Ohio Environmental Council

Comments of the Ohio Environmental Council
In opposition to the Proposed Rule
Revised Definition of "Waters of the United States"

The Ohio Environmental Council (the "OEC"), a 501(c)(3) non-profit committed to ensuring clean air, water, and healthy public lands for all who call Ohio home, respectfully presents these comments to the United States Environmental Protection Agency (the "U.S. EPA") and the Army Corps of Engineers (the "ACOE"). The Revised Definition of "Waters of the United States" adversely impacts waters of Ohio and of the country, ignores the U.S. EPA's own science, and unreasonably fails to demonstrate the tangible effects of its revision. The agencies must return to the drawing board or reimplement the effective and sufficient 2015 definition.

Introduction

Since President Trump issued Executive Order 13778 on February 28, 2017, Titled *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*, the Order had clear intentions: eviscerate the robust and comprehensive regulatory definition provided by the previous administration that protected streams and wetlands across the United States.

In 2015, the U.S. EPA promulgated a definition of the "Waters of the United States," grouping rivers, streams, lakes, wetlands, and other water bodies into three categories:

(1) Waters jurisdictional by rule;

(2) Water jurisdictional upon a case-specific showing of a "significant nexus" with a primary headwater; and

(3) Waters and aquatic features *expressly excluded* from federal jurisdiction.

Under the 2015 rule, jurisdictional waters included tributaries that contributed flow "'either directly or through another water,' to a traditional navigable water, interstate water, or the territorial seas, and that has the 'physical indicator of a bed and banks and an ordinary high water mark.'"[1] Similarly, it included "'wetlands, ponds, lakes, oxbows, impoundments, and similar waters' that are 'adjacent to' a primary

[1] *Revised Definition of the Waters of the United States*, United States EPA and Army Corps of Engineers, 26, https://www.federalregister.gov/documents/2019/02/14/2019-00791/revised-definition-of-waters-of-the-united-states

water, impoundment, or tributary" as jurisdictional waters, defining "adjacent as "bordering, contiguous, or neighboring."[2] Additionally, the Rule provided a sufficiently broad definition of "neighboring," which includes all of the following:

(1) Waters "within 100 feet of the ordinary high water mark of a category (1) through (5) "jurisdictional by rule" water;

(2) Any water located within a 100-year floodplain of those same listed jurisdictional waters, but no more than 1,500 feet from the ordinary high water mark;

(3) Every water "within 1,500 feet of the high tide line of a primary water;" and

(4) All waters "within 1,500 feet of the ordinary high water mark of the Great Lakes."[3]

The 2015 rule provided two "categories" that required case-by-case analysis to determine if the water has a "significant nexus" with a primary, aka navigable, water of the United States. The key phrasing provided in the former rule regarding "significant nexus" embraced the U.S. EPA's scientific evidence on the subject: a water has a "significant nexus" with a primary water if, "either alone or in combination with other similarly situated waters in the region, [it] significantly affects the chemical, physical, or biological integrity of a primary water."[4]

The 2015 Rule provided specific factors to conclude a significant nexus, including:

(1) Sediment trapping;

(2) Runoff storage; and

(3) Provision of life cycle dependent aquatic habitat.[5]

In eliminating this definition from its new rule, the present U.S. EPA reveals its hand when it states the concern with the former significant nexus test implemented in the 2015 Rule:

> Taken together, the enumeration of the nine functions and the more expansive consideration of "similarity situated" in the 2015 Rule relative to the Rapanos Guidance could mean that the vast majority of water features in the United States not otherwise excluded from the 2015 Rule's definition of "waters of the United States" may come within the jurisdictional purview of the federal government. [6]

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[2] Id.
[3] If a "portion" of a waterbody exists within any of the listed zones, under the 2015 Rule the entire body is considered neighboring. Id.
[4] Id at 27.
[5] Id.
[6] Id. at 28, citing *U.S. EPA and Department of the Army. Economic Analysis of the EPA-Army Clean Water Rule*, at 11 (May 20, 2015) ("2015 Rule Economic Analysis") (Docket ID: EPA-HQ-OW-2011-0880-20866), available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.

