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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING



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DIRECTOR

October 1, 2021

VIA E-MAIL

Docket ID No. EPA-HQ-OW-2021-0328
Administrator Michael S. Regan
William Jefferson Clinton Building
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Regan:

SUBJECT: State of Michigan Comments on the U.S. Environmental Protection Agency's Notice of Public Meetings Regarding "Waters of the United States;" Establishment of a Public Docket; Request for Recommendations

This letter regards the U.S. Environmental Protection Agency's (U.S. EPA's) request for recommendations on the definition of "Waters of the United States" (WOTUS) published in the Federal Register on August 4, 2021.

Michigan has been a leader in protecting water resources for almost 50 years and has efficient and effective programs focused on resource protection. As one of only three states to administer both Sections 402 and 404 of the federal Clean Water Act (CWA), the State of Michigan appreciates the opportunity to provide input, and supports the U.S. EPA being guided by the principal objectives of the federal CWA, considerations of sound science and practical implementation, and meaningful engagement with states and tribes and other stakeholders.

Clean water is a critical issue to the State of Michigan. Federal protection of clean water is extremely important to Michigan and the Great Lakes, as inaction by other states and inadequate protections at the federal level could have significant impacts on Michigan waters. Michigan's public health and economy, including tourism, agriculture, and major industries, is dependent on the Great Lakes and clean water. The Michigan Department of Environment, Great Lakes, and Energy (EGLE), Water Resources Division, offers the following comments on the topics for consideration listed in the Federal Register notice.

Implementation

EGLE supports a return to the longstanding framework that has been used in the CWA programs and encourages the U.S. EPA to use the guidance "*Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*" as the framework for new rules.

Regional, State, and Tribal Interests

Michigan's water quality depends on adequate protection being implemented in other Great Lakes States. Any new rule should provide adequate protections for the lakes, streams, and wetlands that provide water quality benefits to traditional navigable waters, including the Great Lakes.

A large component of wetlands that have been regulated for decades under WOTUS (approximately 50 percent) were unregulated at the federal level by the Navigable Waters Protection Rule (NWPR). These wetlands intercept pollutants and sediment from reaching streams and the Great Lakes, as well as store flood waters, provide groundwater recharge, and maintain stream baseflow. These wetlands also provide critical wildlife habitat and are havens of biological productivity. Consistent regulation throughout the Great Lakes region is critical to ensure protection of Michigan's water resources, fisheries, and wildlife, and on public health and well-being of Michigan residents.

Ephemeral headwater streams (estimated between 20 to 60 percent of streams in some other Great Lakes states) provide nursery areas for fish and other aquatic organisms, as well as flood prevention and mitigation, that benefit the Great Lakes, and should be included in the definition of WOTUS.

Any proposed rule should maintain "interstate waters" as a category of WOTUS that are regulated, because activities in neighboring states have impacts on downstream waters of other states.

Opportunities for regionalization are discussed below.

Science

Any WOTUS rule should reflect current scientific knowledge of the connectivity of headwater and upstream waters to downstream areas, including the "*Connectivity of Streams and Wetlands To Downstream Waters: A Review and Synthesis of the Scientific Evidence*" Report (Connectivity Report). Connectivity is important to both the 402 and 404 programs. Under 404, consideration of the connectivity of all streams and associated wetlands and open waters is integral to meeting the objectives of the program. Regarding 402, scientifically addressing connectivity will help ensure that the National Pollutant Discharge Elimination System (NPDES) is applicable to all discharges that impact surface waters.

Environmental Justice Interests

Many Environmental Justice communities are located in watersheds which have experienced significant loss of wetlands and streams, resulting in cumulative effects on health and the environment, and persistent disparities. Especially in these communities, it is important to protect the remaining wetlands, lakes, and streams within the watershed, and stop the continued degradation of these communities. In areas with significant functional loss, the definition of WOTUS should include consideration of historical connectivity and ensure protection of the remaining fragmented wetlands and streams on the landscape.

Climate Implications

Consistent application of water resource protection across the country is critical in addressing climate change and economic development pressure on states. Michigan is blessed with abundant water resources; however, it was apparent during the recent rules processes that other, perhaps drier, states have different concerns than states like Michigan. To address this, Michigan recommends that the U.S. EPA seriously consider a definition that allows for regional variances based on climate, geology, and other factors instead of finalizing a rule that does not provide adequate federal protections.

The Scope of Jurisdictional Tributaries

Tributary streams, including perennial, intermittent, and ephemeral streams should all be included in the definition of WOTUS and identified using physical characteristics. The Connectivity Report clearly demonstrates that “*streams, individually or cumulatively, exert a strong influence on the character and functioning of downstream waters. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers.*” The new rule should allow regionalization, through regional technical guidance, of physical characteristics that should inform tributary determinations, such as indicators of channelization or indicators of ordinary high-water mark without reference to flow regime.

Scope of Jurisdictional Ditches

EGLE supports the way that the exclusion language for ditches is described in the NWPR; in that ditches that are tributaries or that were constructed in jurisdictional wetlands are not excluded.

Administrator Michael S. Regan

Page 4

October 1, 2021

Scope of Adjacency

EGLE recommends that any new rule reflect the U.S. Supreme Court Decisions in Riverside Bayview and Rapanos/Carabell and avoid numerical standards where possible. Furthermore, new rule language should be clear enough to be consistently applied by environmental professionals. The Rapanos guidance should be used as a guide for proposed rules. Nonadjacent wetlands that have a significant nexus to downstream waters should be included. Regionalization, through regional technical guidance, of categories of wetlands that have a significant nexus or clarifications of factors that should be used in case-specific significant nexus determinations should be allowed by the new rules.

Exclusions from the Definition

EGLE recommends that a revised definition of WOTUS avoid expanding the list of exclusions found in previous rules. Furthermore, EGLE supports retaining the long-standing exclusions that have been used in the CWA programs, as well as keeping existing language from previous rules where possible to minimize new concerns being raised. Prior converted cropland should be treated consistent with program implementation prior to 2020. Regionalization of the exclusions does not seem necessary.

Thank you for the opportunity to comment on the U.S. EPA's request for pre-proposal feedback on the definition of WOTUS. EGLE strongly supports the U.S. EPA's efforts to provide a rule that is supported by the provisions of the CWA and ensures consistent and predictable regulation of waters throughout the United States.

If you have questions regarding this matter, please contact me at 517-331-7966; LoundsA@Michigan.gov; or EGLE, P.O. Box 30458, Lansing, Michigan 48909-7958.

Sincerely,



Amy Lounds, Manager
Field Operations Support Section
Water Resources Division

cc: Ms. Teresa Seidel, EGLE
Mr. Phil Argiroff, EGLE
Mr. Jerrod Sanders, EGLE
Ms. Anne Garwood, EGLE