



C. L. "BUTCH" OTTER

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October 24, 2014

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW (1101A)
Washington, DC 20460

Jo Ellen Darcy
Assistant Secretary of the Army
(Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

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

Dear Administrator McCarthy and Assistant Secretary Darcy:

The State of Idaho appreciates the opportunity to provide comment on the proposed rulemaking "Definition of 'Waters of the United States' Under the Clean Water Act"¹ (Proposed Rule). With this Proposed Rule, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) attempt to define certain terms related to the scope of jurisdiction granted EPA and the Corps under the Clean Water Act (CWA). The Proposed Rule modifies 11 different 40 CFR Parts and while Idaho's comments are keyed to the definition of 'Waters of the United States' pertaining to 40 CFR 328.3, Idaho's comments are applicable to all 11 CFR Parts.

Consultation:

Idaho believes EPA and the Corps failed to adequately consult with the states prior to development of the Proposed Rule. Effective consultation could have addressed many of Idaho's concerns and avoided much of the confusion that now exists. EPA and the Corps' failure to include the states in the formulation process effectively missed an opportunity to build consensus with the primary implementing entities and prevent controversy.

As a result, there now is an even greater need, and opportunity, to enter into sustained dialogue and consultation with the states to revise the Proposed Rule. Such consultation should treat the states as co-regulators, separate and apart from the general public, as envisioned by the CWA's framework of cooperative federalism and as required by Executive Order 13132.

To facilitate consultation and sustained dialogue with Idaho and other states, a state-federal workgroup should be established between EPA, the Corps and the states to revise the

¹ 79 Fed. Reg. 22188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 89 and 40 C.F.R. pts. 110, 112, 116, et al.).

Proposed Rule. Although it is unlikely such a workgroup would reach a consensus on every issue, it would facilitate the dialogue, collaboration and relationship-building needed to create a more workable and effective rule. One productive example of such an approach is the workgroup EPA established with the Environmental Council of the States and the Association of Clean Water Administrators to discuss revisions to the National Pollutant Discharge Elimination System (NPDES) electronic reporting rule. Again, the purpose of such workgroups is not necessarily to reach consensus but rather to provide state and federal participants a meaningful and timely opportunity to discuss and resolve their needs and concerns.

Connectivity Report:

EPA and the Corps should finalize the Connectivity Report before proceeding with any action regarding the Proposed Rule. EPA's Science Advisory Board (SAB) is reviewing a draft report on the connectivity of differing water bodies that will inform the Final Rule. Despite requests from the Western Governors' Association, the Western States Water Council, and others, EPA and the Corps published the Proposed Rule for public comment before SAB completed its review and before the report was finalized.

More recently, EPA and the Corps indicated they will wait until the Connectivity Report has been completed before issuing a Final Rule. The State of Idaho appreciates this decision. However, EPA and the Corps also should continue to accept comments for a reasonable period of time after the Connectivity Report is complete in order to utilize the Report and such comments to revise or otherwise develop the Proposed Rule.

Overly Broad – Expanded Scope:

The State of Idaho believes definitions contained in the Proposed Rule lack clarity. While EPA and the Corps suggest the Proposed Rule helps “clarify” the scope of CWA jurisdiction, in some cases the opposite is true. For example, attempts to clarify what constitutes “significant nexus” create ambiguities that will result in further litigation. Moreover, important questions remain regarding the scope of “other waters” and how jurisdictional determinations will be made on a “case-specific basis.”

Despite the EPA and Corps' assertion that the Proposed Rule would not expand jurisdiction, the Proposed Rule introduces new terms that, when applied, will broaden the types of water bodies that are subject to CWA regulation in many instances. This potential expansion is contrary to the direction of Congress and the courts, both of which have clearly limited federal jurisdiction under the CWA.

1. Significant Nexus

Any effort to clarify CWA jurisdiction should recognize that the “significant nexus” test Justice Kennedy set forth in *Rapanos v. United States* requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. Idaho supports efforts to quantify “significant” in order to ensure the term's usage does not extend jurisdiction to waters with a *de minimis* connection to jurisdictional waters. Idaho appreciates language in the Proposed Rule which states that effects on jurisdictional waters

must be “more than speculative or insubstantial.” However, further work is needed to quantify the concept of significance, particularly the term “significantly affects” in 40 CFR 328.3 (c)(7), and to flesh out a transparent process for the agencies to use when making significance determinations.

To address this uncertainty, Idaho believes the Final Rule should provide a specific, quantifiable measure or set of measures to guide determinations of significance rather than simply stating the effect on another jurisdictional water must be “more than speculative or insubstantial.” Waters that satisfy the specified measure(s) would be presumed to have a significant connection to the waters identified in paragraphs (a)(1) through (3) of section 328.3 of the Proposed Rule, while waters that do not satisfy the measure(s) would be presumed to lack a significant connection. Parties should be able to provide evidence to rebut a presumption of significance or non-significance, but the use of specific, quantifiable measure(s) would provide much needed clarity and a justifiable starting point for significance determinations.

Idaho recognizes further discussion between the states and federal agencies is needed to develop the specifics of such measures and the process for applying them, particularly with the variation in hydrologic and geologic conditions existing across the nation. As such, Idaho urges EPA and the Corps to utilize a state-federal workgroup to identify and develop specific, quantifiable measure(s) for determining “significance” consistent with the rebuttable presumption concept.

