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Lee A. Norman, M.D., Secretary

October 4, 2021

Radhika Fox Assistant Administrator Office of Water U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, D.C. 20460

Jaime A. Pinkham Acting Assistant Secretary of the Army (Civil Works) 108 Army/Pentagon Washington, D.C. 20310-0180

# Re: Docket EPA-HQ-OW-2021-0328-001, Pre-Proposal Request for Recommendations, Waters of the United States

Dear Administrator Fox and Secretary Pinkham:

The Kansas Department of Health and Environment (KDHE) administers the Clean Water Act in Kansas and appreciates the opportunity to comment on the proposed approach by the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Army, Corps of Engineers (Corps) [together the Federal Agencies] to address the ongoing quest to define the "Waters of the U.S." (WOTUS). While KDHE operated adequately under the recent Navigable Waters Protection Rule (NWPR), we are comfortable with the concept of pulling back the definition of WOTUS to its interpretation prior to the issuance of the 2015 Clean Water Rule. Whatever definition of WOTUS has been or will be proposed, KDHE has evaluated the proposal through the lens of existing State law for compatibility and implementation.

In Kansas, WOTUS are essentially what the Kansas Surface Water Quality Standards define as classified surface waters. K.A.R. 28-16-28b(m) states, "*Classified surface water*" means any surface water or surface water segment that supports or, in the absence of artificial sources of pollution, would support one or more of the designated uses of surface water defined in K.A.R. 28-16-28d or K.S.A. 2017 Supp. 82a-2001, and amendments thereto, and that meets the criteria for classification given in K.A.R. 28-16-28d.

Much of the debate over Federal jurisdiction of Kansas waters has centered on streams. In 2001, the Kansas Legislature interceded with policy and definitions pertaining to classified streams. The corresponding statute reads, in part:



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Laura Kelly, Governor

#### 82a-2001. Classified stream segments defined; other definitions. As used in this act:

(a) (1) "Classified stream segments" shall include all stream segments that are waters of the state as defined in subsection (a) of K.S.A. <u>65-161</u>, and amendments thereto, and waters described in subsection (d) of K.S.A. <u>65-171d</u>, and amendments thereto, that:

(A) Are indicated on the federal environmental protection agency's reach file 1 (RF1) (1982) and have the most recent 10-year median flow of equal to or in excess of one cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

(B) have the most recent 10-year median flow of equal to or in excess of one cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

(*C*) are actually inhabited by threatened or endangered aquatic species listed in rules and regulations promulgated by the Kansas department of wildlife, parks and tourism or the United States fish and wildlife service;

(D) (i) scientific studies conducted by the department show that during periods of flow less than one cubic foot per second stream segments provide important refuges for aquatic life and permit biological recolonization of intermittently flowing segments; and

(ii) a cost-benefit analysis conducted by the department and taking into account the economic and social impact of classifying the stream segment indicates that the benefits of classifying the stream segment outweigh the costs of classifying the stream segment, as consistent with the federal clean water act and federal regulations [Note: EPA did not accept this provision]; or

(*E*) are at the point of discharge on the stream segment and downstream from such point where the department has issued a national pollutant discharge elimination system permit other than a permit for a confined feeding facility, as defined in K.S.A. <u>65-171d</u>, and amendments thereto.

(2) Classified stream segments other than those described in subsection (a)(1)(E) shall not include ephemeral streams; grass, vegetative or other waterways; culverts; or ditches.

(3) Any definition of classified stream or "classified stream segment" in rules and regulations or law that is inconsistent with this definition is hereby declared null and void....

(d) "Ephemeral stream" means streams that flow only in response to precipitation and whose channel is at all times above the water table.

Several implications arise from the statute. First, State law provides that ephemeral streams and ditches are not to be considered classified streams, i.e., essentially WOTUS within Kansas.

