

The Land Improvement Contractors of America
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Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Ms. Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
441 G Street, N.W.
Washington, DC 20314-1000

Docket No. EPA-HQ-OW-2011-0880

Re: LICA Comments on the Proposed Rule defining the “Waters of the United States” under the Clean Water Act (CWA).

Dear Administrator McCarthy and Assistant Secretary Darcy,

The Land Improvement Contractors of America (LICA) appreciate the opportunity to comment on the referenced Proposed Rule (PR). LICA member contractors, located in every state and working closely with Soil and Water Conservation Districts, are the contractors that since 1951 have helped the nation’s farmers and ranchers install soil and water conservation practices on the land. Our members are dedicated to the professional conservation of soil and water, and promote high standards of workmanship when installing land improvement conservation practices.

The proposed definition will significantly expand EPA’s jurisdiction. While EPA has continued to note that the rule is meant to only clarify what is and is not considered Waters of the US and not to expand jurisdiction, the rule is ambiguous in many areas. For example, some features are exempt, and the way in which they are exempted could be interpreted that the contrary would then be true. Ex: *(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.* Would it be true, then that all ditches that DO contribute flow to a water ARE WOTUS?

The ability of local governments covered by MS4 permits to maintain their drainage systems and post construction stormwater BMPs will be significantly hampered by the expanded definition. Under the proposed new rule, ditches that have been routinely maintained to promote positive drainage and/or prevent flooding will be subject to federal and state permitting, similar to current permits and restrictions placed upon streams. In addition, many stormwater practices will be considered WOTUS, requiring significant resources to maintain. And, where maintenance of stormwater quality and quantity measures is hampered or where permits to maintain the measures are denied by federal agencies, the stormwater measures may fail to function as designed. Flood control structures will lose flood storage, and infiltration BMPs installed for water quality will fail to treat runoff as designed, which could in turn cause MS4s to be out of compliance with their MS4 permits. LICA believes the state and federal regulatory agencies already have clear guidance in place to identify regulated streams.

Over the last several decades, the Supreme Court has sought to clarify the concept of “waters of the U.S.” but in many respects has created greater confusion. Three seminal cases inform the current rulemaking. *U.S. v. Riverside Bayview*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* case requires the government to establish a “significant nexus” (biological, chemical or physical) between non-navigable and traditionally navigable waters (TNWs) to establish CWA jurisdiction. The effect of the *SWANCC* and *Rapanos* decisions was to significantly limit the federal government’s authority over certain waters historically deemed jurisdictional, including isolated, intrastate

wetlands and wetlands adjacent to tributaries located remotely from TNWs.

The significant nexus test must not be used as a method of taking the Connectivity Report and using every hydrological connection as a legal connection for determining “significant.” To be significant, or “more than speculative or insubstantial,”¹ must mean that the expansion of jurisdiction beyond the Supreme Court decisions is not allowed, otherwise too many waterways in the country will be subjected to the full force of federal CWA, in an era with limited federal resources available to address CWA goals. LICA supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments.

As drafted the proposed rule would substantially expand CWA jurisdiction post-*Rapanos*, granting EPA and the Corps broad authority and discretion to regulate wetlands and other water bodies remote from TNWs. The amount of expansion is difficult to predict with any meaningful precision, but if the proposal were to pick up all adjacent waters and most isolated wetlands and ditches, the expansion would be significantly greater than 3% as estimated by EPA, including expanding jurisdiction to water features on agricultural lands that have not been subject to CWA jurisdiction since before the *SWANCC* case in 2001.

To conclude, while EPA’s efforts to preserve the agricultural exemptions are critical and well-intentioned, the combined effect of the expansion of jurisdiction and the framework to implement the agricultural exemptions creates the following legal uncertainties and risks: (1) the potential that current non-jurisdictional features, such as on-farm wetlands, ditches and ponds will be deemed jurisdictional (*e.g.*, those located in natural streams or connected to downstream jurisdictional waters), (2) discharges or fill and dredge activities affecting such previously non-jurisdictional features may require a 402 or 404 CWA permit; and (3) failure to obtain a CWA permit may subject a farmer to CWA enforcement, including a citizen suit.

An on-the-ground problem we see with expanded CWA jurisdiction, in addition to exposure of private landowners to the full force of CWA enforcement, is that current, voluntary, incentive based practices could fall off the radar. We use the § 319 NPS Program to increase the utilization of agricultural beneficial management practices (“BMPs”) such as buffer strips, conservation tillage, and nutrient management, as well as to implement low impact development and stormwater management practices to protect urban water quality.

Thank you for considering our LICA comments to the Proposed CWA Rule. We welcome the opportunity to provide more information in the future.

Sincerely,



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