

AGENDA NOTE – HRPDC ANNUAL COMMISSION MEETING

ITEM #11-F: WATERS OF THE U.S. RULEMAKING

SUBJECT:

The HRPDC staff, in coordination with local government staff on the Regional Environmental Committee, has developed the enclosed comments on the proposed rulemaking by the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) to define “waters of the U.S.”

BACKGROUND:

The U.S. EPA and the Corps jointly proposed a rule in April 2014 to clarify protection under the Clean Water Act (CWA) for streams and wetlands following confusion created by Supreme Court decisions in 2001 and 2006. The purpose of this rulemaking is to provide clarity on whether or not individual water bodies are jurisdictional and discharges are subject to permitting.

The jurisdictional scope of the CWA is “navigable waters,” defined in section 502(7) as “waters of the United States, including the territorial seas.” Both the legislative history and the case law confirm that “waters of the United States” in the CWA are not limited to the traditional navigable waters. The term “navigable waters” is referenced in several provisions of the CWA; including the National Pollutant Discharge Elimination System (NPDES) permit program (section 402) and total maximum daily load programs (section 303).

The CWA leaves it to EPA and the Corps to define the term “waters of the United States.” Current regulations define “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.

The proposed definition would expand the reach of the referenced provisions to include:

- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- Other waters, on a case-specific basis, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.

Attachment 11-F

RECOMMENDED ACTION:

Authorize the Chairman to sign the letter for staff to submit to EPA.

MEMBER JURISDICTIONS

October 17, 2014

CHESAPEAKE

Water Docket

FRANKLIN

U.S. Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OW-2011-0880
Mail Code 2822T

GLOUCESTER

1200 Pennsylvania Avenue NW
Washington, D.C. 20460

HAMPTON

RE: EPA Waters of the U.S. Proposed Rule

ISLE OF WIGHT

Whom It May Concern:

JAMES CITY

The Hampton Roads Planning District Commission (HRPDC) appreciates the opportunity to provide comments on the United States Environmental Protection Agency's (EPA) proposed Waters of the U.S. Rule. The localities represented by the HRPDC face many challenges improving and maintaining public infrastructure due in part to their geographic position within the lower coastal plain of Virginia. Much of the Region is underlain by hydric soils and experiences seasonally high groundwater fluctuations. The HRPDC is concerned that additional Federal or state regulatory oversight proposed by this Rule will further constrict localities' ability to develop and maintain infrastructure.

NEWPORT NEWS

NORFOLK

POQUOSON

PORTSMOUTH

SOUTHAMPTON

The HRPDC does not support the Waters of the US Rule as proposed. Staff has reviewed the proposed Rule and is concerned that it extends the EPA's and U.S. Army Corps of Engineers' (Corps) regulatory oversight further into the watershed, extending across uplands through groundwater and ephemeral pathways, systems that were not previously regulated as Waters of the US (WOTUS). The proposed definitions may cause conflicts amongst the various federal regulatory programs mandated through the Clean Water Act (CWA). Because the proposed exemptions to the Rule are not comprehensive, localities fear that the Rule may inhibit their ability to effectively maintain their public stormwater infrastructure and comply with federal and state stormwater regulations.

SUFFOLK

SURRY

VIRGINIA BEACH

WILLIAMSBURG

YORK

The HRPDC submits the following comments, concerns, and questions on behalf of its localities for consideration during this public comment period:

1. **All man-made purpose built stormwater management facilities should be explicitly excluded from the definition of WOTUS.** If stormwater management facilities are not explicitly excluded in this Rule, then they may be classified as tributaries to WOTUS. Because a stormwater management facility is designed to drain and treat the runoff within its drainage area, under the definition of “adjacent” in this Rule, most of the water draining to the stormwater facility could be classified as WOTUS and subject to the CWA. The Rule should include exemptions specifically for construction, maintenance and/or retrofitting of purpose built stormwater management facilities. Without such exclusion, the Hampton Roads localities’ ability to comply with its Section 402 National Pollution Discharge Elimination System (NPDES) requirements (MS4) and compliance with TMDL allocations will be limited.
2. **All man-made impoundments and ditches should be excluded from the definition of WOTUS.** The exceptions and exemptions provided within the Rule for impoundments and ditches are too narrow to address the unique hydrology of Hampton Roads. Under the proposed Rule, the continuous surficial aquifer running from Richmond to the Atlantic coastline could extend CWA jurisdiction to most of the waters within the Region, including manmade ditches in uplands, under the definition of “neighboring”. This would be onerous and impractical, and we do not believe this to be the intent of this rulemaking.
3. **The HRPDC supports the proposed exclusion for ditches that have less than perennial flow.** Perennial flow hydrology is the appropriate threshold because most perennial streams within the Region are already regulated by the Chesapeake Bay Preservation Act (CBPA) and the Virginia Marine Resources Commission (VMRC).
4. **Manmade flood control and drainage conveyance structures should be excluded from the definition of WOTUS.** These structures are constructed to prevent loss of life and protect property from flooding. A jurisdictional designation will result in more costly and time consuming permitting requirements to maintain or expand these structures to mitigate flooding. This may discourage flood control projects and may cause harm to the public, especially in coastal communities.
5. **The definition of tributaries should not include features such as wetlands, lakes, ponds, impoundments or ditches.** It would be more appropriate to classify these features as “other waters” which would require a case-specific significant nexus analysis to determine if they are WOTUS.
6. **The Rule should include a definition of upland.** During the July 16, 2014 webinar, “Waters of the U.S.: Clarifying Misconceptions,” Ms. Stoner, EPA, clarified that the term upland in this Rule refers to everything that is not water. Specific language clarifying this point should be added to the Rule.

7. **The proposed definition for floodplain may have unintended conflicts with other federal, state and/or local regulations and ordinances.** It is uncertain whether this new federal definition is consistent or will create conflicts with existing federal regulatory programs that utilize the term floodplain. The proposed definition does not meet the goal of clarifying the definition neighboring. The HRPDC proposes the following underlined changes, “The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is regularly inundated one or more times per year.

8. **The Rule places too much reliance on individual COE staff members’ best professional judgment when making jurisdictional determinations.** Over many years, the Region’s localities have experienced a lack of consistency between different regulators within the Norfolk District. The HRPDC is concerned that the Rule relies on interpretation by local Corps staff in the field which may lead to less clarity, certainty and predictability for the regulated public, possibly leading to resource demanding case-specific analyses.

Sincerely,

Kenneth I. Wright
Chair

JLT/jcc

DRAFT