Second, nonetheless, there is a safeguard to protect any waters from Section 402 wastewater and stormwater discharges with the provision of subsection (a)(1)(E). Because KDHE issues permits as joint NPDES/State authorizations, KDHE interprets subsection (a)(1)(E) to mean that any wastewater or municipal or industrial stormwater discharge renders the receiving stream from the discharge outfall to all reaches downstream as a classified surface water. Such designation brings the full weight and expectation of the Clean Water Act on that water, regardless of its hydrologic regime, i.e., even ephemeral streams receiving discharges are classified surface waters. The exclusion of confined feeding facilities, i.e., confined animal feeding operations in Federal parlance, is considered inconsequential because most facilities do not discharge at any rate. Thus, even though ephemeral streams are not considered federally jurisdictional, a level of state protection is provided to ephemeral streams by preventing pollutant loading from a discharge into an ephemeral channel. Additional

protection exists if the ephemeral stream is Designated Critical Habitat for state-Threatened or Endangered species or if it provides important refuge and permits biological recolonization of intermittently flowing segments.

Third, while ephemeral streams are excluded generally from being considered WOTUS by state law, intermittent streams are definitely viewed as classified surface waters, and by extension, WOTUS. The debate following finalization of the NWPR shifted from designating Federal and State jurisdiction to the technical matter of discerning protected intermittent streams from exempt ephemeral streams. Whether ephemeral streams have been protected or not, mitigation requirements historically differed between ephemeral and intermittent streams. Consequently, delineations of those stream types should be robust. Development of technical tools for agencies making hydrologic regime determinations and guidance for the regulated community will be beneficial in alleviating conflict over such determinations. Delineating ephemeral streams should be a priority for science supporting WOTUS implementation. Additional studies on the ecological functions of ephemeral streams will undoubtedly improve management of those systems. The interpretation provided by Justice Kennedy's "significant nexus" test for determining WOTUS emphasized the importance of connectivity. KDHE's concern with the 2015 Clean Water Rule was it accentuated the physical "nexus" portion of that test but gave little guidance as to what functionally constituted "significant".

KDHE believes a core principal of identifying streams as WOTUS is that each stream reach must stand on its own merits to support the Clean Water Act Section 101(a) designated uses defined by each state's surface water quality standards. Past arguments that ephemeral streams provide water for surface water intakes for public water supply systems are erroneous and illogical. A water supply system cannot rely on a stream that only flows in direct response to the occasional rainfall event. Nonetheless, regardless of the WOTUS status of ephemeral streams, they can and will convey flow and materials, including pollutants, to downstream waters. Kansas law protects those downstream waters from such discharges into ephemeral streams even though the ephemeral reaches themselves are not typically protected.

Relative to the questions posed by the Federal Agencies, KDHE offers the following perspectives, noting that this comment period is the first of many opportunities for interaction with the States, particularly as the Federal Agencies embark on building out the definition from its foundational basis.

## 1. Implementation

As stated previously, KDHE water agencies did not have issues of implementation under the NWPR for most facets of the Clean Water Act, notably monitoring, assessment, 303d listing, total maximum daily loads, 402 permitting and watershed management under the 319 program. KDHE does not have authority for the Section 404 dredge and fill program, although a state permit is required for altering the course, current and cross-section of a stream draining watersheds exceeding a threshold area that varies across the state, under K.S.A. 82a-301, et seq. The state program is restricted to hydraulic consequences from alterations in flow, including dams, revetments and obstructions in the stream.

Conversely, Section 404 of the Clean Water Act, governs the discharge of dredge and fill material into jurisdictional waters. Given the predominantly rural nature of most Kansas watersheds, many activities around waters are associated with normal farming and ranching, which are exempt from 404 permitting. Any

agricultural activities that might need a permit are typically covered under a Section 404 Nationwide Permit (NWP) issued by the Corps, e.g., NWP 40 for agricultural activities and NWP 41 for reshaping existing drainage ditches. However, impacts to urban streams such as filling or burial with transition to pipe conveyance have happened in commercial and residential developments.

Likely the most prevalent issue of implementation under the NWPR in Kansas was permitting of watershed impoundments and the subsequent need for compensatory mitigation. An impoundment of an intermittent stream required permitting and mitigation but impounding an ephemeral stream did not. Technical evaluation over the hydrologic regime of the impounded stream has resulted in disagreements between project sponsors and regulatory agencies, highlighting the need for defensible, objective methods in classifying streams as ephemeral or intermittent.

