National Association of Conservation Districts

October 30, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Ms. Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
441 G Street, N.W.
Washington, DC 20314-1000

Docket No. EPA–HQ–OW- 2011–0880

Re: Comments on the Proposed Rule defining "Waters of the United States" under the CWA

Dear Administrator McCarthy and Assistant Secretary Darcy:

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 at the local level.

For more than 75 years, conservation districts have been leaders in locally-led efforts to ensure a clean and sustainable water supply for the nation. By engaging private landowners, conservation districts provide proactive assistance in putting voluntary conservation practices on the ground. These practices have far-reaching benefits, including improved water quality and the mitigation of the effects of climate events, including drought and flooding. Conservation practices also 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 to form partnerships at the local level, conservation districts are well positioned to play a key role in addressing water quality challenges in local communities. NACD acknowledges the successes of the Clean Water Act (CWA) over its 40-year existence. Clean water is critical for the health and viability of the urban and rural landscapes that conservation districts serve.

NACD offers the following comments concerning the proposed rule noted above.

NACD requests that the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (USACE) provide a clear, desired outcome of any proposed rule, and ask that rule writing is consistent with the clear, desired outcome. This would help the public better understand the basis for the proposed rule and would hopefully help to resolve some of the general confusion surrounding it. NACD appreciates the opportunity to provide valuable input to the EPA and USACE. However, we request that additional time be taken to obtain local input for any rule making. To that end, NACD requests that the current version of the rule be withdrawn.

It is NACD's policy to oppose any measure that expands jurisdiction of the CWA. Therefore, if EPA and USACE proceed with the proposed rule, we request that it be confined to current jurisdictional boundaries. As we stated in our earlier comments related to the Connectivity Report, we do not recommend that the report serve as the sole basis in future rulemaking to expand the jurisdiction of the CWA beyond the Supreme Court decisions, especially in the realm of defining significant nexus. Otherwise, nearly every body of water in the country could be subjected to the full force of federal CWA.

As you are aware, NACD submitted comments on June 13, 2014[1] on the IR Regarding Applicability of the Exemption from Permitting under section 404(f)(l)(A).[2] We'd like to reiterate several facts stated in those comments: 1) the IR is not meant to put the USDA Natural Resources Conservation Service (NRCS) in a compliance or regulatory role; 2) the list of exempted NRCS conservation practice standards is not exhaustive of conservation practices that are exempt from Section 404(f)(1)(A) permitting; 3) this list is not defining "normal farming, silviculture, or ranching" activities but falls under the definition of a category of practices now clearly exempted; and, 3) producers will not need to notify regulatory agencies when they self-implement conservation practices in "Waters of the United States" (WOTUS). Reducing uncertainty and the administrative burdens of applying for permits will increase conservation application.

Although EPA intended for the IR to offer guidance to farmers with additional protections for implementing conservation practices, we still have concerns. The requirement for practices to conform to NRCS standards does not protect functionally equivalent practices that serve the same purpose without meeting NRCS standards. While the guidance imposes no new legal requirements on producers, the creation of a bright-line test could potentially increase their exposure to litigious groups and individuals. Based on your MOU and IR, the term "based on NRCS standards" should be taken in the spirit of the intent of NRCS engagement in the CWA where there is no statutory obligation to do so, in line with the flexibility highlighted in the IR. This will also provide for functionally equivalent conservation structures and practices, and for generally accepted local conservation standards, in addition to the practices that readily fall under the statutory exemption in Section 404(f)(1)(A). NACD promotes a variety of successful locally-led conservation practices—

[1] NACD comments on the Interpretive Rule (June 13, 2014) http://www.nacdnet.org/dmdocuments/NACD-Comment-Letter-IR-6-13-14.pdf.
[2] EPA and USACE Interpretive Rule Regarding the Applicability of CWA Section 404(f)1(A)" (March 25, 2014) http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf.

taking into account that not all were developed with direct NRCS supervision— based upon their impact on sustainable and economical food, fuel and fiber production, flooding and commerce, and landscape protection.

