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Water Docket
Environmental Protection Agency
Mail Code 2822T
Docket ID No. EPA-HQ-2011-0880
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Docket Id. No. EPA-HQ-OW-2011-0880
Comments regarding Definition of “Waters of the United States” under the Clean Water Act;
Proposed Rule (76 *Fed. Reg.* 22187; April 21, 2014).

The Pennsylvania Grade Crude Oil Coalition (PGCC) submits the following comments regarding the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers’ (Corps) Proposed Rule Defining “Waters of the United States” Under the Clean Water Act (CWA), 76 *Fed. Reg.* 22187 (April 21, 2014) (Proposed Rule).

PGCC is a nonprofit trade coalition, with approximately 100 members, representing Pennsylvania’s conventional oil and natural gas producers, service companies, related businesses, as well as landowners and royalty owners. The operations engaged in by PGCC’s members involve “conventional” oil and gas formations using, primarily, the traditional method of vertical drilling. Combined, PGCC’s members employ thousands of men and women in Pennsylvania and PGCC members make up key parts of the economic fabric of many communities, particularly rural communities throughout Pennsylvania. PGCC members are subject to provisions of the CWA and implementing regulations relevant to oil and gas operations in Pennsylvania. The coalition and our members, therefore, have a direct interest in the proposed revision to the definition of “waters of the U.S.” under the CWA.

All of PGCC's members are small businesses. We note that no regulatory flexibility analysis of the Proposed Rule was conducted under the Regulatory Flexibility Act because the agencies certified that the Proposed Rule would not have a significant economic impact on a substantial number of small entities, including small businesses. 76 *Fed. Reg.* 22220. PGCC strongly disagrees with this assessment and conclusion. Rather, the proposed changes to the definition of "waters of the United States" are expected to have a significant effect on small businesses by increasing the costs, delays and regulatory uncertainties of doing business.

Overview of the Proposed Rule

Although the agencies have asserted that the Proposed Rule would not expand the types of waters that would be jurisdictional, the private sector (including the oil and gas industry and other industries) has widely disagreed with this assertion. Rather, the Proposed Rule would be expected to have serious repercussions on stream/wetland permitting, spill reporting, and the overall construction, operation and modification of oil and gas facilities, including well locations, roadways and pipelines.

The effect of the Proposed Rule is also far reaching in that eleven subparts of the Code of Federal Regulations impose requirements based on the existence of, or proximity to, a "water of the United States," also referred to as a "navigable water." At present, oil and gas operators, among others, rely extensively on the December 2, 2008 guidance memorandum issued by the EPA and Corps (2008 Guidance) to interpret the meaning of "waters of the United States" under the CWA. "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*," (December 2, 2008).

The Proposed Rule broadens the definition of "waters of the United States" by revising the definitions and interpretations of tributaries, adjacent waters and other waters. Under the Proposed Rule, all tributaries are presumed to have a significant nexus to a traditional navigable water, interstate water or territorial sea. The Proposed Rule broadly defines tributary to include any water with a bed and banks and ordinary high water mark (OHWM), or any wetland, lake or pond, that contributes flow, either directly or indirectly to other jurisdictional waters. In contrast, under current guidance, jurisdiction over tributaries that are not relatively permanent is determined on a case-by-case basis. The Proposed Rule also expands jurisdiction of the CWA to include all waters adjacent to a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. "Adjacent" under the Proposed Rule encompasses all waters located within the riparian area or floodplain of a jurisdictional water. It also includes any water with a shallow subsurface or confined surface hydrologic connection

to a jurisdictional water. A significant nexus to other jurisdictional waters is presumed. Conversely, under the agencies' current guidance, wetlands, but not watercourses, that are in close proximity to a waterway, rather than immediately next to one, are assessed on a case-by-case basis. Lastly, the Proposed Rule allows the EPA to consider unspecified "other waters" on a case-by-case basis to determine if they, either individually or in combination with other similarly situated waters in the same region, have a significant nexus to a traditional navigable water, interstate water, or territorial sea.