KDHE concerns over the Clean Water Rule of 2015 centered on the expansion of jurisdictional waters through the significant nexus test, notably, ephemeral streams within a stream network. The primary concern was the inclusion of such streams into the other functions and programs of the Clean Water Act, i.e., assessment and 303d listing. Given constraints on staff and resources, such a broad application could potentially reduce efficiency and efficacy of KDHE Clean Water Act programs.

#### **Regional, State and Tribal Interests**

Under the NWPR, KDHE did not alter its regulatory approaches to protecting waters of the state. Wastewater discharges were clearly covered by state law and further interpretation of that law to include stormwater protected most streams through construction and industrial stormwater general permits. Those general permits were triggered by activities disturbing over one acre and that presented a potential for discharge of pollutants off-site.

As the Federal Agencies contemplate adding provisions to the pre-2015 interpretation of WOTUS, they might consider tiering of certain waters. Regionalization of categories might prove to be a path toward a more durable definition of WOTUS across the nation. It is possible that a first or second order ephemeral channel on the High Plains of Kansas is functionally different than an alpine ephemeral channel in Colorado's high country or an arid arroyo in Arizona where, in each case, certain species' life cycles may be predicated on infrequent flow events separated by extended periods of dryness. A means of customizing delineations to reflect each State's unique geographic, hydrologic and ecological circumstances would provide greater clarity and certainty for the regulatory agencies and the regulated community.

#### 2. Science

Much has been made of the EPA 2015 <u>Report on Connectivity of Streams and Wetlands to Downstream Waters</u> in support of the significant nexus test promoted by Justice Kennedy. The science behind the report was solid in demonstrating that the integrity of downstream perennial waters is supported by the protection of lower order streams further up in the shared watershed. Hence, connectivity, i.e., nexus, is a key attribute to design a protective system for water bodies. There is no doubt that, under sustained, wet conditions, connection and contribution from first and second order streams, that ordinarily do not flow, is established with downstream waters. In this sense, ephemeral streams act as conveyances of both necessary materials, energy and substrate as well as impairing pollutants.

With intermittent streams, the state can be assured that, most years, presence of water and supporting flows and material loads, can be expected from that stream reach each year. Therefore, continued hydrologic science to delineate ephemeral systems from intermittent conditions remains a need. Arizona's work in implementing the NWPR is a good example of applying hydrologic and geographic analyses to make the distinction among the flow regimes.

Additional science on the ecology of truly ephemeral streams is also warranted to support extending any protection to these continually dry environments.

## 3. Environmental Justice

KDHE supports extending and focusing environmental protection in disadvantaged communities, including steps to reduce the exposure of the population in those neighborhoods to water-borne pollutants. However, we are struggling to make the connection on the jurisdictional status of a water with the social and economic setting that water resides in or flows through. Environmental justice is a matter to be taken on in the implementation of environmental programs to protect water, its designated uses, and the public. But it is not an attribute to assign to a stream to give it more weight for a jurisdictional determination.

Nonetheless, every effort should be made to interact with citizens in disadvantaged communities to gauge the importance of waters in urban and rural settings to their community welfare, well-being and identity. Such input is essential for the scoring and prioritization of projects that are intended to improve the condition of those waters.

## 4. Climate Implications

Changes in climate in Kansas are likely to be presented two ways. First, precipitation occurs in more intense, less frequent storm events. Second, sustained elevation in temperatures induces greater evapotranspiration. Taken in combination with regional ground water use, streamflows, especially baseflow, have seen depletion. Numerous streams in western Kansas have seen loss of flow because of imbalanced supply and demand for water. The Arkansas River between Garden City and Dodge City rarely flows and, not only is it a traditional WOTUS, it is one of the three navigable streams declared in Kansas. The question remains over the WOTUS status of once-flowing streams that are now ephemeral because of changes to climate and water use.

