
To Whom It May Concern,

The Pennsylvania Chamber of Business and Industry (PA Chamber) is the largest, broad-based business advocacy association in the Commonwealth. Our members are of all sizes, crossing all industry sectors throughout Pennsylvania. Thank you for the opportunity for the PA Chamber and its members to comment on the Environmental Protection Agency (EPA) and Army Corps of Engineers’ (the Corps) joint proposed rulemaking regarding the definition of “Waters of the United States” under the Clean Water Act.

The PA Chamber appreciates the efforts and time of EPA and Corps’ staff in considering our comments, which were developed after drawing from the resources and views from a range of its members. The PA Chamber respectfully requests that the EPA withdraw this rulemaking and re-propose if needed only after careful consideration of all stakeholder comments, the convening of public hearings throughout the country, and the finalization of the Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (the draft Connectivity Report). This rule purports to address confusion that does not exist and to regulate waterways which in the case of Pennsylvania are already governed by a robust and expansive set of statutes, regulations and policies which go beyond current federal requirements. The proposal also places no upper bound on the limits of EPA’s authority with respect to jurisdictional waterways and erodes the traditional cooperative relationship between states and the federal government by both ignoring the existing regulatory program in Pennsylvania and threatening to significantly burden the state’s regulatory agencies with additional and unnecessary regulatory obligations.

Pennsylvania’s Regulatory Program is Working, and Further Federal Regulation is Unwarranted

Pennsylvania’s abundant water resources include approximately 86,000 miles of waterway, 404,000 acres of wetlands, and 161,000 acres of lakes. Very few, if any, of these water courses flow seasonally or intermittently, a class of purportedly unregulated waters which EPA has set out to regulate with this proposal. None lack regulatory oversight from the state DEP. Also, the state definition of a wetland is more expansive than federal requirements as well, with a state definition outlining wetlands to be “[a]reas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas” (25 Pa. Code §105.1).
There is currently no confusion about whether or not all waterways, wetlands and lakes in Pennsylvania are subject to some measure of regulation. Regarding waterways and lakes, such “waters of the Commonwealth” are currently governed by the Pennsylvania Clean Streams Law, which was passed more than 75 years ago and holds that “[r]ivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” The Clean Streams Law provided the state Department of Environmental Protection (PA DEP) with the authority to chart out a robust and effective regulatory framework, with regulations codified under Title 25 of the Pennsylvania Code. Various chapters of the code include, but are not limited to, regulations governing National Pollutant Discharge Elimination System Permitting, Monitoring and Compliance (Chapter 92), Water Quality Standards (Chapter 93), Water Quality Standards Implementation (Chapter 96), Erosion and Sediment Control (Chapter 102), Dam Safety and Waterway Management (Chapter 105), and Safe Drinking Water (Chapter 109).

It is unclear if the EPA has unintentionally ignored these state provisions or if EPA unwisely relied heavily on a 2013 Environmental Law Institute report that omitted reference to nearly all of Pennsylvania’s water programs in making the case that a rulemaking such as this “Waters of the United States” proposal is needed.

As DEP has moved forward with promulgating or revising various regulations under these and other Chapters of the Pennsylvania Code, the PA Chamber has for many years worked with the agency to strike an appropriate balance between permitting the impacts that result from economic development and protecting wetlands, waterways and other valuable environmental resources. The PA Chamber also recognizes that there may be a divergence in definitions of certain key words between federal and state programs, and the PA Chamber appreciates the efforts of the PA DEP to keep the programs in as much harmony with federal requirements as possible. By the same token, the PA Chamber would appreciate if the federal EPA recognized that a “one size fits all” approach of applying federal regulation under the Clean Water Act, as is proposed with this rulemaking, is inappropriate, given regional differences in topographical, meteorological, hydrologic and other conditions. It is apparent and abundantly clear that Pennsylvania’s program is working – and as evidence one would need to look no further than the PA DEP’s 2014 Integrated Water Quality Monitoring and Assessment Report, which proposed the delisting for various pollutants in more than 380 stream miles, including the Monongahela River. These delisted stream miles are located throughout the state and are indicative of industry’s widespread commitment to operating responsibly and improving water quality, as well as the efficacy of the existing regulatory framework.

**EPA’s Proposed “Waters of the United States” Rulemaking Adds, Not Eliminates, Confusion and Will Hinder Economic Development with No Real Environmental Gain**

Further, this rulemaking’s approach only adds additional confusion by incorporating nebulous, subjective terms to key terms discussed in the proposal. Such terms and definitions include the lack of a specific inundation period or rain event when discussing floodplains (i.e., the necessary qualifier of an area being a floodplain based on a 100-year storm), as well as unnecessarily broad definitions of “tributary” and “adjacent waters.” EPA and the Corps also propose to proceed with determining a “significant nexus” between navigable waters and other waterways on a “case-by-case” basis, using staff’s “best professional judgment” on certain matters. Such language does not give comfort to the regulated community that this proposal adds any degree of certainty – in fact, one might rationally presume that such a proclivity to proceeding on such a subjective basis will mire federal, state and even county and local governments in protracted litigation regarding appropriate policy determinations, permitting and enforcement, be it by the permit applicant, another regulatory agency or an intervening third party.
While it is abundantly clear which waterways and wetlands in Pennsylvania are subject to state regulation, case-by-case determinations at the federal level are impractical, given the sheer number of routine regulatory decisions that must be made. Also, given the bevy of activities and environmental resources that may or may not be subject to federal regulation under this proposal, the PA Chamber is concerned this proposal opens the door to selective enforcement. The PA Chamber continues to be concerned about the differences in regional decision-making among various EPA and Corps’ district or regional offices, and it is likely that the significant number of subjective elements laid out in this rulemaking will only further add to those concerns.

