RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF WATER RESOURCES
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October 1, 2021

Via E-Mail to Agencies

Vance F. Stewart III, Acting Principal Deputy
Office of the Asst Secretary of the Army for Civil Works
Department of the Army
and
John Goodin, Director
Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency

Re: Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations; **Docket ID No. EPA-HQ-OW-2021-0328** and Federalism Consultation with Co-Regulators

Dear Messrs. Stewart & Goodin:

The State of Rhode Island Department of Environmental Management's ("RIDEM") Office of Water Resources (OWR) appreciates the opportunity to submit comments concerning the EPA's Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations (herein, "the docket"). We are also grateful for the extension of the Federalism Consultation Comment Period with respect to the docket, as communicated to RIDEM through the EPA's Office of Congressional and Intergovernmental Relations in their letter dated August 13, 2021.

RIDEM, through the OWR, is responsible for administering programs under the Clean Water Act ("CWA"). RIDEM currently has strong water protection programs in place and has regulatory authority over State waters that is more stringent than the current definition of Waters of the United States (WOTUS) and the 2020 Navigable Waters Protection Rule (NWPR), including protection of completely isolated freshwater wetlands (that have no surface or clear groundwater connection to other federal waters) as well as buffers for many wetlands, ponds and watercourses. State jurisdictional waters also include protection of certain ephemeral features.

As a result of our State's strong water quality protection programs, changes in the definition of WOTUS within the NWPR did not have an immediate impact on Rhode Island's ability to protect water quality. Nevertheless, RIDEM recognizes the potential indirect and long-term impacts that the federal definition of WOTUS and NWPR may have on the State's ability to implement its water quality protection program. Changes in the definition and implementation of WOTUS have the potential to affect the State's regulatory coordination with the U.S. Army Corps of Engineers, the ability of the State to administer delegated sections of the Clean Water Act that rely on the definition of WOTUS, and coordination with neighboring states which may have differing levels of state-level water quality protection.

Recognizing these potential impacts, RIDEM believes that the recent remand and vacatur of the 2020 NWPR by the U.S. District Court for the District of Arizona and a return to the pre-2015 WOTUS regulations, as also affirmed by EPA's resulting decision to halt implementation of the 2020 NWPR, is a positive interim outcome. During the upcoming rulemaking processes, RIDEM encourages the EPA to develop a comprehensive, consensus driven and evidence-based definition and implementation of WOTUS at the federal level and offers the following feedback as requested in the docket:

1. **Implementation:** As previously mentioned, Rhode Island has long had regulatory authority that is more stringent than both the NWPR and the pre-2015 definition of WOTUS, and therefore RIDEM has not faced any regulatory impact as a result of the changes. The Rhode Island Rules and Regulations Governing the Administration and Enforcement of the Fresh Water Wetlands Act (Freshwater Wetland Rules) (250-RICR-150-15-1) provide protection for isolated wetlands with no surface or groundwater connection to other regulated waters (such as bogs, fens, and vernal pools), floodplains, and areas subject to storm flowage (analogous to ephemeral streams) and buffer areas for many wetlands, ponds, and rivers.

   RIDEM has been somewhat impacted by the WOTUS definition changes in our coordination with the U.S. Army Corps of Engineers (Corps) to issue permits for projects under the RI General Permit. Prior to the 2020 NWPR, any differences between State-recognized waters and WOTUS were inconsequential with respect to co-regulation of such waters. This allowed for consistency of regulatory oversight and decisions, and a predictable process for the regulated public.

