



November 14, 2014

Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Ave. NW
Washington, DC 20460

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

To Whom It May Concern:

The American Council of Engineering Companies (ACEC) – the business association of America’s engineering industry – is pleased to submit comments concerning the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) jointly proposed rule defining “waters of the United States,” referred to in this document as WOTUS, as it is to be applied in the application of the Clean Water Act (CWA) and USACE jurisdictional regulations.

ACEC has reviewed the proposed changes in the Notice of Proposed Rulemaking (NPRM) and is providing the following comments and questions regarding specific sections. While the industry certainly recognizes the need for a uniform policy and consistency in how we identify and delineate wetlands, we are concerned that certain elements of the proposed rule go beyond traditional definitions, or may pose practical problems in implementation. We respectfully offer the following input.

Proposed Section 122.2 – Definitions

Waters of the United States

In the proposed regulations, WOTUS has been categorized as traditionally navigable waters (i.e., susceptible to use in interstate or foreign commerce, interstate waters, territorial seas and impoundments of these waters), tributaries and adjacent waters. The traditional navigable waters are listed as the same as provided in current regulations. Tributary waters are also included in current rules but are not defined, and “adjacent waters” is a new term not previously included in existing regulations. To focus on the new language of the draft regulations, comments are provided for Section 122.2(a)(6) and (7) which read as follows:

§122.2(a)(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (3) and (5) of this section;

§122.2(a)(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) and (5) of this section;

The draft regulations also define waters not subject to regulation. For example, ditches are not covered under certain circumstances: “(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” and “(4) Ditches that do not contribute flow, either directly or through another water...”

Finally, in order to explain some of the words in the sections noted above, the draft regulations provide specific definitions in §122.2(c):

- (1) **Adjacent** – bordering, contiguous or neighboring.
- (2) **Neighboring** – includes waters within the riparian area or floodplain of the currently defined WOTUS.
- (3) **Floodplain** – an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.
- (4) **Tributary** – water physically characterized by the presence of a bed and banks and ordinary high water mark which contributes flow, either directly or through another water, to a currently defined water of the U.S.. Also, wetlands, lakes, and ponds are tributaries if they contribute flow, either directly or through another water as part of waters of the U.S. Further, a tributary can be natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and non-excluded ditches.
- (5) **Significant nexus** – a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to a currently defined water of the U.S.), significantly affects the chemical, physical or biological integrity of a currently defined water of the U.S.

Adjacent and Neighboring

The proposed rule categorically includes adjacent waters as jurisdictional waters of the U.S. by redefining the term adjacent and adding the term neighboring to describe certain features located within the riparian area or floodplain of a traditional navigable water, interstate water, the territorial seas, impoundment, or tributary. Previously, if a feature was determined to be adjacent to an impoundment or tributary (relatively permanent water), then a significant nexus determination was required to discern USACE jurisdiction.

The introduction of “neighboring” in the proposed rule is extremely problematic. Neighboring is defined as “including waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) (waters of the United States), or waters with a confined surface or shallow subsurface hydrologic connection to such a jurisdictional water.” What this means is that wetlands and waters of the United States with a subsurface hydrologic connection are now jurisdictional.

Shallow subsurface connections are distinct from deeper groundwater connections, which do not satisfy the requirement for adjacency. Water does not have to be continuously present in the confined surface or shallow subsurface hydrologic connection and the flow between the adjacent water and the jurisdictional water may move in one or both directions. While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not “waters of the United States.”

Floodplains

It should be of interest to note that the Federal Emergency Management Agency (FEMA) defines “floodplain” as follows: “Any land area susceptible to being inundated by flood waters from any source.” (<http://www.fema.gov/national-flood-insurance-program/definitions>). The proposed rule significantly alters FEMA’s definition, going well beyond established policy, raising concerns that the impact may not be fully understood. More study is needed in this area before proceeding.

Tributaries

The term tributary may create confusion under the proposed rule. The rule defines a tributary as a water physically characterized by the presence of a bed, banks and an ordinary high water mark. It further explains that the great majority of tributaries are headwater streams, and whether they are perennial, intermittent, or ephemeral, they play an important role in the transport of water, sediments, organic matter, nutrients, and organisms to downstream environments.

In the past, ephemeral streams, ephemeral ditches, and other waters with less than intermittent flow or flow only in direct response to rainfall have commonly been determined to be non-jurisdictional features with no regulatory or permitting requirement. Including ephemeral streams as jurisdictional waters constitutes a significant expansion of the definition as they are now explicitly regulated by Section 404 of the CWA.

Furthermore, the proposed rule lists a variety of features that are expressly not to be classified as regulated waters under current rules. Clear examples of these exempt features under current rules include wastewater treatment systems; prior converted cropland; artificially irrigated upland areas; artificial lakes or ponds, reflecting pools or swimming pools, and small ornamental waters created by excavating dry land; water-filled depressions created incidental to construction activity; and groundwater. Unclear examples of these features include ditches that are excavated in uplands, drain only uplands, and have less than perennial flow; ditches that do not contribute flow to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water; and gullies, rills, and non-wetland swales.

