



November 4, 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:

Ohio AgriBusiness Association submits these comments to the Science Advisory Board ("SAB") Panel for consideration as SAB undertakes its review of EPA's Water Body Connectivity Report.

The Ohio AgriBusiness Association is a state trade association representing the wholesale and retail suppliers of plant nutrients and plant protection materials, the grain warehousing industry, the feed industry, the seed industry and other supply side agribusiness in Ohio. Our membership ranges from small locally owned and operated businesses to large international firms.

The EPA is soliciting SAB's review of a new draft science report titled: *Connectivity of Streams and Wetlands to Downstream Waters*, (the "Report"). The Report will be used as a 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.

OABA's members engage in activities on land and water that often times require a jurisdictional determination from the U.S. Army Corps of Engineers (the "Corps") prior to proceeding. Any change in CWA regulations governing how these determinations of jurisdiction are made, particularly, any expansion of federal jurisdiction, will have a substantial effect on our members' ability to obtain timely permits necessary to continue existing operations or develop new or expanding enterprises. Therefore, SAB's review of EPA's synthesis of the available science relative to connectivity of streams and wetlands is of utmost importance to our members.

We are concerned that EPA and the Corps (the "Agencies") have engaged 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 in our comments below. We also believe EPA's Technical Charge

to SAB is too general; does not ask the right questions; and will not yield the kind of information the Agencies need to form a scientific basis for determining whether these connections have regulatory significance. We urge the Panel to use its discretion to expand the Panel's review to include the additional important questions provided below. Finally, we include specific technical comments on the Report for SAB's consideration.

### **SAB Review Should Include Review of the Draft Rule**

EPA has asked SAB to engage in a post-hoc 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, state's 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. How can the public have any confidence that these proposed regulatory changes are based in sound science?

Any proper rulemaking should begin with an agency developing or collecting all the relevant science. Next, the agency should seek to validate or correct its understanding of the science through conducting *outside* scientific peer review that is transparent and robust. Finally, the agency should use what is learned through the vetting process to inform any policy or regulatory decisions. In this case, without any explanation, the Agencies have charted an unusual path.

The Agencies' rush to send a rule to OMB before hearing from SAB is like "putting the cart before the horse." The Agencies should withdraw the proposed rule from OMB and proceed in a more legally sufficient, 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.

We understand that EPA has not provided SAB with a copy of the draft proposed rule. Without a copy of the draft rule, SAB's review will be done in a vacuum and will not provide the kind of meaningful information the Agencies and the public need to assess the Agencies' application of the science. For example, there are certain key terms defined in the Report that also have precise meaning in the regulatory context. SAB must understand how certain Report terminology will be interpreted in the regulatory context in order to avoid confusion and misuse of SAB's findings. In addition, with some understanding of the context in which SAB's findings will be used, new issues may be brought to light or SAB may raise additional questions that should be addressed. SAB may find that EPA's scientific underpinnings for the proposed rule are

problematic. For all these reasons, SAB should request, and the EPA should provide, the proposed rule for inclusion in SAB's review.

### **EPA's Charge Questions Leave Important Questions Unaddressed.**

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 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 connections on the health of downstream waters. For example, 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 effects thresholds that could ultimately be applied in a regulatory context. These are all important questions that need to be answered scientifically for the Agencies to make CWA policy decisions. Unfortunately, EPA's failure to ask these important questions suggests the Agencies may assume any measurable connection is enough. This "any connection" theory may be acceptable for establishing connectedness as defined in the Report, but in a regulatory context, that approach is inappropriate. SAB should use its discretion to expand its review to include these critical questions.

### **The Synthesis Report Is Scientifically and Technically Flawed**

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 of the Report 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 of SAB's role in expanding the review to address these important gaps. We recommend the following points should also be addressed:

- The Report does nothing to inform the key policy distinction between a significant nexus and other hydrological connections;
- The Report does not account for site specificity, regional variability or temporal variability;
- The Report concludes that all connections, no matter the kind, size, or frequency, are considered equal;

U.S. Environmental Protection Agency  
Docket ID No. EPA-HQ-OA-2013-0582  
November 4, 2013  
Page 4

- The Report overstates the importance of certain types of connections such as, ditches and ephemeral drainages;
- The Report considers upland terrestrial habitats to be important vectors that represent connectivity between upstream and downstream waters;
- The Report fails to distinguish ditches from streams; and
- The Report defines key terms such as “stream” and “wetland” that are in conflict with existing regulatory definitions.

Thank you for considering these comments and recommendations. Please feel free to contact me should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher Henney", written over a horizontal line.

Christopher Henney  
President/CEO