



STATE OF WASHINGTON

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington DC 20460

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

Dear Administrator McCarthy:

Washington State agencies submit the following comments on the proposed rule from the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), *Definition of Waters of the United States under the Clean Water Act*, EPA Docket ID No. EPA-HQ-OW-2011-0880. This letter represents the consensus comments of the state departments of Ecology, Transportation, Fish and Wildlife, and Agriculture on the proposed rule. We appreciate the Corps' and EPA's attempt to clarify the definition of "waters of the US."

Final implementation of the rule will affect each of these state agencies. The Washington State Department Ecology (Ecology) is the water quality authority for Washington State. Ecology implements the state's water pollution control act (RCW 90.48) and is delegated by EPA as the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations. Ecology issues Section 401 water quality certifications on federal Section 404 permits. Ecology has enjoyed a cooperative working relationship with our federal partners and looks forward to supporting the implementation of the rule.

Jurisdiction is clarified

Washington appreciates the clarity the rule provides regarding the scope of federal jurisdiction over waters of the United States in the context of U.S. Supreme Court decisions including *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*¹, and *Rapanos v. United States*². These two decisions addressed the extent of federal jurisdiction but did not provide a clear and comprehensive definition of jurisdiction. The plurality decision in *Rapanos*

¹ 531 U.S. 159 (2001)

² [547 U.S. 715](#) (2006)

in particular has resulted in uncertainty regarding the correct scope of federal jurisdiction, especially for wetlands.

The proposed rule provides more clarity on which waters are per se jurisdictional. It also provides some guidance on assessing a "significant nexus" when determining the jurisdictional status of other waters. The rule provides clarity for some waters such as tributaries, but it contains language that is in need of further clarification. "Floodplain," "riparian" and "contributing flow" are all terms whose definitions should be articulated more clearly on a regional basis, since their defining characteristics may vary in different parts of the country.

Additionally, the proposed rule applies to Section 404 permitting as well as other permitting programs such as Section 402. The rule should explain how these two programs compare and overlap. For example, the relationship between the rule and management of municipal separate storm sewer systems needs to be explicit.

Rule is Consistent with Existing Practices

Washington supports the inclusion of the types of "waters of the US" outlined in the proposed rule. These waters are consistent with the jurisdictional determinations that we have seen in Washington. In Washington State, both the Corps and Ecology consider the following waters jurisdictional:

- Perennial, intermittent and ephemeral streams (tributaries)
- Channelized streams in ditches (tributaries)
- Wetlands linked to a navigable water through shallow subsurface flows such as hyporheic flows (in the floodplain)
- Ditches excavated through wetlands or other "waters of the US" (tributary)

No Change for State Waters

Washington interprets the draft rule to not affect the way the state regulates its waters. Washington's definition of "waters of the state" in the state water pollution control act (RCW 90.48) protects additional waters not covered under the federal Clean Water Act such as prior converted croplands and isolated wetlands. Washington will continue to regulate all waters of the state regardless of federal jurisdiction. However, Washington appreciates that the rule more clearly identifies what types of waters would be considered jurisdictional under the federal Clean Water Act. This is important when proponents may need Section 404 permits from the Corps and related Section 401 certifications from the state.

These clarifications regarding "waters of the US" should help streamline permitting since those waters identified in the rule would not require individual jurisdictional determinations. While Washington protects its waters under state law, this uncertainty in federal jurisdiction has resulted in permitting delays when a jurisdictional determination is required. Although this

proposed rule may help streamline determination for some waters, such as tributaries, it may take longer to receive a jurisdictional call when using the significant nexus test since these will require case-by-case determinations.

Significant Nexus

Washington requests that the rule, preamble or guidance should be amended to provide more specificity on what is needed to document a significant nexus. Washington supports the use of remote sensing to identify similarly situated classes of waters when making significant nexus determinations as well as the use of single point of entry watersheds and ecoregions to identify "in the region" where waters are "similarly-situated." Using the watershed and ecoregion in significant nexus determinations will allow states and the Corps and EPA to accommodate the variety of landforms and systems across the country.

Given the broad nature of the rule and the diversity of waters across the United States, Washington recommends that the Corps and EPA work regionally with the states in identifying classes of "other waters" that have a significant effect on downstream waters. Identifying classes that have a significant nexus with downstream waters would reduce the number of individual determinations needed. As part of this work, Washington recommends that the Corps and EPA work with the state to identify appropriate regions in our state that may contain classes of similarly situated waters that provide a significant nexus to a "water of the US."

