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February 7, 2022

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Re: Docket ID No. EPA-HQ-OW-2021-0602

NASDA intro

The National Association of State Departments of Agriculture appreciates the opportunity to provide comments on the notice published December 7, 2021, in the Federal Register by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) collectively referred to as "the Agencies" proposing to revise the definition of the term "waters of the United States" (WOTUS) under the Clean Water Act (CWA).

NASDA represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including conservation and environmental protection, food safety, combating the spread of plant and animal diseases and fostering the economic vitality of our rural communities. A number of state departments of agriculture also administer or partner in administering Section 402 National Pollutant Discharge Elimination System (NPDES) permitting programs for Concentrated Animal Feeding Operations (CAFO).

Summary of NASDA Comments

NASDA remains concerned with the rationale and justification used by the EPA and the Corps to move forward with this proposed rulemaking. The CWA establishes limits on federal jurisdiction and the role of the federal government to regulate interstate commerce, thus recognizing the role of states in regulating non-navigable waters. The Navigable Waters Protection Rule (NWPR) respected these limitations on federal jurisdiction, as well as the capabilities and responsibilities of states to regulate and promote water quality.

The Agencies have referred to a list of 333 projects that are causing environmental harm based solely on the premise that these projects are not subject to federal jurisdiction, and seemingly ignoring the role and responsibilities of state's review and approval of projects that may impact non-jurisdictional waters. In multiple stakeholder briefings and public meetings, the benefits of many of these projects were highlighted. During a federalism consultation on August 5, 2021,

EPA officials seemed surprised that these projects might be beneficial. Rather than conducting the necessary analysis internally, the Agencies continued to assert these misleading arguments in public releases.

Unfortunately, any review undertaken by EPA and the Corps lacked either transparency or input from stakeholders, including state partners. State departments of agriculture could have shared from the start that the local environmental regulatory programs implemented and enforced by states are effective and beneficial.

EPA and the Corps are now moving forward with efforts to resurrect a regulatory structure that was historically problematic for American agriculture. NASDA members, farmers, ranchers, and the agriculture industry have repeatedly advocated for clarity and reasonableness in the regulatory definition of WOTUS. They have argued that compliance with clean water standards should not require the employment of expensive consultants to determine the applicability of standards. Unfortunately, the proposed rule will return us to the ambiguity of past regulation as well as the federal overreach that ignored the role and expertise of state partners. This is unacceptable, and NASDA urges the EPA and the Corps to reconsider the clarity and the undeniably appropriate level of protection offered by the NWPR and move to reinstate this regulatory structure through a process that will withstand procedural complaints in the courts.

Beyond our concerns with the content of this proposal, we are cognizant of the recent announcement by the Supreme Court of the United States granting a *writ of certiorari* in the case Sackett v. EPA. This case challenges many of the underlying issues of concern within current and proposed definitions of WOTUS and will most certainly require EPA & the Corps to commence a new rulemaking following issuance of the courts' decision. When considering the intricacies required to issue a rulemaking, especially one as complex as WOTUS, it would be irresponsible to continue the current rulemaking until the court provides guidance. NASDA urges EPA and the Corps to suspend further action on this rulemaking until guidance is provided.

Fallacy that the NWPR significantly reduced CWA protections

As a rationale for moving forward with this rulemaking, the Agencies assert that substantially fewer waters were protected under the NWPR. The Agencies rely on three indicators: (i) increase in number and proportion of Jurisdictional Determinations (JD) where resources were found to be non-jurisdictional; (ii) increase in determinations that 404 permits are not required for specific projects; and (iii) increase in requests to complete approved Jurisdictional Determinations (AJDs) instead of preliminary Jurisdictional Determinations (PJDs).

In the five years leading up to the NWPR, negative JDs accounted for between 27% and 45% of all JDs in any given year, whereas 75% of JDs were negative under the NWPR. In New Mexico and Arizona, 100% and 99.5% of the 1,525 (NM) and 1,518 (AZ) streams were found non-jurisdictional in year one of the NWPR. In the five preceding years, on average about 94% of streams (138 out of 147) were found to be non-jurisdictional under the significant nexus test.

The Agencies assert that States and tribes did not fill the gap. State departments of agriculture could have shared from the start that the local environmental regulatory programs implemented

and enforced by states are effective and beneficial. The analysis of the 333 projects, which the Agencies used to justify their proposal lacked either transparency or input from stakeholders, including state partners. NASDA is alarmed that this analysis was not completed in a deliberative and transparent way before publishing this list and declaring that these projects are environmentally harmful. Furthermore, if this list, as stated is the administrations' justification for repealing then replacing the NWPR, then it is the administration's responsibility to assess the risks and benefits of the NWPR fully, fairly, and transparently before initiating a new rulemaking process. Failure to do so suggests a political rationale rather than factual rational is at the center of this effort. It is not too late for EPA to reach out and embrace these valuable discussions.

