



John R. Kasich, Governor
Mary Taylor, Lt. Governor
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The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
CWAwotus@epa.gov

Re: Federalism Process for WOTUS Rule Development

Dear Administrator Pruitt,

Ohio EPA appreciates the opportunity to provide comments during the federalism process for the Waters of the United States rule development.

- **Relatively permanent and Continuous Surface Connection:** Ohio EPA has no official opinion on how these terms should be defined, but the definitions should provide predictability and certainty for the federal and state regulators and the regulated community in determining which waters are considered jurisdictional under the Clean Water Act (CWA).
- **“Consistent with” Scalia:** Perennial, intermittent, and ephemeral flow should be clearly defined within the rule. Footnote five in the Scalia opinion of the Rapanos (2006) decision, which states that streams that dry up during drought or those streams which contain continuous flow during some months of the year are not excluded from relatively permanent waters, should be taken into consideration when drafting the new rule.
- **Particular features or implications of any such approaches:** Many streams in Ohio have perennial interstitial flow. These streams have continuous flow that occurs seasonally under the surface of the stream bed within the interstitial spaces of coarse substrate or cracks in bedrock. Streams with interstitial flow often have visually dry stream beds with isolated pools of water that are hydraulically connected by slowly moving water. At times of sustained drought, this type of stream may only have water flowing within the subsurface alluvium. The perennial flow is maintained by either deep groundwater recharge from the water table or from surface wetlands. It is important that the definition and interpretation of a perennial stream incorporate those streams with interstitial flow.
- **Opportunities or challenges for the state with taking a Scalia approach:** Depending on the final interpretation and new rule, many challenges with regard to regulating impacts to streams could result in Ohio. If the strictest interpretation of RPW was taken, only those streams considered to be perennial would be considered waters of the US. This would leave intermittent and ephemeral streams without federal protection. Each state would then have to determine how to regulate those streams. In Ohio, the definition of “waters of the state” from Ohio Revised Code (ORC) 6111.01 *includes all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata*

in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters. Due to the broad definition and prohibitions in ORC 6111, ephemeral and intermittent streams would be protected, but there would be no permitting mechanism to allow the placement of dredge and fill material similar to the 404/401 permitting mechanism. The 401 program in Ohio is dependent on the 404 process, so if certain streams were considered not a water of the US (non-jurisdictional), then a 401 WQC could not be issued for placement of dredge and fill material. The ability to issue 402 NPDES permits on non-jurisdictional streams would also be uncertain, and the lack of clarity on this issue could increase permit appeals, delay permit issuance, and potentially have a cascading effect of NPDES permit delay for downstream permits. Therefore, the state would have to develop a whole new permitting program for those federally non-jurisdictional features that are considered a water of the state. This could also include a whole new process similar to the US Army Corps of Engineers Jurisdictional Determination process that does not currently exist in the state as well as state authority to issue discharge permits previously issued under the NPDES program.

The exclusion of previously protected waters from the Clean Water Act (CWA) could potentially impact downstream use attainment. This could negatively impact current NPDES permit holders and restrict new discharges to streams where the CWA is applicable. In addition, un-regulated activities in non-jurisdictional streams could reduce stream flow or degrade stream quality which would result in more restrictive permit limits and increased treatment costs for dischargers to the downstream jurisdictional portion of the stream. In summary, the potential impacts for current NPDES permit holders could be more restrictive permit limits, higher treatment costs, and delays in permit issuance. New discharge requests may not be allowable or be delayed. Potential impacts to the state include increased appeals, the resource needs to address such, and the potential need to develop a state based permitting authority for both 401 and 402 programs.

The Scalia approach for wetlands does not present as many challenges to the state of Ohio for regulating wetlands. In response to the 2001 SWANCC decision, the state developed an isolated wetland permitting law (ORC 6111.02:6111.028). If more wetlands were considered federally non-jurisdictional, then they would fall under the isolated wetland regulation and impacts would be permitted through the Ohio EPA isolated wetland program.

Thank you for the opportunity to comment on this important rulemaking during the early stages of rule development, and we look forward to continued cooperation as the rulemaking process continues.

Sincerely,



Craig W. Butler
Director
Ohio Environmental Protection Agency