   The new and vast differences in State-regulated waters and WOTUS that were caused with the implementation of the 2020 NWPR have increased uncertainties for the regulated public in determining whether a proposed project would trigger Federal review authority. For better or worse, most of the regulated public in Rhode Island does not understand that there are in fact differences in the scope of regulatory authority between Federal agencies and their State partners. With the reduction of the scope of jurisdictional authority engendered in the 2020 NWPR, it would be a natural, but inaccurate, assumption on the part of the regulated public that such reductions would also take effect at the State level. When informed that this is not the case, the burden often falls on State staff to explain why a project that no longer requires permitting at the Federal level must still receive permits at the State level. Pressure from stakeholder groups with an interest in reducing the regulatory oversight of the State to align with the new reduced regulatory scope over WOTUS, with corresponding reductions in the ability of the State to protect its water resources, is a concern.

   New terms used to identify jurisdictional waters under the NWPR, including "Typical Year" and "Adjacent" are unclear and are difficult to use to designate a watercourse as "intermittent" or classify it as a "tributary". It is our opinion that the only reliable way to identify the existence and nature of hydrology as a means to establish jurisdiction is through review of aerial photographs of multiple years combined with on-site verification of the existence of hydrological indicators. It has been our experience that the "significant nexus" test outlined in previous EPA and ACOE guidance resulted in jurisdictional determinations that were consistent with those of the State.

2. **Regional, State and Tribal Interests:** As previously noted, the State enjoys strong regulatory protections for all waters, and therefore did not need to take any additional steps to protect waters or wetlands that were no longer covered under the 2020 NWPR. Since, however, the State does not have the resources to verify or differentiate WOTUS jurisdictional status using the tools and definitions of the 2020 NWPR for the purposes of implementing the RI General Permit issued by the ACOE, we have taken the approach of considering all waters and wetlands to be jurisdictional unless proven otherwise by the applicant or determined otherwise by the ACOE. If this coordination becomes too inefficient for the agencies as a result of difficulties or disparities in determining jurisdiction, the State will consider taking steps to end its participation in the General Permit process, leaving applicants in the position of having to apply to two separate agencies for any permit affecting both State and Federal waters. This would undermine the streamlining efforts our agencies have been able to implement for the benefit of applicants over the last two decades.

3. **Science:** Rhode Island believes that EPA's 2015 Report, *"Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"* is the definitive document identifying current scientific thought and literature documenting the connectivity of all waters, with clear evidence of how pollutants may travel among and between different waters, supporting their protection at the Federal level under the Clean Water Act. It is likely that additional studies since 2015 have further explored these connections, but we are not able to provide specific citations at this time.

4. **Climate Implications:** In Rhode Island, climate change is expected to result in warmer air and water temperatures, more extreme weather events such as droughts, intense precipitation and flooding, increasing rates of sea level rise, shorter winters and longer summers, and less snowfall. Many of these changes have the potential to impact the State's wetlands and waters by causing loss of coastal wetlands, conversion of perennial wetlands to intermittent or ephemeral wetlands (or vice versa), and conversion of freshwater wetlands to saltwater or brackish wetlands, among others.

   Climate change impacts across the country will vary according to each state's current and expected future climate, topography, geology, land use, and type and distribution of wetlands/waters. To adequately address the potential varying impacts of climate change on water resources at a federal level, a strategy that allows for adaptation and flexibility is necessary. To achieve this, RIDEM recommends including buffer zones and ephemeral streams as jurisdictional under the NWPR.

   Protecting buffers allows for wetland migration and provides protection from flooding, storm surge, and sea level rise associated with climate change. Buffers also protect water quality, prevent erosion, and provide habitat. RIDEM's current Freshwater Wetland Rules include jurisdictional buffers ranging from 50 to 200 feet for ponds, rivers, and wetlands of a certain size (referred to as perimeter and riverbank wetlands). RIDEM recently revised its Freshwater Wetland Rules, which go into effect on January 15, 2022, that expand the State's jurisdiction to include buffers for all regulated wetlands regardless of size. The width of a buffer zone is determined by wetland characteristics, watershed protection needs and existing land use, resulting in a framework of tiered buffer protection ranging from 25 feet to 200 feet. RIDEM recommends that the EPA consider adopting similar buffer standards for WOTUS to promote resiliency for freshwater wetlands that may experience changes as a result of climate change.