While suggested changes are being accepted for CWA definitions, NACD's policy urges EPA and USACE to consider several revisions to section 404(f)(2). The value of food production in non-tidal aquatic environments should be recognized, while establishing criteria and BMPs that provide reasonable protection of the waters of the U.S. We also want to ensure that the definition of agriculture, used by USACE and EPA, encompasses aquaculture, horticulture and all livestock-related operations in addition to food, fuel and fiber-producing operations. We support action by USACE to issue a regulatory guidance letter or nationwide permit (NWP) so that 404(f)(2) becomes less burdensome for agricultural activities. We also ask that USACE establish criteria for an NWP for farm ponds in, and associated with, perennial streams, as well as an NWP for construction and maintenance of ponds and related structures and facilities for aquaculture in non-tidal waters. A follow-up letter will be sent after the close of the comment period to re-state our policy-backed requests related to 404(f)(2) permitting.

NACD appreciates that EPA recognizes the importance of NRCS practices that improve water quality by including the list of exempt practices in the IR. We believe there is a simple solution to make it more inclusive and less confusing, while serving to increase the adoption of practices that improve water quality. As stated earlier, the IR's list of 56 NRCS practices exempt from permitting is not exhaustive of NRCS practices that improve water quality. The fact that some are not listed creates concerns that the use of innovative practices and new technologies could be stymied by the potential of an additional permitting process. 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 disincentive of a potential permitting process is eliminated. NACD suggests that the IR be changed so that all NRCS upland conservation practices are approved by EPA and USACE. A new list should then be developed containing only those NRCS conservation practices requiring a 404(f)(1)(A) permit. This would substantially reduce confusion amongst cooperators, and promote greater implementation of water related conservation practices on the land.

Regarding the Proposed Rule defining WOTUS[3], EPA has repeatedly stated that the proposed rule does not broaden coverage nor "protect any new types of waters that have not historically been covered under the CWA."[4] Furthermore, during NACD's 2014 Summer Soil Health Forum in Indianapolis, EPA officials stated that the rule would not expand the scope of jurisdiction of WOTUS.

[3] 79 Fed. Reg. 22188 (April 21, 2014). Proposed rule located here http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf.

[4] "*We're not expanding the types of waters we have not already been regulating*," – Statement by Gina McCarthy during March 27 House Oversight Hearing; Nancy Stoner recently reacted to the Farm Bureau assertion that the rule expands regulatory reach to such land features as ditches by saying, "*I can only say that it's wrong . . . It actually, again, does not protect any new types of waters, it retains all of the existing exemptions for agriculture and for every other purpose, for that matter, and it even expands some of them.*" – Brownfield Ag News for America, April 22, 2014; Deputy Administrator, Bob Perciasepe, in a House T&I Hearing on June 11 reinforced the protections afforded agriculture under the rule: *I want to emphasize that farmers, ranchers, and foresters who are conducting . . . activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on*

The language of the CWA, as ruled by the United States Supreme Court, states that waters subject to CWA jurisdiction are navigable waters, relatively permanent tributaries of navigable waters, and certain other waters with a significant nexus to navigable waters. All other waters are left to the jurisdiction of states. Therefore, isolated waters[5] and even those with a minor connection[6] are not classified as WOTUS. Because many isolated waters and many classes of wetlands are legally excluded from the CWA, NACD supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments; we oppose attempts to expand federal jurisdiction of water resources beyond these decisions. NACD has concerns in four key areas of the proposed definition of WOTUS.

1. Tributaries

Defining tributaries as perennial, intermittent and ephemeral, carries the potential to capture a great number of areas unintended by the CWA. EPA is proposing that these three categories (perennial, intermittent and ephemeral) are *per se* jurisdictional without the need for a site-specific "significant nexus" test. The term "ephemeral" has different meanings throughout the country, and those differences are creating a great deal of confusion. Substantially, any use of the term "ephemeral" could fall under the definition of "intermittent." Therefore, NACD requests that this term not be used.