The discussion in the proposed rule regarding ephemeral streams lacks sufficient clarity to enable the regulated community and professional practitioners to consistently differentiate between natural ephemeral streams and erosional features that occur in different ecoregions of the U.S. Erosional features can be the result of past land use practices employed between the mid-20th century and the present day. These erosional features may have adverse influence on the conditions downstream which may be improved using modern design criteria for vegetated

swales and channels. Therefore, clarification is needed to assist field practitioners in differentiating between ephemeral streams that would be considered tributaries under the proposed revisions. There should be very clear guidance in the rule as to what constitutes an ephemeral stream as contrasted with erosional features, particularly in light of the significant nexus requirements of the *Rapanos* guidance jointly issued by the USACE and EPA in response to the Supreme Court's plurality decision in *Rapanos v. USACE*.

The specific inclusion of ephemeral streams and the specific exclusion of upland ditches, gullies, rills, and non-wetland swales create confusion and potential risk for our clients as the interpretation in delineating these features can overlap. The intent of the new rule is to provide clarity and predictability to determinations of jurisdiction, yet this proposed definition of waters of the U.S. still remains uncertain. These proposed changes could create significant additional review and revision of delineations, design, planning, and permitting scenarios.

Ephemeral tributaries should be differentiated from erosion features as natural or man-altered drainages with indicators including the existence of an ordinary high water mark, occurrence in natural topographic low (i.e., natural watershed landscape position), and soils developed through both alternating erosional and depositional conditions (i.e., sediment transfer). The proposed rule should clearly state that erosional features do not have a significant nexus and describe how to differentiate those features from ephemeral tributaries (i.e., past land use information, lack of consistent visual confirmation of an ordinary high water mark in historic aerials, indicators of erosional conditions only, and lack of alternating sediment depositional segments).

Ditches and Wastewater Treatment Ponds

The proposed rule appears to apply a two-part test to ditches. First, is the ditch "adjacent", or has a "significant nexus", to currently defined regulated waters? To be adjacent, the ditch must be within a currently defined and regulated floodplain (note that the recurrence interval for the definition of floodplain is not provided; e.g., is this the 100-year floodplain, 500-year, etc.) or is directly or indirectly adjacent to a currently defined water body. To have a significant nexus, a ditch must be within the currently regulated watershed, the flow from which significantly affects the regulated water. From this test, a ditch that is adjacent (according to this definition) is subject to regulation unless specifically excluded. If such a ditch is not adjacent but has a significant nexus, it is also subject to regulation unless specifically excluded.

The second step is to consider whether the ditch is specifically excluded. The exclusion for ditches is identified in §122.2(b)(3) as waters that are excavated wholly in uplands, drain only uplands and have less than perennial flow. It should be noted that the connecting word is "and", meaning that all three elements must apply. The word "uplands" has not been defined. This is critical for coastal Florida, where the flooding zones are expansive, and groundwater is close to, if not at, the surface. So, the unanswered question is, "is a ditch that flows only when it rains and within a currently defined and regulated floodplain (of any recurrence interval) considered waters of the US?" According to the definitions, even interpreted narrowly, the answer is yes. If this is the case, then every ditch within the coastal, or even inland, floodplain would be covered.

ACEC suggests EPA and USACE specifically clarify whether man-made ditches containing wetlands that formed within the channel subsequent to excavation activities in uplands, but without perennial flow, would still be considered to “drain only uplands.” Due to the broad use of engineered drainage channels as best management practices in all regions of the U.S., the agencies should clearly describe under what conditions wetlands in the bottom of man-made ditches would be considered to have a significant nexus to waters of the U.S. as “other waters,” when agency consultation would be required, and when they would be considered to be isolated wetlands. Additionally, guidelines should be established to allow project developers and engineers to clearly understand when excavated man-made ditches would be considered upland, non-jurisdictional features, and what characteristics could result in them subsequently being determined to be tributaries and waters of the U.S.

Taking this analysis further, when considering storm water treatment ponds in the floodplain, based on the analysis above, such a pond would now be regulated with the exception of an exclusion that is applicable:

§122.2(b)(2) “Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.”

This regulation appears to be an obvious reference to wastewater treatment ponds and lagoons, but may refer to stormwater ponds as well. However, if the stormwater pond is to be excluded, it must be designed for the purposes of storm water treatment. If the storm water pond is for the purpose of estimating and managing attenuation volume only, it is not excluded.

Since the regulations are jointly issued by EPA and USACE, there are two consequences to the designation of man-made ditches and storm water ponds as regulated waters of the U.S. First, water quality standards must be met, including water quality criteria and antidegradation requirements. Second, USACE dredge and fill requirements would be applicable. Therefore, stormwater attenuation ponds (with no water quality treatment) and drainage ditches that are in the floodplain would be required to meet water quality standards and jurisdictional requirements – even during routine maintenance activities. This results in a significant change in what has been considered regulated waters, especially in coastal communities.

Conclusion

Once again, the nation’s engineering industry strongly supports a comprehensive effort to define waters of the U.S. with the goal of achieving consistent standards that can be readily applied in the field. Such an effort should proceed through careful consultation with the regulated community and technical practitioners in the engineering community. We hope these comments are helpful, and we stand ready to work with you in moving this effort forward. For further information or assistance, please feel free to contact Steve Hall, Vice President of Government Affairs, or Keith Pemrick, Director of Environment and Energy Programs, at (202) 347-7474.

Sincerely,

The American Council of Engineering Companies (ACEC)