   Ephemeral streams provide many ecosystem functions including nutrient and sediment retention and transport, downstream flow augmentation, groundwater recharge, habitat connectivity, and floodwater conveyance and storage; however ephemeral streams are not considered jurisdictional under the 2020 NWPR. As the nation's waterways face increasing climate change impacts including drought and flooding, protecting ephemeral streams and the functions they provide will become imperative to maintaining clean and flowing downstream waters. Climate change may cause streams that are currently considered perennial or intermittent (and are therefore afforded federal protection as WOTUS) to transition to ephemeral streams, thus losing their jurisdictional status and protection, and effectively reducing federal protection of the quality of the nation's waterways.

   RIDEM regulates ephemeral streams that lead into, out of, or pass through other freshwater or coastal wetlands as "Areas Subject to Storm Flowage" under the Freshwater Wetland Rules, meaning that a permit is required to alter them. Protection of these resources is tied to a clear hydrological connection to other waters of the state, so that we are not regulating simple stormwater conveyance channels or farm ditches that otherwise have no connection to downstream waters and

are less likely to convey pollutants to downstream or adjacent waters. We recommend a similar approach to regulating ephemeral streams under the NWPR, as further described below in Item #5.

5. **The Scope of Jurisdictional Tributaries:** As mentioned above, RIDEM regulates certain ephemeral streams as "Areas Subject to Storm Flowage" or "ASSF" under the Freshwater Wetland Rules. ASSF's are defined in the Freshwater Wetland Rules as "drainage swales and channels that lead into, out of, pass through or connect other freshwater wetlands or coastal wetlands, and that carry flows resulting from storm events, but may remain relatively dry at other times." Including ASSF's as jurisdictional wetlands ensures that they cannot be altered without a permit from the State. When reviewing permit applications, RIDEM considers the impact of the proposed project on the functions and values that the wetland(s) provides. As a result, ASSF's would be evaluated in terms of impacts to flood storage or nutrient retention, for example, and not in terms of impact to wildlife habitat. We recommend that the EPA and ACOE take a similar approach to including ephemeral streams as jurisdictional WOTUS, by considering the connectivity of these waters to other jurisdictional wetlands and evaluating the proposed project in terms of impact to the appropriate functions/values.

6. **The Scope of Jurisdictional Ditches:** The distinction between jurisdictional and non-jurisdictional ditches under the 2020 NWPR is not clear. Ditches are defined in the 2020 NWPR as a "constructed or excavated channel used to convey water." This definition is broad enough to include large features, such as a canal, as well as smaller features such as stormwater channels and farm drainage ditches, each of which serve different purposes and can have varying impacts on water quality. We recommend that EPA define and regulate these various types of ditches or man-made channels according to their hydrologic connectivity to other jurisdictional waters. If a ditch is ephemerally, intermittently, or perennially hydrologically connected to another jurisdictional water, the ditch should be considered jurisdictional because it has the potential to affect water quality of downstream waters.

   Furthermore, RIDEM recommends that the EPA replace the term "ditch" with "conveyance channel" or some similar, appropriate term. The term "ditch" has a negative connotation, and it is not immediately clear as to what type of water feature the term refers to. EPA may also further want to define specific types of ditches, such as canals, if they are to be considered jurisdictional as "(a)(1)" waters under all circumstances, to avoid confusion. EPA should also consider updating the language to specifically exclude types of ditches that will never be considered jurisdictional, similarly to the language used in the 2015 Clean Water Rule, such as specifically excluding "ditches that do not flow, either directly or through another water…".

7. **The Scope of Adjacency:** The definition of "adjacent" under the 2020 NWPR requires that a wetland have a direct hydrologic surface connection in a "typical year" to an (a)(1)-(3) water to be considered jurisdictional. Even without surface water connections, nearby waters and wetlands that are separated from jurisdictional WOTUS by a berm or other narrow upland isthmus may still exert influence on water quality through groundwater connections. Protecting water quality will not be successful if such connected wetlands are not considered jurisdictional. A clearer method of determining adjacency and jurisdiction is needed for both protection and predictability.