If hydrologic regime is to be used to define WOTUS, some consideration for the length and representativeness of the flow record used to make that determination. Long-term periods of record may overstate contemporary conditions seen in western streams. Conversely, decades often oscillate between wet and dry conditions. As an example, the Smoky Hill River near Elkader is a long-term gaging station in western Kansas. The following table shows the mean flow for each decade since 1941. Clearly the streamflow data since 1971 is markedly different than what are seen between 1941-1970, even with a wet decade from 1991-2000. Water use and climatic conditions both influence the decline in flow suggested by the data. The question is if the data from 2001-2020 are now indicative of typical conditions to be expected in the future. Certainly, data taken from any

given year would not be representative of long-term hydrologic regimes. Consultation with the Kansas water agencies would assist the Federal agencies in ascertaining the appropriate conditions that are deemed representative if streamflow is a key to determining WOTUS.

Decade	1941-	1951-	1961-	1971-	1981-	1991-	2001-	2011-
of	1950	1960	1970	1980	1990	2000	2010	2020
Record								
Annual	41.8 cfs	65.7 cfs	17.7 cfs	4.3 cfs	3.2 cfs	10.6 cfs	2.1 cfs	2.2 cfs
Flow								

## 5. Tributaries

Much of this letter has been dedicated to comments over tributary considerations, particularly the ephemeral streams where were excluded by the NWPR and, with caveats, State law. Two comments can be added here. First, drought and runoff cannot be used as an argument for jurisdiction. Most Kansas streams have historically gone dry under severe drought. Nonetheless, those streams are still considered perennial. Similarly, the chance observation of runoff coursing through an otherwise, traditionally dry channel should not be rationale to claim intermittency. Other tools should be introduced to create a preponderance of evidence in determining if a stream is ephemeral or intermittent. In our 2019 comments on the NWPR, we suggested using a process for the Federal Agencies to query state agencies on the rebuttable assumption that a reach in question is an intermittent stream. State agencies could then offer evidence on the hydrologic regime of the reach. Such a process still has merit in making a durable definition of WOTUS determination for Kansas waters.

#### 6. Ditches

In a rural state such as Kansas, ditches are a commonplace feature. They either provide drainage to remove water from productive land or roadways or they convey water away from streams for irrigation of uplands. In either case, KDHE is hard-pressed to see ditches as WOTUS. First, State law specifically excludes ditches as classified stream segments. Second, in the case of irrigation ditches, any water found in those ditches, which are private property, is reflective of the water quality of the source water, e.g., the stream or reservoir. The presence of such water is not sustainable, if the head gates are closed, flow ceases and the ditches go dry. Any aquatic life found in these ditches has either emigrated from the source water or seized the opportunity of transient wet conditions to temporarily colonize the ditch environment.

As a third point, drainage ditches are constructed on upland property and were never WOTUS, let alone waters of the state. They are private conveyances that convey excess water to the natural stream network.

Finally, Section 502(14) of the Clean Water Act defines "point source" as:"...any discernible, confined and discrete conveyance, including but not limited to any pipe, <u>ditch</u>, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

A point source cannot simultaneously be a WOTUS. Regardless, under the statutory definition, rural ditches are non-point source conveyances because they, in many cases, will transport agricultural runoff from uplands.

KDHE will prevent someone dumping pollutants into a ditch for downstream transport during the next runoff event, as state authority precludes that discharge of "sewage" being delivered to a water of the state:

**65-164.** Sewage; definition; complaints, investigations, orders; administrative review. (a) No person, company, corporation, institution or municipality shall place or permit to be placed or discharge or permit to flow into any of the waters of the state any sewage, except as hereinafter provided. This act shall not prevent the discharge of sewage from any public sewer system owned and maintained by a municipality or sewerage company, if such sewer system was in operation and was discharging sewage into the waters of the state on March 20, 1907, but this exception shall not permit the discharge of sewage from any sewer system that has been extended subsequent to such date, nor shall it permit the discharge of any sewage which, upon investigation by the secretary of health and environment as hereinafter provided, is found to be polluting the waters of the state in a manner prejudicial to the health of the inhabitants thereof.

(b) For the purposes of this act, "sewage" means any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry.

KDHE will note that this position of excluding ditches does not apply to stream alterations, i.e., straightening of natural channels. In those cases, the stream channel itself is a WOTUS and any ditching would be subject to Section 404 permitting as well as State law governing stream channel changes. Because of frequent connection during higher flows, we would also view the original tributary channel, e.g., oxbows and meanders, as WOTUS. Additionally, many managed wetlands in Kansas, which we view as Federally jurisdictional waters, utilize ditches to move water among marshes and wetland cells. The ditches within those wetland complexes are viewed as part and parcel of the complex of wetland areas and should be viewed as WOTUS.

