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Comments of the Council of Industrial Boiler Owners (CIBO) on
Definitions of "Waters of the United States" Under the Clean Water Act
Proposed Rule; 79 Fed. Reg. 22188 (April 21, 2014)
Docket ID No. EPA-HQ-OW-2011-0880

The Council of Industrial Boiler Owners ("CIBO") appreciates the opportunity to comment on the U.S. Army Corps of Engineers and Environmental Protection Agency's (the "Agencies") proposed definitions of waters of the US.

On April 21, 2014, the Agencies published a joint proposed rule defining the scope of waters protected under the Clean Water Act in light of several cases decided by the U.S. Supreme Court, including the *SWANCC* and *Rapanos* decisions.

CIBO is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

CIBO members have a direct interest in this proposed rule. While CIBO members support programs and regulations designed to protect and preserve our nation's water, members use water in many energy production systems to produce steam that is used in direct and indirect process applications. This proposed rule creates uncertainty where certainty is essential to navigating the regulatory process associated with these production systems.

CIBO associates itself with comments on this proposed rule filed by the Water Advocacy Coalition ("WAC") , a coalition of representing a diverse group of commercial and industrial

interests, including some CIBO members. CIBO fully endorses the comments of the WAC, including its request that EPA withdraw the proposed rule, revise the rule in coordination with stakeholders in light of these important concerns , and re-issue a revised proposed rule that is supported by the CWA, judicial precedent and scientific justification.

I. Overview of Rule and CIBO Concerns

Following the *Rapanos* and *SWANCC* Supreme Court decisions in 2001 and 2006, the scope of federal jurisdiction over waters has been defined through Agency Guidance documents implementing those judicial decisions. On April 21, 2014, almost a decade after the *Rapanos* decision, EPA and the Army Corps of Engineers have proposed a definition of “waters of the US.”

CIBO members are concerned about multiple aspects of the proposed rule. One chief concern is the expansion of federal jurisdiction by defining tributaries and their waters and wetlands as per se waters of the US. This broad expansion is inconsistent with the Supreme Court direction to EPA and the Corps in *Rapanos*. CIBO members are equally concerned with the lack of clarity over which waters the US government will assert regulatory jurisdiction and the failure to create a reliable pathway for those who must read, understand and comply with the law. The proposed rule purports to define “waters of the United States” lending clarity to the term, according to the Agencies, for the regulated community. CIBO members disagree that this rule provides clarity, as many of the concepts and terms introduced in this proposed rule, for example the concept of “significant nexus” and “other waters”, are not founded in technical criteria upon which project managers can depend. Rather, implementation of these regulatory provisions rely on policy decisions to be made on a case-by-case basis by state and regional staff at the agencies charged with implementation of Sections 401, 402, and 404 of the Clean Water Act.

II. Uncertainty Created by the Proposed Rule

CIBO members are concerned with the uncertainty raised by many of the definitions of this proposed rule. The proposed definitions potentially create a large umbrella under which may fall even the smallest water body, i.e. a puddle. In addition, the status of many waters that would not have been jurisdictional under the existing significant nexus test will now be questionable under the proposed case-by-case analysis.

“Significant Nexus.” The definition of “significant nexus” is not itself a scientific term. The relationship that waters can have to each other and connections to downstream waters that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an “all or nothing” situation. The existence of a connection, or to use the words of Justice Kennedy, a *nexus*, does not by itself establish that it is a “significant” nexus. The rule’s proposed definition of “significant nexus” provides no concrete basis on which a person could assess whether indeed there is a “nexus” or whether it is “significant.” By expanding the definition of waters of the United States the Agencies have expanded the definition of navigable waters, thereby expanding the jurisdiction of federal agencies and creating complications with state programs that regulate classes of waters.

Following the *Rapanos* decision, waters analysis has been governed by agency guidance setting forth the significant nexus test as requiring an [a]ssess[ment of] the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they [alone or in combination with other similarly situated wetlands adjacent to the tributary] significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.¹

¹ EPA and US Army Corps of Engineers December 2, 2008 Guidance “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*,” p. 8 (available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf).

Under the proposed rule, all tributaries of navigable waters and all waters adjacent to those tributaries are presumed to have a significant nexus and are per se jurisdictional. The proposed rule goes on to provide that waters not per se jurisdictional may still be jurisdictional if “on a case-specific basis...alone, or in combination with other similarly situated waters...located in the same region, [they] have a significant nexus” (79 Fed. Reg. 22189) to a traditionally navigable or interstate water or the territorial seas. Under the case-by-case definition, with its aggregate impact language, any water (however isolated) could conceivably be defined as having a significant nexus with a federal water, and thereby be jurisdictional. This uncertainty puts CIBO member facilities at risk of violating their Clean Water Act permits because facilities would not have prior knowledge of what water is regulated and what is not.

