



June 16, 2017

Donna Downing
Project Lead
Office of Wetlands, Oceans and Watersheds
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington DC, 20460

Andrew Hanson
Office of Congressional and
Intergovernmental Relations
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington DC, 20460

Re: Definition of “Waters of the United States”

Dear Ms. Downing and Mr. Hanson,

The National Association of Conservation Districts (NACD) represents America’s 3,000 locally-led conservation districts working with millions of landowners and operators to help them manage and protect land and water resources on private and public lands. Established under state law, conservation districts share a single mission: to work cooperatively with federal, state, and other local resource management agencies, and private sector interest groups to provide technical, financial, and other assistance to help landowners and operators apply conservation to the landscape.

Conservation practices help minimize the impacts of major weather events. For example, soil health practices increase infiltration, improve nutrient uptake, reduce runoff and protect water quality. With earned trust and a proven ability partner at the local level, conservation districts are well positioned to play a key role in addressing water quality and water conservation challenges in local communities.

NACD acknowledges the successes of the Clean Water Act (CWA) over its 40-year existence. Clean water is critical to the health and viability of the urban and rural landscapes that conservation districts serve. New guidance is required to provide clarity regarding the scope of waters protected under the CWA.

On February 28, 2017, President Donald Trump issued the “*Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.*”¹ The order instructed the U.S. Environmental Protection Agency (EPA) and the Department of the Army Corps of Engineers (Corps) to “consider interpreting the term ‘navigable waters’” in a manner “consistent with former Associate Justice of the Supreme Court Antonin Scalia’s opinion” in *Rapanos v. United States (Rapanos)*. NACD appreciates the opportunity to participate in the beginning stages of creating a new guidance, and you will find our comments to the proposed discussion questions below.

¹ Executive Order Number 13778. 82 FR 12497 “*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule*” February 28, 2017.



Importance of local expertise

The CWA language, as ruled by the U.S. Supreme Court, says waters subject to CWA jurisdiction are navigable waters, relatively permanent tributaries of navigable waters, and certain waters with a significant nexus to navigable waters.

NACD encourages the use of local input to ascertain and develop local parameters, criteria, and defined standards regarding the relevance of tributaries to traditional navigable waters. When it comes to the application of continuous surface connections and any new words and definitions the agencies add, their inclusion should enhance clarity and predictability. The 2015 Clean Water Rule included several new definitions that were generally broad in scope and without geographic limit. Rather than providing clarity, the new definitions created greater ambiguity.

The *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*² and *Rapanos*³ decisions put a limitation on the scope of waters that may be determined to be jurisdictional under the CWA. The 2015 rule replaced “other waters” with two defined sets of additional waters included as a “water of the United States” if they are determined to have a significant nexus to a jurisdictional water. The first defined set dealt with the five subcategories of waters previously classified as “other waters:” prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, and western vernal pools. Under the new rule, the waters will be jurisdictional if a significant nexus to downstream waters is found, based on case-specific evaluation in combination with waters from the same subcategory in the same watershed. When previously asked, the EPA stated that in most cases, the subcategories will be found jurisdictional.

The second defined set dealt with waters that are found in their entirety or in part to be within the 100-year floodplain of a traditional navigable water, interstate water, or territorial seas and within 4,000 feet of the high tide line or the ordinary high water mark of a jurisdictional water. Although the Supreme Court failed to reach a majority in *Rapanos*, NACD believes that Justice Scalia’s narrow interpretation of “navigable waters” is appropriate.

Definitions

The CWA defines the term “navigable waters” as the “waters of the United States, including the territorial seas.” With regards to “non-navigable waters” the CWA confers federal jurisdiction, only if the waters exhibit a relatively permanent flow, such as a river, lake, or stream.

² United States Supreme Court “[Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, et al.](#)”, Case Number 99-1178. January 9, 2001.

³ United States Supreme Court “[John A. Rapanos, et ux., et al., Petitioners v. United States](#)”, Case Number 04-1034. February 2, 2005.



NACD believes that jurisdictional waters should consist of and be limited to the following:

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 1 (above).
3. Only wetlands that directly abut and are indistinguishable from waters in 1 and 2 (above). Wetlands are those areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes and bogs. Those wetlands that do not directly abut or are indistinguishable from waters described in 1 and 2 (above) are not jurisdictional.

Furthermore, the terms “indistinguishable” and “relatively permanent” should be defined as:

- Indistinguishable: Relatively permanent waters that are directly connected at the surface by other relatively permanent waters.
- Relatively permanent: Waters that contain throughout the year except for infrequent periods of severe drought⁴ and having an indistinguishable surface connection with those waters in 1.

