



September 29, 2014

Gina McCarthy  
Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

John M. McHugh  
Secretary of the Army  
101 Army Pentagon  
Washington, DC 20310-0101

Re: Proposed Rule to Define “Waters of the United States,”  
Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Secretary McHugh:

We, the Waters Advocacy Coalition (WAC or Coalition),<sup>1</sup> write to raise serious concerns with the rulemaking process associated with the proposed rule to define “waters of the United States” under the Clean Water Act (CWA), 79 Fed. Reg. 22,188 (Apr. 21, 2014). The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (the Agencies) are thwarting important requirements of the Administrative Procedure Act (APA) and frustrating the public’s opportunity for meaningful notice and comment by repeatedly issuing and revising, outside of the APA process, *ad hoc* explanations and other documents critical to the rule.

Within the last month alone, outside of the rulemaking process and just one month before comments are due, the Agencies have released the following:

- A series of agency blog posts that provide new interpretations of the proposed rule’s language;
- New Corps reports that detail national challenges with defining the term “ordinary high water mark,” the most critical term for defining “tributary” under the proposed rule;
- Science Advisory Board comments pointing out problems with the Connectivity Report and the rule;
- USGS maps that depict perennial, intermittent, and ephemeral waters across the nation; and
- A late invitation for select small business entities to attend a meeting with the Agencies on the proposed rule.

---

<sup>1</sup> WAC is a coalition representing the nation’s construction, real estate, mining, agriculture, transportation, forestry, manufacturing, and energy sectors, as well as wildlife conservation and recreation interests. *See* Attached List of WAC Members.



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 2

The APA does not allow the Agencies to keep altering the regulatory landscape throughout the rulemaking process. Indeed, the public cannot be expected to provide meaningful comment on a moving target. As such, we call on the Agencies to immediately withdraw the proposed rule for the following important reasons:

**1. The Agencies Continue To Issue New Materials Explaining the Proposed Rule Throughout the Comment Period, Creating a Moving Target for Public Comment.**

Since the proposed rule was issued on April 21, 2014, the Agencies have continued to issue new documents, blog posts, Q&A documents, and webinars, offering new explanations of key terms in the proposed rule and new reasoning to support the proposed assertions of CWA jurisdiction. Much of this *ad hoc* information is inconsistent with material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the Agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses.

For example, the term “upland” is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded from the definition of “waters of the United States” under the proposed rule. In stakeholder discussions throughout the comment period, the Agencies have acknowledged that they have not proposed a definition of “upland.” Now, a recent Q&A document, issued by the Agencies on September 9, 2014, provides a new definition of “upland:” “Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.”<sup>2</sup> This new definition of “upland” is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? Is the public responsible for tracking the Agencies’ blog posts and *ad hoc* statements to piece together the meaning of key regulatory terms?<sup>3</sup>

---

<sup>2</sup> EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at 5 (Sept. 9, 2014), [http://www2.epa.gov/sites/production/files/2014-09/documents/q\\_a\\_wotus.pdf](http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf) (hereinafter, Sept. Q&A document).

<sup>3</sup> Likewise, although the preamble defines “perennial flow” in terms of the *presence* of water (“water that is present in a tributary year round when rainfall is normal or above normal”), 79 Fed. Reg. at 22,203, the Sept. Q&A document focuses on *flow* (“flow[s] year-round”). Neither of these definitions provides the necessary clarity on “perennial” flow. And the conflicting information from the Agencies renders it impossible for the public to meaningfully comment.



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 3

Similarly, the EPA-prepared economic impact analysis located in the rulemaking docket estimates that “the proposed rule increases overall jurisdiction under the CWA by 2.7%.”<sup>4</sup> Now, in the Sept. Q&A document, the Agencies back away from that estimate, and instead refer to a completely different calculation, claiming, “When the proposed rule is compared to the agencies’ existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA . . .”<sup>5</sup> Worse still, at other times the Agencies have relied on multiple other baselines in their outreach,<sup>6</sup> again creating a moving target for commenters. How is the public to comment on the implications of the proposed rule if the Agencies keep changing the point of reference to avoid addressing direct concerns? If the Agencies are disregarding the EPA Economic Analysis in the rulemaking docket, should the public do the same? Again, how is the public to comment?

