



ENERGY AND ENVIRONMENT CABINET

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Mr. Ken Kopocis
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Office of Water
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Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Via email to ow-docket@epa.gov

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Kentucky Division of Water (the Division) welcomes the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (the Corps) regarding the proposed definition of "waters of the United States" 79 Fed. Reg. 22188 (April 21, 2014). The Division acknowledges EPA's and the Corps' desire to provide clarity to a rule with historically inconsistent application by introducing new definitions that reflect what these agencies believe is current practice. However, the Division believes that the proposed changes also introduce new uncertainties for regulators and landowners, especially in regards to the "Interpretive Rule," and encourages EPA and the Corps to address these potential uncertainties by making clarifications within the final rule. The Division is also concerned that EPA and the Corps failed to appropriately engage the states in the development of the rule.

States Were Not Involved in Drafting of Proposed Rule

Following the publication of the proposed rule, the EPA and the Corp reached out to states and other stakeholders in a series of meetings, speeches, and webinars seeking to explain the proposed rule and answer questions. These efforts to reach out to states are commendable, but do not support the assertion that the EPA and the Corps sought public input on the development of the proposed rule. The EPA and the Corps should have appropriately engaged the states, especially those with delegated §404 permitting authority and §401 Water Quality Certification programs, in the development of the proposed rule as the states are co-regulators with EPA and the Corps in the implementation of the Clean Water Act (CWA). While the Division appreciates these outreach efforts and believes that the agencies' public messages regarding the proposed rule have added value to the dialogue, these outreach efforts do not constitute consultation with the states as part of the rulemaking process. The Division has an additional concern that it appears that the Corps has not engaged meaningfully in these outreach efforts, and EPA seems to be going it alone. The Division recognizes that a sustained and diligent effort to work with states will be critical to developing and implementing an effective final rule and recommends that EPA engage its regulatory partner states to finalize rule language and develop the guidance necessary for implementing the new rule.

Proposed Interpretive Rule Does Not Do Enough to Clarify Agriculture Exemption

The final rule must provide clarity regarding exemptions for agricultural practices. The Division recommends providing broad deference to agriculture practices, especially to the extent that the proposed "waters of the United States" rule may extend jurisdictional waters into agricultural areas that previously would not have been considered jurisdictional. Such deference was anticipated by the CWA and is provided in §404 (f)(1)(a) which provides exceptions to §404, as well as §402 and §301(a) for normal farming, silviculture, and ranching activities.

The inconsistent application of §404 (f)(1)(a) exclusions and the consequent uncertainty resulted in EPA and the Corps promulgating the "Interpretive Rule," a companion guidance to the proposed "waters of the United States" rule which is intended to clarify how §404 (f)(1)(a) is implemented. Unfortunately, the "Interpretive Rule" has led to great concerns within the agriculture sector regarding the authority of EPA and the Corps to limit the exception provided under §404 (f)(1)(a) and the uncertainty regarding the language in the "Interpretive Rule" itself. The Division appreciates that EPA and the Corps are trying to provide greater certainty regarding §404 obligations to the agriculture sector, and acknowledges a number of public comments made by the EPA to provide reassurance regarding the intent of its "Interpretive Rule." However, the language of the "Interpretive Rule" itself creates lingering uncertainty regarding what activities do and do not qualify for the exemption, which may invite or require litigation and judicial review for resolution.

In addition, it remains uncertain whether the agencies possess the authority to use the "Interpretive Rule" as guidance for implementing §404(f)(1)(a), or whether the "Interpretive Rule" should be proposed as a formal rule. If the EPA and the Corps intend the "Interpretive Rule" to be used in lieu of a formal rule, then the "Interpretive Rule" is subject to the Administrative Procedure Act 5 U.S.C. Subchapter II §553. If the "Interpretive Rule" is meant only as guidance, it does not appear to provide the intended certainty for the agriculture sector.

Proposed Rule Creates Further Uncertainties, Especially with Jurisdictional Waters

It seems to be the intent of the EPA and the Corps to avoid further confusion in conflicting case law, and provide a test for jurisdictional waters that will withstand interpretation, scrutiny, and judicial review.

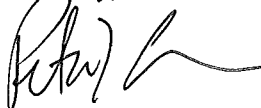
Waters of the U.S.

The Division believes that this effort to clarify “waters of the United States” will expand the scope of jurisdictional waters from its current interpretation, particularly in some regions, which would result in more litigation, and thus may be counterproductive. Specifically, the Division believes the proposed provisions regarding “other waters” and “significant nexus” (§302.3(2)(vii)) give the appearance of expanding the jurisdictional waters, or at the very least are unnecessarily vague. It is unclear from the rule how the provisions would be implemented in each state, though it appears that it would establish additional CWA permitting obligations, particularly under §404. Under the circumstances, those waters not traditionally interpreted as jurisdictional under the CWA would be more appropriately protected by the authorities of individual states. In the alternative, to the extent possible, the final rule should be clear regarding how circumstances previously identified as non-jurisdictional that are subsequently found to be jurisdictional under a new rule will be addressed. In order to minimize regulatory burden, provide regulatory certainty, and avoid unnecessary litigation, the final rule should describe under what circumstances it will apply to jurisdictional determinations made under the current existing rule, and also to what universe of currently pending jurisdictional determinations, if any, the rule will apply.

The Division appreciates EPA’s public efforts to clarify the agencies’ position, identify exceptions, and allay concerns regarding uncertainties in how the rule will be implemented. EPA’s public efforts notwithstanding, these are not part of the record or the rule. Therefore, any intended jurisdictional exclusions and clarifications would be appropriately included in a final rule in order to provide further clarity to regulators and stakeholders alike. Accordingly, the Division recommends that any intended exceptions, exclusions, and other interpretations of the rule be formalized in the final rule or in appendices to the final rule. The Division also emphasizes that to the degree possible the final rule should add sufficient clarity such as to minimize the need to develop guidance intended to facilitate implementation of the rule. To the extent that implementation guidance is needed, the Division strongly urges EPA and the Corps that such guidance should be developed with the states and published concurrently with the final rule.

The Division would like to thank EPA and the Corps for the opportunity to comment on the proposed rulemaking, and appreciates its consideration of these comments and recommendations. The Division encourages the EPA and the Corps to work with state partners in moving forward with finalizing and implementing the proposed rule. Please do not hesitate to contact me at (502) 564-3410 ext. 4012 or at Peter.Goodmann@ky.gov if you have any questions or wish to discuss any matter raised in this comment letter.

Sincerely,



Peter T. Goodmann, Director
Division of Water

c: R. Bruce Scott, Commissioner
Mike Haines, OGC