PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS

October 24, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave. NW
Washington, DC 20460
Docket ID No. EPA-HQ-OW-2011-0880

Attention: Docket ID No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States Under the Clean Water Act"

Dear Administrator McCarthy and Lieutenant General Bostick:

The Pennsylvania State Association of Township Supervisors is thankful for the opportunity to submit comments to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers on the proposed rule which would define when "waters of the United States" fall under the jurisdiction of the federal Clean Water Act.

PSATS is a nonprofit, nonpartisan statewide association in Pennsylvania that represents 1,454 townships of the second class. These townships comprise 95 percent of the Commonwealth's land area and are home to more than 5.5 million Pennsylvanians — or 44 percent of the state's population. These townships are very diverse, ranging from rural communities with fewer than 200 residents to communities with populations of more than 60,000 residents.

PSATS has significant concerns that the proposed rule would, if adopted as written, negatively impact the future of townships throughout Pennsylvania. The proposed rule is overly broad and lacks clear limitations for which waters are considered jurisdictional and which are not. Under the proposed rule, it appears that the jurisdiction of the CWA would be expanded to *any* small stream, ditch, or other body of water that *could*, at some point, flow into a traditionally "navigable water," which the CWA was written to protect.

Clean water is essential to the future of our townships and the Commonwealth of Pennsylvania. While PSATS understands the critical importance of clean water to our collective future, we believe that the proposed rule would expand EPA's jurisdictional oversight of associated "other waters" and impose additional permit requirements that would impose an unfunded mandate on local governments in Pennsylvania for road maintenance and stormwater management responsibilities, while bringing land development activity to a halt. While the proposal may be *intended* to provide clarity to the interpretations over the jurisdiction of the CWA, PSATS believes that the proposal's plain text would instead create overly broad interpretations of what is considered "waters of the U.S." and would create more uncertainty over the agency's "case-by-case" determinations.

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Pennsylvania is home to approximately 86,000 miles of rivers and streams and about 404,000 acres of freshwater wetlands. Contrary to the alleged reasoning for the proposed rule, PSATS contends that Pennsylvania is currently providing adequate protection to the Commonwealth's water resources through its strong existing regulatory framework, which provides for clear oversight of Pennsylvania's waters. The proposed rule will serve only to create litigation and uncertainty while attempting to close regulatory loopholes that do not currently exist. Unlike a few other states, Pennsylvania is **not** experiencing confusion over its jurisdiction of the Commonwealth's waters and the proposed rule would serve to insert uncertainty where certainty currently exists.

Furthermore, PSATS must object to an approach which will empower federal employees to make case-by-case analysis and determination over Pennsylvania's waters. Instead of adding clarity, the rule simply lays out a process for staff to determine whether a particular ditch or puddle is subject to federal oversight and permitting requirements. PSATS must object to any one-size-fits-all approach, particularly one that leaves much to the subjective determination of agency staff and lacks clear guidance. Our geography and hydrology vary widely across our great nation and such a narrow approach does not take into consideration the extreme variations in average annual rainfall and snowmelt characteristics. Where a dispute exists over the interpretation of the existing rule, the court is the appropriate venue for resolution.

Moreover, it has come to PSATS' attention that the science behind the proposal has not been fully vetted by the agencies or the public. PSATS supports the recent announcement that the agencies will wait for the Connectivity Report to be finalized and reviewed before proceeding with finalizing the proposed rule. However, we request that a public comment period be held on the final version of the Connectivity Report that is currently under review by the Science Advisory Board, with the recommendations of the advisory board attached.

Under the proposed rule, jurisdictional waters under the CWA would continue to include those waters identified in Section (a)(1) to (4), which includes traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; and all impoundments of such jurisdictional waters. These waters have traditionally come under the purview of the CWA. However, the CWA jurisdictional expansion is contained in section (a)(5), tributaries to jurisdictional waters; (a)(6), adjacent waters, including wetlands, to jurisdictional waters; and (a)(7), "other waters," including wetlands that have a "significant nexus" to jurisdictional waters determined on a case-specific basis either alone or in combination with other similarly situated waters located in the same region.

PSATS believes that the definitions of "tributary," "significant nexus," and "neighboring" as proposed in the rule would broaden the scope and jurisdiction of the CWA as never before. Even if the EPA and the Corps, as they have suggested in media announcements, do not *intend* to expand the jurisdiction of the CWA, we are concerned that it will be subject to interpretation by the courts *(through citizen lawsuits).* These challenges and interpretations of the proposed rule will broaden the agencies' discretion to make a determination of jurisdiction over whether **any** ditches, drains, ponds, wetlands, or washes are, in their view, "waters of the U.S." and subject to federal CWA jurisdiction and permitting requirements.