2. Other Waters

As currently drafted, the Proposed Rule states that jurisdictional determinations for so-called “other waters” will be made on a “case-specific basis,” provided that those waters “alone, or in combination with other similarly situated waters...located in the same region have a significant nexus” to a traditional navigable water, interstate water, or the territorial seas. While the Proposed Rule and related preamble are clear that “other waters” may be jurisdictional, they are not clear about how, when, or in which circumstances EPA and the Corps will perform case-by-case analyses to determine the jurisdictional status of such waters. This lack of clarity could be interpreted to mean that the status of all “other waters” is unknown until EPA and the Corps determine otherwise at some unnamed point in the future. This result leaves landowners and users in limbo regarding the status of “other waters” located on their property and runs counter to the Proposed Rule’s stated purpose of increased clarity. It potentially leaves landowners in the position of having to prove “other waters” located on their property are non-jurisdictional should they desire to develop their land, or risk the possibility of incurring fines and other penalties. This uncertainty will negatively affect property values and beneficial land use projects.

Idaho urges EPA and the Corps to work with a state-federal workgroup to determine a reasonable process for making jurisdictional determinations involving “other waters” and provide remedies in those situations where the permitting agency fails to make a determination.

Agricultural Exemption, Ground Water, and Exclusions:

The Proposed Rule does not adequately reaffirm the CWA's current agricultural exemption or the CWA's exclusion of ground water. Language should be included to reaffirm these key principals. The Proposed Rule also does not adequately define the following key terms: (1) shallow subsurface hydrologic connection; (2) bed and banks; (3) ordinary high water mark; and (4) uplands. Further consultation is needed between EPA, the Corps and the states to determine how to define these terms.

1. Agricultural Exemptions

Return flows from irrigated agriculture are statutorily exempt from the definition of a "point source" and from the NPDES permitting requirements under 33 U.S.C. §§ 1362(14) and 1342(I)(1). Similarly, normal farming, silviculture and ranching activities, and construction and maintenance activities related to farm and stock ponds and irrigation ditches as well as maintenance of drainage ditches are exempt from the requirement to obtain a dredge and fill permit under 33 U.S.C. § 1344(f). Idaho believes the CWA's agricultural exemptions are appropriate and that the Proposed Rule should not alter or create uncertainty about such exemptions. While the agencies may intend to preserve these exemptions, the Proposed Rule and related Interpretive Rule Regarding the Applicability of Clean Water Act Section 404 have nevertheless created confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions as well as their interaction with state water quality programs. Stated differently, the definition of "tributary" is broadened to such an extent in the Proposed Rule that the agricultural return flow exemptions may be rendered meaningless.

In addition, the agricultural Interpretive Rule has created a significant amount of uncertainty concerning its possible implications for "normal farming, ranching, and silvicultural" activities. Any effort to revise the Interpretive Rule should be done in partnership with the states, particularly to determine what constitutes exempt "normal farming, ranching or silvicultural activities."

2. Ground Water

"Waters of the United States" under the CWA do not include ground water. Idaho appreciates the Proposed Rule's specific exclusion of "ground water, including ground water drained through subsurface drainage systems." However, the Proposed Rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction of adjacent surface waters is less clear even though the preamble states that "nothing...would cause the shallow subsurface connections themselves to become jurisdictional."

The preamble language clarification should be included in the Proposed Rule itself to avoid misinterpretations and confusion about the EPA and Corps' intent and the jurisdictional status of such waters. Idaho requests the ground water exclusion in section 40 CFR 328.3(b)(5)(vi) of the rule be amended to state as follows:

"Ground water, including *but not limited to* ground water drained through subsurface drainage systems *and shallow subsurface hydrologic*

connections between adjacent surface waters under this section” (changes in italics).

3. Exclusions

The Proposed Rule should specifically exclude additional waters and features generally considered to be outside the scope of CWA jurisdiction, including:

- a. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA’s agricultural exemption;
- b. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters; and
- c. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement.

Regional Difference in Water Conveyances:

Improving clarity and consistency related to CWA jurisdiction is an admirable goal. However, the Proposed Rule makes no attempt to recognize regional differences in the terms it defines. Failing to recognize the distinct differences between water conveyances in the arid West will result in confusion and the overbroad application of CWA jurisdiction. This will result in regulatory uncertainty rather than clarity and consistency.

Support for Other Entities’ Comments:

The Proposed Rule has been critically addressed by many stakeholder groups, including the Western Governors’ Association, the National Association of Counties and the National Association of State Departments of Agriculture. In addition to the comments provided here, Idaho joins the Western States Water Council in its recently submitted comment letters to EPA. As a member of the Council, Idaho supports and adopts its comments and concerns.

Recommendations:

The Proposed Rule fails to adequately clarify the scope of EPA and the Corps’ jurisdiction, creating unnecessary ambiguities and contradictions as to the meaning of “significant nexus,” “other waters,” and other key terms and exemptions. The Proposed Rule is not informed by the Connectivity Report, which EPA and the Corps indicated would be considered in rule development. The Proposed Rule creates uncertainty regarding subsurface ground water, and along with the agricultural Interpretive Rule, obscures current understanding of the statutory agricultural exemptions as well. Above all, the Proposed Rule was developed by EPA and the Corps without adequately engaging the states or other stakeholders.

Idaho recommends that EPA and the Corps reject the Proposed Rule as currently drafted. Idaho further urges EPA and the Corps to seek the input of the states and other key stakeholders in developing a substitute rule that is consistent with statutory limitations and

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U.S. Supreme Court precedent. EPA and the Corps also should withdraw the agricultural Interpretive Rule.

In the event EPA and the Corps do not withdraw the Proposed Rule, the State of Idaho requests an additional extension of the public comment period. The current comment deadline is insufficient for Idaho to formulate thorough and thoughtful comments which utilize the SAB Connectivity Report review of the Proposed Rule's impacts, effects and implications.

Idaho appreciates EPA and the Corps' consideration of the comments presented here. As always, Idaho stands ready to work with EPA and the Corps on this Proposed Rule and any and all other issues involving the protection of Idaho waters.

Respectfully,



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