Permit streamlining could result from identifying classes of "other waters" as jurisdictional by reducing the number of individual significant nexus determinations necessary and; reducing the time needed to process permits. When an individual determination is necessary, we recommend that the Corps strive to meet a 180-day timeframe for a decision. A timeframe for individual determinations will provide a clear standard for regulatory staff and will help reassure applicants and the public that projects will be processed in a timely manner.

Support of Tributary Definition

Washington supports the inclusion of the presence of a bed and bank and evidence of flow in the definition of tributary. Regional manuals on determining the Ordinary High Water Mark on tributaries will be important to ensure clarity. We recommend that the Corps and EPA work with states to develop regionally appropriate methods and tools for delineating tributaries. In response to EPA's request, we feel it is appropriate to include wetlands as tributaries rather than just as adjacent waters when they are part of a tributary system.

The change from "adjacent wetlands" to "adjacent waters" to include other water features (such as oxbow lakes) is appropriate when they are adjacent to jurisdictional waters, bordering, contiguous or located in the riparian area or floodplain of a "water of the US."

Clarification on Floodplains, Riparian Areas, and Contributing Flow

Washington supports the inclusion of waters located in the floodplain of jurisdictional waters or in riparian areas along waters and tributaries as "neighboring" waters because of their importance in protecting the physical, chemical and biological integrity of the nation's waters.

Regulatory protection of these critical waters is important in our state. Washington has several federally listed salmonid species. Loss of in-water, floodplain and riparian habitats has been a key contributor to their decline. Washington floodplains support many wetlands that are used by salmonids for refuge and rearing. These wetlands are often connected to rivers via shallow subsurface hyporheic flows and overbank flooding. Wetlands in riparian areas provide critical functions such as nutrient cycling, flow attenuation, and habitat for invertebrates, amphibians, and fish. Wetlands in these areas directly affect the physical, chemical, and biological integrity of "waters of the US." Therefore, Washington agrees that wetlands located in floodplains and riparian areas are appropriately included as "waters of the US."

Washington also concluded that regional specificity is needed to refine these definitions. For example, we believe that a spatial extent is needed on a regional basis for determining which riparian and floodplain wetlands are de facto jurisdictional. These definitions and delineation guidance should be developed cooperatively with the state. It should also be noted that the ecological value of these resources in riparian and floodplains notwithstanding, federal jurisdiction in these waters may result in additional cost to applicants, federal and state permitting agencies, and for actions requiring federal Endangered Species Act consultation when federal permitting is needed. The Corps and EPA should consider potential added costs as the rule is finalized.

"Contributing flow" should be defined based on stream size and significance of the contribution. While the feasibility of doing this on a national basis may not be practical given the diversity of climatic conditions, ecoregions, and landforms among the states; regional guidance could be developed to determine what constitutes a significant contribution for different stream types.

Therefore, Washington recommends that Corps and EPA work with the State and tribes to develop regionally appropriate definitions of "floodplains," "riparian areas," and "contributing flow." In addition, methods for determining their physical extent are needed so that the state and federal agencies have a common understanding of how these terms apply in Washington.

Drainage and irrigation ditches in agricultural areas

Washington supports the existing Section 404 permitting exemptions for normal and ongoing farming, silviculture, and ranching activities as described in 33 CFR § 323.4(a)(1):

- (i) *Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and*

- forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.*
- (ii) *To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in §323.4(a)(1)(iii).*

In cases where farm ditches contain channelized streams, they should, under the proposed rule, be considered jurisdictional even if they only contain intermittent flow. However, under the existing exemption for ongoing agriculture, maintaining them in the course of normal farming, silviculture, and ranching continues to be exempt from Section 404. Under Washington State law, established and ongoing agricultural operations and activities such as ditch maintenance may continue without the need for a wetland authorization. As long as producers are using best management practices approved by Ecology, their ongoing farming activities are considered to be protective of water quality. However, new ditches and new or expanded drain tile systems draining a "water of the US" to convert it to a new use would require a Section 404 permit.

In Western Washington, farmers often construct shallow ditches ($\leq 18''$) on actively farmed fields in the spring. The purpose is to drain surface water from their fields to allow planting. Washington is looking for clarification and affirmation by EPA that shallow, temporary ditches dug specifically for the purpose of draining surface waters from previously converted farmland within floodplains and adjacent to tributaries are not jurisdictional under the new definition.

