Schmauder: The rule has been submitted for publication in the *Federal Register*. How does that affect the grandfathering provision? The date that it goes into effect will be kind of the benchmark date, if you would. The Corps district commanders and regulators who have a bunch of permit applications and requests for jurisdictional

determinations, they need to look at the date that the rule is published in the *Federal Register* and make a determination whether the application or the administrative record is sufficient upon which to make a decision on that date. Again, it doesn't have to be made before it's in the *Federal Register*. It could be made after, but they've got to look on it as of the date it's in the *Federal Register*, whether the record is sufficient upon which to make a decision. If it is, then the applicant will be notified that their JD or permit will be issued under the existing rule, because the new rule is not in effect until the expiration of 60 days after publication in the *Federal Register*.

So, if the applicant says, "Well, you know, I think it's beneficial for me to come in under the new rule, please hold it until after the effective date and issue it then," the Corps will issue it to the benefit of the applicant. If the applicant wants to proceed, they can proceed. If they get an application in and if they can process it before the 60 days, before the new rule goes into effect, they can issue anything under the old rule, provided it is issued before the new rule takes effect. The Corps is working on implementation guidance to the field, and that usually finds its way onto the Corps' websites. For those who are working in or with a particular district, you can check their websites and probably find this guidance.

Scott Schang: So, we have this rule, it's final, it's been published in the *Federal Register*, it's now up for challenge in the courts. What courts have jurisdiction, and are there other likely types of challenges? Will they only be facial challenges to the rule itself or will they be brought through individual determination appeals? What do you foresee in the courts?

Deidre Duncan: The preamble, I think, raises the issue that this rule should be brought under §509. It's an interesting provision in the preamble that I don't think is in the rule itself. It kind of makes the point that some courts have found that jurisdiction might be under §509, but other courts differ.[15] I don't have a lot of experience with that provision, but it essentially requires EPA rules to be challenged in a federal circuit court. However, this is a joint EPA-Corps rule, and Corps rules generally are challenged in a federal district court.

Section 509 talks about other limitations under the CWA. The question will really come down to, is this considered under the law an "other limitation" under the CWA? As EPA has noted in the preamble, there are judicial decisions on both sides of that. I think one of the most recent cases has to do with the water transfer rule where they found that it was actually giving industry relief, saying that something wasn't a permitted discharge and therefore wasn't a limitation. How this rule will be interpreted, whether it's properly brought at a circuit court level, will be an interesting issue, and it will be interesting to see what the government's opinion on that is. There may be multiple petitions brought across the country, and those petitions will ultimately be consolidated at one circuit court, if it is properly brought at the circuit court. Meanwhile, you will likely have district court complaints filed as well, and those may be facial challenges or "as applied" challenges.

It's going to be very complicated, I think, when this rule goes into effect. Section 509 has a statute of limitations associated with it requiring that the claim be brought within 120 days—or actually much sooner because it will be somewhat of a race to the courthouse with multiple petitions being filed. So, very complicated. I'm happy to hear other panelists' thoughts on it. I think Jon should comment.

Jon Devine: What she said.

Ken Kopocis: We're happy to have there be no litigation on the rule.

Scott Schang: So, if there's no litigation, there's going to be legislative action. There's a bill that's made its way through the House and there's a bill pending in the Senate.[16] Jon, I'd be interested in any thoughts you have on Senate Bill 1140, if you wouldn't mind giving us an explanation of what it does and what your views are on it.

Jon Devine: In broad strokes, I think it does two big things. First, it requires the agencies to start from scratch on a rulemaking. Second, it sets out some rules of decision as to what kinds of features can and can't be protected in such a rulemaking. We think there are multiple problems with that bill. If you're worried about clarity, that bill ain't the place to look. Senate Bill 1140 introduces a whole suite of new notions into CWA jurisprudence. It would reboot the entire regulatory process.

I think it's based on a couple of flawed premises: first, that the agencies failed in some way to adequately consult with stakeholders about this rule. That premise is belied by the enormous number of meetings the agencies had about not only this proposal—this issue has been debated for the better part of my children's lifetimes and has been a public concern throughout that entire process. The agencies, as I think Craig alluded to, had draft guidance in 2011 that they took public comment on. That alone got more than 200,000 comments. The agencies received over one million comments on this rule. I hope the Agency people got some frequent-flyer miles out of the amount of consultation they

15. For example, in *North Dakota v. U.S. Environmental Protection Agency*, No. 3:15-cv-59, 45 ELR 20159 (N.D. Aug. 27, 2015), a district court held it had jurisdiction and temporarily stayed implementation of the rule in the 13 plaintiff states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming). But in *Murray Energy Co. v. U.S. Environmental Protection Agency*, No. 1:15CV110, 45 ELR 20158 (N.D. W. Va. Aug. 27, 2015), a district court dismissed a coal company's lawsuit for lack of jurisdiction.

16. Federal Water Quality Protection Act, S.B. 1140, S. Rep. No. 114-84, 161 Cong. Rec. S5170 (daily ed. July 16, 2015). *See also* Waters of the United States Regulatory Overreach Protection Act of 2015, H.R. 594, 161 Cong. Rec. H661 (daily ed. Jan. 28, 2015).

did in the field with various stakeholders. So, the notion that somehow redoing this rule and talking to some new set of people—I couldn't imagine who that might be, nor can I imagine that there would be new issues developed in the course of that consultation that haven't been not only raised during the almost 15 years of ambiguity about this issue, but vetted nine ways to Sunday.

The other flawed premise in S.B. 1140 is that in the absence of this rule, protection of our waters would be just fine, thanks to state programs. As ELI's analysis looks at, there are restrictions in place in two-thirds of the states that can make it more difficult to protect waters that the federal government doesn't protect. When this issue was last vetted by the Supreme Court, more than 30 states weighed in and said, "Please make sure that the CWA protects non-navigable tributaries and their adjacent wetlands because doing it otherwise would be really hard among other reasons."

Scott Schang: We've gotten close to our time limit for this Dialogue. There have been a couple mentions of ELI's report, and you can find that on our website. The issue there, in large part, is the "no more stringent than" provision in many statutes that says that state laws cannot be any more stringent than federal laws. ELI is not taking a position; we're simply recording what our analysis found. I want to thank our outstanding panelists for sharing with us an amazing level of thought, care, and expertise on these issues. Many thanks also to our audience members for participating and asking great questions. For those interested, more information is available at the *National Wetlands Newsletter* and other ELI publications, as well as our online resources.