



## **Poultry Industry Comments**

### **U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act**

November 5, 2014

VIA ELECTRONIC MAIL

Water Docket

U.S. Environmental Protection Agency

Mail Code 2822T

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

**RE: Attention: Docket ID No. EPA-HQ-OW-2011-0880  
Comments on the U.S. Environmental Protection Agency's and U.S.  
Army Corps of Engineers' Proposed Rule to Define "Waters of the  
United States" Under the Clean Water Act**

Dear Sir or Madam:

These comments are submitted by the U. S. Poultry & Egg Association, the National Turkey Federation and the National Chicken Council regarding the April 21, 2014 U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) Proposed Rule to Define "Waters of the United States" Under the Clean Water Act (CWA). 79 Fed. Reg. 22188.

### **I. Industry Overview**

The U.S. Poultry & Egg Association (USPOULTRY) is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. USPOULTRY progressively serves the industry through research, education, communication and technical services.

The National Turkey Federation (NTF) is the national advocate for all segments of the turkey industry. NTF provides services and conducts activities, which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products.

The National Chicken Council (NCC) is a nonprofit member organization representing companies that produce and process over 95 percent of the chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry.

## **II. Background**

On April 21, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published a proposed rule defining the scope of waters protected under the Clean Water Act (CWA). 79 Fed. Reg. 22188. The agencies stated that the proposed rule would “enhance protection of the nation’s public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of ‘waters of the United States’ protected under the Act.” EPA and the Corps claimed that the proposed rule was needed to avoid having to evaluate the jurisdiction of individual waters on a case-by-case basis as dictated by recent U.S. Supreme Court decisions in *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. EPA and the Corps falsely allege that the proposed rule will provide certainty, clarity and predictability to the regulated public regarding what areas are designated waters of the U.S. and subject to CWA jurisdiction. In contrast, if there is any certainty, it is that EPA and the Corps have expanded jurisdiction beyond the legal authority of the CWA.

The fundamental tenets of the proposed rule are based on an EPA report entitled, “*Connectivity of Streams and Wetlands to Downstream Waters: A Review and*

*Synthesis of the Scientific Evidence*” (Report). The Report purports to establish a scientific basis concluding that isolated, rarely existing “waters” are connected to more traditional navigable waters, and, therefore subject to CWA jurisdiction. In essence, this is an attempt to establish a statutory nexus for asserting all-encompassing jurisdictional authority over a very broad range of categories of waters and geographic features. EPA and the Corps are claiming that areas where water is present, as infrequently as once every few years, should be subject to CWA permit requirements because the water could potentially be connected to navigable water. Such a claim stretches CWA jurisdiction beyond statutory authority and practical implementation.

While the processes and inter-relationships identified in the Report provide mechanisms to establish potential chemical, biological and physical ties between waters, the idea of a universally applicable mechanism for every water or drainage feature that exists on the landscape lacks any degree of scientific robustness. Given the financial and potential criminal liabilities associated with violating the CWA, the connectivity of an area to a navigable water is best established on a case-by-case basis. This vague concept of connectivity cannot be applied universally to all areas and navigable waters, thereby defeating the agencies’ stated purpose of avoiding case-by-case determinations for waters of the U.S.

### **III. The Proposed Rule Significantly Increases the Amount of Area Subject to CWA Jurisdiction**

Despite the assurances from EPA and the Corps that the proposed rule would have no substantive regulatory impact and would actually reduce the areas that are subject to CWA jurisdiction, maps developed by EPA and the U.S. Geological Survey identify 8.1 million miles of rivers and streams that would be subject to CWA jurisdiction under the revised definition of “waters of the U.S”. in the proposed rule. This represents a significant increase of more than 130 percent over the 2009 estimate of 3.5 million miles subject to CWA jurisdiction that EPA provided in a previous report to Congress. Furthermore, some states have reported an even greater increase of areas that would be subject to CWA jurisdiction under the proposed definition of waters of the U.S. This increase is a direct result of the expanded definition that includes ephemeral streams

and the land areas that are adjacent to them as “waters of the U.S.” subject to CWA jurisdiction.

Poultry and egg production often coincides with the farming of row crops and forage. Agricultural operations like these exist in rural, largely undeveloped open areas. In order for these agricultural operations to be sustainable, farmers rely on working and shaping the land to make it productive. This includes installing practices to control and utilize stormwater for the benefit of growing crops and forage and also sustaining and protecting agricultural livestock.

The proposed rule would assert jurisdictional authority over countless dry creeks, ditches, swales and low spots that are wet because it rains or a farmer has installed practices to sustain the viability of his operation. Even worse, the proposed rule attempts to claim authority over remote “wetlands” and or drainage features solely because they are near an ephemeral drainage feature or ditch that are now defined as a water of the U.S. subject to CWA jurisdiction. Such unnecessary expansion of CWA jurisdiction significantly burdens poultry and egg production operations without any meaningful public health or environmental benefits.

