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Memorandum

To: Office of Information and Regulatory Affairs, Office of Management and Budget
From: J. G. Andre Monette
Date: January 13, 2020
Re: RIN 2040-AF75, Revised Definition of “Waters of the United States” (Step 2): Waters of the U.S. Coalition of Public Agencies Views

On behalf of the Waters of the U.S. Coalition of Public Agencies, a coalition of municipalities and public water agencies, we respectfully submit the following views on aspects of a revised definition of “Waters of the United States”:

- 1) Clarification that a water body cannot be both WOTUS and a point source that discharges into WOTUS: The proposed rule sought comment “on whether a ditch can be both a point source and a “water of the United States, or whether these two categories as established by Congress are mutually exclusive.” The WOTUS Coalition of public agencies seeks clarification in the final rule’s preamble stating that a water body cannot be classified as both WOTUS and a point source. In some cases, EPA and the states have alleged that highly channelized water bodies (some entirely man-made) can be both WOTUS and a point source. In other cases, they have alleged that rivers and streams are part of a municipality’s separate storm sewer (MS4) system. Classifying a water as both WOTUS and a point source confuses the point at which a discharger is expected to meet effluent limits and water quality standards. It also limits the ability of a discharger to use space within a channel or system for treatment controls that would treat water before discharge to a WOTUS.
- 2) Incidental, isolated recreation should not be the sole basis for jurisdiction: In some cases the Army Corps have asserted that water storage reservoirs with limited or no connection to downstream navigable waters are nonetheless jurisdictional if a water agency allows incidental use for recreation such as boating with small crafts or fishing. The Supreme Court decisions in *SWANCC* and *Rapanos* require a significant connection to downstream waters that qualify as navigable in the traditional sense. We seek clarification in the final rule’s preamble stating that incidental, isolated recreation alone is not sufficient to classify an isolated water body as WOTUS.
- 3) Presumption that man-made infrastructure constructed in waters that are not navigable in the traditional sense are not WOTUS: We recommend a clarification in the final rule’s preamble that man-made infrastructure such as storm drains, water supply canals, irrigation ditches, treatment wetlands, and infiltration basins are presumed not to be WOTUS unless they are constructed on or in a water body that is navigable in the traditional sense. The presumption would be rebuttable if EPA, the Army Corps or an implementing state can provide evidence that the infrastructure was constructed in a water body that is intermittent or connects directly to a navigable water.



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4) We generally support the other clarifications and exclusions in the proposed rule for built water infrastructure.