

October 22, 2014

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314

Vicky Porter  
Chairwoman

Craig Frazier  
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Manly West

Charles Hughes

William Yarborough

Tommy Houser

John Langdon

**Re: Comments on the Proposed Definition of “Waters of the United States” under the Clean Water Act. (EPA-HQ-OW-2011-0880)**

Dear Administrator McCarthy and Assistant Secretary Darcy:

The North Carolina Soil & Water Conservation Commission (SWCC) provides oversight, rules and policy for the state’s agriculture cost share program. The SWCC is concerned that an expansion of federal jurisdiction over small water bodies, ditches, ephemeral streams, and wetlands will cause hardship for agricultural and silvicultural operations in the state by increasing the permitting burden, mitigation costs, and reduced flexibility for on-farm management. The SWCC is concerned that the Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE) are claiming jurisdiction well above and beyond that intended by Congress, the CWA, and Supreme Court decisions.

The SWCC respectfully requests the withdrawal of the proposed definition of “Waters of the US” rule (and the complementary Interpretive Rule) until such time that the EPA and USACE has engaged in substantive discussions with agriculture groups to receive feedback about the impact that this proposed rule could cause, and made revisions to the rule to accommodate the concerns of the agricultural and silvicultural community. In the event EPA moves forward with the proposed rule, the SWCC offers suggestions to improve clarity, and to reduce the burden on the agriculture community as outlined in Attachment A.

Thank you for your consideration of this request to reduce the regulatory burden on the agricultural community. The SWCC reserves the right to submit additional comments on this proposed rule as more information becomes available.

Sincerely,



Victoria P. Porter, Chair  
Soil and Water Conservation  
Commission



## **Attachment A: Comments on Specific Issues**

### **Tributaries:**

The tributary definition encompasses far more waters than intended under the CWA and Supreme Court decisions, including ditches and ephemeral streams.

### **Jurisdiction of Ditches:**

The SWCC feels that ditches are not natural tributaries and should not be subject to CWA jurisdiction. The SWCC opposes expansion of federal jurisdiction to include ditches. EPA has stated that the proposed rule does not expand existing jurisdiction over ditches. However, some of the wording of the proposed rule, specifically the exclusions for ditches, has raised concerns that jurisdiction over ditches will in fact be increased. If a final rule is adopted, the SWCC urges EPA and USACE to exclude ditches from jurisdiction.

### **Jurisdiction of Ephemeral Streams:**

The new definition of “tributary” does not exclude ephemeral water bodies (features which contain water only after a precipitation event). Therefore, ephemeral streams or water bodies that contain a bed and bank and an ordinary high water mark will be subject to jurisdiction.

The SWCC opposes the language of the proposed rule that makes ephemeral streams and water bodies subject to jurisdiction. One particular concern of the SWCC is grassed waterways. Under no circumstances should grassed waterways, which are a widely recognized conservation practice, be considered jurisdictional.

### **Floodplain Definition:**

The SWCC opposes the floodplain being used as a boundary to automatically determine jurisdiction as it will cause confusion, inconsistent interpretations in the field, and undue burden to the regulated community.

While EPA and USACE have stated that using a flood frequency in the definition will result in inconsistent floodplain land areas throughout the country, it will at least provide a definition that is transparent for all landowners. If EPA and USACE wish to include the floodplain as a regulatory tool, a flood frequency should be designated.

### **Depressions:**

(b)(5)(v): “Water-filled depressions created incidental to construction activity,” leads to the conclusion that all other water filled depressions, including those in farm fields, could be subject to jurisdiction. This should be changed to read, “Any water filled depression that does not meet the definition of a wetland.” This change would make it clear that any wet areas in a farm field would in fact need to meet the definition of a regulated wetland in order to be jurisdictional.

**Other waters:**

The SWCC is concerned about the category of jurisdictional waters detailed in (a)(7). The “other waters” category is the most nebulous, and relies almost exclusively on the opinion of the regulator. This category is highly likely to include waters that were not intended to be jurisdictional by the CWA or the Supreme Court. The SWCC is opposed to the inclusion of this category in the rule. If included in the final rule, the parameters under which an “other water” will be jurisdictional need to be far more clearly defined.

Additionally, the wording in this category causes concerns about how the significant nexus test will be demonstrated in the field. Will waters be evaluated on an individual basis, or will one water body be evaluated, and then used to lump all other nearby water bodies into jurisdiction? A water body should not be jurisdictional merely because it is near another water body that met the significant nexus test. If “other waters” are included as a category in the final rule, all “other waters” should meet the significant nexus test individually or be excluded from jurisdiction.