Clarification Needed for Non-Agricultural Ditches

State agencies and local governments have expressed concern that the wording in the "water of the US" definition for excluding ditches from Section 328.3 (§ 328.3(b)(3) and (4)) is somewhat ambiguous. The exclusion should clearly identify that sections of roadside ditches and other drainage ditches excavated in uplands that drain only upland areas, are not jurisdictional upstream of the discharge point even if the ditch periodically "contributes flow" to a "water of the US." Clarifying these distinctions would eliminate much of the confusion.

Roadside or other drainage ditches containing a perennial and intermittent channelized stream would be jurisdictional if it meets the definition of a tributary, as proposed in the rule. The rule should be amended to specifically clarify that ditches that contain tributaries are jurisdictional, and are not excluded simply because they flow through a ditch.

Stormwater systems

It is not clear how Section 402 permitted facilities will be treated under the proposed rule. The proposed language could be interpreted to mean that any ditch system that discharges to a "water of the US" would be jurisdictional. Many roadside ditches and municipal separate storm sewer systems (MS4s) discharge to jurisdictional wetlands and streams. These systems are permitted and regulated under Section 402 and require periodic maintenance. Where they do not contain

streams, they should be able to be maintained without the need for permitting. Washington recommends that ditches in uplands and draining only uplands as part of an MS4 management system should be non-jurisdictional upstream of the discharge point to a wetland or tributary.

The proposed rule should also clarify that those constructed parts of stormwater management systems that often look and act like natural systems (for example, treatment swales and ponds, infiltration ponds, treatment wetlands, rain gardens, and compost filters) are exempt similar to the wastewater treatment exemption. Some of these treatment systems, permitted pursuant to Section 402, meet wetland criteria, especially if they were thoughtfully designed and implemented. However, when they are specifically constructed for stormwater conveyance and treatment those features should be excluded from the definition of "waters of the US". This clarification could be in the preamble or regulatory guidance letters for implementing the rule.

Regional Manuals

As previously noted, Washington strongly recommends that EPA, and the Corps work with their state partners to develop regional manuals, definitions, and guidance to implement the rule. We recognize the difficulty in providing clear definitions and standards nationwide due to the diversity of climate, landforms and ecosystems across the country. Because of this diversity, the rule is understandably vague which makes it imperative that the agencies develop regional definitions and guidance. With the states as co-regulators, the agencies should work directly with the states as they develop implementation guidance in their region.

Connectivity report

We recommend that the agencies wait to finalize and adopt the "waters of the US" rule until after the science advisory board review is completed and the report is finalized. Washington believes that the timing of the final report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and how it interacts with the proposed "waters of the US" rule process is important. Since the connectivity study will be used to provide the scientific basis for the determination of jurisdiction under the rule, it seems appropriate that the agencies wait to finalize the rule until after the Scientific Advisory Board has completed their review and the report is finalized. To adopt the rule prior to the final report being released would miss an opportunity to refine the rule based on the scientific findings of the final connectivity report.

Summary

Washington appreciates the opportunity to comment on the proposed rule, and hopes that our comments are helpful. Washington recognizes the challenges inherent in defining the extent of jurisdiction under the Clean Water Act. We commend EPA and the Corps for the thought and hard work that went into the development of the proposed rule. We appreciate EPA's outreach to the states and the number of calls with states that have been available where EPA has explained some of the rationale behind the rule language. The calls have been very helpful. In

closing, Washington would like to emphasize a repeated theme: the importance of EPA and the Corps working with states on a regional basis to develop guidance on the implementation of the rule.

Sincerely,

A handwritten signature in black ink that reads "Maia D. Bellon" followed by a long horizontal flourish.

Maia D. Bellon, Director
Washington State Department of Ecology

A handwritten signature in black ink that reads "Philip Anderson" followed by a long horizontal flourish.

Philip Anderson, Director
Washington State Department of Fish & Wildlife

A handwritten signature in blue ink that reads "Lynn A. Peterson" followed by a long horizontal flourish.

Lynn A. Peterson, Secretary
Washington State Department of Transportation

A handwritten signature in black ink that reads "Don R. Hover" followed by a long horizontal flourish.

Don R. "Bud" Hover, Director
Washington State Department of Agriculture

