April 15, 2019

Submitted via www.regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2018-0149
Proposed Rule—Revised Definition of "Waters of the United States"

To Whom It May Concern:

The undersigned forestry and forest products organizations submit the following comments for the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (together, "Agencies") consideration in response to the Agencies' Proposed Rule to revise the definition of "waters of the United States." 84 Fed. Reg. 4,154 (Feb. 14, 2019). We appreciate the opportunity to provide these recommendations on behalf of our members.

I. General Principles

In Clean Water Act ("CWA") section 101(b), Congress expressed its "policy to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and elimination pollution" and "to plan the development and use . . . of land and water resources." The Agencies must respect the primary role of the states in restoring the Nation's waters. In light of this clear Congressional policy, where to draw the line between federal and state authority over water resources and addressing water pollution is not—and has never been—a solely scientific inquiry. The Connectivity Report prepared for the 2015 Rule demonstrates that even the scientific community recognized, as it had to, that it is up to the policymakers to draw that line, which would be informed by appropriate scientific analysis, such as the Report.

II. Comments on WOTUS Categories

A. Traditional Navigable Waters

The Agencies should not rely on judicial navigability determinations issued for reasons other than CWA jurisdiction to designate "traditional navigable waters" ("TNWs") under the CWA, the first WOTUS category in the Proposed Rule. Instead, the Agencies should adopt an interpretation of TNW that includes only those "waters which are currently used, or were used in the past, or may be susceptible to transport interstate or foreign commerce." This interpretation would encompass only the highways of commerce and would not extend the TNW category to features such as streams and

lakes that support recreational kayaking, for example.[1] To be clear, CWA jurisdiction is not limited to TNWs. Waters that are not traditionally navigable are still subject to jurisdiction if they fall into one of the other jurisdictional categories.

B. Tributaries

The Agencies propose to define a tributary as "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW or territorial sea] . . . in a typical year either directly or indirectly through" other jurisdictional waters. We support the proposal not to include "ephemeral" features, which the Agencies define as "surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall)." The Agencies should go further and provide a minimum flow-based metric for tributaries to qualify as "intermittent". State regulatory authorities also should ascertain what days of the year constitute the low-flow period to account for regional variability, and the Corps must accept those findings when making CWA jurisdictional determinations.

The Agencies propose to define "intermittent" as "surface water flowing continuously during certain times of a typical year" when the groundwater table is elevated or when snowpack melts. The Agencies should provide additional clarification on how key terms such as groundwater, snow pack and typical year, will be interpreted and implemented, such as how precipitation ranges will be calculated or what sources of data will be used. Without reliable, consistent, and predictable tools, fair notice and vagueness concerns remain.

C. Ditches

The Proposed Rule adds certain ditches as a new category of jurisdictional waters. [2] All other ditches are expressly excluded from the WOTUS definition. We agree with the distinctions drawn by the proposed regulations on ditches and particularly with the recognition of the exclusions in the regulatory text. Finally, the Agencies have appropriately recognized that the government should have the burden to prove whether ditches fall within the definition of WOTUS and thus within the federal government's jurisdiction. We recommend the Agencies codify this presumption in regulatory text.

---

[1] Indeed, the Agencies have done this before. *See, e.g.*, Letter from Benjamin H. Grumbles, EPA Assistant Administrator, to John Paul Woodley, Assistant Secretary of the Army, on Santa Cruz Traditional Navigable Waters Determination (Dec. 3, 2008), available at http://www.spl.usace.army.mil/portals/17/Docs/Regulatory/JD/TNW/SantaCruzRiver_TNW_EPALetter.pdf.

[2] Ditches are WOTUS only if they would also fall within the TNW category, if they are constructed in or they relocate or alter a tributary satisfying the definition for WOTUS, or they are constructed in an "adjacent" wetland.

(Continued…)

D. Lakes and Ponds

The Proposed Rule identifies three categories of lakes and ponds as WOTUS.[3] We support this approach, which provides specific criteria for determinations rather than falling back on the nebulous "significant nexus" analysis. However, as explained above in our comments on tributaries, we believe additional clarity is needed on the term "intermittent" and other terms used within that definition.

E. Wetlands

The Proposed Rule would include as WOTUS only those wetlands adjacent to another category of jurisdictional water, with "adjacent wetlands" being defined as "wetlands that abut or have a direct hydrologic surface connection to" those waters. We support this definition, which would avoid asserting jurisdiction over isolated wetlands, which has raised statutory and constitutional problems reflected in Supreme Court decisions as well as substantial uncertainty among the regulated community. Elimination of the terms "bordering, contiguous, and neighboring" from the definition of "adjacent" also helps in avoiding overly-broad assertions of jurisdiction, thereby respecting the federal-state balance that Congress struck.

We support including in the regulatory text that areas must satisfy all three wetland delineation criteria (*i.e.*, hydrology, hydrophytic vegetation, and hydric soils) "under normal circumstances" to qualify as jurisdictional wetlands. As the proposed "uplands" definition provides, the absence of *any one* of the three criteria "under normal circumstances" is sufficient to exclude a feature from being a wetland. These changes would send an important signal to Corps Districts that have not consistently required that all three elements be satisfied.