The present U.S. EPA purposely ignores its own science in favor of a legal rule that benefits polluters under the pretext of "federalist concerns." The OEC, along with thousands individuals and groups across the country, oppose the Dirty Water Rule and implore the agencies to reverse course, avoiding further conflict on these issues and ensuring environmental protections for the Waters of the United States.

I. The Revised Definition fails to protect the Waters of the United States.

The new rule entirely fails to protect the Waters of the United States and ensure water quality. Not only will this failure affect the ecological qualities of these water bodies, it will fail to protect the drinking water of millions of Americans.

The new rule's most egregious error occurs when it eliminates all case-by-case factors implemented in the 2015 Rule. As provided above, the 2015 Rule implemented specific factors for consideration in determining if a water was jurisdictional. These factors accounted for the U.S. EPA's robust scientific research performed over many years, informing conclusions as to what constituted a "Water of the United States." More importantly, those conclusions show that arbitrarily delineating hydrologically linked wetlands and tributaries from their primary waters could seriously jeopardize the water quality of the traditional "navigable water."

In particular, the OEC takes issue with the following language proposed in the Revised Definition, specifically for the content it excludes:

1. The definition excludes important classifications of tributaries.

The original rule included tributaries that "flowed through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water." However, the Revised Definition emphasizes that a tributary loses its tributary status if it flows through a water feature that fails to convey perennial or intermittent flow downstream.

While the scientific significance of such an exclusion will be explored in a later section, it's worth noting this major exclusion.

2. The definition excludes wetlands that play an important hydrological role unless they are directly adjacent to a jurisdictional water.

The 2015 Rule defined the term "adjacent" as "bordering, contiguous, or neighboring a water." Next, it further defined the term "neighboring" expansively, as explained earlier in these comments. The U.S. EPA based that definition on its research that explored and explained the important hydrological connections played by wetlands not obviously connected to a navigable water of the United States.

In contrast, the Revised Definition simplifies and weakens the term "adjacent" so that it lacks any real meaning. Where the 2015 definition accounted for scientific facts, the new definition requires "direct hydrological surface connection," a relationship that ignores all other realities regarding hydrologic processes.

3. **The definition excludes ephemeral features even if the water body has a significant nexus with a jurisdictional water.**

The agency has eliminated all ephemeral features from inclusion in the Waters of the United States. The agency's science emphasizes the connectivity of many intermittent and ephemeral features with downstream water bodies. The previously defined "significant nexus" standard would have allowed exclusion of ephemeral waters when they didn't substantially affect other waters.

These three examples are only the tip of the iceberg regarding the insufficiencies of this proposed rule. Beyond the linguistic changes, however, the more detrimental shift performed by the agency is its decision to ignore its own science when developing the new rule.

II. The EPA's science shows it must regulate seasonal streams and isolated wetlands.

Through the discussion attached to the rule on the Federal Register, the EPA and Army Corps of Engineers ignore its own science and the recommendations of the Science Advisory Board, instead hiding behind quotes taken out of context to bolster their anti-regulatory position.

In 2015, the EPA released *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*. The analysis provided in the report provided the technical basis for the definition developed and implemented in the 2015 Waters of the United States Definition. Importantly, the synthesis in the 2015 report directly influenced the definition promulgated by the EPA; the agency fundamentally grounded its definition in the scientific method, defining "Waters of the United States" based on the best science available.