While the proposal specifically excludes two types of ditches from jurisdiction, EPA clarifies the following ditches that are jurisdictional waters: natural streams that have been altered (e.g., channelized, straightened or relocated); ditches that have been excavated in "waters of the United States," including jurisdictional wetlands; ditches that have perennial flow; and ditches that connect two or more "waters of the United States." Importantly, the determination of jurisdiction over features, such as ditches, wetlands and ponds, is made independent of the intended use of those features. For example, a constructed pond or wetland intended for reuse or to provide water quality improvements could still be jurisdictional under this rule.

The difference between streams and ditches under the definition of tributary is incredibly important in agriculture. As stated in NACD's comments on the EPA Connectivity Report, EPA is underemphasizing this distinction. For example, farm ditches and other drainage features are critical to farming and ranching operations. In many instances, farm ditches or drainage features are dry unless it rains. As a result, they do not have enough water in them for a long enough time to

---

their lands . . . can continue these practices after the new rule without the need for approval from the Federal government. Additionally, the proposed rule expressly excludes groundwater from jurisdiction, including groundwater in subsurface tile drains. It reduces jurisdiction over ditches, and maintains the existing exclusion for prior converted cropland and waste treatment systems, including treatment ponds or lagoons.

[5] Supreme Court finding that § 404 authority over discharges into "isolated waters" (including isolated wetlands), exceeded the authority granted by that section. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

[6] Supreme Court finding that "significant nexus" remains open to judicial interpretation but that isolated wetlands could not be WOTUS. *Rapanos v. United States*, 547 U.S. 715 (2006).

merit consideration as a waterway under the federal CWA. The proposed rule must clarify when, where and how there might be a significant nexus between remote drainage features or isolated waters and downstream navigable waters, given the limited jurisdiction of the CWA.

As drafted, the proposal raises legitimate concerns about the potential regulation of on-farm ditches, ponds, and isolated wetlands that are located in a natural stream or have a hydrologic connection to a downstream jurisdictional water body. This creates the very real potential for the regulation of on-farm water features not regulated since *Solid Waste Agency of Northern Cook County* (*SWANCC)*, regardless of intended use.

EPA has the option to consider intended use, which may provide a way to limit the scope of jurisdiction around the problem of discharges or fill and dredge activities affecting such features that may require a 402 or 404 permit. 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 WOTUS.

2. Adjacency

EPA is proposing that adjacent waters are *per se* jurisdictional without the need for a site-specific "significant nexus" test. The rule's *per se* jurisdiction over "adjacent waters" is inconsistent with historic USACE practice, and would invariably result in an expansion of jurisdiction with regard to certain types of waters.

EPA proposes a new concept of "fill and spill" that would result in the jurisdiction of prairie potholes and other currently non-jurisdictional, isolated water bodies.[7] The agency has also stated for the first time that a biological connection, *e.g., via* migratory waterfowl, would be sufficient to establish jurisdiction. In a historical context and in theory, the "migratory bird rule" (which was struck down) granted broad expansive authority that could have reached nearly any and all water bodies; in practice, however, the Corps asserted jurisdiction over isolated wetlands that were more ecologically significant. We believe that jurisdiction should be based wholly on hydrologic connection, and any biological connection should be weighed in light of its ecological significance.

EPA also introduces new definitions (*e.g.,* "adjacent," "neighboring," "riparian areas," and "floodplain,") that are generally broad in scope and without geographic limit. This creates even greater ambiguity and concern by those who believe the proposal reflects an expansion of jurisdiction, notwithstanding the agency has requested comments on how to improve clarity and predictability. The following questionable wording should be addressed.

[7] Fill and spill as described as follows: For purposes of this rule, "fill and spill" describes situations where wetlands or open waters fill to capacity during intense precipitation events or high cumulative precipitation over time and then spill to the downstream jurisdictional water. Report at 5-62 (citing T.C. Winter and D.O. Rosenberry, "Hydrology of Prairie Pothole Wetlands during Drought and Deluge: a 17-year Study of the Cottonwood Lake Wetland Complex in North Dakota in the Perspective of Longer Term Measured and Proxy Hydrological Records," Climatic Change 40:189-209 (1998); S.G. Leibowitz, and K.C. Vining, "Temporal connectivity in a prairie pothole complex," Wetlands 23:13-25 (2003). Water connected through such flows originates from adjacent wetland or open water, travels to the downstream jurisdictional water, and is connected to those downstream waters by swales or other directional flowpaths on the surface." 76 Fed. Reg. at 22208.