In addition to releasing new information, the Agencies continue to revise and remove previous blog posts and statements released throughout the comment period. On June 30, 2014, EPA released a blog post by Nancy Stoner and an accompanying Q&A document.<sup>7</sup> Now, without any indication or notice that the June 30 Q&A has been revised, the Stoner blog post links to a different Q&A document in which some of the previous information has been removed and many of the responses have been revised. For example, under the heading “The proposed rule does NOT mean that previous decisions about jurisdiction will have to be revisited,” the June 30 Q&A document provided, “Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations.” This entire section, including the statement about existing jurisdictional determinations, has now vanished in the revised Q&A document. Have the Agencies changed their position on revisiting previous determinations? How is the public to rely on these Q&A documents when their content is only temporary? As another example, in discussing “ordinary high water mark” (OHWM), the June 30 Q&A document provided, “*Features that flow extremely rarely would not exhibit these characteristics* and would not be jurisdictional.” (emphasis added). Now, the document has been revised to state, “*Water features that don’t flow frequently enough or with enough volume to exhibit these characteristics would not be jurisdictional.*” (emphasis added). Not only are these sentences not accurate, but the meanings are different. Again, the Agencies are changing their

---

<sup>4</sup> EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 12 (March 2014), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003>.

<sup>5</sup> Sept. Q&A at 3.

<sup>6</sup> See, e.g., Remarks of Gina McCarthy at Agricultural Business Council of Kansas City on Clean Water Proposal (July 10, 2014), available at <http://go.usa.gov/Xmrvh> (“EPA feels confident that, under this proposal, fewer waters will be jurisdictional than under President Reagan.”); Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014) (“[T]he rule protects fewer waters than prior to the Supreme Court cases.”).

<sup>7</sup> <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/> (June 30, 2014).



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 4

story without explanation or notice. Have the Agencies changed their position on OHWM? How is the public to comment when the Agencies keep revising their stance on important issues without notice?

## **2. Without Public Notice or Opportunity for Comment, the Agencies Are Developing Policies on Key Components of the Proposed Rule, Such as Ordinary High Water Mark.**

In August 2014, the Corps Engineer and Research Development Center (ERDC) released two new guidance documents regarding OHWM: (1) A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States, and (2) A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification.<sup>8</sup> OHWM is the lynchpin concept of the proposed rule's "tributary" definition, but the meaning of this key term is still in flux.

Separate from the proposed rulemaking, the Agencies are redefining OHWM without the required public notice and comment. The preamble asserts that the 33 C.F.R. § 328.3(e) definition of OHWM "is not changed by [the] proposed rule."<sup>9</sup> Yet, the two August 2014 OHWM guidance documents indicate that the Agencies are developing a new OHWM standard. These guidance documents essentially ignore the regulatory definition at § 328.3(e) and create a new method for determining OHWM based on the delineation of an "active channel signature" through the use of three primary indicators—topographic break in slope, change in sediment characteristics, and change in vegetation characteristics. In effect, other physical indicators explicitly referenced in § 328.3(e) are superfluous under this new methodology. This is a clear change in regulatory practice and will have a substantial effect on how CWA jurisdiction is interpreted. Any efforts to redefine OHWM, a key term in the Agencies' proposed "waters of the United States" definition, should be part of this rulemaking. The Agencies may not segment key components of the proposed "waters of the United States" definition and address them separately to avoid APA notice-and-comment requirements.

---

<sup>8</sup> Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036027> (hereinafter, Western Mountains OHWM Guidance); Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036026> (hereinafter, National OHWM Review).

<sup>9</sup> 79 Fed. Reg. at 22,202.



