pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER MANAGEMENT

October 8, 2014

Water Docket
Environmental Protection Agency
Attention: Docket ID No. EPA–HQ–OW–2011–0880
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act (79 FR 22188, April 21, 2014)

To Whom It May Concern:

Enclosed please find the Pennsylvania Department of Environmental Protection's (PADEP) comments on the United States Environmental Protections Agency's (EPA) proposed rulemaking: Definition of "Waters of the United States" Under the Clean Water Act (79 FR 22188, April 21, 2014).

Pennsylvania respectfully requests EPA and Army Corps of Engineers (ACOE) to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.

PADEP appreciates the opportunity to submit these comments to EPA and reserves the right to submit additional comments after review of the final Scientific Advisory Board report: *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.*

Should you have questions or need additional information, please contact me by e-mail at kheffner@pa.gov or by telephone at 717.783.4693.

Sincerely,

Kelly J. Heffner
Deputy Secretary

Commonwealth of Pennsylvania, Department of Environmental Protection
Comments on the U.S. Department of Defense, Department of the Army, Corps of Engineers and U.S. Environmental Protection Agency
Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act (79 FR 22188, April 21, 2014)

General Comment:

The Commonwealth of Pennsylvania has abundant and precious water resources with approximately 86,000 miles of streams, 404,000 acres of wetlands, 161,445 acres of lakes, 17 square miles of the Delaware estuary, and 63 miles of Great Lakes shore front.[1] These "waters of the Commonwealth" have long been protected in Pennsylvania by a network of state laws, of which the Pennsylvania Clean Streams Law, passed in 1937, is central.[2] Under the Pennsylvania Clean Streams Law ("CSL"), the scope of protected waters is not subject to confusion or debate, but is clear and comprehensive, with the statutory prohibition on pollution or potential pollution to waters[3] of the Commonwealth providing the framework. In contrast to the confusing definition proposed by this rulemaking, the Pennsylvania Clean Streams Law protects all waters of the Commonwealth, which are defined as: *"Rivers, streams, creeks, rivulets, impoundments, ditches, watercourses, storm sewers, lakes, dammed water, wetlands, ponds, springs and other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth."*[4] The Pennsylvania Clean Streams Law in turn provides authority for at least 56 Chapters in Title 25 of the Pennsylvania Code. These regulations constitute a robust, comprehensive and effective regulatory framework for protection of waters of the Commonwealth.

The Pennsylvania Clean Streams Law is the principal state law authority for the state's permitting programs and the foundation of delegation under Section 402 of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act)[5] by the U.S. Environmental Protection Agency ("EPA") of the National Pollution Discharge Elimination System ("NPDES") program to the Pennsylvania Department of Environmental Protection ("DEP"). The Clean Streams Law also provides authority (together with the Pennsylvania Dam Safety and Encroachments Act ("DSEA")[6]) for the companion state law program under Title 25, Chapter 105 of the Pennsylvania Code relied on by the U.S. Army Corps of Engineers ("ACOE") in their administration of the Pennsylvania State Programmatic General Permit ("SPGP") for Clean Water Act Section 404[7] permitting.

Pennsylvania was therefore frustrated, disappointed and frankly, alarmed, to discover that in formulating this rulemaking, EPA is relying on inadequate and inaccurate information regarding the breadth and scope of state law programs. It is of great concern to Pennsylvania that, despite delegation agreements referencing existing state laws, and the routine interaction with

[1] 2012 Pennsylvania Integrated Water Quality Monitoring and Assessment Report.
[2] Act of June 22, 1937, P.L. 1987, No. 396, as amended.
[3] 35 P.S. §§ 301, 401 and 402.
[4] 35 P.S. § 691.1.
[5] 33 U.S.C. § 1342.
[6] 32 P.S. §§ 693.1 et seq.
[7] 33 U.S.C. § 1344.

Pennsylvania DEP regarding our obligations and collaboration in administering our NPDES duties alone, EPA would nonetheless rely on and cite in public forums with Pennsylvania DEP officials, the 2013 Environmental Law Institute ("ELI") study titled: *State Constraints – State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*. This assessment is named as background information supporting the rulemaking,[8] in articles[9] and in public presentations by EPA officials[10], although it is not cited in the rulemaking. One of DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is *needed* because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states.

The ELI study fails entirely to identify codified statutes and regulations that have provided the foundation for Pennsylvania's regulatory programs for decades – in some instances for nearly half a century. Instead, the ELI report only cites a 1996 Executive Order and the wetlands provisions under the PA Dam Safety and Encroachments Act ("DSEA"), and identifies these as loopholes in Pennsylvania. The ELI report does not further analyze the Pennsylvania wetlands permitting program (or compare it to the ACOE 404 permitting program) and more egregiously, fails to reference or acknowledge the regulatory authority under the Pennsylvania Cleans Streams Law and the multiple chapters of the Pennsylvania Code which comprise the state's regulatory program. Again, these state laws and regulations form the basis for delegation of the Clean Water Act NPDES program to Pennsylvania, as well as the foundation for the ACOE Pennsylvania SPGP for Clean Water Act Section 404 authorizations.