Adjacency:[8] "bordering, contiguous, or neighboring." There needs to be clarity in the proposed rule as to whether a physical connection is required.

Neighboring:[9] "located within the riparian area or floodplain … or waters with a shallow subsurface hydrological connection or confined surface hydrological connection to such a jurisdictional water." Clarity is required in terms of parameters, criteria and specific standards, for determining "shallow" for the purposes of "shallow subsurface hydrological connection."

Riparian area:[10] "directly influence the ecological processes and plant and animal community structure." This definition supports a pre-SWANCC application of the strength of the ecological connection for purposes of USACE determinations. Only those with very strong ecological connections based upon clearly defined parameters, criteria and threshold standards should be considered.

Floodplain:[11] "inundated during periods of moderate to high water flows," noting that local input and generations of perspective should be consulted in specific floodplains at the local level.

As such, NACD requests that EPA and USACE take adequate time to obtain local input for the development of parameters, criteria, and defined standards for each of the above definitions, including "significant nexus."

3. "Other waters"

EPA's assertion of jurisdiction over "other waters" based on broad regional classifications of similarly situated waters, on an aggregation approach, would also likely expand EPA authority.

The proposal specifically mentions prairie potholes, Carolina and Delmarva bays, pocosins, Texas coastal prairie wetlands, western vernal pools and other categories of waters as potentially *per se* jurisdictional under one option being considered.[12] Again, we have concerns about expanding the scope of authority without local input from the Northern Plains, Southern, Southeastern and other impacted regions. Local conservation districts could help provide expert input on the management of these specific "other waters." NACD recommends that regional determinations should be left to the states.

As for isolated wetlands, EPA has been somewhat transparent in its intent to recapture many of the types of water bodies, including isolated wetlands, no longer subject to federal jurisdiction under *SWANCC* and *Rapanos*. EPA argues that its proposal does not apply to waters not historically or previously regulated, which is partially correct. The "migratory bird rule" (MBR), struck down in *SWANCC,* authorized the government to assert jurisdiction broadly over isolated waters "which are or would be used as habitat by . . . migratory birds that cross state lines." In theory, the "migratory

[8] 40 CFR 230.3(u)(1).
[9] 40 CFR 230.3(u)(2).
[10] 40 CFR 230.3(u)(3).
[11] 40 CFR 230.3(u)(4).
[12] See 76 Fed. Reg. at 22216.

bird rule" granted broad expansive authority that could have reached nearly any and all water bodies. We do not think these isolated wetlands significantly impact water quality in the United States and should therefore not be considered jurisdictional.

4. Significant Nexus

For the last several decades, the Supreme Court has sought to clarify the concept of "waters of the U.S."; but in many respects, it has created greater confusion. Three seminal cases inform the current rulemaking: *U.S. v. Riverside Bayview*, 474 U.S. 121 (1985), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006). The *Rapanos* case requires the government to establish a "significant nexus" (biological, chemical or physical) between non-navigable and traditionally navigable waters (TNWs) to establish CWA jurisdiction. The effect of the *SWANCC* and *Rapanos* decisions was to significantly limit the federal government's authority over certain waters historically deemed jurisdictional, including isolated, intrastate wetlands and wetlands adjacent to tributaries located remotely from TNWs.

