Nevada Association of Counties

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RE: Substantive Input from the Nevada Association of Counties Pursuant to Executive Order 13778 on Revising the Waters of the United States Rule under the Clean Water Act

Dear Ms. Downing and Mr. Hanson,

The Nevada Association of Counties ("NACO") greatly appreciates the opportunity to provide substantive input on the new "waters of the United States" ("WOTUS") definition under the Clean Water Act ("CWA") Section 404 permit program. NACO works with counties to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and optimize the management of county resources.

Counties provide and maintain services pertinent to the CWA. These services include roads, storm water and sewer systems, flood control facilities, land use planning, building and safety codes and permitting, emergency management, engineering and capital projects, parks and open space, and other infrastructure and utilities. It is from this perspective that NACO, on behalf of Nevada's 17 counties, is providing substantive input.

I. "Waters of the State" Presumption

Our waters must be protected, and it is the States that have the jurisdictional responsibility to protect the entirety of those resources within their boundaries. The State of Nevada has existing statutes that provide for protection of all waters in Nevada, called "waters of the State." This program is administered through Nevada's Department of Environmental Protection ("NDEP").

The Agencies should adopt a rebuttable presumption that all waters are "waters of the State" unless and until the EPA and Corps can prove the implicated waters are WOTUS. For those waters that are not WOTUS, should the EPA and Corps wish to assist with State water programs, the Agencies should consider grant or other funding mechanisms that are not tied to a WOTUS classification.

NACO asks that the Agencies work closely with the State of Nevada to identify duplicative processes, expand grant program eligibility to include State programs, and work with the State to assume programs where requested.

II. The Scalia Approach

NACO supports a pure Justice Scalia approach. Executive Order 13778 directs the agencies to consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). A Scalia approach would address the uncertainty that often causes inaction of regulators and the regulated public.

Jurisdictional arguments result in States' unwillingness to assume responsibilities due to apprehension of, and past experiences with wasteful "means to an end" battles. A simpler, bright line rule as provided by Justice Scalia will help States and local governments re-align their respective incentives and ultimately provide the protection the public seeks.

A. Please see the attached "Proposed Definition, 'Waters of the United States'"

This attachment represents NACO's substantive input and is a result of an intra and inter-state effort to provide a definition that is "consistent with" Scalia, and that fleshes out the concepts of "relatively permanent" and "continuous surface connection." This final rule provides a tiered approach and takes into consideration the various challenges discussed with Nevada's conservation districts, flood control districts, planning departments, consultants, environmental attorneys, national associations and counties across various states including in Idaho, California, Nevada, Utah, Arizona, and Wyoming.

Major topics incorporated include:

- Tributaries
- Ephemeral Streams and Washes in the Desert Southwest
- Man-made conveyances and facilities, in particular Municipal Separate Storm Sewer System (MS4) infrastructure such as ditches, channels, pipes, and gutters
- Groundwater
- Intrastate bodies of water, whether navigable or not

The first tier addresses "navigable in fact," as the most basic qualifying waters. The second tier addresses waters that are tied, by an "indistinguishable surface connection," to waters that are "navigable in fact." This second tier ties in the concepts of "relatively permanent" and "continuous surface connection" so that in Nevada the definition is not so expansive that it extends to the entire Nevada landscape, including ephemeral streams and washes, flood zones, groundwater, and manmade conveyances and facilities. Rather, those tributaries that are included should flow for at least three contiguous months per regular water year. The term "regular water year" is determined by USGS, so that science leads the discussion. The third and final tier addresses wetlands and adopts the analysis posed by the 1987 Wetlands Delineation manual.[1] This approach requires that all three basic wetlands criteria, vegetation, soil, and hydrology, must be present for an area to be designated a wetland. Finally, the proposed rule clarifies what are never WOTUS, pointing to those instances that are often unclear.

It is important that the Agencies re-evaluate regional approaches to ensure consistency and conformance with the rule and national guidance. This issue should be discussed by region and state during the rule making process.

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[1] Corps of Engineers Wetlands Delineation Manual: Technical Report Y-87-1. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. 1987, *retrieved at* http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf.