In 2013 alone, DEP provided approximately 13,066 state law water program authorizations – 4,914 of which were under the Clean Streams Law for the delegated NPDES program. These numbers represent the extensive state law oversight in Pennsylvania over projects which affect or have the potential affect waters of the Commonwealth. In order to obtain each one of these authorizations, the permittee is required to undertake its project in compliance with one or more chapters of Title 25 of the Pennsylvania Code. It is particularly noteworthy given the ELI assessment of the Pennsylvania program, that the authorizations and oversight undertaken by PA DEP pursuant to the delegated NPDES program constitutes only 38% of the water related permitting in 2013. In other words, 62% of the 2013 water related permitting in Pennsylvania was pursuant to state law authority only.

DSEA/CSL - Chapter 105	3,224
CSL/NPDES	4,914
CSL/Sewage Facilities Act[11]/Non-NPDES	4,928

[8] http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act

[9] http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30

[10] June 13, 2014, Berks County, EPA Official Nancy Stoner

[11] Pennsylvania Sewage Facilities Act, 35 P.S. §§ 750.1 *et seq.*

As these statistics demonstrate, Pennsylvania does in fact have a significant and robust regulatory program that reaches beyond the federal Clean Water Act. Pennsylvania's approach in fact could serve as a model for the cooperative federalism at the heart of the Clean Water Act, which envisions a federal-state partnership in the oversight and protection of the nation's waters with the federal law providing a broad general regulatory framework that relies on and supports strong state programs specifically tailored to the unique attributes of each states.

Specific Comments:

- **Overcoming structural and authority limitations of the Clean Water Act through the revision of the definition of "Waters of the United States" is not appropriate.** Pennsylvania recognizes that the challenges in protecting water resources have evolved since passage of the Clean Water Act in 1972. However, trying to address the problems of 2014 (which are largely wet weather driven and/or are associated with nonpoint sources) by changing the definition of "Waters of the United States" is not appropriate. The proposed definition will expand jurisdiction over stormwater related systems, which is particularly inappropriate after EPA has chosen not to proceed with the national stormwater rulemaking. Further, using this new definition in the existing permitting programs under Sections 402 and 404 will render both of these programs more cumbersome and confusing. Expansion of federal regulatory oversight through a definitional change is not appropriate, but more significantly, will not be effective. The permitting authorities (state and federal) will be mired in litigation and disputes related to the proper interpretation of the proposed re-definition of "Waters of the United States."

- **The proposed rule is premature in relation to the ongoing discussions with the Scientific Advisory Board (SAB).**
  The determination of applicable science, which provides a baseline for the proposed rule, is not complete or finalized. The proposed rule cites the report and recommendations titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* which is currently being peer reviewed by the SAB. This process of simultaneously evaluating the science during the comment process provides a major obstacle in providing substantive comments and recommendations regarding the scientific basis for the validity of the obligations established in the rule. It also implies that the scientific basis provided in the draft rule is irrelevant. PADEP recommends that the states and the public be provided with a 60 to 90-day review and comment period, and an opportunity to submit additional comments on the rule given the relationship of the study to this rule.

- **Pennsylvania is not experiencing the purported confusion** that is one of the drivers for the rule. Our state law jurisdiction is common-sense in application and does not generate confusion. As the foundation of our delegated NPDES program and the basis for the ACOE's Pennsylvania State Programmatic General Permit, our state law based programs are effective. Clarification or expansion of federal CWA jurisdiction is not needed from Pennsylvania's perspective.

- **One size does not fit all.** EPA asserts that protection of the 60 percent of nation's stream miles that flow only seasonally[12] is an important objective of the rule. However, Pennsylvania is not a

[12] Pennsylvania uses the terminology "intermittent stream" and "perennial stream" rather than seasonal. 25 Pa. Code §102.1

state for which the majority of stream miles only flow seasonally. Further, to the extent Pennsylvania streams have seasonal flow, they are protected under State law. Administering a detailed and specific but 'one-size-fits-all' definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule may in fact undermine existing state law protections.

- **The rule's focus on Section 404 permitting is problematic for Section 402 permitting.** It appears that the rule, which grows out of Section 404 cases decided by the United States Supreme Court, is focused on providing clarification for purposes of Section 404 permitting. This clarity in the Section 404 context, however, will come at the expense of clarity and common sense administration of the Section 402 NPDES program.