The NWPR was in effect for over a year, yet the Agencies are unable to point to any facts demonstrating environmental harm actually occurred. They merely speculate that such harm will take place because more JDs are coming back as non-jurisdictional than in the previous five years, but there is no demonstration of water quality impacts. The Agencies assume, without proving, that more certainty/confirmation about what features are non-jurisdictional necessarily equates to environmental harm.

The Agencies overlook that federal protections, e.g., requiring permits for the conveyance of pollutants through an ephemeral stream to a downstream WOTUS, remained in place.

The Agencies' own data shows the vast majority (~94%) of streams in AZ have been determined to be non-jurisdictional even under the significant nexus standard. That a lot of JDs were requested in year one of the NWPR proves nothing, as there is no basis to assume that if the Corps was asked to conduct more significant nexus determinations in AZ, the percentage of non-jurisdictional streams would have decreased.

The Proposed Rule Disregards Important Constitutional, Statutory, and Judicial Limitations on Federal Authority

The CWA establishes limits on federal jurisdiction and affirmatively recognizes the role of states in regulating non-navigable waters. The NWPR respected these limitations on federal jurisdiction, as well as the capabilities and responsibilities of states to regulate and promote water quality.

In the current proposal, the Agencies misconstrue Section 101(b) of the Act which states that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. 1251(b).

The Agencies assert that this provision is best read as merely a recognition of states' authority to address water pollution and to support EPA's exercise of authority to advance the Act's objective, *not* as a general policy of deference to state regulation to the exclusion of Federal regulation. But the Agencies' interpretation does not give sufficient weight to the policy's explicit reference to preserving and protecting states' primary responsibilities and rights to *plan*

the development and use of land and water resources, which the Supreme Court emphasized in rejecting the Government's broad interpretation of WOTUS in *SWANCC*.

The term "navigable" must be given more importance

NASDA supports establishment of a definition of WOTUS wherein jurisdictional waters must have a relatively permanent flow that reaches a traditional navigable water; wetlands must have a continuous surface connection to navigable waters; and such flow or connections must be sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of traditional navigable waters.

Assertion of jurisdiction over a wetland "requires two findings: first, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water *connected to traditional interstate navigable waters*); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends, and the 'wetland' begins." *Rapanos*, 547 U.S. at 742. By using the term "traditional interstate navigable waters," the court was referring to waters that are navigable in fact (or readily susceptible of being rendered so) that form part of a continued waterborne highway of interstate commerce.

The Agencies wrongly remove the requirement that a relatively permanent water be connected to a "traditional interstate navigable water." For instance, the proposal applies the standard to assert jurisdiction over relatively permanent tributaries and other waters by virtue of their connection to non-navigable interstate waters as well as relatively permanent other waters that are connected to non-navigable tributaries.

The Agencies further misapply the court's decision by using a "flow at least seasonally" approach. The court indicated it would not necessarily exclude the 290-day, continuously flowing stream (*Rapanos*, 547 U.S. at 732 n.5). But that does not mean tributaries that flow for one season can automatically be *included*.

The Agencies continue to interpret the court's use of the term "continuous surface connection" as not requiring surface water to be continuously present between the wetland and the tributary. While the presence of water at all times may not be what the court had in mind, it plainly is not enough for wetlands to have "only an intermittent, physically remote hydrologic connection to 'waters of the United States'" because such wetlands "do not implicate the boundary-drawing problem of *Riverside Bayview*" (*Rapanos*, 547 U.S. at 742).

The Agencies' Interpretation of "Significant Nexus" Is Impermissibly Broad

The Agencies define "significantly affect" to mean "more than speculative or insubstantial effects on the chemical, physical, or biological integrity of" a traditional navigable water, interstate water, or the territorial seas. Waters and wetlands would be evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform.

The Agencies state they assess significant nexus under the 2008 guidance. But they seek comment on whether to take an even broader approach to significant nexus that is reminiscent of the 2011 draft guidance and the 2015 rule. And the proposed "other waters" category necessarily envisions a different approach, to the extent the starting point for the analysis is not a "tributary."

The significant nexus test should not apply to waters other than wetlands. Justice Kennedy explained that "[w]etlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters" (*Rapanos* 547 U.S. at 780).

Even the 2008 Guidance's approach (tributary reach + aggregation) stretched Justice Kennedy's opinion too far. Justice Kennedy repeatedly expressed concern about remote, insubstantial, or minor flows. He further emphasized distance, quantity, and regularity of flow for a particular wetland. Yet the Proposal opens up the possibility of aggregating not just wetlands, but any waters, potentially across entire watersheds, which effectively negates consideration of distance and hydrologic factors.