B. Implications of a Scalia Approach

It is important to avoid duplicative services and instead work together in a streamlined and efficient manner by drawing clear, long-lasting jurisdictional lines. Therefore, it is extremely beneficial to know where one jurisdiction ends and the other begins. This is why we advocate for Justice Scalia's plurality in *Rapanos*.

The Supreme Court of the United States settles the extent of the federal government's jurisdiction and authority to regulate the environment. Because the Constitution does not speak directly to the environment, the federal government may enact laws regulating the environment only to the extent that it relates to Interstate Commerce, under the Commerce Clause. It is the states that hold the expansive authority to manage the environment, as the states and local governments are not limited as the federal agencies are by the U.S. Constitution. Justice Scalia, in *Rapanos*, spoke directly to the EPA and Corps authority under the CWA. Justice Scalia very helpfully tackles key questions, balances what are clearly not waters of the U.S., and provides several examples to help draw the line.

Justice Kennedy also spoke to this question, but the "significant nexus" analysis has proven too difficult to measure. This has caused unnecessary conflicts over jurisdictional authority. It is clear from *Rapanos*, and Justice Kennedy agrees, based on his concurrence, that a "mere hydrological connection" is not enough. Yet Justice Kennedy's approach allows the Agencies to claim jurisdiction if they can prove there is a "significant nexus" between the land in question and navigable waters. This connection can be direct or cumulative, and the Agencies in the past have construed this to mean that even a single molecule of water is WOTUS if it could affect the "physical, chemical, or biological" integrity of navigable waters. Thus, the distinction between the terms "hydrological connection" and "significant nexus" in practice have not made a difference. Justice Scalia foresaw this expansive interpretation and criticizes the approach as an "all lands are water" approach, which would render the jurisdictional limitations set forth by Congress and the Constitution meaningless.[2] NACO agrees.

III. The Scope of State and Local Programs and the Economic Impacts Analysis

Currently, there is no way to measure the change in regulatory scope, as jurisdictional determinations have been inconsistent, and in favor of regulation. The EPA and Corps have issued statements that they will not develop a GIS map for WOTUS. Yet there is great need for such a map. It is imperative that this occur for an accurate picture of the scope of federal jurisdiction. Only then can a meaningful analysis of the change of scope occur. NACO urges the EPA and Corps to devise a schedule, and to work closely with the State on these important questions before adopting a final rule.

A. Do you anticipate any changes to the scope of your state or local programs regarding CWA Jurisdiction?

NDEP currently manages the waters of the State, so the scope of state and local programs will not change. Thus, "rolling back" the WOTUS rule does not mean there will be a gap in protection over Nevada's water resources.[3] If the State of Nevada is willing to assume federal programs, then the federal Agencies should consider shifting to a more supportive role. We understand that there may be states that do not regulate runoff as the State of Nevada does, and that a State or local jurisdiction might even *want* to request a waterway, which would not otherwise qualify for WOTUS under the new definition,

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[2] "…a clear statement rule can carry one only so far as the statutory text permits. Our resolution, unlike Justice Kennedy's, keeps both the overinclusion and the underinclusion to the minimum consistent with the statutory text. Justice Kennedy's reading-- despite disregarding the text--fares no better than ours as a precise "fit" for the "avoidance concerns" that he also acknowledges. He admits, post, at 782, 165 L. Ed. 2d, at 205, that "the significant-nexus requirement may not align perfectly with the traditional extent of federal authority" over navigable waters--an admission that "tests the limits of understatement," *Gonzales v. Oregon*, 546 U.S. 243, 286, 126 S. Ct. 904, 932, 163 L. Ed. 2d 748 (2006) (Scalia, J., dissenting)--and it aligns even worse with the preservation of traditional state land-use regulation. *Rapanos*, 547 U.S. at 738.

[3] "It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U.S.C. § 1251(b), are in any way inadequate for the goal of preservation." *Rapanos*, 547 U.S. at 745.

be designated as a WOTUS. This may occur for features such as intrastate lakes, or within a National Park, for example, that the State or local jurisdiction may not wish to have the responsibility for.

