



November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
United States Environmental Protection Agency
Office of Water
William Jefferson Clinton Building
1200 Pennsylvania Ave NW, MC 4101M
Washington, DC 20460

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Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Via email to: ow-docket@epa.gov

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA-HQ-OW-2011-0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

On behalf of the Environmental Council of the States (ECOS), I submit this letter to the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed national rulemaking *Definition of "Waters of the United States" Under the Clean Water Act* (79 Fed. Reg. 22188, April 21, 2014). This letter provides comments to EPA and the Corps on this proposed rule (hereinafter, "proposed rule").

We write on behalf of states and territories (hereinafter, "states") who are co-regulators with EPA and the Corps jointly seeking to deliver the nation's environmental protection system of laws, regulations, programs, research, and services. States have many laws that protect waters and wetlands, and implementing the Clean Water Act (CWA) is a fundamental responsibility of states. States have long supported early, meaningful, and substantial state involvement in the development and implementation of environmental statutes and related rules, as stated in ECOS [Resolution 11-1](#). ECOS believes that EPA and the Corps must engage states as co-regulators prior to and during the rulemaking process. While ECOS appreciates the time and effort spent on calls and outreach to states regarding this proposal, some states find that these efforts do not rise to the level of consultation that should occur between the states and federal agencies in developing comprehensive regulations with such significant impact.¹ Recent calls held answered many state questions about the proposed rule, but many questions remain.

The following comments from ECOS cover broad concerns that should be addressed by EPA and the Corps. They do not supersede or alter the comments of any individual state.

¹ Some states find the consultation deficit in this case so serious that it requires the rule be withdrawn and the process restarted with full consultation. Other states believe consultation has been adequate, and do not think delaying the process will produce any significant benefits.

Continuing diligent and frequent communication with states will be critical to developing and implementing an effective final rule on this difficult subject matter. EPA and the Corps must maintain regular forums and contact with states leading to any finalization of the proposed rule. EPA has been the main communicator and participant in outreach forums. A concern of states throughout the process has been the lack of Corps participation. States ask that the Corps engage meaningfully in the process of developing a final rule as co-regulators.

Uncertainty about the effects of the proposed rule still exists among states, largely due to regional, geographic, and climactic differences around the country. Cost impacts may differ from state to state depending on legislative and administrative process differences. States ask EPA and the Corps to consider variations in state implementation costs as appropriate, and structure any final rule to "provide the maximum flexibility possible that is still consistent with underlying statutory objectives" ([ECOS Resolution 12-2](#)).

ECOS also requests that EPA and the Corps seek to secure federal funding for the states to cover the customary portion of costs associated with any new rule, and consider the availability of funding support in planning for new obligations. States have expressed concern that the economic analysis of the proposed rule is not accurate for all states. To the extent that states may have new regulatory obligations under any final rule, ECOS requests the inclusion of estimates of both state administrative costs and state direct implementation costs in recognition of the significant and wide-range of activities necessary to implement any new requirements ([ECOS Resolution 14-3](#)).

ECOS appreciates any bright line jurisdictional exclusions that can be made in a final rule, because they will provide further clarity to regulators. Accordingly, we recommend EPA and the Corps add to the list of clear exclusions in any final rule.

ECOS also appreciates the EPA and the Corps' recognition in the proposed rule preamble that the issue of state assumption of CWA Section 404 authority is a distinct issue that that should be addressed in a separate process for this specific topic:

"This proposal does not affect the scope of waters subject to state assumption of the section 404 regulatory program under section 404(g) of the CWA. See CWA section 404(g). The scope of waters that are subject to state and tribal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. States administer approved CWA section 404 programs for 'waters of the United States' within the state, except those waters remaining under Corps jurisdiction pursuant to CWA section 404(g)(1) as identified in a Memorandum of Agreement 7 between the state and the Corps. 40 CFR 233.14; 40 CFR 233.70(c)(2); 40 CFR 233.71(d)(2). Clarification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g)." (79 Fed. Reg. 22200)

States agree that Section 404 assumption is an important matter which should be treated separately from any final rule on the definition of Waters of the United States. ECOS supports state assumption of the Section 404 program by interested states ([ECOS Resolution 08-3](#)) and recently wrote to EPA requesting that efforts be undertaken to clarify several ambiguities surrounding the assumption process.

States emphasize that a final rule should add such clarity that the need for implementation guidance is minimized. To the extent that guidance is needed, it should be developed with state involvement and published concurrently with any final rule.

If and when the proposed rule is finalized, it may set new standards in some regions for defining jurisdiction under the CWA Section 404 and 402 permitting programs. To the extent that an area previously found to be non-jurisdictional has the potential to be found jurisdictional under a new rule, a final rule must be clear regarding how such situations will be handled. A smooth transition between regulatory approaches is critical. In order to reduce litigation and uncertainty, the final rule should describe under what circumstances it will apply to previously made jurisdictional determinations, and also to what universe of currently pending jurisdictional determinations, if any, it will apply.

This letter, though submitted on behalf of states, in no way overrides individual comments made by states - our members and your co-regulators. We appreciate the opportunity to offer these comments. If you have any questions, please contact Alexandra Dunn, ECOS Executive Director and General Counsel, adunn@ecos.org or 202-266-4929.

Sincerely,

A handwritten signature in blue ink that reads "Robert J. Martineau, Jr." The signature is written in a cursive, flowing style.

Robert J. Martineau, Jr.
ECOS President
Commissioner, Tennessee Department of Environment and Conservation

cc: ECOS Officers
Sara Parker Pauley (MO), ECOS Water Committee Chair
David Paylor (VA), ECOS Water Committee Vice Chair