   RIDEM recommends using a similar standard for "adjacent" as was used in the 2015 Clean Water Rule, which defines an adjacent water as one that is "bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like." The 2015 Clean Water Rule then goes on to define the term "neighboring" for the purposes of determining adjacency. The 2015 adjacency definition both acknowledges the importance that nearby waterways can have on water quality

(through surface or groundwater connection) and provides the specificity needed to appropriately determine whether a waterbody is considered "adjacent" and therefore jurisdictional.

8. **Exclusions from the Definitions:** For many years, RI DEM has struggled with the identification certain "waters" where they may have met a regulatory definition of waters or wetlands but were clearly present only due to artificially manipulated hydrological conditions. Some such areas (e.g. stormwater treatment systems) were typically, if unofficially, excluded from regulation as wetlands or waters of the State. Recent changes to our Rules have incorporated specific exclusions of some waters from jurisdiction in order to provide clear guidance to applicants on what types of waters were not considered jurisdictional. Many of the "waters" included on this exclusion list are in fact consistent with the list of exclusions provided in the 2020 NWPR.
That being said, as is made clear here RI DEM feels that the 2020 NWPR erroneously reduced or eliminated protections for waters that should in fact be considered jurisdictional in order to adequately protect the water quality of the Nation's waters, such as with the removal of jurisdictional protections for ephemeral streams. As also discussed above, further clarification and clear direction with respect to "ditches" is necessary, in order to ensure that such water channels that direct flows into or out of, through, or connect other jurisdictional waters, are themselves considered jurisdictional waters under the "significant nexus" paradigm.

Additionally, Rhode Island considers most artificial lakes and ponds to be jurisdictional as Waters of the State. While we understand that many such waters would not be appropriate to regulate at the Federal level insofar as they may be completely isolated from other jurisdictional waters, many such ponds do include channels flowing into or out of other jurisdictional waters and should then themselves be considered jurisdictional due to their "significant nexus" to such waters.

In conclusion

RIDEM appreciates and supports the efforts of EPA and the Corps to revise the definition of "Waters of the United States" and to pursue rulemaking processes that will restore and build upon the pre-2015 regulatory foundation. Given the rapidly changing regulatory climate surrounding the protection of the Nation's waters, RIDEM recommends the agencies skip Step 1 and instead focus the limited time and resources on Step 2. Given the remand and vacatur of the 2020 NWPR resulting from the decision of the U.S. District Court in the District of Arizona, the first step in this two-step process provides no additional environmental protection, is arguably unnecessary, and serves to delay the decision-making needed to provide additional protection until Step 2. The agencies focus on Step 2 will allow coregulators and the agencies additional time to ensure robust cooperative federalism and allow the agencies and states ample time to properly implement the rule.

Rhode Island values clean water, and our extensive regulatory programs reflect that. We also value a strong federal water quality protection program to support our efforts and to ensure that our interstate waters are thoroughly protected. The 2020 NWPR reduced the jurisdictional scope of WOTUS, removing federal protection of many of the nation's waters and we therefore believe the recent remand and vacatur of the 2020 NWPR was a positive interim outcome. The State urges the EPA and the Corps to consider previous relevant Supreme Court decisions, the comments of State and Tribe co-regulators, and the most recent peer-reviewed science throughout the revision of WOTUS and the associated rulemaking processes.

Thank you for the opportunity to comment on the EPA's Notice of Public Meetings Regarding "Waters of the United States"; Establishment of a Public Docket; Request for Recommendations and for your consideration of these comments.

Please do not hesitate to contact me at (401) 222-6820, ext. 2777402 or chuck.horbert@dem.ri.gov with questions.

Sincerely,

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