F. Exclusions

As a general matter, we support the proposed exclusions, as they are necessary to exclude areas or features that do not have a connection to, or effect on, navigable waters, or the regulation of which under the CWA would impose a regulatory burden with little or no regulatory benefit or produce absurd results. Several aspects of the Agencies' discussion about the exclusions provide certainty and clarity, continue the *status quo,* and will help make application of the CWA clearer and more predictable. However, a few categories could benefit from further explanation or expansion, preferably in the regulatory text:

1. <u>Requirement that a Feature Have Been Constructed in Upland</u>

Several of the exclusions only apply if the feature was "constructed in upland" or "created in upland" or "excavated in upland". Tying many of the exclusions to an

[3] (1) Lakes and ponds that also qualify as TNWs; (2) lakes and ponds contributing perennial or intermittent flow to traditionally navigable waters; and (3) lakes and ponds flooded by other jurisdictional waters, except adjacent wetlands.

assessment of the condition of the land on which a feature sits at the time of its construction may be impossible to implement. Rather than, in effect, require someone with an artificial lake or pond or other feature to "prove a negative" before relying on one of the exclusions in § 328.3(b), those exclusions should be re-worded. If the exclusions are expressed in terms of, e.g., "unless it was not excavated or constructed in upland," the person asserting that a man-made feature does not qualify for an exclusion because it was not constructed in upland would, appropriately, have the obligation of showing that the area had been a wetland or other type of water before the man-made feature was constructed.

2. Other Subjective Conditions on Exemptions

Several of the exemptions contain other provisions that require the owner or operator of a feature to first make a showing that will be difficult or impossible to make in practice. For example, sections §§ 328.3(b)(9) and 328.3(c)(14) require that a feature be "constructed to" or "designed to" fulfill a particular purpose. In this example, inserting an alternative qualifier -- e.g. "constructed to or used to," "designed to or used for" – would help give the owner or operator a better chance of having access to information that demonstrates one or the other circumstance applies.

3. Unjustified Preamble Limitations on the Waste Treatment Exclusion

Certain preamble discussion adds uncertainty or unjustified limitations on the exclusion. For example, the Agencies ask whether they should "includ[e] in the rule text that the exclusion only applies to 'lawfully constructed waste treatment systems.'" See 84 Fed. Reg. at 4195 col. 3. Does the language mean that a waste treatment system loses the exclusion and is considered a WOTUS if a state water pollution statute requires a permit for construction of a wastewater treatment system, which the facility failed to obtain? If the language were added to the rule, it also could require determining whether the waste treatment system is a WOTUS (e.g. it would require a determination of what the relevant legal requirements applicable to construction of the waste treatment system were at some point, likely distant, in the past as it would require assessing the condition of the land on which the waste treatment system now sits, before the system was constructed). This often would require research into historical facts, some of which might not be available, or available only with an expenditure of significant resources.

If the Agencies, nonetheless, decide to include the limitation, they should do so in the rule itself, by adding the following to the end of § 328.3(b)(11) (the exclusion for "waste treatment systems":

> , unless the feature was first constructed after October 18, 1972, and EPA or COE demonstrates that the feature was constructed in or created by impounding a water that was considered a water of the United States at the time, and without a permit under Clean Water Act section 404 that was being required at the time for such construction or impoundment.

Similarly, the preamble contains numerous statements that could be read to mean that a waste treatment system must have obtained certain permits or must comply with

requirements of such permits or other CWA requirements, in order for the exclusion to apply. For example, the preamble says that "any entity with a waste treatment system would need to comply with the CWA by obtaining…a section 402 permit for discharges from the waste treatment system into waters of the United States," 84 Fed. Reg. at 4193, col. 1, even though not all discharges require an NPDES permit (e.g., discharges of certain stormwater). This and other statements in the preamble implying additional requirements for the exclusion to apply should be removed.

4. Artificial Lakes and Ponds

The Proposed Rule would exclude "[a]rtificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds)," as long as they do not fall within the definitions of jurisdictional tributaries or lakes and ponds. "Log cleaning ponds" is unclear; the final rule should simply refer to "log ponds." Also, the final rule should clarify that these are merely examples by substituting "for example" for "including." Finally, the Agencies should also make clear *in the regulatory text* that features constructed in any non-jurisdictional water, in addition to upland, should be excluded.

The exclusion also only applies to artificial lakes and ponds "constructed in upland," and yet the exclusion states that it does not apply to lakes and ponds "identified in paragraph (a)(4) or (a)(5) of this section." Paragraph (a)(4) describes natural lakes and ponds, and paragraph (a)(5) is for waters created by impounding a WOTUS. Since the exclusion in paragraph (b)(7) already only applies to a lake or pond created in uplands, and obviously a natural lake or an impoundment of WOTUS would not meet the definition of "upland," there is no apparent need to add on an exception to the (b)(7) exclusion for natural lakes and ponds or those created by impounding a WOTUS.

G. Implementation Issues

Field evaluations should be required to classify as a WOTUS all ambiguous water features. Desktop tools should only be used to confirm what has been identified on the ground. The Agencies should explicitly recognize the need for field verification in the regulatory text—if not as a default presumption, then certainly whenever requested.

III. Conclusion

Overall, we support the Proposed Rule as an important step in restoring the proper balance between federal and state jurisdiction over the nation's waters, but recommend that the Agencies further clarify certain terms and implementation methodologies to enhance regulatory certainty and predictability for the regulated community. We appreciate the opportunity to comment and would be open to discussing any of these issues further at the Agencies' convenience.

Sincerely,

Alabama Forestry Association
Arkansas Forestry Association
Empire State Forest Products Association
Florida Forestry Association
Forestry Association of South Carolina
Forest Landowners Association
Forest Resources Association
Georgia Forestry Association
The Hardwood Federation
Kentucky Forest Industries Association
Louisiana Forestry Association
Maine Forest Products Council
Mississippi Forestry Association
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Oklahoma Forestry Association
Oregon Forest Industries Council
Oregon Women in Timber
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Treated Wood Council
Virginia Forestry Association
Washington Forest Protection Association
West Virginia Forestry Association