The important factual conclusion derived from the report is that watersheds, including non-adjacent and disconnected riparian/floodplain wetlands, interact on a complex gradient of interconnectivity. Through physical, chemical, and biological integration, watershed features provide downstream benefits "through various surface-water, subsurface-water, groundwater flows, and biological and chemical connections."[7]

Not only are wetlands with surface connections vital to the health of a watershed, but "geographically isolated wetlands" provide important benefits, too. They connect through "local, intermediate, or regional groundwater flows or through biological movement."[8] Proximity alone "is not sufficient to determine connectivity, due to local variation in factors such as slope and permeability."[9]

Connectivity is not a cut and dry standard but varies on a spectrum from highly connected to highly isolated.[10] These connections can be permanent, can occur frequently, or infrequently. Thus, connectivity is not a fixed characteristic of a system, but varies over space and time.[11] The degree of hydrological connectivity between all wetlands and river networks "varies with lateral expansion and contraction."[12] Even geographically isolated wetlands and those that spill into streams that are completely disconnected from the river still have varying degrees of connectivity with downstream waters. Wetlands that lack hydrologic connection to other water bodies can influence water through

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[7] U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA/600/R-14/475F, *CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE* (2015), ES-2, 3.
[8] Id. at 4-41.
[9] *Id.* at ES-11.
[10] *Id.* at 1-4.
[11] *Id.* at 2-29. (quoting Ward, 1989; Leibowitz, 2003; Leibowitz and Vining, 2003).
[12] U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 7, at 2-18.

storage and mitigation of peak flows and can be connected in wetter seasons or years.[13] The possible effects of these non-floodplain wetlands on downstream waters despite lacking a surface water connection has been detailed by Ewel and Odum (1984), Mitsch et al. (1995), Reddy and DeLaune (2008), and Kadlec and Wallace (2009), among others.[14]

Geographic isolation should not be confused with functional isolation because geographically isolated wetlands can still have hydrologic connections to downstream waters. Wetland complexes could have connections to downstream waters through stream channels even when individual components are geographically isolated.[15] The term geographically isolated, further, "should not be used to infer lack of hydrologic, chemical, or biological connectivity."[16] Both non-floodplain and riparian/floodplain wetlands can include geographically isolated wetlands, or wetlands completely surrounded by uplands.[17] These wetlands have no apparent surface-water outlets but can still hydrologically connect to downstream waters.[18]

Some wetlands have effects on downstream waters *due to their isolation*, rather than their connectivity.[19] The sink functions of non-floodplain wetlands, resulting, in part, from their relative isolation, will still "have effects on downstream water when these wetlands are between the downstream water and known point or nonpoint sources of pollution."[20] Temporality impacts the story, too; "connectivity of these waters will vary over time as the river network and water table expand and contract in response to local climate."[21] Connectivity and effects of these non-floodplain wetlands are more variable, and thus more difficult to assess based solely on evidence from peer-reviewed studies.[22]

Further studies are needed on the various aspects of connectivity. There is insufficient peer-reviewed literature identifying which types of non-floodplain wetlands have or lack the types of connections needed to convey the functional effects to downstream waters.[23] The literature provided did not provide evaluations of connectivity for specific groups or classes of wetlands, meaning it did not enable the EPA to distinguish connectivity of these wetland types from each other.[24] Additional information not considered in this literature review could accurately distinguish "wetlands that are truly geographically isolated."[25]

But requiring *only a direct surface connection* to a jurisdictional water is unsupported by the agency's own research. And the agency's reliance on other intra-agency communications in an attempt to invalidate the findings of *Connectivity of Streams & Wetlands to Downstream Waters* reveals their pursuit of any line that could possibly justify their pre-ordained definition.

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[13] *Id.* at 4-22.
[14] *Id.* at 4-26.
[15] *Id.* at 6-7.
[16] *Id.* at 4-38.
[17] *Id.* at 2-8.
[18] *Id.*
[19] *Id.* at 4-42.
[20] *Id.* at 4-43.
[21] *Id.* at 4-41.
[22] *Id.* at 6-9.
[23] *Id.* at 6-13.
[24] *Id.* at 4-41.
[25] *Id.* at 4-45.

The new rule, in its Federal Register analysis, attempts to justify its avoidance of scientific explanation for its definition by relying on insights from a Science Advisory Board letter discussing the conclusions of the aforementioned report.[26] In the currently proposed rule, the agency argues: "science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the [Clean Water Act.]"[27]

But the Science Advisory Board's letter never makes this conclusion. It merely emphasized that the definitions in *Connectivity of Streams & Wetlands to Downstream Waters* are "scientific, rather than legal or regulatory definitions, and may differ from . . . Clean Water Act [definitions.]"[28] While the definitions may differ, that does not mean that the "legal" definitions must be completely devoid of scientific influence.