The emphasis here is on State and local leadership and responsibilities. Thus, appropriate funding mechanisms, perhaps through grants issued to States or local government based on need, could be considered to ensure States and/or local municipalities have appropriate resources.

B. Economic Impact Analysis

The cost of a State's expanded program should not be included in the economic impacts analysis. As stated in *Rapanos*, "it makes no difference …that some States wish to unburden themselves of" their responsibility to provide water quality, because it is 'attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests,' if the statute does not provide the authority in the first place. *Rapanos*, 547 U.S. at 737.

Once an accurate picture of current jurisdictional waters is provided, the following should be measured:

- The reduced cost to the State from duplicative permitting and staff resources
- The reduced cost and time for the regulated public to work exclusively with the State
- The reduced cost to local government
- The reduced cost to the federal Agencies
- The reduced cost of litigation due to fewer decisions/jurisdictional determinations

The following should not be measured:

- A State's decision to expand the scope of its programs
- Changes in programs, such as grant programs, that can be adjusted along with the Rule

Conclusion

NACO again appreciates the opportunity to provide substantive input at this early juncture, and looks forward to working with the Agencies as they propose and finalize a new WOTUS definition. NACO supports Justice Scalia's approach in *Rapanos* for the reasons stated above. There is so much existing confusion over jurisdictional waters that many localities choose not to update key infrastructure or take a leadership role in CWA programs. Justice Scalia's approach will provide certainty, will remove an expensive duplicative process, and will encourage the State to potentially assume federal programs under the CWA.

Opportunities exist through more local control of water resource management, including a relatively nimble decision-making process for evaluation, conservation, and development projects. Again, NACO urges the EPA and Corps to devise a schedule, and to work closely with the State and counties on these important questions before adopting a final rule.

Thank you for considering these important issues. If you have any questions, please do not hesitate to contact me at jeff@nvnaco.org, or by phone at (775) 883-7863.

Respectfully,

Jeffrey Fontaine
Executive Director

JF/ts

Cc: File

PROPOSED Clean Water Rule: Definition of "Waters of the United States" 40 CFR 230.3[1]

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL.

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§230.3 Definitions.

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(o) The term *waters of the United States* means:

a. For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term ''waters of the United States'' includes only:

1. Those interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce. These waters include the territorial seas.
2. Relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters described in a.1.[2]
3. Those wetlands that directly abut and are indistinguishable from the waters described in a.1. and a.2. Wetlands are those areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands are indistinguishable from the waters described in a.1. and a.2.[3]
4. The following are never "waters of the United States":[4]
    A. Groundwater or channels through which waters flow intermittently or ephemerally.[5]
    B. Ditches, conveyances, and other structures, manmade or otherwise, used for agricultural, flood abatement or storm-water control purposes.
5. The following definitions apply to terms used under this section:
    A. Indistinguishable means that the waters have merged so there is no clear demarcation between the two.[6]
    B. Relatively permanent waters are those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards, and have an indistinguishable surface connection with navigable-in-fact waters described in a.1.

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[1] The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have requested, pursuant to Exec. Order No. 13778, 82 Fed. Reg. 41 (Mar. 3, 2017), substantive comments from state and local governments to help develop a new "Waters of the United States" definition under the Clean Water Act (CWA) Section 404 permit program based on Supreme Court Justice Antonin Scalia's opinion in *Rapanos v. United States,* 547 U.S. 715 (2006) (*Rapanos*). This proposed definition is the result of a collaborative effort to capture Justice Scalia's plurality opinion in *Rapanos*.

