



**Albuquerque Metropolitan
Arroyo Flood Control Authority
Special Meeting Minutes
October 30, 2014**

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1. Call to Order and Roll Call

Chairman Brown called the Special Board Meeting to order at 9:09 a.m. Thursday, October 30, 2014. Roll was noted as follows:

Directors present:	Chairman Ronald D. Brown Director Tim Eichenberg Director Daniel F. Lyon Director Bruce M. Thomson Director Danny Hernandez
Directors excused:	None
Attorney present:	Attorney Vanessa Chavez, Robles, Rael & Anaya
Others present:	Jerry M. Lovato, P.E., Executive Engineer Staff Other attendees on file at AMAFCA

A quorum was present.

2. Approval of Agenda

Director Hernandez made a motion to approve the agenda. Director Lyon seconded the motion, which passed (5-0).

3. Items from the Floor/Public Comment

No one had signed up for Public Comment.

4. Clean Water Act

Mr. Lovato, AMAFCA Executive Engineer, and Ms. Vanessa Chavez, Attorney with Robles, Rael & Anaya, presented information on the current rule and the proposed rule for Waters of the US (WOUS), and a brief history of the Clean Water Act from 1972. Mr. Lovato briefed the Board on the current WOUS definitions of ground water, surface water, wetland areas and how those definitions are being used to in describing the Rio Grande. The Corp of Engineers is looking at all aspects of the WOUS which could conflict with States rights. States are concerned with the broad definitions of the WOUS which overlap State jurisdictions. He went over current AMAFCA facilities, the 404 process, and how waters flow in and out of the Pueblo of Sandia.



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Mr. Lovato stated that if AMAFCA facilities become Waters of the US the full 404 process has to be done each and every time AMAFCA performs maintenance. Numerous questions were answered during the presentation. Ms. Chavez stressed that the rule does not provide differences between stormwater in normally dry arroyos and streams.

The following information was covered and expanded upon:

What is a Wetland? There are 3 indicators:

Hydrology

- Surface water or waterlogged soils present for periods sufficient enough to influence soil chemistry and vegetation type

Soil

- Hydric soils, which may contain partially decomposed plant material, smell of rotten eggs, or may be sandy with a black surface layer that indicates low oxygen content

Vegetation

- Hydrophytic vegetation common to local wetlands

Rule of thumb: if one indicator from each of the three categories is present - then it is a wetland

Wetland Delineations

- Where are the wetlands
 - The United States ARMY Corps of Engineers (USACE) conducts and issues federal Jurisdictional Determinations

Mr. Lovato advised that the 404 individual permit process, adds 18 months to the project.

Overall Historical Timeline for Waters of the United States

- 1972 - The Clean Water Act (CWA) is enacted
- 1974 -1977 - Corps issues & revises early CWA jurisdictional rules
- 1977 - Congress amends the CWA
- 1985 - Supreme Court decides Riverside Bayview Homes
- 1986 - Corps issues the “migratory bird rule”
- 1987 - Corps publishes “Wetlands Delineation Manual”
- 2001 - *Supreme Court decides SWANCC*
- 2003 - *Corps and EPA issue joint memorandum on SWANCC*
- 2006 - *Supreme Court decides Rapanos*
- 2008 - Corps and EPA issue guidance on CWA jurisdiction after Rapanos
- 2011 - Corps and EPA release new draft guidance (never finalized)
- 2013 - EPA releases draft “Connectivity Report”



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- 2014 - Corps and EPA release proposed rule for public comment
 - *Italic – Jurisdiction Arguably Reduced*
 - All others – Jurisdiction Arguable Expanded

The Clean Water Act

- The Clean Water Act currently covers “*navigable waters*,” which the Act defines as “waters of the United States including the territorial seas”
- The Act does not define “Waters of the United States,” leaving it to the EPA and the Corps of Engineers to give more detail to the term through rulemaking

Supreme Court Decisions

- *Riverside Bayview Homes* (1985): Unanimous decision upholding agencies’ broad regulatory definition of “waters of the United States,” including “adjacent wetlands” as waters of the U.S.
- *SWANCC* (2001): Use of waters by migratory birds not sufficient basis by itself for Jurisdiction - need significant nexus with navigable waters
- *Rapanos* (2006): Splintered decision provides relative permanence and significant nexus as standards for determining CWA protection

Resulted in 2 Standard Rule 2 Standards (applied on case-by-case basis):

- Relative Permanence
 - May include certain ephemeral water bodies such as streams, rivers or lakes that dry-up due to extraordinary circumstances such as drought, as well as seasonal rivers
- Significant Nexus
 - Either alone or in combination with similarly situated waters
 - Affects **chemical, physical, and biological integrity” of navigable waters**
 - Relationship with navigable waters must be more than “**speculative or insubstantial**”

Why the Proposed Rule?