From the beginning of the Clean Water Act, Congress grounded the policy of water pollution prevention in a scientific context, stating the Act's objective as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[29] The federal government cannot accomplish that goal without grounding its regulations in scientific language. By reducing the Clean Water Act to purely federalist and legalist terminology, the United States EPA will eliminate any hope of achieving its mission.

The Administration's proposed definition of the Waters of the United States is merely a clever mask intended to strip protections of the nation's waterways. By hiding behind "federalist" concerns,[30] the U.S. EPA and Army Corps of Engineers will allow polluting industries to devastate valuable ecological systems and the drinking water of millions of Americans. It may take decades for watersheds to recover.

The United States EPA and Army Corps of Engineers must rescind this proposed regulation and return to the 2015 Rule. Ignoring the government's own science will result in an arbitrary and capricious decision by the government, and an environmental outcome that will adversely impact communities across Ohio and the United States.

III. The agencies should develop a tool that lists which water bodies lose protections.

In addition to ignoring its own science, the agencies have failed quantitatively to account for the number of streams which will lose protections under this proposed rule. Before making any regulatory decision, the government must ground it in reasoned, informed data.

However, the agencies have failed to provide any information regarding the actual impact of its new definition for the Waters of the United States. Some groups have attempted to estimate the total impact

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[26] *Letter to Gina McCarthy*. October 17, 2014. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.
[27] Supra note 1, at 83.
[28] Supra note 28, at 2.
[29] 33 USC §1251(a).
[30] The "federalist" arguments used by the Administration to defend its Dirty Water Rule imply that the 2015 Rule's jurisdictional definition is an overreach of Congressional authority. However, the Clean Water Act still places primary responsibility of preventing, reducing, and eliminating pollution in the hands of the States. 33 USC §1251(b). The 2015 "significant nexus" standard only required states to protect those waters; it did not dictate *how* states protect them.

of the rule, but given the lack of data and research performed by the agencies, no definitive number is possible to identify.

According to the Union of Concerned Scientists, a 2017 analysis conducted by the U.S. EPA and Army Corps of Engineers "attempted to calculate the percentage of different types of streams and wetlands across the country."[31] The analysis showed "that at least 18% of streams and 51% of wetlands in the United States will lose federal protections if the agency's proposed rule shrinks the definition of WOTUS."[32] And the 2017 reported emphasized that it was most likely underestimating "the number of ephemeral streams throughout the country."[33]

Even worse, the new definition endangers the drinking water of nearly one-third of Americans that acquire it from sources proposed for deregulation under the Dirty Water Rule.

Before proposing any regulation, the federal government must have the information necessary to make a reasoned and informed decision. Therefore, the U.S. EPA must do a thorough analysis of the impacts of its proposed rule, otherwise its decision to do deregulate will be arbitrary and capricious. To assist in this analysis, the agency must develop a tool that accurately identifies each waterbody that will lose protection under the new definition.

Conclusion

The Ohio Environmental Council opposes the Dirty Water Rule and its myriad changes that will destroy important protections for Ohio's waterways. It puts drinking water at risk; it puts ecological systems at risk; our economy at risk; and it opens the door for new polluting industries to impact the environment.

Alongside the thousands of other individuals and organizations opposing this rule, the OEC urges the U.S. EPA and Army Corps of Engineers to reverse course and keep the 2015 Rule intact.

Respectfully submitted,

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[31] *EPA Keeps Data Analysis on Stream and Wetland Protections in the Dark*, Union of Concerned Scientists, (January 17, 2019), https://www.ucsusa.org/center-science-and-democracy/attacks-on-science/epa-keeps-data-analysis-stream-and-wetland
[32] Id.
[33] Id.