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 5

Moreover, a review of the OHWM guidance documents issued by the Corps demonstrates that, contrary to the Agencies' statements in the context of the "waters of the United States" rule, determination of the OHWM is anything but simple or clear. In various blog posts, stakeholder calls, and statements released by the Agencies during the comment period, the Agencies have touted the OHWM as "well-known" and "easy to observe and document."<sup>10</sup> But the recent Corps statements and publications paint a different picture. In March 2014, the Corps recognized that OHWM is a "vague definition," leading to "inconsistent interpretation of [the] OHWM concept," and "inconsistent field indicators and delineation practices."<sup>11</sup> Likewise, the Corps' Western Mountains OHWM Guidance states that "OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging" and notes that "it is often difficult to determine what constitutes ordinary high water and to interpret the physical and biological indicators established and maintained by ordinary high water flows."<sup>12</sup> For these reasons, the Corps' National OHWM Review recognizes the "need for nationally consistent and defensible regulatory practices" and suggests that "a comprehensive framework is needed."<sup>13</sup>

In light of the confusion surrounding OHWM definition, it is difficult to understand why the Agencies would rely on OHWM as a determinative measure of CWA jurisdiction over tributaries.<sup>14</sup> Indeed, the Science Advisory Board (SAB) panel questioned the proposed rule's use of OHWM as part of the "tributary" definition, and panel members were "concerned about the definition of tributary being anchored in something as regionally variable" as the OHWM concept.<sup>15</sup> There is a serious disconnect between the Agencies' statements that the OHWM is easy to determine and the Corps' guidance documents and recent statements to the contrary. These mixed messages from the Agencies make it difficult for the public to provide meaningful comment on the proposed rule.

---

<sup>10</sup> See, e.g., Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), <http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/>.

<sup>11</sup> Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of National OHWM Delineation Technical Guidance (March 4, 2014),

<sup>12</sup> Corps Western Mountains OHWM Guidance at 1-2.

<sup>13</sup> National OHWM Review at 1-2.

<sup>14</sup> These concerns are not new. In *Rapanos*, Justice Kennedy criticized the Agencies' use of OHWM to determine whether tributaries are jurisdictional, because he was concerned that such a standard was overbroad and would leave room for the Agencies to assert jurisdiction over waters that do not have a significant nexus to traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 781-82 (2006) (Kennedy, J., concurring).

<sup>15</sup> See Bridget DiCosmo, InsideEPA.com, EPA Appears to Reject SAB Calls to Clarify Controversial "Waters" Proposal (Aug. 22, 2014).



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 6

### **3. The Science Advisory Board Has Raised Concerns with Significant Components of the Proposed Rule, and EPA Has Not Released a Final Connectivity Report.**

We reiterate our concern, raised in the Coalition's May 13, 2014, letter, with the Agencies' preparation of a draft rule before the foundational science, the "Connectivity Report," is peer-reviewed and final. The SAB panel has recommended significant changes to the Connectivity Report and, if EPA intends to be responsive to those concerns, the final Connectivity Report will substantially differ from the draft that has been made available to the public. To comply with the APA, the Agencies must allow the public the opportunity to comment on the final report.

Moreover, on September 2, 2014, the SAB panel released comments on the adequacy of the scientific and technical basis of the proposed rule.<sup>16</sup> The SAB panel members raised a number of serious concerns about the proposed rule's definitions and categories of regulation. For example, "Panel members generally found that the term 'significant nexus' was poorly defined . . . and that the use of the term 'significant' was vague."<sup>17</sup> Panel members also questioned the adequacy of scientific support for several of the rule's definitions and exclusions. For instance, "Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included."<sup>18</sup> And, as recently as September 26, 2014, a member of the chartered SAB questioned why neither the Connectivity Report nor the SAB review assessed the level of importance of connectivity. He stated, "EPA scientists should consider *where* along the connectivity gradient there is an impact of sufficient magnitude to impact downstream waters," and noted that, although there is a continuum, scientists are depended upon to make determinations of significant or critical effects.<sup>19</sup> Substantial changes to the proposed rule and the Connectivity Report are needed to address these important concerns raised by the SAB. The public must be given the opportunity to review and comment on any such revisions.

---

<sup>16</sup> Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled "definition of 'waters of the United States' under the Clean Water Act," (Sept. 2, 2014), [http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/\\$File/Rodewald\\_Memorandum\\_WOUS+Rule\\_9\\_2\\_14.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf) (hereinafter, SAB Panel Comments on Proposed Rule).

