



## Indiana Department of Environmental Management

100 N. Senate Avenue • Indianapolis, IN 46204  
(800) 451-6027 • (317) 232-8603 • [www.idem.IN.gov](http://www.idem.IN.gov)



## Indiana State Department of Agriculture

One North Capitol Avenue, Suite 600 • Indianapolis, IN 46204  
(317) 232-8770 • [www.isda.IN.gov](http://www.isda.IN.gov)

October 4, 2021

John Goodin, Director  
Office of Oceans, Wetlands, and Watersheds  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW Washington, DC 20460

Vance F. Stewart III, Acting Principal Deputy  
Office of the Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon, Washington, DC 20310-0104

Via email to: [ow-docket@epa.gov](mailto:ow-docket@epa.gov)

Re: Request for Recommendations Regarding "Waters of the United States"  
Docket ID No. EPA-HQ-OW-2021-0328

Dear Mr. Goodin and Mr. Stewart:

The Indiana Department of Environmental Management (IDEM) and the Indiana State Department of Agriculture (ISDA) value the opportunity to provide the U.S. Environmental Protection Agency (U.S. EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the pre-proposal request for recommendations regarding the definition of "Waters of the United States" (Federal Register / Vol. 86, No. 147 / August 4, 2021) (hereinafter, "Request"). IDEM is responsible for the daily implementation of the Clean Water Act (CWA) water quality programs in Indiana, and ISDA serves as an advocate for Indiana agriculture at the local, state, and federal level.

IDEM and ISDA understand this proposal is the initiation of a process intended to review and revise the definition of "waters of the United States" consistent with the Executive Order 139990 signed on January 20, 2021 directing all executive departments and agencies to review Federal actions taken in the last four years that conflict with current, important national objectives. We appreciate U.S. EPA's and the Corps' (Agencies') efforts to prioritize the rulemaking(s) and support the stated objectives of the effort: 1) Ensuring protection of our water resources consistent with the Clean Water Act. 2) Considering the latest science. 3) Prioritizing a practical implementation approach for state and Tribal partners. 4) Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns.

IDEM and ISDA have reviewed our comments on prior rulemakings regarding the definition of WOTUS and take this opportunity to reiterate the following concerning some of the topics highlighted for feedback in your request.

### **The Scope of Jurisdictional Tributaries**

The Corps previously identified channels having a defined bed and bank and connecting to downstream waters as jurisdictional while the Navigable Waters Protection Rule (NWPR) used flow duration and frequency to identify jurisdictional tributaries. The clarity of this approach is challenging due to the difficulty of finding clear and specific terms for use within the definition of “intermittent”. Therefore, the state agencies support the use of the ordinary high water mark (OHWM) to establish the lateral extent of a tributary and suggest that it may be useful to include that concept in the definition of tributary. However, many tributaries may exhibit an OHWM upstream and downstream of another aquatic feature, but lose that definition through the feature (e.g., wetlands, lakes and ponds) itself. These features may influence the quality of TNWs and their tributaries and therefore may merit consideration for protection as a jurisdictional water.

### **The Scope of Jurisdictional Ditches**

IDEM and ISDA supports the exclusion from jurisdiction ditches constructed wholly in upland. However, when determining jurisdiction, it is important to consider the purpose of the ditch and its construction. For example, stream relocations may be dug partially in upland to retain flow between other existing jurisdictional features. Ditches which exhibit intermittent or perennial flow and connecting to otherwise jurisdictional waters may justify treatment as jurisdictional tributaries, regardless of the conditions in which they were constructed. Determining if a ditch was in fact constructed out of a wetland, tributary, or upland could prove challenging resulting in a reduction in efficiency in permitting and authorization determinations, therefore clear guidance on methods is needed. The state agencies suggest the determination process include review of National Wetland Inventory Maps, soils maps and historical imagery.

### **The Scope of Adjacency**

#### Wetlands

IDEM and ISDA believe there is a need to include some flexibility in any definition of “adjacent wetlands” with such flexibility allowing for site specific reviews when such reviews are appropriate for protecting jurisdictional resources. We believe that wetlands with a hydrological connection via flooding, including those which flood due to overtopping upland or a dike, barrier, or similar structure frequently enough to establish wetland hydrology should continue to be jurisdictional, recognizing the seasonal variability of a wetland boundary. Regional guidance should establish methods for the

determination of common flooding frequencies that create wetland hydrology. We appreciate the use of the terminology of “dikes, barriers, or similar structures” in the definition of adjacent wetlands, as it provides greater clarity than the use of the term “upland” alone.

IDEM and ISDA do not support using an arbitrary distance to establish jurisdiction and prefer using the practiced science of wetland delineation. To assist with clarity for implementation, the Agencies could consider referencing the 1987 Wetland Delineation Manual and Regional Supplements.

### Lakes and Ponds

IDEM and ISDA agree that lakes and ponds should be a separate category of WOTUS and believe that most Indiana lakes, which are valued recreational resources, are jurisdictional and would be determined as jurisdictional based upon their relationship to a jurisdictional TNW or TNW tributary. The state agencies want to ensure, for implementation, that it is clear when a pond with a connection to a TNW or a TNW tributary is not a WOTUS, upstream waters continue to be jurisdictional.

### Special Water Features

The state agencies request clarification on how jurisdiction will be determined for special water features. Indiana has unique wetland ecosystems such as dune and swale wetland complexes (which filter the water that feeds Lake Michigan) as well as rare fens and bogs for which we want to ensure protection. Additionally, Indiana has karst terrain that includes features with atypical hydrology which some classify as groundwater. To support protection of the state’s water resources including and impacted by karst, IDEM and ISDA believe karst features, whether above or below ground, should continue to be jurisdictional. With the exception of the consideration for karst, the state agencies agree with the exclusion of groundwater from the definition of WOTUS.

### **Exclusions**

IDEM and ISDA support the use and description of the exceptions to WOTUS. We particularly appreciate the clarity the NWPR provided by creating an explicit exclusion for and defining prior converted wetlands. We support the clarification that cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use, and therefore maintains the prior converted cropland exclusion. The state agencies agree with the five year time frame for establishing abandonment. Landowners wishing to utilize this exclusion should be able to produce their determination along with property history and receipts to demonstrate the property was used for, or in support of, agricultural purposes at least once in the preceding five

years. The state agencies request that the storm water control feature exclusion indicate that it encompasses conservation infrastructure found on agricultural lands such as grassed waterways, treatment wetlands, and sediment basins. To avoid creating disincentives to water quality conservation practices and infrastructure, the Agencies should make it clear that these conservation features are *not* jurisdictional, so long as they were constructed in upland.

IDEM and ISDA provide the above feedback to help the Agencies develop a durable definition of WOTUS and strongly encourage clarity in the rule itself or in complementary guidance, as appropriate. IDEM and ISDA, as state resource management agencies, make critical decisions on water protection on a daily basis. With that in mind, knowing that a change in the definition of WOTUS will change the number of federally regulated waters, the state agencies respectfully request consideration of inclusion of an implementation transition period in a final rule. If the effective or implementation date could be set out from the date a revised definition is finalized, we will have a better opportunity to ensure our resources are aligned and be ready to ensure continuous, appropriate protection of Indiana's waters.

Again, we thank you for the opportunity to comment on the critical definition of WOTUS. We encourage continued collaboration with the states as the process proceeds.

Sincerely,



Bruno L. Pigott  
Commissioner  
Indiana Department of Environmental Management



Bruce Kettler  
Director  
Indiana State Department of Agriculture