



STATE OF NEW YORK

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VIA EMAIL: ow-docket@epa.gov

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue NW, MC 4101M
Washington, DC 20004

Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20460

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

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

The New York State Departments of Environmental Conservation (DEC) and Agriculture and Markets (DAM) offer the following comments to the proposed national rulemaking Definition of "Waters of the United States" Under the Clean Water Act (79 Fed. Reg. 22188, April 21, 2014), hereinafter, "proposed rule." DEC and DAM appreciate the purpose of the joint rulemaking by the Environmental Protection Agency and the U.S. Army Corps of Engineers as an attempt to clarify what types of bodies of water will be regulated by the Clean Water Act. As a pollution prevention statute, Congress wrote the CWA to extend beyond waters that are actually navigable to include the headwater streams, lakes, and wetlands.

However, after an in-depth analysis of the proposed rule, and as discussed below, DEC and DAM find that the proposed rule does not achieve its goal of providing clarity. Therefore, we request that EPA and the Army Corps significantly revise and renote its proposed rule for public comment. This should occur only after consultation with states and recognize the significant regional differences of water resources across the country. A one-size-fits-all approach to redefining regulated waters will only lead to legal challenges, cause unnecessary harm to farmers, and could lead to other unintended consequences while at the same time not achieving the Administration's stated goal.

Early Consultation with States for a Successful Rulemaking Process

We recognize and appreciate that EPA and, to a lesser extent, the Army Corps, made some efforts to reach out to the states and regulated entities both before releasing the proposed rule and during the comment period. However, meaningful early consultation to identify the regulatory impacts to states and local governments did not occur. There is concern among the regulated community that the Waters of the United States regulation could result in amendments to already-approved permits, and/or make it more difficult and time consuming to obtain a future permit.

Under the proposed rule, we cannot determine its impact on existing or future projects since the normal processes for outreach and comment were not followed, including necessary consultation with the states and local governments. For example, the proposed rule could be easy to implement, with little change in existing DEC permitting activities. Alternatively, depending upon EPA/USACE interpretation of the regulation, it is also possible that the federal agencies could place new requirements on projects which could slow their implementation. If so, many initiatives, including the implementation of projects to restore areas affected by Superstorm Sandy could be affected.

Additionally, there is little to no regional flexibility in the proposed rule. The geography of the northeast is different than that of the southwest, for example. New York State, with its rocky terrain and multitude of glacial lakes is a complicated environment that requires a tailored permitting process. New York State already has some of the strongest water quality programs in place, and could work with EPA/USACE to craft New York-specific guidance which would clearly apply to New York's waters. This approach is consistent with the way in which EPA has handled other water quality issues under the CWA.

New York has long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules, and the EPA and the Army Corps should consider restarting the effort to redefine waters of the U.S. with state agency partners fully engaged as co-regulators prior to and during the rulemaking process. A partnership with the states should be an essential component of revising and renoticing this rule.

New York State Places a Priority on Its Natural Resources and Its Agricultural Industry

New York has long been a national leader on environmental quality and natural resource protection. Water systems under the jurisdiction of the proposed rule, including wetlands, are valued in New York for their myriad environmental benefits, including resiliency. As discussed in the preliminary report released by the NYS2100 Commission after Superstorm Sandy¹, “(n)atural features, such as wetlands and streams, should be protected.”²

Almost 36,000 farms in New York State produce high quality fruits, vegetables and dairy products which are sold to markets around the world, and we are committed to safeguarding their economic and environmental viability. Under the proposed rule, the redefinition of navigable is an expansion of the waters of the U.S. to now include many lands as part of jurisdictional ‘waters’ to be regulated. As a result, activities that have been unregulated may now be regulated or must fall into a specific exemption. Ambiguous or contradictory definitions for what types of bodies of water to be regulated will negatively harm the farming community, even if they support the overall goal of stemming the flow of all types of water pollution – confusion can

1 Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure (“Report”)

2 Report, p. 128

carry significant costs. Our farmers are the backbone of our state economy, but they operate on the thinnest of margins. If farmers are expected to implement any new regulations and rules, they must be well thought out and understandable. Farmers cannot be expected to change their operational practices year after year.

Given the high value which New York State places upon the agricultural industry and water systems, *effective* federal initiatives that compliment New York's natural resource protection measures are a priority for the State.

Need for Clarity in the Waters of the US Rulemaking

The proposed rule lacks the clarity needed to be effective. As currently drafted, the rule leaves too much room for interpretation and case-by-case evaluations of whether certain waterbodies are jurisdictional under the CWA. This will ultimately lead to discrepancies, both among states and potentially, within individual states, in the interpretation of its provisions. If adopted, the proposed rule will likely result in legal challenges, continuing the uncertainty over CWA jurisdiction.

The lack of clarity in the proposed rule prevents New York State from providing meaningful comments about the impacts of the proposal. Specifically, the following terms are undefined or not clearly defined in the proposed rule, leaving wide latitude for interpretation and prompting legal challenges:

- Tributary;
- Upland;
- Adjacent waters;
- Shallow subsurface hydrologic connections as "neighboring" waters;
- Floodplain; and
- Significant nexus.

We recommend that a significantly revised rule clearly defines these terms and provide examples of what EPA and the Army Corps believe are encompassed by them. This will enable the states to better understand the intent of EPA and the Army Corps and successfully implement the rule. The regulated community will also be able to better understand the rule's requirements.

Ensure a Level Playing Field for All States


In revising the proposed rule, we encourage EPA and the Army Corps to ensure a level playing field for all states and regulated entities. For example, New York already has in place strong programs to protect waters and wetlands. The federal rule should set a strong regulatory floor which will ensure that all states have a strong basis for protecting water quality and habitats, while also ensuring that local economies can thrive. As long as states remain consistent with a strong national program, the option for the development of EPA-approved regional or state

alternative guidance on jurisdictional waters, as EPA has done in other water quality regulations, may be useful in better defining the waters of the United States. This approach would help ensure flexibility in a manner that best meets the needs of the states that will be involved in implementing this rule.


We request EPA and the Army Corps work with our Departments to rethink this proposal in a way which recognizes New York's sound water quality programs and provides the level national playing field that we need.

We strongly urge EPA and the Army Corps to significantly revise the proposed rule, taking into account the points articulated above. By doing so, EPA and the Army Corps will have the opportunity to ensure that the new proposed rule provides New York with an early and meaningful engagement in the process; ensure clarity and flexibility to states who will be involved in its implementation; afford a fair and level playing field for all potentially regulated entities; and ensure that the goals of the CWA are met.

Sincerely,



Joseph J. Martens
Commissioner
Department of Environmental
Conservation



Richard A. Ball
Commissioner
Department of Agriculture and Markets