[2] The EPA and Corps have asked about three potential approaches to the term "relatively permanent" waters: (1) Perennial plus streams with "seasonal" flow (Current practice: seasonal flow = about 3 months (varies regionally); (2) Perennial plus streams with another measure of flow; and (3) Perennial streams only. The language in (a)(2) and (a)(5)(B) adopts the first approach, and codifies the three-month period of time as a minimal flow requirement and relies on USGS standards for determining extreme drought or precipitation. Relatively permanent waters are catered towards arid regions, especially those with snowmelt or hyporheic

connections. This approach would address concerns within the arid regions, and avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

This definition directly addresses Justice Scalia's explanation of "relatively permanent":

> "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months – such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. Common sense and common usage distinguish between a wash and seasonal river. Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, …, we have no occasion in this litigation to decide exactly when the drying-up of a stream-bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams, that is, streams whose flow is '[c]oming and going at intervals… [b]roken, fitful,' Webster's Second 1296, or 'existing only, or no longer than, a day; diurnal… short lived,' are not.'" *Rapanos*, 547 U.S. at 733 FN 5.

[3] The EPA and Corps have asked about three potential approaches to the term "Continuous Surface Connection": (1) Surface connection even though non-jurisdictional feature; (2) Some degree of connectivity; or (3) Wetland must directly touch jurisdictional waters. The only approach consistent with Justice Scalia's opinion is the third approach, that the "wetland must directly touch jurisdictional waters." According to Justice Scalia, the two must be "indistinguishable" like the wetlands that literally merged with the Black River in *Riverside Bayview*.

> "Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely 'neighboring' wetlands came within the Corps' jurisdiction. *Obiter* approval of that proposition might be inferred, however, from the opinion's quotation without comment of a statement by the Corps describing covered 'adjacent' wetlands as those 'that form the border of *or are in reasonable proximity* to other waters of the United States.' The opinion immediately reiterated, however, that adjacent wetlands could be regarded as 'the waters of the United States' in view of 'the inherent difficulties of defining precise bounds to regulable waters,' a rationale that would have no application to physically separated 'neighboring' wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves "actually abut[ted] on a navigable waterway;' given that our opinion recognized that unconnected wetlands could not naturally be characterized as 'waters' at all; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere 'reasonable proximity' to waters of the United states is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*." *Rapanos*, 547 U.S. at 741 FN 10 (citations excluded).

> "Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Rapanos*, 547 U.S. at 741.

Thus, the proposed verbiage does not use the term "continuous surface connection" and instead adopts the term "indistinguishable" to reduce confusion as it might be applied both to sections (a)(2) and (a)(3). In *Rapanos*, Justice Scalia only used the term "continuous surface connection" to identify the connection between a wetland and a covered water and as described in the previous paragraph it means 'indistinguishable." The term "indistinguishable" was selected over "continuous surface connection" because that term is more exact and it was used by Justice Scalia to describe what he meant by "continuous surface connection." This also reduces any potential confusion with the term "continuously flowing."

This approach adopts the Corps 1987 Manual which responds to the debate over "adjacent" and precludes the EPA from regulating land or other features between the wetlands and the covered waters. US Army Corps of Engineers. *Corps of Engineers Wetlands Delineation Manual: Technical Report Y-87-1*. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. 1987. This again avoids the regional variations which often swallow the rule and provides the brightest line for the regulators and regulated public.

[4] (a)(4) is meant to capture all of the examples listed by Justice Scalia in *Rapanos* which are not "Waters of the United States." We request that the EPA and Corps include in the preamble to their rule Justice Scalia's list of exclusions, as well as those examples provided in individual comment letters to help illustrate various scenarios. This will provide necessary clarity and intent during implementation to show clearly what is not "Waters of the United States". The list as provided by Justice Scalia's plurality in *Rapanos* includes:

> Ditches, including roadside ditches, manmade ditches, and irrigation ditches; Drains; Channels that provide only drainage, such as from rainfall; Conduits; Highly artificial, manufactured, enclosed conveyance systems; Discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, main, pipe, hydrant, machinery, building, and other appurtances and incidents of systems of water works; Ephemeral streams; Wet meadows; Storm sewers; Culverts; Directional sheet flow during storm events; Drain tiles; Storm drains systems; Man-made drainage ditches; Typically dry land features such as arroyos, coulees, washes, and channels; Transitory puddles; Floods and inundations; and Intrastate waters, whether navigable or not.

[5] Groundwater should include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters.

[6] This definition directly addresses Justice Scalia's explanation for when wetlands are covered by the rule:

> "Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." *Rapanos*, 547 U.S. at 741.