



AMERICAN PUBLIC WORKS ASSOCIATION

Your Comprehensive
Public Works Resource

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April 15, 2019

Mr. Michael McDavit
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Ms. Jennifer A. Moyer
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street NW
Washington, D.C. 20314

RE: Revised Definition of “Waters of the United States” – Docket No. EPA-HQ-OW-2018-0149-0003

Dear Mr. McDavit and Ms. Moyer:

The American Public Works Association (APWA) appreciates the opportunity to submit comments on the proposed new definition of “Waters of the United States” (WOTUS) under the Clean Water Act, 84 Fed. Reg. 4154 (February 14, 2019).

Protecting the Nation’s surface water and groundwater is essential to public health and the quality of life our citizens enjoy. APWA’s over 30,000 members play a critical role in providing clean and safe water to their communities which are large and small, urban and rural. Chief among their responsibilities are the planning, design, construction, operation, and maintenance of the following: water supply systems, wastewater treatment systems, stormwater management programs, and drainage and flood control infrastructure, among numerous other public assets. Our members include public works professionals from cities, counties, and special districts, as well as their private sector partners. Our members take their responsibilities under the Clean Water Act (CWA) seriously, and are committed to a partnership with federal, state, regional, and local partners in assuring a sustainable future.

While APWA and its members are appreciative of the administration’s efforts to deal with the issues raised in our previous comments, the Association feels that there are still substantial issues with the revised definition issued on February 14, 2019.

PRESIDENT
David (Dave) Lawry, P.E.

EXECUTIVE DIRECTOR
Scott D. Grayson



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The comments issued by APWA on November 14, 2014, asked for clarity regarding two specific instances: 1) expanded jurisdiction over ditches; and 2) the need to assure that any proposed rule be clear that municipal separate storm sewer systems (MS4s) and other stormwater management programs are excluded from regulation as “Waters of the United States.” The proposed rule issued February 14, 2019, does much to clarify the specific questions from our comments. First, the proposed rule provided a specific definition under which a ditch would be classified as jurisdictional. Additionally, the proposed rule complements that definition with additional language to provide precision. Finally, the proposed rule issued February 14, 2019, states specifically that “stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off” will not be classified as jurisdictional.

The comments issued by APWA on September 26, 2017, asked for both the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps) to revise the 2015 proposed rule in order to provide consistent implementation across the Nation, specifically regarding the definition of the “significant nexus” terminology used by Justice Anthony Kennedy in his *Rapanos* opinion.

The EPA and Army Corps have largely solved the questions raised by EPA in our initial comments but has created more issues with the new proposed rule issued February 14, 2019. Rather than supplying language that would allow for consistent and fair implementation across the Nation, the new proposed rule adds uncertainty for public works professionals. In three key areas, the new proposed rule could do serious harm to public works professionals and programs: 1) Continued permitting uncertainty under the new proposed rule; 2) Assumptions regarding cooperative federalism; and 3) Additional costs for water providers and water customers.

Continued Permitting Uncertainty

Within the proposed rule, the regulatory definition of WOTUS applies to intermittent or perennial streams that contribute flow to navigable waters in a “typical year,” meaning over a rolling 30-year average. This new definition under the proposed rule would undo federal CWA protections for streams that flow after rainfall or snowmelt. It also would remove protections for wetlands without surface water connections to larger waterways.

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The proposed rule is a departure from previous administrations which protected wetlands with either surface or shallow subsurface connections to navigable waters. Previous administrations also protected some wetlands that were not directly connected by water to larger waterways. Under the Obama Administration, ephemeral streams were protected if they had an identifiable bed, bank, and high-water mark. Under the Bush Administration, streams with “significant hydrological or ecological connections” to navigable water were protected.

This new proposed rule does little to provide clarity and may cause greater confusion. For example, the new proposed rule offers no metrics for what a “typical year” would be in terms of intermittent or perennial streams. There is no clarity on whether such a metric would include the number of days or months a stream must flow, or volume of water it must carry, or other data points. Furthermore, the new proposed rule fails to clearly define the differences between ephemeral, intermittent, and seasonal streams. As a result, decisions on jurisdiction would be left up to Army Corps field personnel, often with wildly differing outcomes.