#### **IV. The Expanded Claim of Jurisdictional Authority over All “Tributaries” Will Lead to Confusion, Increased Burden and Potential Liability**

Despite the claim of EPA and the Corps that the proposed rule simply clarifies an existing regulatory program, nothing could be further from the truth. The proposed rule expands the definition of “tributary” to cover anything that is capable of contributing any amount of flow to downstream locations that eventually connect to larger water bodies. The expansion of the types of waters, drainage features, and other areas that will fall under the definition of “tributary” will lead to confusion as to whether or not low spots and drainage swales in fields are jurisdictional under the proposed rule. Accordingly, to be safe and avoid potential liability under the CWA, regardless of the agencies’ claims to the contrary, farmers operating under the new jurisdictional framework would indeed need a federal permit to plow the field, apply fertilizer, graze cattle in the pasture, build a fence, or operate a poultry and egg production operation.

In defining a tributary as a drainage feature having a bed, bank and an ordinary high water mark (OHWM), the agencies want the public to believe that the assertion of CWA authority over “tributaries” is appropriate. This assertion fails to recognize the unnecessary inclusion of numerous other land features that fall within the definition of “tributary,” such as those areas with drainage features that do not resemble any stream, brook or creek. Instead, the agencies advance new jurisdictional authority by introducing ambiguity and vague concepts of connectivity. The agencies justify this effort to broaden the boundaries of what the agencies consider a tributary because in “some regions of the country where there is a very low gradient, the banks of a tributary may be very low or may even disappear at times.” 79 Fed. Reg. at 22202. This appears to be a thinly veiled justification to protect human health and the environment, without first demonstrating any harm that must be eliminated or prevented.

The uncertainty and potential liability associated with implementation of the rule is further aggravated by the EPA and the Corps determination that “[a] water that otherwise qualifies as a tributary under the proposed 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 debris piles, boulder fields, or a stream segment that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break.” 79 Fed. Reg. at 22202. This determination prompts some practical, but critical questions for implementation of the rule. For example, how far will a farmer have to look “upstream” to ensure he is not liable for applying fertilizer or pesticide into an area that may lack a bed and a bank and an OHWM, yet is still considered a jurisdictional water? The agencies have specifically indicated that “[I]n many intermittent and ephemeral tributaries, including dry-land systems in the arid and semi-arid west, OHWM indicators can be discontinuous within an individual tributary due to the variability in hydrologic and climatic influences.” *Id.* at 22202. Consequently, how does a farmer gauge his liability for CWA violations of \$37,500 per day per occurrence and the risk of a citizen lawsuit when the discernible features required for a water to be a “tributary” do not exist in a specific location? It is difficult to understand how the agencies consider it logical that the proposed rule provides clarity and certainty to poultry and egg producers.

## **V. The Jurisdictional Expansion to Include Adjacent Waters Will Bring Additional Burden and Potential Liability to Farmers and Other Landowners**

Where the jurisdictional authority that the agencies assert through the broad and ambiguous definition of “tributary” is not enough, the proposed rule claims even more authority over a new category of waters and drainage features labeled “adjacent waters.” The agencies capture jurisdictional authority over a multitude of small streams, no matter how remote, by mandating that the ecological functions provided by adjacent waters are biologically connected to adjacent navigable waters and tributaries.

The proposed rule retains the definition of “adjacent waters,” but expands it further with new definitions for “neighboring waters,” “riparian areas,” and “floodplain.” Prior to the proposed rule, “adjacent waters” have been considered wetlands that actually abut navigable waters because there is a significant nexus between the wetlands and the jurisdictional water. Under the proposed rule, non-wetlands can be considered jurisdictional waters of the U.S. The term, “neighboring,” includes waters located in the riparian areas or floodplains of a major navigable water or tributary or water with a shallow subsurface hydrologic connection. This could include nearly all waters within the geographic area of a floodplain.

In addition, the definitions of “riparian area” and “floodplain” rely on ambiguous and undefined concepts. For example, “riparian area” is defined as “an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.” While this definition is vague and broad (particularly as it relates to ecological processes, communities and structures), there is no clarification in the proposed rule on how far a riparian area extends away from the water body.

Furthermore, “floodplain” is defined as an area that has been inundated by actual waters or was formed by sediment deposition from actual water. However, the proposed rule does not specify whether it is the 10-year, 50-year, 100-year or 500-year

floodplain that is included in the definition. Using “best professional judgment” to answer this on a case-by-case basis (as is suggested in the proposed rule) provides no meaningful guidance as to what areas are to be included as a floodplain for purposes of designating waters of the U.S. subject to CWA jurisdiction.

