



## **Executive Summary of Comments Submitted Regarding Waters of the U. S. (WOTUS) Proposed Rule Changes Published February 14, 2019 in the Federal Register**

### **General Comments with respect to the 2019 Rule and Process**

- The touchstone for the final WOTUS rule and future administration of jurisdiction must be the primary purpose of the CWA— *“to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”* through federal-state partnerships without impinging on traditional states’ rights to manage their own water and land resources. This “cooperative federalism” approach must recognize the financial, institutional, and temporal limitations of state wetland programs and incorporate pragmatic feedback from the states in a meaningful and comprehensive way.
- DU supports the maintenance of the longstanding exemptions for normal farming, ranching, silviculture, and other activities that have been in statutes (Section 404(f)(1)). These exemptions are important for maintaining the economic health of many of the private partners and landowners throughout the Nation whose farming and other activities help provide habitat for waterfowl.
- DU encourages the Agencies to work substantively to align with states and USDA NRCS on policies and procedures to reduce confusion and conflicting interpretations. Proactively providing clarity and alignment should advance the voluntary conservation of all waters.
- Ducks Unlimited’s review and comments on the proposed Rule were developed with four primary criteria in mind, and we suggest that explicit consideration and balanced application of these criteria would help guide the Agencies toward an effective final Rule. These key criteria are:
  1. Is the proposed Rule in line with historical Agency interpretation, legislative intent and judicial opinion?
  2. Is the proposed Rule consistent with the preponderance of the existing and emerging science?
  3. Will the proposed Rule promote increased clarity, certainty, and predictability as directed by Executive Order 13778 and stated by the Agencies?
  4. Does the supporting economic analysis follow established federal guidelines and best practices (OMB Circular A-4, 2003) and provide robust support that the Rule will promote economic growth as directed by Executive Order 13778?

## Specific Comments on the categories of waters covered under the 2019 Rule

- *Traditionally navigable waters and territorial seas, interstate waters, and impoundments*— Since the waters in paragraph (a)(1) (*traditionally navigable waters including territorial seas*), as well as *interstate waters* (including wetlands), and the waters in paragraph (a)(1)(5) (*impoundments of jurisdictional waters*) have traditionally not been the subject of intensive litigation or judicial oversight, we suggest the Agencies retain the historical inclusion of the definitions of these waters and should not remove interstate waters, nor should they alter the historical definition or interpretation of impoundments as a stand-alone category of WOTUS.
- *Adjacent waters*—We strongly encourage the Agencies to replace the new, more limited, definition of *Adjacency* in paragraph (c)(1) with the historic definition and interpretation that includes not only abutting wetlands, but neighboring wetlands of the waters identified in paragraphs (a)(1) through (5). We suggest that this is more consistent with previous implementation and would retain continuity within the Agencies. Adjacent features would be easily distinguished using existing federal agency methodologies and datasets that can establish continuous hydrologic connections between riparian and floodplain wetlands and navigable waters. A topographic barrier that does not impact the continuous subsurface connection should not extinguish jurisdiction, particularly a man-made barrier.
  - In considering the definition of adjacency, the Agencies should consider the functional aspects of connectivity in the context of the range of pollutants, including particulate and dissolved constituents (not just fill) that could be deposited in a wetland or water and their potential impacts on the integrity of connected waters through continuous connections through surface or groundwater in line with the recommendation of the Connectivity Report and the expert Scientific Advisory Board (SAB).
  - DU’s experience in the field and discussion with permitting experts also leads us to believe this will be an equally difficult standard to delineate in the field and will not reduce uncertainty or workload.
- *Tributaries*—We encourage the Agencies to utilize definitions of “tributaries”— as well as “intermittent”, “perennial”, and “ephemeral”— that are consistent with common understanding of the scientific community and other federal agencies. We recommend the Agencies take the approach recommended by the EPA Science Advisory Board (SAB) to analyze flows based on their contribution to the integrity of navigable waters, which is not captured only by timing of flows. Furthermore, the implementation of this standard will be field intensive.
  - Given the importance of ephemeral flows to contributing flow and conveying contaminants in addition to the practical difficulty and history of significant litigation surrounding delineating the exact geographic point of transitions between flow

regimes, the Agency should consider defining minimum flow standards based on regional precipitation and drainage basin maps. This methodology has been employed by USGS, states and some USACE districts.