- **The proposed rule as drafted creates more confusion than it clarifies.** The proposal put forth by EPA and ACOE seems to replace the current "other waters" case-by-case analysis with a new "significant nexus" analysis. However, the "significant nexus" analysis appears to be done on a case-by-case basis. As a result, agencies may be doing little more than exchanging one collection of uncertainties for another. See the following language from the preamble to the proposed rule:

    - "The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and *make the process* of identifying ''waters of the United *States'' less complicated and more efficient.*" 79 FR 22190 (emphasis added).

    - "The agencies did not adopt the all in or the all-out approach to ''other waters.'' Based on the information currently available in the scientific literature, applicable case law, and the agencies' policy judgment about how best to provide clarity and certainty to the public regarding the jurisdictional status of ''other waters'' *the agencies today propose the case-specific significant nexus analysis* presented in this rule and explained in the preamble." 79 F.R. 22198 (emphasis added).

- **EPA staff assurances and presentations suggest that despite the new rule, the implementation of the Section 402 and 404 programs in Pennsylvania will not change. This does not provide sufficient certainty to Pennsylvania.** Because the rule as drafted can be interpreted in ways that could significantly impact the administration of these programs, the language of the rule itself must be clarified in a manner that provides assurance to the public, the regulated community and to states such as Pennsylvania with robust programs and bountiful water resources.

- **The "significant nexus" approach to determining jurisdiction in the proposed rule is impractical.** The proposed procedures provided in the preamble for documenting whether there is a "significant nexus" with individual wetlands such that they should be treated as "Waters of the United States." are extremely complex and will be very time consuming. The procedures may be scientifically valid, but will be largely impractical for routine regulatory determinations.

- **The proposed definitions do not exclude wet weather/stormwater conveyance or treatment systems.** The proposed rule would include wet weather or stormwater conveyance and treatment systems as regulated waters of the US. This result is unrealistic and unsound from the scientific perspective. The application to current regulated efforts to treat and manage stormwater through pipes, conveyances, and other engineered structures, or through passive green infrastructure practices, would result in these activities being categorized as waters of the US. EPA has indicated in the Q&A related to the rule that this is not the intention, but language in the rule should be added to the exemptions in order to clarify this.

- **The proposed rule will impose a significant impact on available resources to implement CWA program requirements.** If the issues related to the definitions, and uncertainty about how EPA and ACOE administration of the terms described above are not addressed, the number of water bodies needing to be assessed, water quality standards established, and determinations of impairment will significantly increase. For example, a shallow subsurface aquifer with an established connection to a water body into which septic systems discharge under the proposed rule could now be defined as jurisdictional triggering the need for an NPDES permit to discharge. Would the aquifer itself also have to be assessed, added to the list of water bodies and defined as impaired or not?

- **As written, many of the proposed definitions have the potential to expand the scope of "CWA jurisdictional" waters.** This will result in states expending a significant amount of resources assessing, listing, and issuing NPDES discharge permits for activities that have traditionally, and should continue to be, treated as a nonpoint sources, with no real meaningful benefit to protection of water resources in Pennsylvania. For example, discharges from best management practices for the treatment of stormwater runoff, individual discharges toMS4 systems, and septic systems discharging into an aquifer with an established hydrologic connection could all potentially be subject to NPDES permit requirements, even though they are all subject to state law regulations and permit requirements. States do not have the resources to deal with the increase in workload that this change could potentially cause, without any increased water quality protection.

- **To address some of the problems described above, Pennsylvania proposes the following specific revisions to definitions in the rule:**

    1. Neighboring – Delete "or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."

    2. Floodplain – Define moderate to high water flows in term of a certain rain event. The lands adjoining a channel or conveyance that have been or may be expected to be inundated by flood waters in a 100-year frequency flood.

    3. Tributary – Define to mean a channel or conveyance of surface water having both defined bed and banks, whether natural or artificial, with perennial or intermittent flow that flows to a larger stream or other body of water; the "bed" being the bottom/substrate area/base of the channel or conveyance; and "banks" being the

break in slope between the edge of the bed of the channel and the surrounding terrain and generally parallel to the channel or conveyance.

4. Significant nexus – Terms like "significantly", "speculative" or "insubstantial" are too subjective. A scientifically defensible definition of significant, based on water quality assessment, health standards, etc. is necessary.

5. Significant nexus - Delete the "case-specific basis" for other waters.

Conclusion

Pennsylvania respectfully requests EPA and ACOE to withdraw this proposed rulemaking, and to amend the rule after careful consideration of the comments, further collaboration with states, and public hearings. The rule as drafted creates more confusion than it clarifies, and is already subject to differing interpretations by EPA and ACOE staff. This confusion will delay permitting and could undermine strong state programs. Pennsylvania asks EPA and ACOE to consider an approach that recognizes regional differences in geography, climate, geology, soils, hydrogeology and rainfall, and that supports strong and comprehensive state programs.