



Cahaba River Society

Date before submitting DRAFT

Via www.regulations.gov and email to ow-docket@epa.gov

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Water Docket
 Environmental Protection Agency
 Mail Code 2822T
 1200 Pennsylvania Avenue, NW
 Washington, DC 20460
 Attention: Docket ID No. EPA—HQ—OW—2011—0880

Re: Comments On “Definition of ‘Waters of the United States’ Under the Clean Water Act, Proposed Rule,” 79 Fed. Reg. 22188-22271.

Dear Administrator McCarthy and Assistant Secretary Darcy:

We appreciate the Army Corps, the EPA, and the many others who worked to clarify the definition of “waters of the United States” (WOTUS). We generally endorse the proposed rule with recommended revisions that we will describe below.

Also, we have carefully reviewed the comments submitted by Mr. William Sapp with the Southern Environmental Law Center (SELC). Please note that our organization signed-on to that comment letter as a partner group. We found SELC’s comments to be especially thoughtful, thorough, and well-supported. As a partner group with SELC, we express our vigorous support of the SELC comments.

The EPA website, www.epa.gov/uswaters, indicates the proposed rule “...does not protect any new types of waters that have not historically been covered under the Clean Water Act.” We urge the Army Corps and EPA to adopt a rule that maintains their current ability to categorically include additional water resources that have been shown to have a significant hydrological or ecological connection to WOTUS but which are not currently so designated. An ability to establish categorical waters as jurisdictional is essential for efficient administration of the responsibilities these agencies have. Likewise, we ask that the proposed rule not be weakened regarding the agencies’ ability to designate “other waters” as being jurisdictional.

The EPA’s Connectivity Report and many other scientific investigations of the hydrology and ecology of our landscape have improved our understanding of factors influencing the physical, chemical, or biological integrity of our nation’s waters. It is clear to us that a more expansive, inclusive definition of

WOTUS is appropriate and that some waters that are not currently included should be included. As scientific understanding of these interconnections improve, we hope this rule will not discourage thoughtful adoption of those waters as WOTUS.

Both the economic and environmental health of our nation are best served by adoption of a rule that promotes a sound scientific basis in its protection of WOTUS. A healthy economy is essential for maintaining a healthy environment. Likewise, a healthy environment is essential for maintaining a healthy economy.

Aspects of the Meaning of “a significant nexus”

For purposes of defining which water features should be jurisdictional, the proposed rule would require demonstration of significant nexus with a traditional navigable water. However, some readers interpret the proposed rule to require demonstration that there be a physical, chemical, AND a biological nexus for consideration to proceed to an affirmative designation. That is, some commenters assert the proposed rule requires that all three factors be demonstrably connected to a traditionally navigable water. We disagree with that interpretation. We urge the agencies to make an affirmative jurisdictional determination when one or more of these qualities has been established as having a significant nexus with a traditional navigable water.

The Clean Water Act calls for protection of the physical, chemical, and biological quality of our nation’s waters. We understand this to mean that each of these factors or qualities are individually subject to regulation under the Clean Water Act. Usually there are fairly obvious interconnections and interactions among these factors whereby one or both of the other two of these three qualities of the receiving water are altered by a change in any one quality. But we do not currently require demonstration that altering one quality will necessarily alter the other two qualities in order to allow its regulation. There is an appropriate and reasonable assumption that physical, chemical, and biological qualities may each have impacts on the others. It is reasonable to regulate each of these factors separately and it is reasonable to make a positive jurisdictional determination when only one of these qualities have a significant impact on traditional navigable waters.

For example, regulators limit temperature alterations to receiving waters caused by a discharge. We understand temperature has associated impacts on chemical and biological qualities of the receiving waters. Such interactions almost invariably occur, even when we may not understand the full range and nature of those interactions. So, we try to manage overall impacts to WOTUS by placing limitations individually on important parameters.

In similar fashion, when defining which waters have a significant nexus with traditional navigable waters, the test should be whether the feature in question impacts the physical, chemical, or biological integrity of a traditional navigable waters, not whether the feature in question can be demonstrated to impact all three of these. Demanding demonstration of a significant nexus for all three is an attempt to limit the number and types of waters that are designated without regard for their actual impacts on WOTUS.