PGCC generally concurs with and joins the Independent Petroleum Coalition of America (IPAA) in its submittal of comments to the Proposed Rule. PGCC's members echo the sentiments of IPAA and believe the Proposed Rule will significantly expand jurisdiction over waters of the United States beyond that which is authorized under the CWA. This expansion will have substantial adverse impacts on the siting, permitting, construction, maintenance and operation of oil and gas facilities in Pennsylvania and throughout the United States. In addition to the IPAA comments, PGCC submits the following commentary specific to the impact of the Proposed Rule on the oil and gas industry in Pennsylvania.

1. The Proposed Rule would affect the jurisdictional determination of much more than three percent of the waters in Pennsylvania.

EPA estimates that the Proposed Rule will result in an approximate 3 percent increase in assertion of jurisdiction over waters when compared to 2009-2010 field practices. U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (2014). PGCC believes this percentage will be much higher.

According to the Pennsylvania Department of Natural Resources, Pennsylvania is second only to Alaska in the number of miles of streams in one state.¹ To provide some perspective on the large proportion of surface waters in Pennsylvania, as compared to the total land surface, the Pennsylvania Department of Environmental Protection (PADEP) provided the following estimates of waters in Pennsylvania:²

State Surface Area (square miles)	45,333
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¹ <http://www.dcnr.state.pa.us/forestry/recreation/Boating/index.htm>

² 2014 Pennsylvania Integrated Water Quality Monitoring and Assessment Report , PADEP, April 2014.

Number of Water Basins (major basins)	6
Total Miles of Rivers and Streams	86,000
Number of Lakes/Reservoirs/Ponds**	3,956
- Number of Significant, Publicly Owned Lakes (subset)	226
Acres of Lakes/Reservoirs/Ponds**	161,445 ³
- Acres of Significant, Publicly Owned Lakes (subset)	104,024
Square Miles of Estuaries/Harbors/Bays	
- Delaware Estuary	17
- Presque Isle Bay	6
Miles of Great Lakes Shore	63 (Lake Erie)
Acres of Freshwater Wetlands	403,924
Acres of Tidal Wetlands	512

Based on PADEP’s data, for each square mile (i.e., 640 acres) of surface area in Pennsylvania, there are an average of approximately 1.9 miles of streams and rivers, 8.9 acres of freshwater wetlands and at least 3.5 acres of lakes, reservoirs and ponds that are two acres or greater in size. Changes to the definition of waters of the United States will undoubtedly have a significant effect on how these waters, and waters that are not accounted for in this tally, are classified. For example, the Proposed Rule’s definition of tributary is expected to extend the jurisdictional status of many waters farther upstream than previously delineated, where a bed, bank and OHWM may be present (regardless whether this reach of the water would be considered to be relatively permanent). As a further example, ephemeral streams that were not previously considered to be jurisdictional would be considered to be categorically jurisdictional under the Proposed Rule. The Proposed Rule’s definition of “adjacent waters” is also expected to increase the number of jurisdictional waters, given the

³ Lakes and ponds greater than two acres.

inclusion of all water bodies, beyond wetlands, and the broad definitions of “adjacent” and “neighboring.”

2. The Proposed Rule would result in increased delineation costs and delays.

The Proposed Rule would increase the efforts needed to delineate potential waters of the United States, resulting in significantly increased costs and delays for nearly every project involving earth disturbance. Given the extensive water resources in Pennsylvania, costs and delays would be associated with evaluating the expanded view of jurisdictional waters to determine whether a jurisdictional water would be impacted by an activity. For example, the Proposed Rule considers jurisdictional streams to continue even though they have gone underground for an unspecified period of time.⁴ Therefore, qualified professionals would need to evaluate a larger up gradient area to determine whether a connection to jurisdictional water exists. Similarly, water that is connected to a jurisdictional water by a non-jurisdictional water could still be considered to be jurisdictional. Therefore, professionals would need to evaluate not only water connected to the jurisdictional water, but also all waters up gradient and down gradient from it. In all, professionals would no longer be able to walk the limit of disturbance and reasonable buffer areas to identify jurisdictional resources and impacts. Instead, they will need to assess a much larger area to determine whether surface or subsurface hydrologic connections exist, whether a bed/bank exists upstream or downstream from a tributary or whether a significant nexus exists with an “other water” when considered in combination with similarly situated waters within the same region.