Accordingly, “adjacent waters” in the proposed rule is a vague and overly broad concept that could include an area as vast as the 500-year floodplain of the Ohio River valley. Landowners in these areas or any area within miles of a navigable water or tributary could never be sure if activities on their land would trigger federal water permit requirements covered by the CWA. This is not the clarity and certainty that poultry and egg producers and other landowners need.

#### **VI. The Proposed Rule Further Expands Jurisdiction with Broad Category of “Other Waters”**

In addition to expanding the scope of CWA jurisdiction with the definitions of tributaries and adjacent waters, the proposed rule also includes “other waters” as waters of the U.S. Specifically, the term, “other waters,” includes “[o]n a case-specific basis” waters that “in combination with other similarly situated waters” have a “significant nexus” with navigable waters, tributaries and adjacent waters. The term, “significant nexus,” means a water, alone or in combination with other similarly situated waters, that “significantly affects the chemical, physical, or biological integrity” of a navigable water. EPA and the Corps therefore, could consider the cumulative impacts of multiple waters to determine the jurisdictional status of a particular area that has, or had, the presence of some water at some time. Accordingly, under the proposed rule it is difficult, if not impossible, for a poultry and egg producer to assess the jurisdictional status of an area without undertaking a comprehensive, complex, and costly watershed study.

The definition of “other waters” is similarly vague and overly broad. This further expansion of CWA jurisdiction goes beyond any authority that Congress intended to provide and leaves farmers and other landowners vulnerable to unnecessary and inappropriate enforcement actions because no clear guidance is provided by the proposed rule.

## **VII. The Exclusions in the Proposed Rule Lack Clarity and Are Far Too Limited to Be Meaningful**

The proposed rule does include certain exclusions from the definition of waters of the U.S., but these exclusions are too limited, ambiguous and are of little, or no, value to agricultural operations. For example, the proposed rule excludes “ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow.” Unfortunately, the term, “uplands,” was not explained or clarified in the proposed rule.

Similarly, the proposed rule also excludes “ditches that do not contribute flow either directly or through another water” to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion is a nonfactor for agricultural operations. The agencies’ claims that exclusions provide some relief from the expanded CWA jurisdiction are meaningless, cannot withstand close scrutiny and do not provide poultry and egg farmers with the benefits the agencies assert.

## **VIII. Conclusion**

If the justification for finalizing this proposed rule relies on the need to provide certainty, clarity and predictability to the regulated public, the agencies have no choice but to withdraw the proposed rule and open a real dialogue with the agricultural community. The ambiguity that binds the inferences of broad connectivity between existing and new categories of waters of the U.S. is based on a questionable report that has not yet been fully vetted by the Scientific Advisory Board and was developed behind closed doors. Given the breadth and depth of the negative feedback and calls for the agencies to withdraw the current proposed rule, it is difficult to comprehend the agencies’ assertion that the rule is clear and understandable and will reduce regulatory burdens. 79 Fed. Reg. at 22192.



The proposed rule lacks clarity, is ambiguous, and would impose undue and unnecessary burdens on agricultural operations and other landowners without providing any meaningful human health or environmental benefits. The proposal should be withdrawn so that the overly broad scope and the potentially devastating impacts of the rule can be assessed more thoroughly, particularly with respect to small businesses and farms. Such action is warranted because EPA and the Corps are not compelled to issue the rule by a court order or court-issued deadline. Accordingly, the agencies can take the necessary time to redraft the rule consistent with federal statutory authority, state rights, and local land use provisions. In addition, the extra time would allow the agencies to develop a rule that is protective of human health and the environment, does not impose unnecessary burdens on law-abiding landowners, and that is clear and understandable.

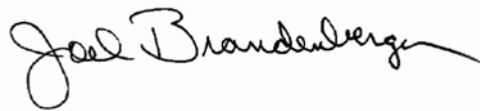
We appreciate the opportunity to submit these comments and look forward to working with EPA and the Corps to develop an appropriate rule to define waters of the U.S. that should be subject to CWA jurisdiction. If you have any questions regarding these comments or would like additional information, please contact Paul Bredwell at [pbredwell@uspoultry.org](mailto:pbredwell@uspoultry.org).

Respectfully submitted,



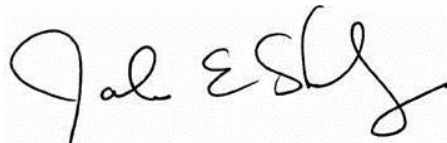
---

Mike Brown, President  
National Chicken Council



---

Joel Brandenberger, President  
National Turkey Federation



---

John Starkey, President  
U.S. Poultry & Egg Association