PSATS believes that the proposed rule must not burden our communities by creating newly broadened and expansive controls over the tiniest trickles of runoff by broadly defining "tributary" as jurisdictional waters, using the federal CWA to unreasonably restrict or stop growth.

PSATS' detailed concerns are noted below, along with some suggested improvements to the proposed rule that, if incorporated, may alleviate some of these concerns.

Definition of "Waters of the U.S.":

"Tributary"

The proposed rule states that all waters that are tributaries to traditionally navigable waters are considered "waters of the U.S." and are jurisdictional under the CWA. The rule would define a "tributary" as "a water physically characterized by the presence of a bed and bank and ordinary high water mark…which contributes flow, either directly or through another water, to a water identified" as a "water of the U.S." This definition, if adopted, would significantly increase your agencies' jurisdictional reach under the CWA. This definition will bring into play countless streams, creeks, rivulets, washes, and other features where water does, will, or could run to *(eventually)* navigable waters. PSATS believes that there needs to be a clear, concise limit set as to just how far the CWA manifests its dominion over local and state waters.

The agencies should provide assurances in the final rule that the definition of "tributary" will be limited to those with "bed and banks with an ordinary high water mark" that have formed over several years, and that would **not** include temporary accumulations of sediment or hydraulic activity resulting from specific isolated precipitation or runoff events. Definitions must be fleshed out for the terms "ordinary high water mark," "bed and banks," and other subjective terminology used in the proposed rule; without such definitions, these terms will only cause additional uncertainty in the implementation of the final rule. Jurisdictional tributaries should meet a new test related to size of bed and banks, amount of flow, or distance from the jurisdictional navigable water in order to be considered a "water of the U.S." and establishing a limit on just how small or how far upstream the CWA would apply from the jurisdictional navigable water. Wetlands should not be considered "tributaries" in the final rule, as they should have to meet "adjacency" or "significant nexus" tests associated with "adjacent" or "other waters" to be considered "waters of the U.S."

"Adjacent"

The proposed rule expands the reach of the CWA by replacing the term "adjacent wetland" with the term "adjacent waters" *(including wetlands)* to "waters of the U.S."

The proposed rule defines "adjacent" as "bordering, contiguous or neighboring," noting further that "[w]aters, including wetlands, separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'" Adjacency determinations will now depend on the newly proposed definition of "neighboring," defined in the rule for the first time as "waters located within the riparian area or floodplain of a water

identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water." Under this definition, waters in a riparian area or floodplain of jurisdictional waters already are assumed to have a "significant nexus" to navigable waters and would automatically be jurisdictional without the need to determine "adjacency." The uncertainty arises when the agencies use their judgment to decide "adjacency" of waters.

PSATS believes that the term "adjacent" should **only** apply to waters in the riparian area or floodplain of jurisdictional waters with confined, scientifically-verifiable, and substantial surface water connections, and should not consider shallow groundwater connectivity in determining adjacency. This would limit agency discretion over waters outside the riparian zone or floodplain of jurisdictional waters as either excluded or subject to the "significant nexus" test, and would take out the subjectivity of assessing shallow groundwater connections between adjacent water bodies.

The definition of "floodplain" should be further refined. As stated, a floodplain is an area bordering inland or coastal waters that was formed by sediment deposition from such water under "present climatic conditions" and becomes inundated during periods of "moderate to high water flows." The terms "present climatic conditions" and "moderate to high flows" should be defined to limit the floodplain to those flood events with a more recent history *(rolling 20-year interval)*. And, the statement in the proposed rule that "uplands in a floodplain are never considered 'waters of the U.S.'" should be highlighted in the definitions.

"Significant Nexus"

Other waters not covered by Section (a)(1) to (6) may fall into section (a)(7) of the proposed rule. These waters would be subject to a case-specific analysis by the agencies that the water has a "significant nexus" to a jurisdictional water under (a)(1) through (3). The proposed rule defines the term "significant nexus" as a "water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." The proposed rule also states that "other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."

PSATS believes that use of the term "similarly situated" would allow the agencies to consider multiple waters together when making a "significant nexus" determination. The proposed rule states that the agencies should look at whether these waters "can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas," and whether these waters are "sufficiently close" to each other or the jurisdictional water. **This analysis is fraught with uncertainty and subjective decision-making.** The agencies should assess each of the individual functions that the group of waters perform in order to be considered "similarly situated," including listing such functions as examples in the proposed rule. Also, the agencies should

require a confined, verifiable surface connection to each other *(and not "fill and spill" as set out in the proposed rule)* in order for these waters to be considered "similarly situated" and limit the distance allowable between "similarly situated" waters. Waters that fail to meet these tests should not be considered "similarly situated" and be considered non-jurisdictional under the CWA. Considering CWA jurisdiction of "other waters" in a watershed on a landscape scale would burden both the regulated community and the regulating agencies without much benefit to water quality and should not be considered as an alternative in the rule.