All other ditches are locally managed or privately held conveyances which should not be subject to Federal oversight as WOTUS or point sources. In most cases, the water that is conveyed by these ditches, e.g., irrigation return flows, rural and agricultural runoff, is exempt from CWA regulation. Ditches conveying wastewater or stormwater regulated by a NPDES permit are treated as part of the permitted conveyance and outfall delivering those wastewaters to a receiving stream. Intersection of a new ditch with a jurisdictional river or reservoir may trigger permitting such as 404, but the point of emphasis would be mitigating impacts to the river or reservoir, not the ditch itself.

## 7. Adjacency

The NWPR required a hydrologic surface connection to consider a wetland adjacent to a WOTUS as jurisdictionally a WOTUS itself. KDHE has viewed wetlands separated from streams or reservoirs by berms as connected because the typical supply of water for the wetland comes from occasional inundation from the stream or backwater of the reservoir. There are managed wetlands that have historically been connected to streams but now have a water control gate at their inlet. We have not viewed the presence of that gate as severing the connection with other jurisdictional waters, thereby threatening the status of the wetland as WOTUS.

Many remaining wetlands in Kansas are riparian wetlands abutting along stream courses. Over 99% of the land in Kansas is held in private hands and the bed and banks of most streams in Kansas are considered private. Regardless of how adjacency is defined, there will likely be friction and conflicts between the Federal agencies and private landowners over activities impacting those privately held, adjacent wetlands.

This will occur under Section 404 permitting reviews, since KDHE effectively prohibits 402 permitted discharges into natural wetlands. Since many of these activities will be rural in nature, reconciling what would be considered normal agricultural operations remains a task for the Federal agencies to sort. KDHE cannot recall a Section 404 public notice for agricultural impacts to wetlands, since most agricultural activities are covered by Nationwide Permits. KDHE would request the Federal agencies coordinate with the Kansas Department of Agriculture to confirm the "normal and ongoing farming, silviculture and ranching activities" exempt from 404 permitting under Section 404(f)(1).

In Kansas, isolated wetlands such as playas, have not been considered WOTUS, through Supreme Court rulings and Federal agency treatment of such wetlands. Nonetheless, there have been strong local conservation efforts to protect and manage playas for environmental benefits. The Playa Lakes Joint Venture (playasworkforkansas.com) has supported education, management and conservation endeavors successfully for western Kansas playas. These efforts have been undertaken despite the lack of Federal jurisdiction under WOTUS.

## 8. Exclusions

As a rural state, KDHE views exemption of normal farming practices from considerations regarding WOTUS and Section 404 permitting as essential. The exceptions from Section 404 permitting outlined in 33 U.S.C. 1344(f) and 33 U.S.C. 323.4 should be carried forward into any definition of WOTUS. Specific identification of soil and water conservation practices as exempt from WOTUS definition should be made. Best management practices such as stormwater runoff detention ponds, do not constitute WOTUS. Similarly, waste treatment systems should not be considered WOTUS. Private waters, especially farm and stock ponds, should continue to be excluded from consideration. Off-channel neighborhood association impoundments, many of which serve as stormwater control, should be similarly excluded.

Finally, consistent with the intent and context of the Clean Water Act, ground water is not a WOTUS. Ground water protection and management remains a state and local responsibility.

In summary, KDHE has robust state authorities to buttress Federal jurisdiction in protecting the water quality of the waters of the state. Defining WOTUS sets the boundary where Federal authority can hand off to state powers to protect certain waters of a more local nature. Our hope for a durable definition of WOTUS is that it not over task Clean Water Act programs administered by KDHE. We stand ready to help the Federal agencies in finding that appropriate balance in defining and delineating the jurisdiction of surface waters in the state.

Sincerely,

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Lee A. Norman, M.D. Secretary Kansas Department of Health and Environment

cc: Leo Henning, DOE, KDHE Earl Lewis, DWR Mike Beam, KDA Connie Owen, KWO Brad Loveless, KDWP