This “or” not “and” distinction is extremely important in making determinations about the definition of “other waters”. Therefore, the language of the proposed rule should reflect the more inclusive form of definition for purposes of determination of a “significant nexus” and for definition of jurisdictional waters or “other waters”.

Regarding another aspect of determining which “other waters” will be included as jurisdictional, at §401.11 (1)(1)(vii), the proposed rule reads as follows:

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 (1)(1)(i) through (iii) of this section.

We understand the proposed rule would allow EPA and the Army Corps to make case-specific determinations about whether a given water is jurisdictional. We agree that the appropriate geographical scale for such assessments is the local watershed. In making a ‘significant nexus’ determination, we encourage the agencies to consider the potential total cumulative impact if a significant portion of such water features under consideration were actually impacted. If impact to a significant portion of such water features would have a negative impact on paragraph (1)(1)(i) through (iii) waters (navigable waters), then we agree those features should be classified as jurisdictional waters. However, we also would extend the list to include the paragraph (1)(1)(iv) and (v) waters.

Section (b) (3)

Over the past 25 years, our organization has observed that large-scale urban development often alters or replaces streams that would otherwise meet the definition of WOTUS with storm drains or other man-made conveyance features. We are concerned that Section (b)(3) of the proposed rule might be used to re-classify what were formerly jurisdictional waters as exempt once those have been rerouted or significantly altered. While the wording of section (b) (3) appears to avoid this possibility in theory, avoiding this misclassification depends on prior knowledge about the landscape. This in turn requires either a timely site visit by the Army Corps or the existence of adequately detailed and accurate mapping of water resources *vis a vis* their jurisdictional status.

For example, when the Army Corps allows a WOTUS to be altered or destroyed, how will subsequently constructed ditches be classified for the purposes of receiving discharges that otherwise would have been covered under the NPDES system?

We note here that we concur with Mr. Sapp’s (SELC) comment regarding ditches in wholly upland areas. If a man-made ditch is sufficiently deep as to maintain intermittent flow, then it should be considered a jurisdictional water.

Current Environmental Management Efforts have been Inadequate

In February of 2013, the EPA released the results of a DRAFT National Rivers and Streams Assessment¹. The results of this nationwide survey of 1,924 rivers and streams are troubling, especially for those of us in the Southeast. Over half of these rivers and streams were found to be in poor biological condition. In the Southeast, where the Cahaba River is located, only 16-17% of the streams were classified as being in “good” condition. As citizens who value rivers and

¹ National Rivers and Streams Assessment 2008-2009: A Collaborative Survey DRAFT. February 28, 2013. U.S. Environmental Protection Agency, Office of Wetlands, Oceans and Watersheds, Office of Research and Development. EPA/841/D-13/001.

streams, we are not satisfied with this very poor result. It is a result that falls woefully short of the goal of the Clean Water Act.

Summary

While an individual business or a particular stakeholder group might realize financial benefits from limiting the scope of waters that come under the Clean Water Act's modest protections, those benefits could come from externalizing the actual total costs of their activity onto a resource that belongs to the American public. Our national interest is best served by protecting our rivers and streams. We need to improve the health of our rivers and streams to a far greater degree than we have currently achieved.

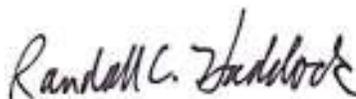
Rather than limit the scope of waters that are classified as jurisdictional, we should, in most all cases where those waters have a significant ecological or hydrological connection to WOTUS, extend Clean Water Act protections.

We support adoption of this rule and encourage the Army Corps and EPA to adopt an inclusive view of which waters are to be covered under Clean Water Act regulations. We support the comments offered by the Southern Environmental Law Center's William Sapp.

Sincerely,



Beth K. Stewart
Executive Director
Cahaba River Society



Randall C. Haddock, PhD
Field Director
Cahaba River Society