- According to the EPA, applying the two different standards has proven difficult for both the regulated community and agency field staff
 - Thousands of hours spent on determining jurisdiction, causing many entities to concede jurisdiction to get a permit faster
 - Enforcement actions often have been focused where jurisdiction is clear, leaving many waters vulnerable



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- State and local governments, environmental organizations and the regulated community have called for rulemaking to clarify the jurisdictional scope of waters under the CWA

Save Time?

- One stated purpose of the proposed rule is to reduce the use of the Corps' *Wetlands Delineation Manual* (1987) and its supplements. The Manual is the tool agencies use to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis
- AMAFCA past experience for Individual Permits
 - 18 months

Clean Water Act

- Proposed rule change meant to address inconsistent determinations by COE on 404 permitting
- The proposed rule change will affect the entire CWA

Section 3: Programs Affected

Any water found not to be a "water of the U.S." generally is not subject to CWA requirements. Exhibit 1 depicts the CWA programs that are affected by the definition of "waters of the U.S.," along with the government entities that are responsible for administering the programs. Among its many provisions, the CWA establishes oil spill prevention programs (section 311); requires permits for pollutant discharges (section 402); requires permits for the placement of dredged or fill material in waters of the United States, including wetlands (section 404); calls for states to set standards for meeting water quality goals and develop plans to restore polluted waters (section 303); establishes state roles in certifying that federal permits will not violate state water quality standards (section 401); and allows the federal government, states, and communities to enforce the law.

Exhibit 1. Clean Water Act Programs Affected



As shown in Exhibit 1, states and tribes have a large role in administering many CWA programs. This economic analysis does not account for the possibility that some states may already be considering a broader set of waters to be subject to their implementation of certain CWA programs. Although the extent of their CWA jurisdiction may not be smaller than the definition of waters of the U.S., states and tribes may elect to implement CWA programs more broadly according to a definition of "waters of the state" or "waters of the tribe". To the extent states have elected to do this, the economic impacts may be smaller than presented here (because states may already be asserting jurisdiction over waters for



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Proposed Rule – will affect every state/every Indian tribe

- **Purpose** is to define “waters of the U.S.” in a clear and understandable way, supported by scientific evidence and consistent with the law, which protects the nation’s waters
- **Defines** “waters of the United States” for all CWA programs in light of Supreme Court cases
- Establishes **bright line categories** for:
 - Waters that are jurisdictional
 - Waters that are *not* jurisdictional
- **Retains** existing exemptions

DRAFT CONNECTIVITY REPORT (SEPT. 2013)

The proposed rule relies on a draft scientific report

- Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence that the EPA's Science Advisory Board released for public comment September 2013
- The agencies are using the draft Report as the scientific basis for the policy decisions expressed in the jurisdictional rule

Clean Water Act; Definitions: Waters of the United States (33 C.F.R. §328)

“Waters of the United States” are defined as:

- Traditionally **navigable waters**.
 - All **impoundments** of navigable waters.
 - All **tributaries** of navigable waters.
 - All waters **adjacent to** navigable waters.
 - On a case-specific basis, **other waters** that those waters alone, or in combination with other similarly situated waters located in the same region, have a **significant nexus to** navigable waters.
- All waters that meet the regulatory definition of “tributary” or “adjacent” are jurisdictional *per se*

AMAFCA affected by Definition

- The Connectivity Report's conclusions have the effect of establishing categorical federal jurisdiction over the following waters:
 - A tributary system, including perennial, intermittent, and ephemeral streams because they are physically, chemically, and biologically connected to downstream rivers
 - *AMAFCA lost the “Waters of the US Determination” appeal on this interpretation* – pertaining to the Calabacillas Arroyo and South Pino Watershed



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Bright Line Categories of Non-Jurisdictional Waters

