



November 14, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, N.W.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880

RE: Comments on Proposed Waters of the United States

The Wisconsin Department of Natural Resources (WI DNR) respectfully submits comments on the proposed rule to amend the definition of "Waters of the United States" (WOTUS) jointly released by the Environmental Protection Agency (EPA) and the United States Corps of Engineers (USACE) on March 25, 2014 and published for public comment in the Federal Register on April 21, 2014.

The Wisconsin Department of Natural Resources is concerned this rule was developed without sufficient consultation with the states, generally, and with the State of Wisconsin, specifically. We believe that adequate consultation could have addressed many of the concerns of our state and its elected leaders. Therefore, this rule, in its current construct, should be withdrawn in order for meaningful and comprehensive consultation with the States to occur.

It remains unclear what benefit this new rule would have for the State of Wisconsin, its citizens, or even water quality because the new rule ignores existing state regulations and authorities. The State of Wisconsin more broadly defines "Waters of the State," so we would be remiss if we did not object to another instance of the federal government encroaching upon powers and responsibilities previously delegated to the states. As co-regulators of our state's water resources, we believe that a thorough and robust consultation is both warranted and imperative for any rule package to move forward.

In Wisconsin, there are many waters that are subject only to state regulations; however, this rule aims to vastly expand the reach of federal regulations while Wisconsin's regulatory authority would be duplicative, at best, if not outright eliminated. For example, the State of Wisconsin remains one of the few states that currently regulate isolated, non-federal wetlands following the decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). This illustrates that environmental protections are best when driven locally by those who are directly impacted.

The stated purpose of the proposed rule is to define the scope of waters protected under the Clean Water Act by clarifying recent Supreme Court rulings on the determination of jurisdictional WOTUS; however, it is unclear whether the goals of the proposed rule are fully achieved. Other than the clear demarcation of categorical or traditional waters of the United States as WOTUS, the terms and definitions utilized to describe when a "tributary", "adjacent waters", or "other waters" are jurisdictional are vague and will still be subject to a wide degree of interpretation. The rule identifies that jurisdictional determinations for "other waters" will be a case-by-case evaluation, but the terms utilized to describe a "tributary" or "adjacent waters" are also so vague, that they will also necessitate a case-by-case evaluation. If the EPA

and USACE go forward with this rule package the WI DNR suggests that the agencies consider adding or clarifying the following terms in the proposed rule.

Tributaries

The definition of tributary includes waters that have a defined bed and banks and an ordinary high water mark and contributes flow directly or through another water to a traditional WOTUS. The definition goes on to say that wetlands, lakes and ponds do not need to have a bed, banks or OHWM to fall within the definition of tributary as long as it contributes flow directly or through another water to a traditional WOTUS. The rule is unclear and it should be clarified whether a tributary that contributes flow through another water must also have a bed and bank and OHWM.

Although the proposed definition includes waters, such as wetlands, lakes and ponds that do not have a bed and banks or an ordinary high water mark but contribute flow to traditional waters, the definition would not include tributaries, such as head water streams, that may not exhibit a bed and banks or ordinary high water mark. Although these waters may be regulated as “adjacent waters” it seems counterintuitive to regulate some waters, which do not exhibit a bed and banks and OHWM, but not others. The WI DNR suggests the agencies make a determination on the proposed regulatory construct, so that comments that are provided can be responsive to the proposal. Additionally, we would recommend the proposed regulations not result in any increase of jurisdiction over current federal guidance.

Adjacent Waters

For waters that are adjacent to a traditional WOTUS, the proposed rule would expand the definitions in an attempt to clarify when a feature on the landscape would be considered adjacent for the purposes of asserting Clean Water Act authority. First, the proposed rule would define the term neighboring, which is included in the definition of “adjacent”, to be a “water located in the riparian area or floodplain of a traditional “waters of the United States” or a water with a shallow subsurface hydrologic connection or confined surface hydrologic connection to a traditional ‘waters of the United States’, even if it is located outside of a floodplain or riparian area.” The proposed rule then goes on to define riparian area and floodplain.

The proposed definition of “neighboring”, “riparian area” and “floodplain” are all subject to a wide degree of interpretation. Unfortunately, while many of the details that further define these terms are described in the preamble, there is still a wide degree of uncertainty as to what level of storm event should be utilized to determine if a water is located in the floodplain of a WOTUS, what constitutes a subsurface hydrologic connection and how you would prove it, and then how the agencies will determine whether there is a reasonable proximity to a WOTUS. This uncertainty would seem to suggest that determinations for “adjacent” waters will continue to be case-by-case analysis. The WI DNR suggests that the agencies consider adding some of the details located in the preamble to clarify uncertainty in regulating adjacent waters and further define some of the vague terms utilized in these definitions.

“Other Waters” and Significant Nexus Test

While the proposed rule adopts the language from Justice Kennedy’s concurring opinion in *Rapanos*, it does little to clarify when these “Other Waters” would be considered jurisdictional. Realizing it is a case by case decision, the agencies should consider adding more details regarding the analysis or factors that would be utilized to determine if a significant nexus exists.

Exceptions to the definition of Waters of the United State

The WI DNR supports the exceptions contained in the proposed rule from the definition of WOTUS for landscape features, such as prior converted cropland, ditches, swales etc... are distinguished from the

discharges that are not regulated under Section 404(f) of the Clean Water Act. Under section 404(f) of the CWA, certain discharges to WOTUS are not regulated if certain conditions or standards are met. On the other hand, the proposed exceptions to the definition of WOTUS are merely waters that the agencies have determined would not fall within the jurisdictional scope of the Clean Water Act. Additionally the agencies should consider adding language to the exceptions for water-filled depressions created incidental to construction activity, and groundwater, including groundwater drained through subsurface drainage systems. Specifically, the WI DNR suggests that the agencies consider adding the language, which is underlined, to the exception for water-filled depressions,

“(v) water-filled depressions created incidental to construction activity created by excavating or diking dry land that do not constitute a new normal circumstance under the 1987 US Army Corps of Engineers Wetland Delineation Manual.”

Additionally, the agencies should consider adding language to the exception for groundwater to clarify the intent of the exception. If a subsurface drainage system was installed to drain a wetland or other aquatic resource, but is not effectively draining that wetland, then that wetland or aquatic resource should still be regulated under the Clean Water Act. The department suggests adding the following language, which is underlined,

“(vi) groundwater, including groundwater drained through subsurface drainage systems. If a subsurface drainage system is not effectively draining a wetland or aquatic resource, the wetland or aquatic resource remains a waters of the United States and activities to repair or enhance subsurface drainage may require approval under Section 404 of the Clean Water Act.”

The WI DNR appreciates the opportunity to provide these comments and hopes that they will be helpful to EPA. We would be happy to provide additional information or clarifications.

If you have any questions, please contact Russ Rasmussen, Water Division Administrator at (608) 264-6278.

Sincerely,



Cathy Stepp
Secretary, Wisconsin DNR

Cc: Russ Rasmussen, Water Division Administrator – WI DNR
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