The proposed definition of “relatively permanent” is consistent with U.S. Geology Survey (USGS) Hydrologic Unit Code FCode 46006. Based on GIS analysis at the USGS Hydrologic Unit at the 1:24,000 scale, the above definitions will clarify and enable the regulated communities, local, and state governments to determine jurisdictional waters, limit federal oversight as appropriate, and recognize that states and local governments clearly have the capability and expertise to address their water quality protection.

Any definitions proposed by the EPA upon this review need to have come about after careful consideration of the effect it would have on localities and developed with respect to local decision makers and the regional makeup of the country. One local unit of government the EPA should consult as natural resource experts is conservation districts. The districts provide the on-the-ground working knowledge that is critical when developing a thoughtful and unbiased rule.

The 2015 Clean Water Rule would have expanded the jurisdiction of the CWA unlawfully and unnecessarily.

⁴ US Geological Survey. “Feature Directory.” NHD USGS. <https://nhd.usgs.gov/FeatureDirectory.pdf>.



Under Section 404(e) of the CWA, the Corps can issue general permits to authorize activities that have only minimal individual and cumulative adverse environmental effects. A nationwide permit is a general permit that authorizes activities across the country, unless a district or division commander revokes the nationwide permit in a state or other geographic region. Per the Corps' own fact sheet, there are currently 50 nationwide permits, which authorize approximately 40,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to Corps districts.⁵ A more expansive definition of waters of the U.S. would lead to a probable increase in the importance of such general permits.

In the western U.S., the prior appropriation doctrine has long served as the basis for which local water laws and rights are determined. In the late 1800s, Congress passed two laws that supported these local rights: the Mining Act of 1866 and the Desert Land Act of 1877. In doing so, Congress approved past and future appropriations of water on public lands pursuant to "local laws and customs."⁶ This doctrine was further strengthened with the passage of the Reclamation Act of 1902, which reads:

"[N]othing in this Act shall be constructed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."⁷

State water rights have long been challenged but have been continually confirmed in the Supreme Court. Water rights are precious and highly valuable – in some cases even being used as collateral for getting a bank loan. As the review process continues, it is important that landowners' existing water rights are not in any way impeded upon.

Consistency

NACD supports the decision of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments. In his plurality opinion, Scalia argued that the "waters of the United States' should include only relatively permanent, standing or continuously flowing bodies of water."⁸ He argued this based on the Webster's Dictionary definition, which refers to waters as being found in "streams," "oceans," "rivers," "lakes," and "bodies of water "forming geographical features." Those terms, Scalia argued, "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which

⁵ US Army Corps of Engineers. "Nation Wide Permit Reissuance." US Army Corps of Engineers. <http://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1043655/nationwide-permit-reissuance/>.

⁶ National Archives. "Land Acts." National Archives. <https://www.archives.gov/files/calendar/genealogy-fair/2014/handouts/session-11-handout-5of5-martinez-land-other-land-acts.pdf>.

⁷ Reclamation Act of 1902, Ch. 1093 §8,32 Stat. 388 (codified at 43 U.S.C. §485(h)-4).

⁸ *Rapanos v. United States*, 547 US 715 (2006), "Plurality opinion" 13.



water occasionally or intermittently flows.”⁹ None of the terms name or include transitory puddles or ephemeral flows of water.

In the court’s discussion of ephemeral flows, Justice Scalia argued that the Corps had over stretched its definition of “waters of the United States” by using it to include “‘ephemeral streams,’ ‘wet meadows,’ storm sewers and culverts, ‘directional sheet flow during storm events,’ drain tiles, man-made drainage ditches, and dry arroyos in the middle of desert” as jurisdictional waters.¹⁰

NACD believes there needs to be a clear distinction between streams and ditches in this definition. Ditches and other ephemeral drainage features are critical fixtures in farming and ranching operations. These features never have enough water in them for a long enough period of time to warrant classification as a waterway under the CWA. Associate Supreme Court Justice’s significant nexus test can be replaced by recognizing the term “indistinguishable surface connections.”

When discussing tributaries, the EPA should continue to use the consideration of intended use as a review tool. NACD recommends the use of local input to ascertain and develop local parameters, criteria, and defined standards regarding the relevance of tributaries to traditionally navigable “waters of the United States.”

Lessons that can be learned

Any agency action should be conducted in a way that respects local and state water rights, does not expand the federal jurisdiction over water resources, and acknowledges historical congressional and Supreme Court actions. This is where the 2015 Clean Water Rule failed. The rule included jurisdictional expansions for isolated waters, including but not limited to regional areas such as the prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, and western vernal pools. Both Congress and the Supreme Court have recognized the importance of local and state water rights, NACD encourages the agencies to do so as well.

