



August 13, 2018

Submitted via www.regulations.gov

The Honorable Andrew Wheeler
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

EPA-HQ-OW-2017-0203

Re: Definition of “Waters of the United States”—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The National Association of State Departments of Agriculture appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency’s (EPA) and U.S. Army Corps of Engineers’ (Corps) supplemental notice of proposed rulemaking, “Definition of ‘Waters of the United States’ – Recodification of Existing Rule,”. We provided initial comments on September 25, 2017 on the agencies’ “Proposed Rule: Definition of “Waters of the United States’-Recodification of Pre-existing Rules.”¹ Our previous comments support repealing the 2015 rule and focus on the lack of federalism consultation, the overreach of federal authority and the need for clarity. The below comments provide additional reasons for the need to repeal the 2015 rule and pursue a new rulemaking.

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).

¹ <https://www.nasda.org/letters-comments-testimony/nasda-comments-on-epas-proposed-rule-definition-of-waters-of-the-united-states-recodification>

The 2015 Rule Violated Federalism Principles

The Clean Water Act (CWA) is rooted in cooperative federalism, a working relationship between the federal government and the states to protect the nation's waters. Over the past three decades, the Supreme Court has made three pivotal rulings outlining the limits of federal authority around the Clean Water Act. *Riverside Bayview Homes* (1985) concluded that it is permissible to exert federal jurisdiction over wetlands that actually abut a navigable waterway. Second, *Solid Waste Agency of Northern Cook County* (2001) explained that the text of the CWA does not allow for jurisdiction to extend to ponds not adjacent to open water. Finally, in *Rapanos* (2006) the Court dealt with sites containing soils that were sometimes saturated.

In all of these cases the jurisdictional question is where federal jurisdiction stops and state jurisdiction begins. The overly vague and broad definitions of "tributary," "adjacent," and "floodplain" allowed the 2015 rule to take authority traditionally given to the states, like the regulation of isolated wetlands and "other waters." The CWA text acknowledges this state role and recognizes state authority over local lands and water resources. Questions of ephemerals, arroyos, wet meadows, and isolated wetlands are always different based on local soil types and geographies and must be left to the states.

The 2015 rule created vague definitions that did not honor these Supreme Court precedents and encroached on state authority. We support repealing the 2015 rule for these reasons.

The Definitions of "Tributary" and "Adjacency" and Use of "Navigable" Are Unworkable

The 2015 rule asserted jurisdiction over dryland features, isolated features and vaguely defined "other waters." The rule used an ill-defined application of the "significant nexus" test that ignored the above Supreme Court precedents and read the term "navigable" out of the text of the Act. These definitions allowed for regulation of waters that have no relation to navigable waters and waters that do not contribute flow to navigable waters.

Further, the rule's utilization of the "ordinary high watermark" standard disregarded consideration of water flow and allowed for the regulation of dryland. The use of the ordinary high watermark assumes that because these marks are made by regular flow, that the feature must be a water of the United States. This is untrue and does not account for ephemeral flows or waters that are now arid. This standard would have dramatically expanded jurisdiction throughout the Western United States.

Finally, the application of "adjacency" was flawed. The 2015 rule defines adjacent as "bordering, contiguous, or neighboring." This could mean waters that were within 100 feet of an ordinary high water mark or tributary or waters in a 100-year floodplain. This application disregarded the relationship between waters and did not account for surface connection or connection in anyway. Allowing all waters to be jurisdictional in floodplains is a gross expansion of the intent of the CWA and Supreme

Court precedent. Further, this standard is impractical to apply for farmers and ranchers. NASDA supports a definition of adjacent that takes the ordinary definition of the word—waters that are abutting or directly connected.

The above reasons outline why NASDA strongly supports repealing the 2015 rule and proceeding with a new rule to define Waters of the United States. Clear definitions with applicable standards are necessary for implementation of any new rule. Finalizing the repeal will help prevent a patchwork of legal challenges from dictating which regulations apply throughout the country and instead, will allow the previous regulations to go into effect. This near-term certainty and consistency is essential for agricultural land use decisions.

Thank you again for the opportunity to comment. Please reach out to Britt Aasmundstad (britt@nasda.org) if you have further questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nathan Bowen", with a stylized flourish extending to the right.

Nathan Bowen
Executive Director, Public Policy