Excluded Waters and Exempted Activities:

Agriculture

The CWA itself contains broad exemptions from regulation for the agricultural sector. Farmers currently do not need permits for normal practices like plowing or constructing farm roads. And stormwater runoff from farm fields is not subject to federal pollution limits. The agencies have said that these exemptions would be carried forward under the proposed rule and issued an "interpretive rule" to explain dredge-and-fill exemptions for normal farming practices, listing 56 conservation practices approved by the U.S. Department of Agriculture – Natural Resources Conservation Service (USDA-NRCS) that would be exempt from permitting requirements under Section 404 of the CWA. Most agricultural groups claim that these exemptions do not protect farmers from requirements related to pollutant discharges and future permitting requirements under the CWA and would actually narrow the exemptions for production agriculture under the CWA. The interpretive rule could also place the USDA-NRCS in a position of policing these practices under the CWA rather than their usual role of partnering with agriculture to ensure the adoption of best practices important to the balance of productive farms and clean water.

PSATS believes the EPA should withdraw the interpretive rule and collaborate with the agricultural sector to ensure that all normal farming practices, including USDA-NRCS practices continue, are exempt from CWA regulation.

Ditches

Section (b) of the proposed rule lists several categories of waters that are explicitly excluded from the definition of "waters of the U.S." and are not jurisdictional under the CWA. Two types of ditches are excluded that, in the past, would have been subject to case-by-case determinations. Sections (b)(3) and (4) exclude ditches that are constructed "wholly in the uplands and that drain only uplands" and that do not contribute flow, directly or through other waters, to a "water of the U.S."

Under the proposal, jurisdictional ditches would be considered to be just like any other tributary. That means they would not only be subject to the CWA's permitting requirements, but they would also be subject to other requirements of the law, including water quality standards, pollution cleanup plans, and oil spill prevention measures. There is some question as to whether a ditch that collects agricultural runoff could end up needing a pollution discharge permit for where it flows into navigable waters. The proposed rule is ambiguous enough to leave an uncomfortable possibility that the ditches and streams running generally along local roads and through farms could receive closer scrutiny if the rivers and lakes downstream from them rank as "polluted" under the CWA.

The thousands of miles of roadside ditches in Pennsylvania could be brought under CWA regulation if they are determined to either flow to navigable waters *(tributary)* or are considered "adjacent" to a "water of the U.S." or have a "significant nexus" to those waters, which would require a specific case-by-case determination by the agencies. These ditches typically do not have perennial flow and should be considered exempt from CWA jurisdiction. If they are not clearly exempted and are considered "waters of the U.S.," more of these ditches will likely fall under federal jurisdiction and certain maintenance activities may require a CWA Section 404 permit. This permitting process is very expensive and time consuming, creating an enormous unfunded mandate for municipal governments in Pennsylvania that are responsible for maintaining these roadways.

PSATS believes that the agencies should specifically exempt <u>all</u> roadside ditches, as well as ditches and drains constructed and maintained in association with agricultural uses, from CWA jurisdiction. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches." Also, certain upland drainage that has perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually stop. In the case of delayed agricultural runoff causing perennial flows, these upland agricultural drains should also be considered excluded from the definition of "waters of the U.S."

Under the proposal's broadened definition of a "tributary" that is considered a "water of the U.S.," certain farm or roadside "ditches" could qualify as a tributary and be subject to CWA regulation. We are concerned with what this proposed rule would mean for ditches that are used to drain stormwater off of farm fields. EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries, but many ditches do carry water either directly or through other waters to a navigable water. PSATS is very concerned with the catastrophic implications of this proposed rule.

"Waste Treatment Systems and Other Exclusions"

In section (b), the proposal excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. While such systems have traditionally been excluded from CWA jurisdiction, PSATS believes that due to the expansive nature of the proposal, the agencies should also exclude other constructed water management and treatment infrastructure that have similar attributes to these waste treatment systems. These facilities include water reuse and recycling ponds, treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff *(e.g. green infrastructure)* used and managed to improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. All of these features would revert to dry land if the application of water were to cease and should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S."

Conclusion:

PSATS understands the meaning and purpose of the Clean Water Act and the agencies' goal of protecting our nation's water resources, while providing clarity and certainty for the regulated community. While PSATS does not believe that the proposed rule achieves this goal, we have provided suggested changes to the proposal that *could* help to address our concerns. However, PSATS believes that any approach to protecting water quality must be accomplished through true partnerships at the local and state levels and the federal government must provide more clarity in defining which waters are truly "waters of the United States." PSATS stands ready to work with the EPA, the Corps, and other local and state governments to accomplish this task for our future and the future of our nation's water resources.

Sincerely,

David M. Sanko
Executive Director