



# National Association of Conservation Districts

October 4, 2021

Damaris Christensen, Oceans, Wetlands and Communities Division  
Office of Water, US Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2021-0328; Notice of Public Meetings Regarding “Waters of the United States”; Establishment of a Public Docket; Request for Recommendations

Dear Mr. Christensen:

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.

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, protect water quality, and conserve water through improved irrigation and enhanced recharge practices. 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.

## **Importance of Local Expertise**

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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 clearly defined and reliable parameters, criteria and 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



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ambiguity. NACD recommends the Biden Administration’s definition of “waters of the United States” recognize and accommodate local input instead of simply mirroring that of the 2015 Clean Water Rule.

The *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*<sup>1</sup> and *Rapanos*<sup>2</sup> 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 Navigable Waters Protection Rule, the waters would have been jurisdictional if a significant nexus to downstream waters was documented, 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 would have been 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

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**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 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 “relatively permanent” should be defined as:

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<sup>1</sup> 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

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



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- Waters that are present throughout the year except for infrequent periods of severe drought<sup>3</sup> 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 can clearly have the capability and expertise to address their water quality protection, in addition to defining jurisdictional WOTUS in their area of authority.

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 be 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. Conservation districts provide the on-the-ground working knowledge that is critical when developing a thoughtful and unbiased rule.

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.<sup>4</sup> A more precise definition of “waters of the U.S.” using well-defined parameters would lead to a probable increase in the importance of such general permits and more efficient utilization of agency resources to address individual permit actions.

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.”<sup>5</sup> This doctrine was further strengthened with the passage of the Reclamation Act of 1902, which reads:

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<sup>3</sup> US Geological Survey. “Feature Directory.” NHD USGS. <https://nhd.usgs.gov/FeatureDirectory.pdf>.

<sup>4</sup> 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/>.

<sup>5</sup> 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>.



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“[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.”<sup>6</sup>

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 and traditional water uses are not in any way impeded (or infringed) upon.

### Consistency

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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.”<sup>7</sup> 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 water occasionally or intermittently flows.”<sup>8</sup> 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.<sup>9</sup>

NACD believes there needs to be a clear distinction between streams and ditches in this definition. Ditches and other man-made drainage features are critical fixtures in farming and ranching operations. These features often do not have enough water in them for a long enough period of time to warrant classification as a waterway under the CWA. Associate Supreme Court

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<sup>6</sup> Reclamation Act of 1902, Ch. 1093 §8,32 Stat. 388 (codified at 43 U.S.C. §485(h)-4).

<sup>7</sup> *Rapanos v. United States*, 547 US 715 (2006), “Plurality opinion” 13.

<sup>8</sup> *Ibid.*, 14.

<sup>9</sup> *Ibid.*, 15.



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Justice's significant nexus test can be replaced by recognizing the term man-made and maintained surface connections.

When discussing tributaries, the EPA should continue to use the consideration of intended use as a review tool, in addition to the national delineation manual for jurisdictional determinations. 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."

### **Waters and Features That Are Not "Waters of the United States"**

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NACD is always supportive of decisions being made as close to the local or state level as possible and recommends the Agencies 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 and operators. 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, while promoting water protection best management practices.

### **Conclusion**

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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 assess, 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 "Michael Crowder".

Michael Crowder  
President  
National Association of Conservation Districts