Importantly, when oil and gas operators are determining a well site location, several sites are typically evaluated at the same time for a variety of factors, including environmental factors, geology, and unit configuration. This expanded delineation process would need to be undertaken for each potential well site to determine and compare the feasibility of each site. Therefore, these increased costs and time requirements may be tripled or quadrupled.

Because PGCC’s members are all small businesses this expanded delineation process will be particularly debilitating. Virtually none of PGCC’s members have the necessary expertise on staff and the cost and lack of availability of outside qualified professionals create both economic and timing difficulties. Indeed the small profit margins inherent in the “stripper” and tight gas oil and gas wells which are the core of PGCC member’s conventional oil and gas operations, mean that the proposed new requirements will significantly reduce new operations or cause them to cease.

⁴ See 76 *Fed. Reg.* 22199 for additional examples.

3. The Proposed Rule would result in excessive delays in permitting.

The delineation of additional jurisdictional waters under the Proposed Rule would result in an increased need for individual Section 404 permitting and increased Corps' involvement under the State's Programmatic General Permit (PASPGP-4), both of which would necessitate significant lead time and increase permitting expenses.

In Pennsylvania, PADEP and the Corps have entered into the State Programmatic General Permit (PASPGP-4), which is intended to address state and federal stream and wetland permitting for impacts that are 1.0 acre, or less. The PASPGP-4 relies on the following three classifications of impacts, each of which involve progressively more interaction with PADEP and the Corps:

- a. Category I – Category I generally includes activities that are authorized by general permits, and activities for which permit requirements are waived under 25 Pa. Code. 105.12. To qualify as a Category I activity, the single and complete project, including all attendant features, both temporary and permanent, must individually and cumulatively result in direct or indirect impacts to 1.0 acre or less of waters of the United States, or 250 linear feet or less of streams, rivers, other watercourses and open waters. Permit applications for Category I activities are reviewed by PADEP, and authorized under PASPGP-4 without notification to the applicable Corps District.
- b. Category II – Category II includes activities that do not meet the terms and conditions of a Category I activity. Activities authorized under Category II must result in the discharge of dredged or fill materials and the placement of structures for a single and complete project, including all attendant features, both temporary and permanent, which individually and cumulatively result in direct or indirect impacts to 1.0 acre or less of waters of the United States, or 250 linear feet or less of streams, rivers, other watercourses and open waters. In order to classify as a Category II activity, the applicant or PADEP must run a Pennsylvania Natural Diversity Inventory (PNDI) within the last 12 months and receive no conflicts with federally-listed species; receive a “No Effect” determination from the Corps; or receive a clearance from the United States Fish and Wildlife Service that the activity will not affect federally-listed species. Category II activities may be authorized after an opportunity for review and comment by the Corps, all other Federal and State resource agencies, and the general public through publication in the *Pennsylvania Bulletin* as a Public Notice for at least 30 days. The Corps and other resource agencies review the *Pennsylvania Bulletin* to determine the need for federal review on a case-by-case basis. The Corps or other resource agencies may request that a proposed project be classified as a Category III activity prior to the permit issuance. If the application is not forwarded as a Category III activity, PADEP reviews the application.
- c. Category III – Activities are classified as Category III based on the type of regulated activity, geographic location, the waterway where the project is located, the type of project proposed, and the potential effects on endangered species or historical and cultural resources. These types of activities receive the most stringent evaluation. Applications for Category III projects are forwarded to the Corps for review. The Corps coordinates with appropriate resource agencies to verify that no more than minimal adverse environmental

impacts will occur. The Corps notifies the PADEP and applicant regarding the project's eligibility under PASPGP-4.

The conventional exploration and development activities engaged in by PGCC members carry a small footprint. Well site locations generally involve a small fraction of an acre and under current regulations the permitting and notification requirements for the vast majority of conventional operations are minimal. However, the expanded scope of jurisdictional waters under the Proposed Rule will dramatically increase those requirements. That expanded scope will necessitate both complex general permitting. As noted, the additional costs associated with the permitting requirements will have a significant negative impact upon conventional operations.