- **Retains exemptions** in CWA or in existing regulations:
 - Prior converted cropland (PCC)
 - Waste Treatment Systems
- **Adds several waters** that ongoing practice has considered generally non-Jurisdictional
 - Irrigated areas that would revert to upland if irrigation ceased
 - Artificial lakes or ponds created on dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing
 - Water-filled depressions created incidental to construction activity
 - Gullies and rills and non-wetland swales
- **Narrows jurisdiction over ditches** and exempts the following:
 - Ditches excavated wholly in uplands, draining only uplands, and that have less than perennial flow
 - Ditches that do not contribute flow, either directly or through other waters, to a Traditional Navigable Waters (TNW)

Bright Line Categories of Jurisdictional Waters

Traditional Navigable Waters (TNWs)

- Rule language is unchanged: categorically a water of the U.S.
- TNWs are waters that either carry or have potential to carry commercial navigation, including recreational navigation
 - When deciding if water has potential for future commercial navigation, among relevant factors are the water's physical characteristics

Impoundments and Adjacent Waters

- **Impoundments** Proposal indicates impoundments of TNWs are jurisdictional
- **Adjacent Waters** - Waters adjacent to TNW, tributary or jurisdictional impoundment are waters of the U.S.
- Existing regulations define "adjacent" as "bordering, contiguous, or neighboring." Remains unchanged, but rule now defines "neighboring"
- Existing regulations include wetlands as "adjacent." Proposal applies adjacency to all waters

Tributaries

Existing regulations and proposed rule both consider tributaries to be waters of the U.S.

- **Proposal defines "tributary" for first time:**
 - Waters with "bed and banks" and an "ordinary high water mark" that contribute flow, either directly or through another water, to TNW
 - The proposed rule does not quantify the frequency or extent of "flow"



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- any flow that reaches or could potentially reach a navigable water creates a significant nexus

- **The proposal expressly states that a tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and non-exempt ditches**

Man-Altered or Man-Made Tributaries:

- EPA REASONING
 - Features that convey water, whether natural, man-made, or man-altered, **provide connectivity** between streams and downstream rivers
 - Man-made and man-altered tributaries **perform many of the same functions as natural tributaries**
 - Man-made and man-altered tributaries also **provide corridors for movement** of organisms between headwaters and navigable waters
 - Tributaries of **all flow regimes** have a significant nexus to the chemical, physical, or biological integrity of downstream jurisdictional waters

Man-Altered or Man-Made Ditches:

- EPA REASONING
 - Non-exempt ditches meeting the definition of tributary **provide the same chemical, physical, and biological functions** as tributaries
 - Due to the often straightened and channelized nature of ditches, these tributaries **quickly move water downstream** to jurisdictional waters
 - Ditches and canals, like other tributaries, **export sediment, nutrients, and other materials downstream**
 - Ditches are very effective at transporting water and materials, including nitrogen, downstream

Ephemeral and Intermittent Tributaries:

- EPA REASONING
 - **Intermittent and ephemeral streams are chemically, physically, and biologically connected** to downstream waters, and these connections have effects downstream
 - Tributaries **do not need to flow perennially** to have a significant nexus to downstream waters
 - These streams **perform the same important ecological and hydrological functions** as perennial streams
- Periodic flows can have a strong influence on biogeochemistry by **connecting the channel and other landscape elements**



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- This connection can be very important for transmitting a substantial amount of material into downstream rivers
- Ephemeral desert streams have been shown to export particularly high sediment loadings

Waters That Require a Case-Specific Evaluation
“Other Waters”

- Waters that do not fall into the established categories are jurisdictional only where case-specific analysis shows that they have a **significant nexus to a navigable water**
- Significant Nexus Defined: water, either alone or in combination with other similarly situated waters in the region, that significantly affects the chemical, physical, or biological integrity of a navigable water
 - The significant nexus must be more than speculative or insubstantial
 - Language based on Justice Kennedy’s opinion in *Rapanos*
 - Which waters are aggregated during a significant nexus analyses depends on size of the “region” and which waters are “similarly situated”
 - The proposed rule also provides EPA’s proposed definitions of “region” and “similarly situated”
- EPA’s connectivity report suggests that there is a gradient of connection between categories of “other waters“ and large rivers and other large waters downstream

Mr. Lovato advised that probably the entire state will be under Federal jurisdiction. AMAFCA facilities will be included in the Federal jurisdiction. Playa lakes would continue to be exempt unless a significant nexus can be demonstrated in a special case.

How will it be interpreted?

