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November 14, 2014

Mr. Ken Kopocis
Deputy Assistant Administrator for Water
United States Environmental Protection Agency
Office of Water
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1200 Pennsylvania Ave NW, MC 4101M
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Ms. Jo Ellen Darcy
Assistant Secretary of Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon, Room 3E446
Washington, DC 20310-0108

Via email to: ow-docket@epa.gov

Re: Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880

Dear Deputy Assistant Administrator Kopocis and Assistant Secretary Darcy:

The Indiana Department of Environmental Management (IDEM) and the Indiana State Department of Agriculture (ISDA) value the opportunity to provide the U.S. Environmental Protection Agency (U.S. EPA) and the U.S. Army Corps of Engineers (Corps) with comments on the proposed national rulemaking *Definition of "Waters of the United States" Under the Clean Water Act* (79 Fed. Reg. 22188, April 21, 2014) (hereinafter, "Proposed Rule"). IDEM is responsible for the daily implementation of the Clean Water Act (CWA) water quality programs in Indiana, and ISDA serves as an advocate for Indiana agriculture at the local, state, and federal level.

The Proposed Rule falls far short of the clarity ostensibly sought by its promulgation, and multiple procedural errors only serve to enflame the significant angst instilled in the regulated community. These procedural and substantive shortcomings require the withdrawal of the Proposed Rule. Accordingly, and pursuant to the reasons that follow, Indiana respectfully requests that the U.S. EPA and the Corps (hereinafter, the "Agencies") withdraw the Proposed Rule and work with the States, as co-regulators,

and all stakeholders, including regulated industry, to draft regulations that provide the clarity needed.

1. **The Proposed Rule is premature and inappropriately relies on the draft Connectivity Report.**

The U.S. EPA relied on a draft report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: a Review and Synthesis of the Scientific Evidence*" for the scientific support for the Proposed Rule. However, this report had not been released when the Proposed Rule was issued, and it still has not been adequately peer-reviewed. It is extremely difficult, if not impossible, to appropriately respond to, and comment on, a proposed ruled based on a draft scientific study. The Proposed Rule should be withdrawn and held until after the report is finalized and has undergone a thorough peer-review process.

Furthermore, we are concerned that the draft report relies on studies that conclude that waters are connected through the movement of birds, animals, and insects. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 174 (2001), the Supreme Court rejected this type of connection as a basis for federal jurisdiction, stating it "would result in a significant impingement of the States' traditional and primary power over land and water use." We are also concerned that the draft report relies on studies of the impacts of storing water to assert that water is connected. Storage of water implies choices regarding water allocation that Congress expressly left to the States under section 101(g) of the Clean Water Act. If the draft report is to be used as a basis for establishing the Waters of the United States rule, studies unrelated to water quality should be removed from the report.

2. **The Agencies failed to adequately engage affected stakeholders.**

IDEM and ISDA are disappointed in the development and rollout of the Proposed Rule. Executive Order 13132, Section 3(c), notes that "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States maximum administrative discretion possible." Section 3(d) requires agencies to consult with State and local officials in developing standards and where possible, defer to States. This is known as a federalism review. EPA and the Corps did not perform a federalism review, nor did they adequately engage the States, as co-regulators, in development of the Proposed Rule language. Only after the Proposed Rule was published did the U.S. EPA and the Corps hold meetings, conference calls and webinars to explain the intent of the rule. Even after those meetings, the intent and effect of the Proposed Rule was unclear with Agencies' staff frequently answering questions with, "We don't know" and "We'll have to figure that out." As an agency responsible for implementing Section 401 of the CWA, IDEM insists that states should have been consulted during the development of the Proposed Rule.

The Agencies also failed to consult with states on the financial impact of the Proposed Rule. The economic analysis for the Proposed Rule presumes no new economic burden on State agencies. In issuing a new rule proposal, the Agencies must include any additional costs that the States will incur to carry out their water quality programs and permitting programs as a result of the rule.

While we agree that in the wake of *Rapanos v. United States* there was a need to clarify the applicability of the CWA to certain waters, we contend that if the Agencies had conducted a federalism review and consulted with state and local officials, many of the misunderstandings regarding the intent of the proposal could have been avoided. The Proposed Rule must be withdrawn to comply with Executive Order 13132 and to allow the Agencies time to adequately engage affected stakeholders.

3. The Interpretive Rule guidance complicates the Proposed Rule and should be revoked.

The Interpretive Rule limits the applicability of Section 404(f) of the CWA. Although we recognize the Agencies' belief that the related Interpretive Rule broadens the exemptions to landowners, in reality, the Interpretive Rule only obfuscates the intent. The Interpretive Rule would not be necessary but for the expanded federal jurisdiction under the Proposed Rule.

Congress has already established permitting exemptions for farming and conservation practices. The Interpretive Rule raises the concern that normal farming practices not listed in the rule will require a permit. Additionally, it increases the cost of practices that are listed by requiring compliance with NRCS standards. Finally, the Interpretive Rule does not provide protection, even for listed activities that do comply with NRCS standards, because under the Proposed Rule's definition of waters of the U.S., planting and plowing could be considered activities that affect "the flow and circulation of waters of the United States. Both the Proposed Rule and the Interpretive Rule guidance should be withdrawn.