<sup>17</sup> SAB Comments on Proposed Rule at 6.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> U.S. EPA Science Advisory Board Quality Review Teleconference (Sept. 26, 2014) (Statements of Dr. Michael Dourson).



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 7

#### **4. The USGS Maps Recently Released by Rep. Smith Depict Only a Portion of the Land and Waters Subject to Federal CWA Jurisdiction Under the Proposed Rule.**

During the comment period, there has been significant discussion over EPA maps that rely on data from the U.S. Geological Survey (USGS) and appear to depict the scope of CWA jurisdiction.<sup>20</sup> The Coalition commends Rep. Lamar Smith and the U.S. House of Representatives Committee on Science, Space, and Technology, for making these maps publicly available and requesting that EPA enter the maps and related information into the rulemaking docket.<sup>21</sup> Unfortunately, these maps are just the tip of the iceberg, as they depict only a fraction of the land and waters that would be subject to federal CWA jurisdiction under the proposed rule.

In yet another blog post, EPA states that these maps “do not show the scope of waters . . . proposed to be covered under EPA’s proposed rule” and “cannot be used to determine Clean Water Act jurisdiction—now or ever.”<sup>22</sup> But why not? The proposed rule effectively provides that the Agencies intend to treat all perennial, intermittent, and ephemeral streams as *per se* jurisdictional (no case-specific analysis), and the preamble indicates that the Agencies will identify tributaries using USGS maps and other appropriate information.<sup>23</sup> How, then, can the Agencies claim that these maps do not show the scope of streams subject to federal CWA jurisdiction under the proposed rule?

Indeed, these maps indicate a total of approximately 8.1 million miles of perennial, intermittent, and ephemeral streams across the 50 states, all of which would be categorically regulated as tributaries under the proposed rule. And, these maps show only a subset of the land and waters that would be jurisdictional under the proposed rule, because they do not depict all of the other features, such as ditches and adjacent ponds, that would be categorically jurisdictional, or “other waters” that could be jurisdictional if the Agencies find a significant nexus. These USGS maps, and EPA’s casual dismissal of their significance, demonstrate that, as suggested by Rep. Lamar Smith, the public is “getting the run-around” and has not been provided with significant information needed to meaningfully comment on the proposed rule.

---

<sup>20</sup> See <http://science.house.gov/epa-maps-state-2013#overlay-context>.

<sup>21</sup> See Letter from the Honorable Lamar Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to the Honorable Gina McCarthy, Administrator, U.S. EPA (Aug. 27, 2014), [http://science.house.gov/sites/republicans.science.house.gov/files/documents/08-27-2014%20Science%20Committee%20Chairman%20Smith%20to%20Administrator%20McCarthy\\_0.pdf](http://science.house.gov/sites/republicans.science.house.gov/files/documents/08-27-2014%20Science%20Committee%20Chairman%20Smith%20to%20Administrator%20McCarthy_0.pdf).

<sup>22</sup> Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), <http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/>.

<sup>23</sup> 79 Fed. Reg. at 22,202.



Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 8

## **5. The Agencies Have Failed to Conduct Meaningful Outreach With States and Small Businesses.**

Throughout this rulemaking process, the Agencies have failed to engage with the States, as required by Executive Order 13,132 (Federalism), or the small business community, as required by the Regulatory Flexibility Act (RFA). Instead, the Agencies certified, without any supporting analysis, that “this proposed rule will not have a significant impact on a substantial number of small entities” and “will not have a substantial direct effect on the states . . .”<sup>24</sup> Of course, even a cursory analysis indicates that the revised definition would have a significant economic impact on a substantial number of small entities and on the States.

After largely ignoring States and small entities throughout this rulemaking process, EPA has now invited select small entities to participate in a meeting, to be held just over a week before the comment deadline, to “provide input” on the proposed rule. This is too little too late. As in the past,<sup>25</sup> invitations for this meeting were sent to a very limited list of small entity participants. The meeting is not open to the public. Ultimately, this meeting is a feeble attempt by the Agencies to give the appearance of engaging with small entities—it is no more than window dressing. It in no way satisfies the Agencies’ obligations to consider impacts to small businesses.<sup>26</sup>

We appreciate your attention to this important matter. If you wish to discuss any of these concerns, please contact Deidre G. Duncan (Hunton & Williams LLP), counsel for the Coalition, at (202) 955-1919.