The significant nexus test must not be used as a method of taking the Connectivity Report as the basis for making every hydrological connection as a legal connection for determining "significant." To be significant, or "more than speculative or insubstantial,"[13] means that the expansion of jurisdiction beyond the Supreme Court decisions is not allowed. NACD supports the decisions of the Supreme Court to leave the management of non-navigable waters in the hands of landowners and local governments, as well as the use of local input to ascertain and develop parameters, criteria and defined standards

As drafted, the proposed rule would substantially expand CWA jurisdiction post-*Rapanos*, granting EPA and USACE broad authority and discretion to regulate wetlands and other water bodies remote from TNWs. While EPA and USACE have continued to state that the proposed rule does not increase CWA jurisdiction, they have also stated that there's an estimated three-percent increase in jurisdiction after completing their economic analysis. While the amount of expansion is difficult to predict with any meaningful precision, if the rule were to encompass all adjacent waters and most isolated wetlands and ditches, it would be significantly greater than three-percent as estimated by EPA. A three-percent increase in jurisdictional areas is indeed significant, considering the total number of acres affected and the associated potential economic impacts. This broadened jurisdiction would include water features on agricultural lands that have not been subject to CWA jurisdiction since before the *SWANCC* case in 2001. As noted above, EPA's authority prior to *SWANCC* based on the "migratory bird rule" was significantly broad in that any water used or potentially used by a migratory bird would be subject to jurisdiction. As a practical matter, this rule would reestablish jurisdiction over most waters on agricultural working lands lost under *SWANCC* and *Rapanos*.

In conclusion, while EPA's efforts to preserve the agricultural exemptions are critical and well-intentioned, the combined effect of the expansion of jurisdiction and the framework to implement

[13] 40 CFR 230.3(u)(7).

the agricultural exemptions creates the following legal uncertainties and risks: (1) the potential that current non-jurisdictional features, such as on-farm wetlands, ditches and ponds will be deemed jurisdictional (*e.g.,* those located in natural streams or connected to downstream jurisdictional waters); (2) discharges or fill-and-dredge activities affecting such previously non-jurisdictional features may require a 402 or 404 CWA permit; and (3) failure to obtain a CWA permit may subject a farmer to CWA enforcement, including citizen suits.

In addition to exposure of private landowners to the full force of CWA enforcement, expanded CWA jurisdiction could potentially lead to a reduction in the implementation of conservation practices on the ground; landowners and users may avoid the use of current, voluntary, incentive-based practices on their land, out of fear of burdensome regulation. .

Conservation districts and their customers use the § 319 NPS Program to increase the utilization of agricultural best management practices ("BMPs") such as buffer strips, conservation tillage, and nutrient management, as well as to implement low impact development and stormwater management practices to protect urban water quality. The impacts of this rule and its costs along with the three percent expansion of jurisdiction that the Congressional Research Service[14] acknowledges but that is highly disputed by professionals,[15] will be best understood in light of less costly alternatives to achieving water quality, such as voluntary efforts and ecosystem service trading schemes.

NACD appreciates EPA's efforts through the National Water Quality Initiative to target highest priority areas and nurture community-based voluntary actions on watershed scales, including coordination with state technical committees and their local work groups convened by conservation districts.

It is our philosophy that an ounce of prevention is worth a pound of cure. Less-costly preventative measures are being implemented on the ground every day due to voluntary and incentive-based conservation practices. An expansion of CWA jurisdiction would take away from the current voluntary approach to conservation, which promotes collaboration in a large-scale manner. Any attempt to clarify CWA jurisdiction should be subject to local input, in order to develop effective parameters, criteria, and standards that successfully meet specific local needs. No final ruling should be employed until EPA and USACE have successfully vetted and approved clear provisions that are predictable when applied on the local level.

Finally, NACD requests that a state-based advisory board be put in place to provide an avenue for local input, interpretation and implementation which would include Stage I permitting and appeals. NACD and its member soil and water conservation districts place high importance on the protection

[14] Claudia Copland, *CRS Report*, "EPA and the Army Corps' Proposed Rule to Define 'Waters of the United States'" (March 27, 2014).
[15] David Sunding, "Review of the 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States"(May 15, 2014) http://www.nssga.org/economist-reviews-epas-economic-analysis-proposed-waters-united-states-rule/.

and enhancement of our nation's natural resources. The incorporation of local knowledge, heritage and passion during any rule- writing process will help ensure the rule is workable at the local level and successfully meets its intended goals.

Thank you for your attention to our comments. We sincerely appreciate your consideration and would welcome the opportunity to provide more information as needed in the future.

Sincerely,

Earl J. Garber, President

National Association of Conservation Districts