Among other things, the Agencies propose various possible interpretations of "in the region", including watersheds, sub-watersheds, ecoregions, and hydrologic landscape regions. None of these are supported by science and all would allow for the assertion of jurisdiction over isolated waters that bear no meaningful connection with downstream navigable waters.

By defining "significantly affect" as "more than speculative or insubstantial effects," the Agencies ignore that Justice Kennedy's test was meant to be a limiting principle. More than speculative or insubstantial does not equate to "significant" and does not reflect any attempt to ascertain whether effects are substantial or important. And the Agencies' illustrative examples of waters that do not meet the significant nexus test seem to only confirm that the Agencies continue to assert jurisdiction so long as there is *any* connection, in plain disregard of *Rapanos*.

The Agencies fail to provide clarity or any metrics as to what constitutes a significant nexus. The Agencies speak generally about the importance of upstream waters to downstream waters and how evidence of even one factor or function can be enough to establish a significant nexus, but their explanation of this standard remains too vague.

Justice Kennedy's "significant nexus" standard requires chemical, physical, *and* biological effects. The Agencies again improperly change the exclusive term "and" to the overly inclusive term "or," providing the potential for significant and unjustified expansion of federal jurisdiction.

In summary, the Agencies' many proposed changes are in direct conflict with established interpretation of set law. Let's not return to such vagueness such that oversight and management of waters begs a state-federal conflict.

Prior Converted Cropland (PCC)

The proposal recodifies the 1993 version of the exclusion, which states that PCC is "not 'waters of the United States'" and clarifies that "notwithstanding the determination of an area's status as

prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA."

The preamble refers to the problematic 2005 Joint Memorandum from the Corps and USDA's NRCS and the "change in use" policy discussed therein. The preamble further states the NWPR's approach to PCC "significantly reduced the likelihood that prior converted cropland will ever lose its excluded status" because of its approach to abandonment.

A landowner may demonstrate PCC status through a USDA PCC certification. The Agencies invite comment on whether to implement the exclusion consistent with the USDA's "change in use" principle, as opposed to in accordance with the abandonment principle in the 1993.

NASDA supports retaining the longstanding PCC exclusion in the regulatory text. The exclusion, originally codified in 1993, recognizes that PCC generally has been subject to such extensive modification and alteration that the resulting cropland constitutes the normal circumstances for such lands. The 1993 Rule specifically clarified that PCC does not lose its status merely because the owner changes use. That interpretation was upheld in *United States v. Hallmark Constr. Co.*, 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998).

NASDA opposes implementation of the PCC exclusion for CWA purposes in a manner consistent with the USDA's "change in use" principle. The 1996 Farm Bill adopted that concept relevant to USDA *wetlands* certifications (not PCC certifications), and Congress specified that "the amendments to the abandonment provisions under Swampbuster should not supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA. H.R. Conf. Rep. No. 104-494, at 380 (1996). USDA likewise expressly clarified that its regulations do not affect the Agencies' authority to determine the scope of CWA jurisdiction. *See also* 61 Fed. Reg. 47,091, 47,023 (Sept. 6, 1996).

Far from merely re-interpreting WOTUS to mean the waters defined under the longstanding 1986 regulations, with updates informed by Supreme Court case law, incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the abandonment principle in the 1993 Rule.

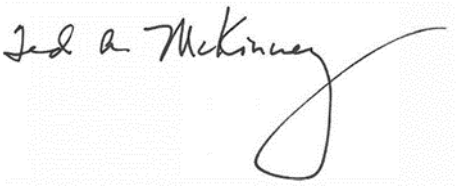
NASDA recommends that the Agencies retain the following clarifications in the NWPR, which will help reduce confusion over how the PCC exclusion is implemented: (i) withdrawal of the 2005 Joint Guidance; (ii) a site can be PCC regardless of whether there is a PCC determination from NRCS; and (iii) PCC designations are retained so long as land has been used for a broad range of agricultural purposes at least once in the preceding five years.

Conclusion

NASDA supports the Agencies stated desire to establish a durable definition of 'waters of the United States' but suspects the arguments forming the basis for dismissing the pragmatic, reasonable, and protective approach established by the NWPR to be based on a political agenda, rather than a factual analysis of the costs and benefits of this rule. This is deeply troubling.

The CWA is built on the concept of cooperative federalism as codified in section 101(b) of the Act. By acknowledging states' role in providing clean water and using federal regulations as a framework, the CWA should be a prime example of cooperative federalism. Through the cooperative efforts of states and our federal partners, we can continue to secure a healthy environment, including clean air and water, which is necessary for the agriculture industry. We hope this is the course EPA will choose in going forward.

Sincerely,



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