Sincerely,

A handwritten signature in blue ink that reads "Deidre G. Duncan". The signature is written in a cursive, flowing style.

Deidre G. Duncan

---

<sup>24</sup> 79 Fed. Reg. at 22,220.

<sup>25</sup> As explained in EPA’s “Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of ‘Waters of the United States,’” EPA held *one* small entity outreach meeting to discuss the 2011 Draft Guidance. The 2011 meeting was open to only a limited number of participants and EPA has wholly ignored the feedback it received from small business entities during that meeting.

<sup>26</sup> When a rule will have a significant economic impact on a substantial number of small entities, the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), requires EPA to convene a review panel *before* the publication of the proposed rule. Small Business Administration, RFA Guide for Government Agencies, at 52 (May 2012), *available at* [http://www.sba.gov/sites/default/files/rfaguide\\_0512\\_0.pdf](http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf).





Gina McCarthy  
John M. McHugh  
September 29, 2014  
Page 9

Attachment

cc: Ken Kopocis, EPA, Deputy Assistant Administrator, Office of Water

Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)

Senate Committee on Appropriations, Chair, Barbara Mikulski  
Ranking Member, Richard Shelby

House Committee on Appropriations, Chair, Harold Rogers  
Ranking Member, Nita Lowey

Senate Committee on Environment and Public Works, Chair, Barbara Boxer  
Ranking, David Vitter

House Transportation and Infrastructure Committee, Chair, Bill Shuster  
Ranking, Nick Rahall II

Senate Committee on Small Business and Entrepreneurship, Chair, Maria Cantwell  
Ranking, James Risch

House Committee on Small Business, Chair, Sam Graves  
Ranking, Nydia Velazquez

Senate Committee on Commerce, Science and Transportation, Chair, Jay Rockefeller  
Ranking, John Thune

House Committee on Science, Space, and Technology, Chair, Lamar Smith  
Ranking, Eddie Bernice Johnson



## Member Organizations

Agricultural Retailers Association  
American Exploration & Mining Association  
American Farm Bureau Federation  
American Forest and Paper Association  
American Gas Association  
American Iron and Steel Institute  
American Petroleum Institute  
American Public Gas Association  
American Public Power Association  
American Road & Transportation Builders Association  
American Society of Golf Course Architects  
Associated Builders and Contractors, Inc.  
Associated General Contractors of America  
Association of American Railroads  
Association of Equipment Manufacturers  
Association of Oil Pipe Lines  
Club Managers Association of America  
Corn Refiners Association  
CropLife America  
Dairy Farmers of America  
Edison Electric Institute  
Federal Forest Resource Coalition  
Fertilizer Institute  
Florida Sugar Cane League  
Foundation for Environmental and Economic Progress  
Golf Course Builders Association of America  
Golf Course Superintendents Association of America  
Independent Petroleum Association of America  
Industrial Minerals Association – North America  
International Council of Shopping Centers  
International Liquid Terminals Association  
Interstate Natural Gas Association of America  
Irrigation Association  
Leading Builders of America  
NAIOP Commercial Real Estate Development Association  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Realtors  
National Association of State Departments of Agriculture  
National Cattlemen’s Beef Association  
National Club Association  
National Corn Growers Association  
National Cotton Council  
National Council of Farmer Cooperatives  
National Golf Course Owners Association of America  
National Industrial Sand Association  
National Milk Producers Federation  
National Mining Association  
National Multifamily Housing Council  
National Oilseed Processors Association  
National Pork Producers Council  
National Rural Electric Cooperative Association  
National Stone, Sand, and Gravel Association  
Portland Cement Association  
Professional Golfers Association of America  
Public Lands Council  
RISE – Responsible Industry for a Sound Environment  
Southeastern Lumber Manufacturers Association  
Southern Crop Production Association  
Texas Wildlife Association  
Treated Wood Council, Inc.  
U.S. Chamber of Commerce  
United Egg Producers