Unless the EPA and the Corps’ address uncertainty about how the key terms of this proposal are going to be defined and interpreted, it is apparent that additional waterways, such as those in a ditch, impoundment or stormwater conveyance, would be subject to an impairment designation. Such a designation would not only trigger burdensome permitting and regulatory requirements for nearby point and non-point source discharges, but state and federal regulators would have to devote additional staff time to developing and enforcing a TMDL for the waterway.

This Proposed Rulemaking Would Lay Down Unnecessary Regulatory Hurdles to Valuable Industries

The PA Chamber’s membership includes companies and organizations from a variety of industries. Many members, including those in the electric transmission, natural resource extraction, pipeline construction, agriculture, and construction industries have expressed serious concern about how this proposal would impact their operations. Generally, it is already quite expensive for an applicant seeking to engage in these industries to secure the necessary regulatory approval, secure necessary mitigation, and remain in compliance. This rulemaking threatens to add greatly to that burden, despite an existing state program that is already accomplishing the environmental protection EPA purports to seek with this rule.

The PA Chamber also remains concerned about how the agencies will continue to interpret the phrase “single and complete” project for the purposes of permitting. To date, such determinations have been made inconsistently for various projects, leading to considerable permitting delays and regulatory uncertainty. With this rule bringing in additional environmental features, such as ditches, impoundments and culverts that were not previously subject to federal regulation, and individual section 404 permits being very costly for an applicant to secure, the PA Chamber’s ongoing concerns about interpretation of “single and complete” projects are only amplified. One year ago, the state legislature passed a long-overdue comprehensive funding package, Act 89 of 2014, which was supported by the PA Chamber and will result in the rehabilitation of hundreds of bridges and thousands of miles of roadway. This proposal threatens to add unneeded cost to the state and local agencies and their contractors tasked with completing this vital work.

This rule could also hamper the development of electric transmission and oil and gas pipeline infrastructure. As the events of the recent polar vortex showed, the regional grid is in need of more natural gas infrastructure and electric transmission lines. EPA’s own Clean Power Plan expects that more natural gas will be consumed at power plants for electric generation – which cannot happen in Pennsylvania and PJM’s competitive generation market without additional gas infrastructure to economically deliver gas to market. The regional grid is also in need of upgraded infrastructure to more efficiently deliver power to the market. But this proposal would expand the definition of environmental features subject to various
permitting requirements, including Section 404, adding to both time and cost for these vital projects at a time when such infrastructure could not be more needed.

The PA Chamber also requests that, should this rulemaking be amended, specific exemptions be made for stormwater conveyance and treatment systems. Otherwise, stormwater retention basins might be unnecessarily categorized as waters of the United States. The existing regulatory structure for wastewater treatment ponds at electric generation should also be preserved. The PA Chamber also urges EPA to dismiss the conjectures of the agency’s advisory panel, the Scientific Advisory Board, that certain exclusions of the Clean Water Act are not justified by science. These conjectures were laid out in a letter to EPA Administrator Gina McCarthy on Sept. 30 regarding the Adequacy of the Scientific and Technical Basis of the EPA’s Proposed Rule titled “Definition of Waters of the United States under the Clean Water Act.” The Scientific Advisory Board suggests that EPA ought to seek to override these provisions of the Clean Water Act by further expanding jurisdiction far beyond what Congress contemplated or intended when it passed the Clean Water Act. The PA Chamber opposes another of the Scientific Advisory Boards recommendations: that the final rulemaking include “other waters” -- beyond adjacent or those connected via a significant nexus – as opportunities for EPA to assert its regulatory authority on a case-by-case basis. Contrary to EPA’s stated goal in publishing a final rulemaking that increases regulatory clarity, such authority would lead to considerable uncertainty for industry and state regulators and would raise even more questions about the EPA’s appropriate jurisdiction.

Because the EPA’s Draft Connectivity Report Remains a Draft, This Rulemaking is Premature

EPA and the Corps published this draft “waters of the United States” rulemaking this past April, with the stated purpose of issuing the proposal to “clarify the scope of waters protected under the Clean Water Act (CWA) in light of the U.S. Supreme Court cases in U.S. v. Riverside Bayview, Rapanos v. United States, and Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers.” The decisions in these cases limited EPA’s authority. EPA and the Corps have proposed this rulemaking on the basis of a draft Connectivity Report, which is only now being reviewed by the EPA’s Scientific Advisory Board. While the draft Connectivity Report may have been intended to make the case on a scientific basis that isolated or intermittent “waters” are connected to “navigable” waterways traditionally regulated by the Clean Water Act, the report remains a draft. Any development or revision to regulatory frameworks, particularly a revision with the scope, magnitude and ramifications of this proposed rulemaking, should certainly proceed with a modicum of caution and be based, on the very least, on reports that have been made final after being vetted by the public. The PA Chamber urges that this rulemaking be rescinded until the Connectivity Report is finalized, and reproposed only after careful consideration of all stakeholder comments and holding a serious of public hearings with the regulated community.

In closing, the PA Chamber again reiterates its appreciation for the time and consideration of EPA and Corps staff time in reviewing these comments and making appropriate revisions to the proposed rulemaking.

Sincerely,

Kevin Sunday
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Pennsylvania Chamber of Business and Industry