By Elmer Ronnebaum, KRWA General Manager

Controversy Concerning Proposed Rule to Clarify Clean Water Act

Cities and rural water district professionals in Kansas generally understand the impact the Environmental Protection Agency (EPA) has had, and continues to have, on the operation of their water and wastewater systems. Regulations exist to protect customers from naturally occurring and human sources of contaminants in drinking water, as well as from ineffective and faulty water and wastewater treatment processes. Within the state of Kansas, regulations address back-siphonage and cross-connections; regulations exist for operator certification and continuing education, for reporting continued compliance with regulations and reporting of any lapse in maintaining water pressure and disinfection. The National Rural Water Association and State Rural Water Associations work hard to keep a balance between these regulations and affordability, and at the national level, are continuously in discussion with the EPA to keep safe water available and affordable to as many Americans as possible.

The latest "controversy" involving the EPA is not with drinking water regulations, but with a definition of the "Waters of the United States." The issue stems from a Supreme Court ruling in 2006 in the case Rapanos v. United States. Mr. Rapanos, a developer in Michigan, filled in 22 acres of wetlands to build a shopping mall. He failed to obtain necessary permits and proceeded even after orders to cease by the State of Michigan. Rapanos contested that the land was not a wetland, contrary to the opinions of state officials and his own consultant. In the case, the justices were split over the reading of the term "navigable water".

Contrary to some comments, a "dry ditch" such as shown in this photo would not be regulated because of changes in rules governing the Clean Water Act.

The case was remanded to the lower court. Rapanos paid a $1 million fine. The Army Corps of Engineers claimed that by filling the wetland, Mr. Rapanos had discharged a pollutant into the "waters of the United States." The US. Supreme Court rejected that position, holding that isolated wetlands could not be considered "waters of the United States" for purposes of the Clean Water Act.

The EPA Web site for proposed regulations has a summary, where CWA is an abbreviation for Clean Water Act and SWANCC is an abbreviation of Solid Waste Agency of Northern Cook County. The full report can be found at http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OW-2011-0880.

The abstract of "Definition of Waters of the United States" under the Clean Water Act can be found at http://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2040-AF30. It reads as follows:

After U.S. Supreme Court decisions in SWANCC and Rapanos, the scope of "waters of the US" protected under all CWA programs has been an issue of considerable debate and uncertainty. The Act has a single definition for "waters of the United States." As a result, these decisions affect the geographic scope of all CWA programs. SWANCC and Rapanos did not invalidate the current regulatory definition of "waters of the United States." However, the decisions established important considerations for how those regulations should be interpreted, and experience implementing the regulations has identified several areas that could benefit from additional clarification through rulemaking. U.S. EPA and the U.S. Army Corps of Engineers are developing a proposed rule for determining whether a water is protected by the Clean Water Act. This rule would make clear which waterbodies are protected under the Clean Water Act.

The EPA and the U.S. Army Corps of Engineers (Corps) extended the comment period for the proposed rule "Definition of `Waters of the United States' Under the Clean Water Act" published on April 21, 2014 (79 FR 22188), due to many requests for an extension, to November 14, 2014. The comment period was originally scheduled to end on July 21, 2014.

The agencies state, "Developing a final rule to provide the intended level of certainty and predictability, and minimizing the number of case-specific determinations, will require significant public involvement and engagement. Such involvement and engagement will allow the agencies to make categorical determinations of jurisdiction, in a manner that is consistent with the scientific body of information before the agencies, particularly on the category of waters known as "other waters." To do this, the proposed rule will retain the existing regulatory definitions for the terms "adjacent" and "wetlands" and for the first time define the terms "neighboring," "riparian area," "floodplain," "tributary," and "significant nexus." The agencies propose no change to:

- the exclusion for wastewater treatment systems designed consistent with the requirements of the CWA
- no change to the exclusion for prior converted cropland, and
- no change to the regulatory status of water transfers

The proposed rule is reportedly consistent with science and the two Supreme Court opinions.

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In summary, rivers, creeks and wetlands in Kansas, and the water quality in those waterbodies regulated under the 1972 Clean Water Act are, and will continue to be, regulated by the EPA and the Corps. What is new is that all waters adjacent to streams – not just wetlands – will now be regulated. These "other waters" will include oxbow lakes and possibly sand pits in floodplains. Wetlands not adjacent to streams, will be regulated on a case-by-case basis if there is found to be a "significant nexus" to a traditional navigable or interstate stream.

For more in-depth explanations of the scientific evidence and case law related to the uncertainty created by the lawsuits and the goals of the new rule, visit the regulation Web site http://water.epa.gov/lawsregs/guidance/wetlands/cwawaters.cfm and click on the Primary Document (PR) with the title, "Clean Water Act; Definitions: Waters of the United States."

As proposed, the rule has no change on the 56 "normal farming" agricultural exempted activities. It's difficult to understand the negative reaction to the proposed regulation from some in the agricultural community, other than to profit on people's lack of accurate information for political gain. The proposed regulation has become a charged political issue.

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The Clean Water Act

The Federal Water Pollution Control Act Amendments, now known as the Clean Water Act, were enacted 42 years ago in 1972. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The definition of the "waters of the United States" was not defined by Congress in the CWA, but in 1986, a regulation was adopted that defined "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, the territorial seas, and adjacent wetlands.

Under the proposed first section of the regulation, Section (a), the agencies propose to define the "waters of the United States" for all sections of the CWA to mean:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

Temporary wet spots after heavy rains, in fields already under cultivation, will not be considered to be wetlands under the new rule, as suggested by some. The American Water Works Association has assessed the proposed rule and has stated that some increase in Corps of Engineers permitting requirements may occur when treatment plants are expanded and new pipelines are installed, possibly increasing regulatory oversight and permit processing times. This does not appear to be overly burdensome. It's a small price to pay for high-quality water and a clean environment.

Elmer Ronnebaum is KRWA General Manager; he has been employed by KRWA since 1983. He served seven years on the KRWA board of directors prior to that. He also helped develop a large RWD and served for fourteen years on a water district board of directors.