

**From:** Mike Kuntz  
**To:** [CWAwotus](#)  
**Cc:** [Hanson, Andrew](#); [John Vial](#)  
**Subject:** Definition of Waters of the U.S.  
**Date:** Thursday, June 08, 2017 5:45:54 PM

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Ms. Downing,

Thank you for this opportunity to comment on the re-write of the Definition of the Waters of the U.S. This is a matter I have been following through the press for quite some time and I have read the Executive Order and the presentation from the April 19, 2017 Consultation Meeting. In response to the request toward step 2 of the process, I would like to offer the following comments for your consideration:

- First, I strongly disagree with the premise in the presentation that the courts and agencies consistently interpreted the jurisdiction of the CWA from the 1970's through the 1990's. I believe it was in fact the slow but continuous broadening of jurisdiction by the agencies over this time, with some acceptance by the courts, that prompted the Supreme Court to check the EPA in the 2001 Solid Waste Agency of Northern Cook County (SWANCC) and 2006 Rapanos judgements. Based on this, my first recommendation is that the new definition should be as clearly and specifically written as possible in order to minimize future agency broadening of jurisdiction once again.
- Second, I recommend that all man-made facilities [roadside ditches, drainage ditches, irrigation canals, log ponds, stock ponds, etc.] should be clearly defined as non-jurisdictional unless they were constructed with the intent of becoming jurisdictional. Further, it should be the agencies' responsibility to prove a man-made facility was intended to be jurisdictional [not the applicants responsibility to prove the facility was not intended to be jurisdictional]. I believe taking this position will help with the other questions regarding "Relatively Permanent" Waters and "Continuous Surface Connection". The broadening of CWA jurisdiction has made it more difficult for local agencies to maintain their facilities. This definition would restore the ability of local agencies to properly and efficiently operate and maintain their facilities as needed for the public good. Further, such change should not impact water quality as MS4 Permits and TMDL programs will still regulate water quality entering the waters of the U.S.
- I would suggest that "Relatively Permanent" Waters be defined as perennial plus streams with **continuous** "seasonal" flow. There are many drainages that flow seasonally, but quickly dry up between rain events and do not flow continually through the season. I do not believe these non-continuous drainages should be defined as "Relatively Permanent".
- I would suggest that "Continuous Surface Connection" be defined such that only jurisdictional waters provide connection. If there is no jurisdictional body providing the connection, then the body is isolated per SWANCC.
- I believe if EPA defines and implements the definition as described above that "Scalia" will be met. Further, I believe a definition broader than that described above will violate "Scalia" and jeopardize successful completion of step 2.
- Taking the Scalia approach will significantly clarify jurisdiction, which will improve the efficiency of all operations and projects related to water bodies.
- I do not anticipate any changes in scope to state and local programs.

- If the definition is defined and implemented as described above, costs to state and local governments, and to the private sector, should be reduced. This should make the needed economic analysis much easier for EPA and should encourage more economic activity across the country.

Thank you very much for considering these comments. Please feel free to contact me for any clarification or follow-up.

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