The 2015 Clean Water Rule in part was used to circumvent the Supreme Court decisions regarding the “migratory bird rule.”¹¹ The water rule broadened the agencies’ jurisdiction to include water features on agricultural lands that had not been subject to CWA jurisdictions since the Supreme Court’s ruling in *SWANCC* in 2001, which found the “migratory bird rule” to be unconstitutional. NACD does not believe that these isolated waters significantly impact water quality in the U.S. and should therefore not be considered jurisdictional under a new rule. If more waters are considered navigable, then conservation districts would need to obtain

⁹ Ibid., 14.

¹⁰ Ibid., 15.

¹¹ The migratory bird rule authorized the federal government to broadly assert jurisdiction over isolated waters which are or would be used by migratory birds that cross stateliness.



additional §404(d) permits for work they have historically performed for the good of this country's natural resources. This would result in a slowdown in the application of conservation practices and ultimately less conservation getting on the ground without significant environmental benefits.

Producers and landowners will be much more likely to engage in the use of new and innovative conservation practices – thus getting more conservation on the ground – if the threat of a required permitting process is eliminated. Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application and result in environmental benefits.

In March of 2014, the EPA and Corps issued an interpretive rule that identified 56 conservation practices approved by the USDA Natural Resources Conservation Service (NRCS) that qualify for exemption under the CWA Section 404(f)(1)(A) exclusion of “normal farming and ranching” activities from Section 404 permit requirements and do not require determination whether the discharge involves a “water of the United States.” The rule’s attempt at clarifying that agricultural practices were exempt from the Section 404 permitting process led to increased confusion. Congress, as part of the Fiscal Year 2015 omnibus appropriations act (P.L. 113-225), included a provision instructing the agencies to withdraw the interpretive rule. On January 29, 2015, they signed a memorandum withdrawing the rule.¹² While we appreciate the EPA’s attempt to clarify the rule’s jurisdiction by publishing a list of exemptible practices, this list was not exhaustive and failed to include all the conservation practices that should be exempt. In the end, the EPA’s rule created additional ambiguity. NACD supports maintaining all the existing agricultural exemptions in the CWA and those exemptions associated with existing regulation.

If the agencies in implementing a new clean water rule decide to establish another interpretive rule, that rule should not include an expansion of jurisdiction to tributaries and other adjacent waters, including “ditches” on agricultural land. NACD encourages the EPA and Corps to issue regulations, a regulatory guidance letter, or nationwide permit so that 404(f)(2) becomes less burdensome for agricultural activities. Steps that can be taken include:

- Establishment of a set of criteria that would enable a nationwide permit for farm ponds in, and associated with, perennial streams.
- Establishment of a nationwide permit (NWP) for construction and maintenance of ponds and related structures and facilities for aquaculture in non-tidal waters. It is important that responsible agencies recognize the value of food production in non-tidal aquatic environments when establishing design criteria and best management practices to provide for reasonable protection of the “waters of the United States.”

¹² Environmental Protection Agency and Department of Defense, “Notice of Withdrawal,” 80 *Federal Register* 6705, February 6, 2015.



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- An increase in the length of the streambed included in NWP40¹³ for farm pond construction in ephemeral and intermittent streams to 500 linear feet (currently 300 feet).
- Adoption of a definition of agriculture that includes, but is not limited to, food, aquaculture, fiber, equine, and horticultural production.

NACD is available and willing to assist the EPA and Corps, in consultation with NRCS, to develop and distribute a single guidance document on handling agricultural activities and the 404-permit program.

Conclusion

To ensure local input in the establishment of a new clean water rule, NACD recommends the establishment of a state-based advisory board. The board would serve as an avenue for local input, interpretation, and implementation, which would include CWA stage I permitting and appeals. The incorporation of local knowledge, heritage, and traditional uses during any rule writing process will help ensure that the new clean water rule is workable at the local level, while still successfully accomplishing the agencies' goals for clarification. NACD applauds the early steps the EPA has taken to seek input. In its outreach to local entities, however, the EPA did not directly seek input from conservation districts, which under some states' law are listed as having special expertise on natural resources issues.

Conservation districts are local units of government that under state law provide technical assistance and tools to manage and protect natural resources across the United States. As you continue to move forward with the development of a new clean water rule, NACD encourages the EPA to hold a stakeholder input call with conservation districts.

Thank you for the opportunity to participate and submit comments on the creation of a new clean water rule. We appreciate your consideration and look forward to continuing to work with you in the future on the development of a new rule that protects water quality and strengthens American resources management.

Sincerely,

A handwritten signature in black ink that reads "Brent Van Dyke".

Brent Van Dyke
NACD President

¹³ Department of Defense, Army Corps of Engineers, "[Decision Document Nationwide Permit 40](#)" February 12, 2012.