III. Negative Effect on CWA Permitting

CIBO members must navigate the complex suite of regulations at the local, state, and federal levels related to construction and maintenance activities at their facilities to determine permitting obligations under the CWA, including obligations related to wetlands permitting, stormwater management, construction in flood plains, and construction in waterways. CIBO members are concerned that the proposed requirement that waters be aggregated with other “similar waters” in the region for determining whether they have a significant nexus to navigable waters. This will cause a gridlock in the CWA permitting process for facilities expecting to permit a project or activity with a Nationwide Permit (NWP) and facilities that are subject to National Pollutant Discharge Elimination System (NPDES) permits.

NWPs. NWPs streamlined wetland permits specifically authorized by the CWA that authorize specific, limited activities which allow applicants to design projects in a way that comports with the regulatory parameters of the NWP and lends predictability to the issuance of a permit. These permits are reauthorized every five years by the Corps, which requires each NWP to be re-analyzed under the rigorous National Environmental Policy Act (NEPA) process and the CWA 404(b)(1) process. These reviews ensure that any project authorized under a

NWP is in public interest and will not significantly degrade US waters and that few impacts will be incurred by the project.

This proposed rule, with its aggregate impacts focus, could greatly complicate the reissuance of the NWPs, and perhaps invite legal challenges to regulatory conclusions reauthorizing NWPs. Without NWPs, the Corps would otherwise have to issue individual permits for each project, which take almost seven times longer to process than regular NWPs.² Without these NWPs, the Corps could not provide an adequate level of review for major projects, which would reduce its ability to enforce wetland laws. The proposed rule and its aggregate impacts on wetlands, once aggregated with other wetlands and expanded determinations of their significant nexus to downstream waters would impede this already efficient Corps program and the Corps will be forced to reduce the number of NWPs they issue. This potential effect of the proposed rule greatly increases the regulatory burden of the Corps and creates the possibility for unnecessary wetland degradation.

NPDES Permits. Many CIBO members are subject to the NPDES permitting program. NPDES permits regulate the discharge of pollutants through point sources. A NPDES permit is required when a facility's point source is discharging into a federal jurisdictional water. With the uncertainty of what will be determined to be a jurisdictional water under the proposed rule, a facility may discharge from a point source into a water feature that is not recognized by the facility to be a jurisdictional water but that is determined to be one later. Similarly, the rule creates regulatory risk for non-NPDES permitted dischargers. A source not currently subject to the NPDES permitting program could become subject to the program not by any change on behalf of the discharger, but by a change in the classification of the receiving ditch, puddle, or other water. This puts facilities at risk of violating their NPDES permits, the CWA, or unwittingly becoming subject to NPDES requirements, and it creates another regulatory burden for

² Congressional Research Service, January 30, 2012; *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments*; Copeland, Claudia, p.2, available at <http://www.fas.org/sgp/crs/natsec/97-223.pdf>

authorized states. Ditches, swales, ponds, and other waters that are part of specifically permitted or unpermitted stormwater and wastewater management systems at manufacturing sites should be clearly exempt from jurisdictional waters determinations.

Endangered Species Act. Around the time of this proposal, the federal government also released proposed rules under the ESA. The ESA prohibits federal government agencies from acting in ways that cause destruction or modification of habitats critical to a listed species. The two proposed rules greatly expand the territories that may be classified as critical habitat and restrict the activities, including permitting of discharges, that the government may undertake that would result in adverse modification of habitats.

The ESA rules and the waters of the US rule, combined, will result in greater jurisdiction over water and increased likelihood of ESA restrictions. With more federal jurisdiction over waters, the Agencies will need to consult with the Fish and Wildlife Services and the National Marine Fisheries Services (FWS and NMFS) when issuing permits. This could create additional delay in the permitting process and could result in permit denials and/or restrictions. At a time when many state and local agencies are facing resource constraints in the implementation of their environmental and natural resource conservation programs, this proposed rule imposes additional administrative burdens on states. Complicating regulatory implementation at state and local agencies directly affects CIBO members by slowing the deployment of projects at their facilities. Slowing permitting and projects – particularly where the projects will have *de minimis* environmental impact – disserves the public, which benefits from CIBO members' contribution to the local, state, and regional economies.

These comments reference a selective number of failings of the proposed rule; other aspects of the rule will create similar negative effects on CWA permitting programs. Rather than ease through clarity an already complicated regulatory program, the Agencies here propose to make it less clear and more complicated. EPA and the Corps should withdraw this rule in favor of developing a proposal that is within the scope of the CWA Congress authorized and that will

provide certainty in the definitions of jurisdictional waters within that scope that will ensure that facilities are not unknowingly violating their permits or the CWA.