4. The Proposed Rule seeks to regulate many waters already regulated by Indiana.

The states know best how to protect the waters of their state. The U.S. Supreme Court has noted that:

> "Congress passed the CWA for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.'...In so doing, Congress chose to 'recognize, preserve, and

protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...."[1]

Admittedly, *Rapanos* leaves open the jurisdictional limitations under the CWA, but this open question should be resolved in favor of the states. State regulators are more familiar with and accountable to their regulated industries than distant federal regulators. We do not need this additional layer of federal regulation in order to realize the goal of the CWA. Indiana can get there on its own. The Proposed Rule should be withdrawn so that Indiana can seek the right solutions for Indiana.

5. <u>The Proposed Rule does not add complete clarity to what is regulated.</u>

Indiana prefers rules over guidance for both clarity and enforceability. We find the inclusion of specific exceptions/exemptions/exclusions in addition to those permitting exemptions already existing in Section 404(f) of the Clean Water Act useful. If, during implementation, these exceptions are treated as iron clad and not second guessed, the added specificity will expedite the determination of the need for, and the issuance of, some 401 water quality certifications. However, we stress that the exemptions and other important aspects of the final rule must be clarified.

a. The final rule must clarify the full scope of the exemption for a waste treatment system and other waste management systems.

Indiana agrees that "waste treatment systems, including treatment ponds and lagoons, designed to meet the requirements of the Clean Water Act" are not waters of the U.S. Yet, the proposed rule creates confusion over this provision by adding a comma after "lagoons" thereby implying that all waste treatment systems must be designed to meet Clean Water Act requirements. This is not true today as waste treatment systems that do not discharge to waters of the U.S. are not subject to Clean Water Act requirements. The comma after "lagoons" must be removed.

Also, further definition of what is and is not included as a waste treatment system must be added. We suggest language such as: "*all components located behind the outfall of an NPDES permit*" be inserted after "lagoons" in the Proposed Rule language. Additionally, it must be clearly stated that permitted storm water collection systems (particularly MS4s) fall within the exclusion of "waste treatment systems."

b. The final rule must clarify the complete description of what portions of ditches are not jurisdictional.

Regarding the exclusion of "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," the Agencies should clarify in the final

[1] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (2001)

rule that such ditches that drain uplands, but do eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that is upstream of the traditional waters of the United States defined in proposed (a)(1) through (a)(5). Additionally, a definition of upland should be included in the final rule that clarifies that upland is all land other than wetlands even when rainfall results in ponding of water in flat areas. Further, manmade drainage ditches that drain uplands only should not be jurisdictional regardless of the number of months it holds water. Finally, a landowner should be able to use a ditch to drain a non-jurisdictional water, such as a private pond or prior converted cropland, without turning that water body into a water of the U.S.

c. The final rule must clarify the definition of "significant nexus."

IDEM and ISDA have concerns with the use of the term "significant nexus" in the Proposed Rule. First, the courts are split as to whether significant nexus is the proper test under *Rapanos*, and, therefore, we question its inclusion in the Proposed Rule. Such a term should not be used to justify federal jurisdiction over broad categories of water such as ephemeral water, or to bring "other waters" under federal control. Alternatively, if the significant nexus test is to be implemented, it must be as clear as possible. We urge a simplification of the language that accurately reflects the Supreme Court's decision in *Rapanos*. In his description of significant nexus, Justice Kennedy identified waters that "affect, the chemical, physical, **and** biological integrity" which is critically different from saying "affect the chemical, physical, **or** biological integrity." This definition should be coupled with the plurality's "relatively permanent water" test to determine the extent of federal jurisdiction intended under the Clean Water Act.

d. The final rule must clarify that connecting waters will themselves not be considered jurisdictional.

The proposed definition of "tributary" includes water that goes underground and the proposed definition of "neighboring" includes water that has a connection to navigable water only through shallow groundwater or through a "confined surface hydrologic connection." We question the inclusion of groundwater as connecting water. Regardless of how connections are defined, the final rule must clarify that it is not the Agencies' intent to claim jurisdiction over the connecting features themselves

e. The final rule must clarify the status of existing jurisdictional determinations.

The Proposed Rule does not address the status of existing jurisdictional determinations. It is important that the Agencies are clear on how jurisdictional/non-jurisdictional determinations made prior to the effective date of the final rule will be grandparented in for implementation of projects.

Indiana reiterates that the appropriate course of action is to withdraw the Proposed Rule and work with stakeholders to develop revised regulatory language that provides clarity without overreach. We encourage continued dialogue with the States, including Indiana, as the Agencies work to develop clear, implementable language for future reproposal and public comment. In the long run, Indiana believes that such a process will speed the completion of the regulatory process and result in an implementable final rule that provides the clarity the Agencies are seeking.

Sincerely,

Thomas W. Easterly
Commissioner
Indiana Department of Environmental Management

Ted McKinney
Director
Indiana State Department of Agriculture