- At minimum, DU recommends the Agency employ an ecoregional approach to including ephemeral streams under federal jurisdiction because they are especially important to arid and semi-arid regions where these features contribute disproportionately high flows to navigable waters.
- *Ditches*—DU concurs with provisions in the proposed Rule to include ditches as “waters of the United States” if they (1) satisfy any of the conditions identified in paragraph (a)(1) of the proposed rule; (2) are ditches constructed in a tributary as defined in paragraph (c)(11) of the proposal as long as those ditches also satisfy the conditions of the tributary definition; or (3) are ditches constructed in an adjacent wetland as defined in paragraph (c)(1) of the proposal. We support the Agencies alluding to the exemption of broad categories of ditches “conveying irrigation water to and from fields,” and we convey the concerns of our agricultural and wildlife management partners that this can be clarified with greater specificity and would appreciate the opportunity to engage with the Agency on this point.
- *Ponds and Lakes*—We generally support the specification of Ponds and Lakes as a new category of WOTUS encompassing both navigable ponds and lakes, and lakes that contribute intermittent or perennial flow to navigable waters. There is a need for clarification on how ponds and lakes will fit into the adjacency standard, as only wetlands are addressed. We also encourage the Agencies to consider not only the timing of flow exchange (perennial or intermittent) but also the contribution of these exchanges to the integrity of navigable waters under the functional connectivity framework.
- *Wetlands*—Wetlands are an integral feature of many landscapes that play a disproportionate role in the transformation of both physical flows and the chemical integrity of downstream waters. As such, DU advocates for the continued acknowledgement that wetland protection and conservation is vital for restoring and protecting the integrity of navigable waters. Like tributaries, ponds, and lakes, wetlands should be viewed through the lens not only of physical or structural connectivity but also functional connectivity.
  - *Adjacent wetlands*—Riparian and floodplain wetlands should be considered for inclusion as WOTUS based on both the historic interpretation of adjacency by the judiciary and by the strong science that supports that these systems are inexorably linked with navigable waters and are continually exchanging water and dissolved materials.
  - *Isolated wetlands*—The preponderance of existing science illustrates, in many cases, the clear and substantial effects that isolated wetlands exert on navigable waters, as well as the costs downstream states bear to mitigate pollution and flooding associated with upstream drainage. We recommend further consideration of material and economic

impacts relative to the extent of federal jurisdiction for isolated wetlands in the context of functional impacts to navigable waters.

- Given the tremendous importance of isolated wetlands from social, economic and environmental perspectives as confirmed by existing science, DU strongly believes that isolated wetlands must be protected. In our interpretation of the proposed Rule, isolated wetlands, for the most part, would not be subject to federal jurisdiction under CWA and WOTUS. This outcome would place much greater importance and weight on voluntary incentive- and market-based mechanisms for protecting these wetlands.
- DU is committed to working with the EPA, USACE, other federal agencies and state agencies to help develop new programs and strengthen existing programs to incentivize protections for isolated wetlands. Removing federal jurisdiction from these systems could potentially jeopardize vital protections for isolated wetlands currently in place through other federal voluntary programs enacted by Congress with the stated intent of slowing wetland loss and discouraging wetland conversion.
- These programs include wetlands Conservation Compliance (also known as Swampbuster), conservation easements, and other related programs. For these programs to effectively conserve and protect wetlands, they must be adequately funded and implemented to the fullest extent. Therefore, DU is strongly opposed to any efforts to weaken the integrity of these programs that would result in the loss or degradation of wetlands, including through funding cuts, administrative rulemaking, or legislation.

#### **Specific Comments on the proposal to map waters of the U.S. in the proposed 2019 Rule**

- We support the Agencies' general proposal to map WOTUS as a tool but note that this will be a lengthy and costly process that cannot be guaranteed to suffice as a stand-alone jurisdictional tool.
- Because traditional navigable waters, interstate waters, and the territorial seas ultimately provide the basis for designating by rule or assessing potential CWA jurisdiction for all other categories of waters, we strongly recommend that existing and readily available technology be used to prioritize the mapping of these waters.
- There are multiple federal and state level consortiums, for instance the Wetland mapping Consortium <https://www.aswm.org/wetland-science/wetlands-one-stop-mapping/wetland-mapping-consortium> and an enormous body of literature regarding advances in the potential for mapping and modeling hydrologic features. Any proposal to map WOTUS should involve extensive stakeholder outreach with these groups.

### **Specific Comments on the analysis supporting the proposed 2019 Rule**

- We are concerned that the Agencies have not addressed several probable impacts in their supporting economic analysis.
  - This Rule has the potential to destabilize established mitigation markets which employ tens of thousands of Americans and have an estimated value of \$4 billion.
  - The Agencies do not adequately address the potential for increased wetland drainage because of the Rule and its substantial downstream costs associated with increased flooding, pollution, and mitigation thereof. This is not a trivial component of the net impact of the Rule as historical patterns of wetland loss have closely tracked with the expansion and contraction of the WOTUS rule.
  - We are also concerned the Rule may have substantial impacts on recreational interstate economies associated with boating, fishing, waterfowl hunting, and other quintessential American pastimes.
- We are also concerned that the modeling of potential rule impacts assessed watershed that, by the Agencies' own admission, are not likely to see the largest changes in land use and therefore have underestimated these impacts.