While the 2015 rule was unclear on ditches, as mentioned in APWA’s 2014 comments, the new proposed rule is little better. Agricultural or public works ditches that are treated with pesticides or other substances and then flow into a jurisdictional water would require the owner/operator to apply for a National Pollutant Discharge Elimination System (NPDES) permit, which would likely be a larger burden on the owner/operator than WOTUS jurisdiction. Roadside and public works ditches MAY fall under NPDES rather than WOTUS under this rule, though there is uncertainty on what the result will be.

Assumptions Regarding Cooperative Federalism

The current administration has stated that it wants to return power to states and local governments in terms of environmental regulation, and APWA has no issue with this position on its merits. However, the new proposed rule would essentially prohibit many states from regulating waterways due to specific state laws. Thirty-six states currently have laws that prohibit the state from instituting regulations that are more stringent than federal standards. Such laws would effectively exempt any waters not included in the proposed rule from state regulation. Currently, two more states (Michigan and Wisconsin) are debating similar laws.

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Arizona is one state which has enacted such a law. In arid western states like Arizona, which face significant water supply issues, all water is drinking water. The proposed rule would add significant cost to treating these unprotected waters, since as much as 94% of the states' waters would lose federal protection and would be exempt from state regulation under state law.

In addition to specific state laws that prohibit states from regulating non-jurisdictional waters, there is an element of whether states have the means, or the will, to institute such regulation. Various officials from the current administration have stated that they would be willing to devolve various CWA programs to the states, which is ignoring the main issue. State budgets across the Nation are tight and asking state agencies to undertake a complete takeover of CWA jurisdiction would be beyond the means of most if not all states. Assuming a state will be able to take up regulation over now non-jurisdictional waters, if that is the wish of the state, is a high risk to take when the outcome could be greatly impaired water resources throughout the country.

Additional Costs for Water Providers and Water Customers

The EPA estimates 50% of the country's rivers and streams are impaired, including roughly 25% of rivers that serve as drinking water sources. While the new proposed rule deals with CWA jurisdiction, the outcome will have a massive impact on drinking water and Safe Drinking Water Act (SDWA) compliance. As mentioned previously, especially in the arid western states, all water is drinking water. As a result, the new proposed rule would expose more waterways to impairment, meaning local agencies and water providers will need to do further treatment on those waters in order to make them safe for drinking. With additional treatment comes greater costs, which are passed on to the customers, thereby exacerbating the water affordability issue that afflicts communities across our country.

Public works encompasses many of the things that make our communities livable. Providing drinking water and treating wastewater and stormwater are essential services that public works delivers. The new proposed rule would likely impose higher costs on local agencies and water providers for those bodies to deliver those services. As a result, those bodies would be faced with a choice between raising rates and potentially pricing members of the community out of those services or risking noncompliance by trying to stretch already thin budgets for water and wastewater treatment. Additionally, raising rates to meet federal water quality standards for drinking water could result in

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communities losing residents and ratepayers, as those residents may choose to move to a jurisdiction with lower rates.

With a mind to next steps, APWA's stance is the Trump Administration would provide more benefit to our environment, our public health, and our Nation's public works professionals by drafting a WOTUS rule that clarifies the "significant nexus" language used by Justice Kennedy.

On behalf of public works professionals nationally, we thank you for the opportunity to comment and urge you to give serious consideration to the above comments. We are committed to working with EPA and the Corps on our common goal of clean water. If you have any questions, please contact Sean Garcia in our Washington, D.C. office at sgarcia@apwa.net or at 202-218-6734.

Sincerely,

Two handwritten signatures in black ink. The signature on the left is 'Dave Lawry' and the signature on the right is 'Scott Grayson'.

Dave Lawry, PE
President

Scott Grayson
Executive Director

PRESIDENT
David (Dave) Lawry, PE.

EXECUTIVE DIRECTOR
Scott D. Grayson