- The literal interpretation of the proposed rule would be that a tributary (which is merely a discernible bed, bank and high water mark) and all of the adjoining riparian areas and floodplains would be under CWA jurisdiction
- The proposed rule creates an additional determinant of jurisdiction. The term, "other water" refers to waters that cannot be considered "adjacent" to downstream jurisdictional waters and that are not tributaries of such waters. "Other waters" are found outside the riparian area and the floodplain, since waters within those areas are considered to be adjacent
- ***Read this way, which is the most direct reading, much of New Mexico would be categorically under federal jurisdiction and the entire AMAFCA jurisdiction would be as well***



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Potential Implications for AMAFCA Facilities

- All facilities connecting to the river would be jurisdictional.
- All tributaries to facilities connected to the river would be jurisdictional.
- Potential to encompass entire system or entire parts of the system.

How will it affect AMAFCA?

- **Avoidance**
 - Find alternative locations
 - Not likely
- **Minimization**
 - Design around or under WOUS
 - Not likely
- **Mitigation**
 - Replace wetlands impacted and or WOUS
 - Possible, will require additional funding and time
- **Maintenance**
 - Permits required
 - Exposure to liability through Federal process (ESA, CWA)

AMAFCA's Comments

- Regulation should be under the NPDES Permit
 - Currently operates under CWA regulation
 - Asserting jurisdiction creates a conflict in interpretation.
 - EPA's own interpretation states that an MS4 flows into a water of the U.S.
- MS4 System should be non-jurisdictional per se.
 - Unlike other tributary systems.
 - MS4 should not be classified as a water of the U.S.
 - Does not provide any traditional tributary functions (habitat, etc.).
 - Connection is minimal at best.
 - Lacks substantive tributary features.
- Determination should be case specific
 - *Rapanos* anticipated a case specific evaluation.
 - In the case of MS4, calls for speculation as to connectivity.
- Additional Guidance is Required for Ditches Altering Natural Waterways
 - Unclear what is considered a natural waterway Dry Arroyos?
 - Jurisdiction continues as long as contributes flow. Unclear what amount of flow is necessary.
- A Regulatory Flexibility Analysis is Required
 - Claim that less waterways will be held jurisdictional.
 - A regulatory flexibility analysis is required when small governments will be



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- impacted.
- Not applicable to AMAFCA.
- MS4 Entities Who Have Already Submitted Comments Opposing Rule
 - California Stormwater Quality Association on behalf of members (CASQA)
 - Beaufort County Stormwater Utility (Beaufort, S.C.)
 - City of Brea (Brea, CA)
 - Alameda (CA) Countywide Clean Water Program
 - City of San Marino (CA)
 - City of Aurora (CO)
 - City of Phoenix (AZ)
 - Nevada County Resource Conservation District (NV)
 - Palm Beach County (FL)
 - Southeast Stormwater Association on behalf of members (FL)
 - Florida Stormwater Association on behalf of members
 - Various Illinois Drainage Districts
 - Charlotte-Mecklenburg (NC) Storm Water Services
 - Carroll County (MD) Department of Land Use, Planning & Development
 - City of Chesapeake (VA)
 - Various Associations of Counties on behalf of members

Ms. Chavez referred to the draft letter of comments that will be submitted. There are four to five comments at this time. She asked the Board to provide input on how to approach the issue on Watersheds.

Responding to a questions regarding if AMAFCA should be stalling, Ms. Chavez advised that there is a deadline for comments; however, she does not believe that the rule will be finalized at this time. Mr. Lovato advised that there are many groups and individuals who are submitting comments.

Director Thomson asked if there would be any traction to ask for a De minimis (too trivial or minor to merit) determination. Ms. Chavez advised that they could ask.

Director Eichenberg requested that whenever the comments are sent that they be directed to specific individuals and not To Whom It May Concern. The salutation will be reworded to “All Interested Parties.” Director Thomson suggested sending carbon copies to the Congressional Delegation and noting the comments are from the Board.

Director Thomson made a motion to endorse the submittal of comments as presented and that the Directors names be listed as part of the submittal. Director Hernandez seconded the motion, which passed (5-0).



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Director Lyon thanked Ms. Chavez and Mr. Lovato for the information that was presented. Chairman Brown concurred and advised the presentation was very informative.

5. Unfinished Business

None.

6. New Business

None.

7. Adjourn

There being no further business to come before the Board, Chairman Brown adjourned the meeting at 10:15 a.m.

Bruce M. Thomson, P.E., Secretary-Treasurer, 11/20/14

Recorded by Guylene Harris, Executive Administrative Assistant