In addition to additional costs the additional delay associated with obtaining an individual permit can presently be as much as a year or more. With the demand for individual permitting for many industries expected to increase due to the Proposed Rule, delays for permit approvals are likely to increase by an additional six months or more. Such lengthy delays have critical consequences for oil and gas development. For example, leases may expire before a permit is obtained, resulting in the loss of land position, the loss of signing bonuses and lease payments, and the need to re-sign the lessor (or find another tract of land) at potentially higher rates. Further, the inability to meet a rig schedule could result in the possible loss of a rig and/or the significant costs associated with shutting down and starting up the rig.

4. The Proposed Rule would create conflicts with applicable state law.

In many oil and gas development scenarios, the Proposed Rule would create conflicts with state permitting and regulations. These conflicts should be recognized and addressed by the Proposed Rule to decrease potential confusion and delays in operation.

Site restoration - In Pennsylvania, oil and gas owners and operators are required to restore "the land surface within the area disturbed in siting, drilling, completing and producing the well." 58 Pa.C.S. 3216(a). Within nine months after completion of drilling a well (extensions may be granted for an additional two years), the owner/operator must restore the well site.⁵ 58 Pa.C.S. 3216(c), (g). The law states that the failure to restore a well site as required by this provision is a violation of the

⁵ As used in this section, the term "well site" means areas occupied by all equipment or facilities necessary for or incidental to drilling, production or plugging a well.

law, while the law also requires restoration activities to comply with all applicable provisions of the CWA.

In most cases, ditches are installed around well sites in Pennsylvania to divert water from the well site. Given the topography of Pennsylvania, and a large amount of the Appalachian Basin, a shallow groundwater table or groundwater seeps are often encountered, resulting in perennial flow in the ditches. Under the Proposed Rule, these ditches would become jurisdictional (as tributaries). These same ditches, however, would also be required to be restored when drilling is completed, under Pennsylvania law. If the Proposed Rule is adopted, operators would be required to obtain a Section 404 permit before they could comply with the site restoration requirements. Delays in receiving, or the inability to receive, the Section 404 permit could cause a violation of Pennsylvania restoration requirements.

Erosion and sediment control/post-construction storm water management - In Pennsylvania, an erosion and sediment control plan must be prepared for any well site earth moving activities. 58 Pa.C.S. 3216(b). Owners and operators must also obtain authorization under an Erosion and Sediment Control General Permit (ESCGP-2) for oil and gas activities that involve five acres or more of earth disturbance. See 25 Pa. Code 102.5(c). Under this authorization, erosion and sediment control and storm water management best management practices (BMPs) must be implemented and maintained, and a post-construction storm water management plan must be developed to manage changes in storm water runoff after the earth disturbance activities have ended and the project site is permanently stabilized. Where post construction BMPs stay in place, long-term operation and maintenance schedules must be prepared that allow for inspection of BMPs and repair, replacement or other routine maintenance to ensure proper operation.

State oil and gas agencies typically will require drainage ditches to be constructed and stabilized with appropriate erosion and sediment controls. These controls may include installation of water bars within the ditches and lining the channels with riprap. Under the Proposed Rule, any maintenance or repair of these ditches required by the ESCGP-2, including the placement of riprap, would be prohibited by the Corps without a Section 404 permit.

5. **The Proposed Rule's consideration of certain ditches, impoundments and storm water ponds as jurisdictional waters would hinder future development and increase operational/construction costs, without adding environmental value.**

In addition to the conflicts with state law and regulation, the reclassification of certain ditches and impoundments as jurisdictional waters under the Proposed Rule, would severely limit and delay operations, maintenance and future development. Essentially, existing operations would be “fenced in” by jurisdictional waters. If ditches or impoundments are considered to be jurisdictional, they could not be modified, cleaned out, maintained, or otherwise changed without a Section 404 permit. As a result, under the Proposed Rule, either (1) operational processes or timelines would need to be modified to assess the presence of jurisdictional waters and conduct subsequent permitting, or (2) construction techniques would need to be modified to avoid the creation of jurisdictional waters. Construction modifications, such as the installation of underground piping around well pads (rather than gravel ditches) would require increased material and labor costs. It would also require increased engineering efforts.

6. The Proposed Rule would cause unnecessary increased in costs and efforts regarding spills.

The identification of additional jurisdictional waters would increase the likelihood that spills on oil and gas sites would be federally reportable, raising the costs and complexity of spill response. In particular, the reclassification of diversion ditches as jurisdictional waters would significantly increase the likelihood that a spill would reach a “water of the United States,” and therefore, could require federal reporting to EPA and/or the National Response Center. When agencies, such as the EPA, become involved in spill response that is currently managed under Pennsylvania law, the cost and complexity for reporting such spills increases, even though the spill response measures generally do not change.

