



Via email

November 6, 2013

U.S. Environmental Protection Agency
Office of Environmental Information Docket
Mail Code: 28221T
Docket ID No. EPA-HQ-OA-2013-0582
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: Comments on the U.S. Environmental Protection Agency (EPA) Draft Report:
*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of
the Scientific Evidence (September, 2013 External Review Draft, EPA/600/R-11/-98B).*

Dear Dr. Rodewald:

Western Energy Alliance respectfully submits the following comments to the Science Advisory Board (SAB) Panel for consideration as the SAB reviews EPA's Water Body Connectivity Report. The EPA is soliciting SAB's review of a new draft science report titled: *Connectivity of Streams and Wetlands to Downstream Waters*. The report will be used as the scientific basis for revising the scope of federal jurisdiction under the Clean Water Act (CWA). EPA announced that the rule has already been drafted and sent to the Office of Management and Budget (OMB) for interagency review.

Western Energy Alliance represents over 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The majority of our members are independent producers – small businesses with an average of twelve employees. Our companies continually strive to protect our scarce water resources here in the West, and manage water throughout their operations to reduce usage and ensure quality is protected.

There are many ephemeral and intermittent water bodies in the West, and they have been successfully managed by the states and local water boards for over 100 years. Expanding CWA jurisdiction over these water bodies will infringe on state jurisdiction of water that is a defining feature of the West. We believe EPA should not expand federal jurisdiction over state water rights.

We are concerned that EPA and the Army Corps of Engineers (the agencies) have engaged the SAB in a flawed process. First, sending a proposed rule to OMB before SAB completes its review of the underlying science suggests outcomes have been pre-determined. This approach is troubling for a number of reasons set forth below. We also believe EPA's Technical Charge to the SAB is too general, does not ask the right questions, and will not produce the information the agencies need to form a scientific basis for determining whether these water connections have regulatory significance. We urge the SAB to use its

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discretion to expand the review to include the additional questions provided below. Finally, we include specific technical comments on the Report for SAB's consideration.

SAB Review of the Draft Rule

EPA has asked SAB to engage in an after-the-fact review of the science that has been used to justify a rule that has already been written. It is widely known that the anticipated regulatory revisions proposed by the agencies will be a broad reinterpretation of the CWA with significant implications for the economy, states' rights, and private interests. The decision to develop a rule based on a scientific report that has not undergone external scientific peer review raises questions about the legitimacy of the rulemaking process.

The agencies' rush to send a rule to OMB before hearing from SAB will likely result in a flawed regulation, and the agencies should withdraw the proposed rule from OMB and proceed in a more thoughtful and transparent way. First, EPA should allow SAB to complete its review, including consideration of public comments on the science that will ultimately form the basis for the rulemaking. Only after having completed a thorough vetting of the report and any other relevant science that comes to light through SAB's review process should the agencies draft a proposal that reflects these scientific conclusions.

Inadequate Charge Questions

EPA has developed a report that concludes that streams and most wetlands are connected and exert an influence on downstream waters. EPA's Charge Questions to the SAB Panel focus on verifying the clarity and technical accuracy of the report, but EPA stops short of asking important questions about the scientific significance of these hydrologic connections on the integrity of downstream waters. The report identifies the presence but not the significance of these connections, fails to discuss how effects are measured, and whether it is possible to establish science-based thresholds that could be applied in a regulatory context. Unfortunately, EPA's failure to ask these important questions suggests the agencies may assume any measurable water connection is enough. This "any connection" theory is inappropriate in a CWA regulatory context. SAB expand its review to include these critical questions.

As stated earlier, one major concern with the report is that the science of connectivity must address more than the mere presence of connectivity. It is well understood that connectivity exists; therefore, this purely academic exercise will generate little useful information that can be used to make jurisdictional decisions on-the-ground. For example, the regulatory status of ditches is controversial and in need of clarification but the report lends very little. The same is true for certain other important "other waters" categories such as waste ponds, channelized and diverted waters. The purely academic nature of the report underscores the importance for SAB to address these important gaps. We recommend the following should be addressed in the report:

- The key policy distinction between a significant nexus and other hydrological connections

- Site specificity, regional variability and temporal variability
- Differentiation between connections based on kind, size, frequency, importance, and type, such as ditches, ephemeral drainages and streams
- Key terms such as “stream” and “wetland” are in conflict with existing regulatory definitions.

Thank you for considering these comments and recommendations. We appreciate the opportunity to participate in the process.

Sincerely,



Kathleen Sgamma
VP of Government & Public Affairs