Comments of
American Council of Engineering Companies

Docket No. EPA-HQ-OW-2018-0149
Army Corp of Engineers,
Environmental Protection Agency
Revised definition or “Waters of the United States”

Federal Register, Vol. 84, No. 31
Thursday, February 14, 2019
pp. 4154-4220

ACEC

ACEC members – numbering more than 5,600 firms representing more than 600,000 employees throughout the country – are engaged in a wide range of engineering works that advance the nation’s economy and enhance and safeguard America's quality of life including transportation, energy, and water infrastructure. These works give Americans access to clean drinking water, safe and efficient transportation systems, sustainable energy, and projects which protect the environment for generations to come.

ACEC fully supports the objectives of the Clean Water Act (Act) to restore and maintain the integrity of the nation’s waters and to achieve water quality levels that are fishable and swimmable by controlling the discharge of pollutants. ACEC also recognizes the jurisdictional confusion created in the implementation of the Act and welcomes the attempt in this rulemaking to meet the challenges posed under the relevant case law.

Overview

ACEC supports a comprehensive effort to define waters of the U.S. with the goal of achieving consistent standards that can be readily applied in the field. ACEC expressed concerns with the 2015 rule that appear to have been addressed in the current proposal. We noted that the 2015 rule went beyond the traditional definitions and posed practical problems in implementation. Among the definitional issues that previously posed practical problems to ACEC included:

a) “adjacent” and “neighboring waters”, which meant that wetlands and waters of the US with a problematic “significant nexus” standard, such as a subsurface hydrologic connection were jurisdictional;
b) “floodplains”, which went well beyond established FEMA policy;
c) “tributaries”, which significantly expanded jurisdiction well beyond traditional limits to include ephemeral streams, ephemeral ditches, and other waters with less than
intermittent flow or flow only in direct response to rainfall; these features have commonly been determined to be non-jurisdictional with no regulatory or permitting requirement;

d) “ditch” determinations made under a two-part test including the “significant nexus” test which created confusion concerning upland exclusions; and
e) a “waste treatment systems” definition making stormwater ponds jurisdictional.

The present proposed rule favorably addresses nearly all issues raised by ACEC with the 2015 rule. Importantly, the impractical significant nexus test is gone. The time-consuming case-by-case application for the determination of significant nexus under the 2008 Rapanos guidance for whether certain wetlands are jurisdictional is eliminated. Ephemeral overreach is removed. Surface connections for wetlands that do not abut jurisdictional water, are relied upon, while subsurface connections are dropped. Waste treatment systems and stormwater ponds are now excluded.

These changes, among others, are a welcome step in the direction of practical implementation. Additionally, ACEC supports the concept of creating Geospatial Datasets (GIS) under a future rulemaking.

The present proposal appears to be an elegant resolution of the confusion created under the applicable Supreme Court decisions. Furthermore, the present proposal appears to be a respectable balance between Federal and State jurisdictional authority and as a serious effort to achieve practical application.

We applaud the government’s effort to try to simplify, for both the regulated community and regulatory agencies, the definition that needs to be considered in the determination of jurisdictional features on property during an agency jurisdictional determination process and/or permit application review.

**Physical Surface Water Connection /Adjacent Wetland**

We agree that using the presence of a physical surface water connection to traditional navigable waters to make a feature jurisdictional under the USACE program makes common sense. Determining this connection in the field will require updates to the USACE delineation manual to help regulators and the regulated community determine what a “physical surface water connection” will have to look like to make the feature in question jurisdictional. The simplification of what is an adjacent wetland under the proposal is welcomed. The 2015 Rule introduced complex adjacent terms such as bordering, contiguous and neighboring, which was very confusing.

Under Part 328.3(c)(1), Adjacent Wetlands, the definition should be modified to say “…means wetlands that abut and have a direct hydrologic surface connection to a water” to provide two aspects when determining whether a wetland is regulated. One is immediate adjacency. The definition does not provide any distance but uses the term “abut” and defines a physical, spatial connection of one part of the wetland to the water. We agree that aspect can be determined in the field. The second one is having a direct hydrological surface connection between the water and adjacent wetland. That connection can be usually visually determined in the field. We feel
that both aspects of the adjacent wetland definition should be considered in determining jurisdiction (not just one).

**Perennial, Intermittent and Ephemeral**

The introduction of the terms perennial (Part 328.3(c)(7)), intermittent (Part 328.3(c)(5)) and ephemeral (Part 328.3(c)(3)) into the definition of waters of the United States provides guidance as to what type of surface water connection will trigger the jurisdiction. The definitions provide certain time frames that should be further clarified to provide more specific determinations to these terms. Perennial waters have year-round flow, intermittent waters should have a continuous flow of at least 2 months (usually in the spring), and ephemeral waters should have continuous flow no more than 2 weeks of flow anytime of the year. While the time of flow for each type of water can be debated, we feel that timeframes should be provided in the definitions to provide specific direction to the regulators and regulated community.