7. The Proposed Rule does not address grandfathering or provide for a smooth transition for pending applications and jurisdictional determinations.

Although not unique to Pennsylvania, PGCC notes that the lack of a grandfathering provision is a concern for its members. PGCC requests clarity regarding the extent to which the Proposed Rule would be applied to areas that were previously determined to be non-jurisdictional. PGCC requests that language be inserted into the Proposed Rule to preserve previous non-jurisdictional determinations and prevent the expansive of previous jurisdictional determinations. Similar grandfathering provisions have been included in the Nationwide Permit renewals.

8. **The Proposed Rule would create more confusion regarding the jurisdictional status of waters, by the leaving open questions regarding the definitions and scope of terms used in the Rule.**

PGCC and its members highly value regulatory certainty. They want to clearly understand and comply with state and federal laws. While the intent of the Proposed Rule may have been to add clarity, predictability and consistency to the definition of “waters of the United States,” the Proposed Rule creates substantial uncertainty regarding its applicability and opens the door to subjective interpretation of many terms. The agencies have acknowledged many of these questions and have requested comment regarding specific definitions and proposed alternative approaches for determining jurisdiction. Although not intended to be an exhaustive listing, the following types of questions (as discussed within the analysis) would remain if the Proposed Rule is finalized, as currently written.

- a. Upland – How is upland defined and applied? A clear definition of what is considered to be upland will significantly increase the clarity of the Proposed Rule and eliminate confusion in its application.
- b. Riparian area - What are the boundaries of a riparian area? How will “transitional areas between aquatic and terrestrial ecosystems” be delineated? As written, the definition of “riparian area” would result in subjective determinations that are open to significant disagreement.
- c. Floodplain – What flood interval(s) will be used to evaluate the presence of adjacent waters? Many state and federal regulatory requirements are based on modeling the 100-year storm event. The shorter the storm interval arbitrarily applied by the agencies, the larger the floodplain and the larger the number and extent of potential waters that could be present within the floodplain.
- d. OHWM – How will an OHWM be determined? Delineation of OHWM is open to subjective interpretation. The identification of the OHWM limits will be influenced by uncharacteristically high rainfall events and are seasonably difficult to identify.
- e. Shallow subsurface hydrologic connection – How will a subsurface hydrologic connection be determined? If proximity is a factor, will there be a bright line rule?

- f. Tributary – If a “break” occurs in the tributary, is the area of the “break” considered to be jurisdictional? Asserting that a tributary still exists when water flows underground, through boulders or otherwise without a bed, bank and OHWM only confuses and complicates the “bright line” categories of jurisdictional waters reportedly sought by the agencies to simplify the jurisdictional determination process.
- g. Other waters – Other than those waters specifically excluded from the definition of “waters of the United States,” nearly every water could be considered jurisdictional as an “other water” given the broad range of factors that could establish a significant nexus, especially when considered in combination with other similarly situated waters in a region. PGCC requests clarification and limitation of the water bodies that would be considered to be “other waters.”
- h. Exclusions – The exclusions to the definition of “waters of the United States” are very specific and seemingly arbitrary. PGCC asks that the exclusions for (1) “artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins or rice growing” and (2) “artificial reflecting pools or swimming pools created by excavating and/or diking dry land” be expanded to include other types of ponds excavated in dry land, including impoundments and stormwater ponds.
- i. Erosional features and swales – In the Proposed Rule, EPA admits the difficulty in distinguishing between an erosional feature or gully and a jurisdictional water. EPA indicates that the only difference between these features may be the length of time that they have existed. 76 *Fed. Reg.* 22218-22219. This type of distinction would undoubtedly cause confusion and subjective determinations. PGCC requests clarification of the distinction between these features.

Conclusion

In closing, the proposed definition of “waters of the U.S.” significantly, and improperly, expands the jurisdiction of the Clean Water Act. For all the above reasons, PGCC strongly urges the

EPA to withdraw its proposed rule. PGCC appreciates the opportunity to express our views on this important issue.