



National Association of Conservation Districts

April 15, 2019

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket, Mail Code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Assistant Secretary R.D. James
United States Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Docket ID No.: EPA-HQ-OW-2018-0149

Submitted online at <http://www.regulations.gov/>

RE: Comments on the Proposed Rule defining “waters of the United States” under the CWA

Dear Administrator Wheeler and Assistant Secretary James,

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 conservation districts serve.

The proposed definition of “waters of the United States” (WOTUS) is greatly appreciated for providing certainty and clarity regarding the scope of jurisdictional waters subject to 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

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.



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Department of the Army Corps of Engineers (collectively, “the Agencies”) 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*² (*Rapanos*). NACD appreciates the opportunity to participate in creating the proposed guidance, and you will find our comments below.

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.

The *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*³ and *Rapanos* 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 WOTUS if they were 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 2015 rule, the waters would have been 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. The second defined set dealt with waters found in their entirety or in part to be within the 100-year floodplain of traditional navigable waters, interstate waters, or territorial seas and within 4,000 feet of the high tide line or the ordinary high-water mark of jurisdictional waters. When previously asked, the EPA stated that in most cases, the subcategories were found jurisdictional. NACD appreciates that those additional categories of water were removed from the proposed definition of WOTUS.

While acknowledging federalism throughout the proposed definition, NACD strongly encourages the Agencies to consult with local conservation districts in developing maps and analyzing local flow data to determine if the water is deemed eligible to be protected as a WOTUS. As local government entities with natural resources expertise, conservation districts are uniquely positioned to provide on-the-ground working knowledge critical to developing a thoughtful and unbiased decision on if the water should be protected under the CWA.

Under the proposed definition, NACD appreciates the efforts made by the Agencies to align with the intent of Congress.

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

³ 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



Proposed Categories of “Waters of the United States”:

Traditional Navigable Waters and Territorial Seas:

The CWA defines the term “navigable waters” as the “waters of the United States, including the territorial seas.”⁴ 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. NACD believes jurisdictional waters under the CWA should include interstate waters that are navigable-in-fact and currently used or susceptible to use in interstate or foreign commerce and include the territorial seas.

Interstate Waters:

As aforementioned, NACD believes waters protected under the CWA should be interstate and navigable-in-fact. Though the Agencies propose to eliminate the category of “interstate waters” in the proposed definition, the rationale provided by the Agencies is clear and concise. Should the waters be protected as a WOTUS, it is understood these waters are often subject to a different category under the proposed definition. NACD understands and accepts that the intention of “interstate waters” has always meant “interstate navigable waters.”

Impoundments:

NACD applauds the consistency in regulatory actions regarding impoundments since the 1986 rulemaking.

Tributaries:

Per the Agencies’ request for comment regarding the proposed definition for “tributary,” NACD supports the definition of “river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to traditional navigable waters or territorial seas in a typical year.” 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.

NACD appreciates the proposed definition of the WOTUS, as it would eliminate the current practice of conducting case-specific nexus evaluations. The significant nexus test should no longer be used as a method for making every hydrological connection as a legal connection for determining “significance.” To be significant, or “more than speculative or insubstantial,”⁵ means the expansion of jurisdiction beyond the Supreme Court decisions should not be allowed. NACD recommends to the Agencies to adhere to the prior guidance from the Supreme Court to leave the management of non-navigable waters in the hands of landowners, state and local governments.

Ditches:

Private landowners, farmers and ranchers often struggled with previous definitions of the term and its negative impact on working private lands. Traditional agricultural ditches that convey irrigation water or runoff from a field are common features on working lands across the country and serve no direct interstate or foreign commerce function. While we appreciate the intent behind grouping all “ditches” under the definition “artificial channels used to convey water,” by

⁴ 33 U.S Code §1362

⁵ 83 FR 32227



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using examples such as the Erie Canal juxtaposed with a small agricultural ditch, the proposed rule's definition is overly broad and for private landowners, may create further confusion.

We do, however, appreciate the following language that puts the burden of proof on the Agencies, not the landowner: "The burden of proof would be on the Agencies to determine the historic status of the ditch construction, and if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland, then a determination would be made that the ditch is not jurisdictional under this proposed rule."⁶

For ditches under this definition that were constructed in a tributary, historical records may not exist to prove what was altered to create the ditch, as many were constructed over 100 years ago. Determining "the nature of the landscape before and after construction"⁷ may be impossible, and we encourage deference to these ditches not being jurisdictional.

As a solution for seeking a tool or map in identifying whether a ditch or canal is constructed in a tributary or adjacent wetland, NACD strongly recommends the Agencies consult the local conservation district while making the determination. Conservation districts may have these maps readily available, as they frequently use them for private landowners and could provide the local knowledge needed to make an accurate assessment.

Lakes and Ponds:

NACD supports the Agencies' proposal to include a separate category for lakes and ponds to meet the definition of a WOTUS. These waters should be considered jurisdictional if they are a traditional navigable waterway; they contribute perennial or intermittent flow to a traditional navigable waterway; or they are flooded by a traditional navigable waterway, tributary, ditch, lake, pond or impoundment in a typical year.

While lakes and ponds are critical to the way farmers and ranchers use their water, NACD recommends to the Agencies to be clear and succinct in their final definition and to consider the agricultural benefits of using lakes and ponds.

NACD appreciates the efforts to exclude isolated, intrastate lakes and ponds, as well as the elimination of the "significant nexus" determination for each lake and pond.

As mentioned in the Preamble⁸, there are different definitions used by federal agencies for the terms "lakes" and "ponds." NACD recommends to the Agencies that they consult with local conservation districts for on-the-ground determinations for which waters may be applicable under the proposed definition.

Wetlands:

For wetlands, NACD believes jurisdictional waters should directly abut and must be indistinguishable from tributaries and traditional navigable waterways. Wetlands are those areas inundated or saturated by surface or groundwater at a frequency and duration enough to support, and that under normal circumstance do support, a prevalence of vegetation typically adapted for

⁶ <https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0003>

⁷ *Id.*

⁸ *Id.*



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life in saturated soil conditions. Wetlands generally include swamps, marshes and bogs. NACD appreciates the direct abutment requirement in the proposed rule.

NACD recommends coordination with local conservation districts during the implementation of the adjacent wetlands category.

Waters and Features That Are Not “Waters of the United States”:

NACD is always supportive of decisions being made as close to the local or state level as possible and applauds the Agencies’ efforts to exclude all waters that are not explicitly stated in the proposed definition. State level decisions over what regulations are required on waters that are not jurisdictional under CWA will allow for greater local control over the protection of natural resources. Certainty should be the Agencies’ primary goal when reviewing the proposed rule and its effect on landowners. It is important for local government to be able to assist farmers, ranchers and landowners in determining if the water on their land is protected as a WOTUS and applicable under the CWA.

Conclusion:

The incorporation of local knowledge during the implementation of the proposed definition ensures the waters subject to the CWA are workable at the local level. 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.

Thank you for the opportunity to participate and submit comments on the proposed definition of the WOTUS. We appreciate your consideration and look forward to continuing to work with you in the future on the development of the regulatory actions that protect water quality and strengthen American resources management.

Sincerely,

A handwritten signature in black ink that reads "Tim Palmer".

Tim Palmer
NACD President