The definition of intermittent (Part 328.3(c)(5)) should be modified to state “…during certain times flow should be continuous no more than 2 months in duration during a typical rainy period/snow melt time of the year…” to reflect a specific time period when flow should be present to qualify as being intermittent. Otherwise, the interpretation of “certain times of the year” as currently proposed will be open ended.

The definition of ephemeral (Part 328.3(c)(3)) should be modified to state that these types of waters only flow during a short-period of time after large rain events “…direct response to precipitation (e.g. rain or snow fall) for a continuous period of no more than 2 weeks.” Otherwise, the interpretation of the duration of an ephemeral feature will be open ended.

Regulators should keep in mind that field observations for wetland delineations are usually limited to only a few days. A perennial water will need to be flowing year-round, so during a field visit the presence of the flow in the water feature will confirm a perennial feature. Intermittent waters will be continuously flowing for several months during snow melt and/or the rainy season. An ephemeral water will only flow during or immediately after a rain event. Therefore, jurisdictional tributaries/waters will likely be limited to rivers and streams that flow year-round or continuously several months during the wet season.

**Ditch**

We recommend that the definition of ditches at Part 328.3(c)(2), “artificial channel used to convey water,” be expanded to include language stating that ditches are: a) man-made features; b) usually linear in nature; c) typically constructed in uplands; and, d) usually constructed to manage stormwater, surface water and shallow groundwater for specific land use purposes including agricultural uses and roads. By incorporating these types of descriptions into the definition, the interpretation of the term ditches will hopefully be clearer in its application and exclude most ditches from being a regulated feature.
Not “waters of the United States”

The expansion of the list of what is not waters of the United States at Part 328.3(b) is helpful. We suggest that this section be expanded so that the rule contains a description and criteria that can be used during the jurisdictional determination process used by the regulated community and regulators. For example, the ditches exclusion is very simplistic but does not describe the type of ditches that are typically excluded. We suggest that Part 328.3(b)(4) - Ditches – be expanded to specifically state that excluded features “typically include ditches in uplands, ditches on lands used for agricultural uses, and ditches constructed for stormwater runoff management along roads.”

In (b)(3) we suggest separating the “ephemeral features” from the “diffuse stormwater runoff and sheet flow” language to be clear that all “Ephemeral water features created typically as a direct result of rainfall” are excluded and are not related to or considered a subset of the stormwater runoff issue discussed. Diffuse stormwater run-off should be presented as a separate exclusion item under a new (b)(12).

We suggest that the USACE and USEPA consider adding an additional exclusion group in (b). The rules should eliminate the jurisdiction of small wetland features (say less than 10,000 square feet) found in otherwise lands described as uplands. This would eliminate the time spent delineate these small wetland features in upland areas and then discussing with the regulatory agencies of whether or not they are jurisdictional.

Additional Comments on Proposal

The proposal also asked for comments on developing a mapping system to provide a clearer understanding of the presence/absence of jurisdictional waters that landowners and members of the regulated community could rely upon in the future. Several states have developed maps that are used in their regulatory programs.

The State of New Jersey prepared freshwater wetland maps in the 1980s through aerial photography interpretation to try to map regulated wetlands in the State. Although these maps are better than the National Wetland Inventory (NWI maps), hundreds of field delineations performed over the past several decades have clearly shown the limitations of the New Jersey Department of Environmental Protection (NJDEP) maps. The NJDEP has always required field delineations, but the regulated community uses the maps to see whether their property has potential wetlands.

The State of New York has mapped and adopted wetland maps that depict regulated freshwater wetlands. These maps are used in the State regulatory process. Although modifications to the wetland line might be made in the field, the State uses these maps for regulatory purposes even if some smaller wetlands or unmapped wetlands are non-jurisdictional because of potentially inaccurate maps. In New York it is common to have the USACE and New York State Department of Environmental Conservation (NYSDEC) approve different jurisdictional maps for regulated freshwater wetland because of this State approach (which differs than the USACE
approach). In a perfect world, one wetland map should be embraced by the federal and state levels to help the property owner understand what is regulated and not be held to two different maps of regulated wetlands.

One mapping set that should be considered for development by the USACE is the mapping of traditional navigable waters and tributaries (perennial and intermittent). From USGS maps to soil surveys the federal and state governments should be able to easily create maps showing these regulated water features. Watershed analysis to determine the extent of intermittent waters would likely be required to determine where tributaries change from intermittent to ephemeral. This location in the upper watershed would be helpful during jurisdictional determinations.

Contact

For questions concerning these comments, please contact Lynn Schloesser, Director of Water, Energy and Environment Programs (lschloesser@acec.org), ACEC.