



October 1, 2021

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Stacey Jensen
Office of the Assistant Secretary of the Army
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Washington, DC 20310-0104

Docket ID No. EPA-HQ-OW-2021-0328

Re: Request for Recommendations: Waters of the United States; Proposed Rulemaking, 86 Fed. Reg. 41,911 (August 4, 2021)

Dear Ms. Christensen and Ms. Jensen:

The National Association of State Departments of Agriculture appreciates the opportunity to provide comments on the notice published August 4, 2021 in the Federal Register by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) with information on the agencies' plans 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, many of them water-related, 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).

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 Navigational 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.

Recent comments of EPA and the Corps have referred to a list of three hundred and thirty-three 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 5th, EPA officials seemed surprised that these projects might be beneficial and subsequently, encouraged public comments on these benefits. NASDA members could have shared from the start that the local environmental regulatory programs implemented and enforced by states are effective and beneficial.

Unfortunately, the review conducted by EPA and the Corps lacked either transparency or input from stakeholders, including state partners. While NASDA appreciates the stated desire of EPA to receive such comments, we are 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.

NASDA's Policy on WOTUS focuses on the rights and responsibilities of states.

Previously, NASDA submitted comments in support of repealing the 2015 rule and focused on the lack of federalism consultation, the overreach of federal authority and the need for clarity. NASDA strongly urges that there is no need to revert to the 2015 rule, or some facsimile thereof, and that EPA maintain a balance between federal and state jurisdiction as successfully achieved by the NWPR. Specifically, the NWPR correctly limits federal jurisdiction consistent with the constitutional role of the federal government to regulate interstate commerce. Non-navigable waters were correctly left within the jurisdiction of states to regulate based on the needs of the citizens of the various states.

The 2015 Rule Violated Federalism Principles

The 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 specific to 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. NASDA therefore supported repealing the 2015 rule.

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 2015 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 dramatically expanded jurisdiction throughout the Western United States and was correctly repealed and replaced with the NWPR.

Finally, the application of “adjacency” was flawed. The 2015 rule defined adjacent as “bordering, contiguous, or neighboring.” This could include 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 any way. Allowing all waters to be jurisdictional in floodplains was a gross expansion of the intent of the CWA and Supreme Court precedent. Further, this standard was 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.

NASDA policy moving forward

The above reasons outline why NASDA does not support restoring the 2015 rule or any facsimile thereof, and instead, urges caution as EPA and the Corps proceed with a new rule to define Waters of the United States. As successfully accomplished with the NWPR, NASDA would support a definition of WOTUS that fully addresses the concerns of the agricultural community.

Clear definitions with reasonable, economical and achievable standards are necessary for implementation of any new rule. The certainty and consistency achieved by the NWPR is essential for agricultural land use decisions. NASDA encourages EPA and the Corps to work with the agricultural community to create clear, administrable definitions and respect state authority while furthering the mission of protecting clean water. Further, we support protecting statutory exemptions for farming operations and a scientifically sound approach. We encourage EPA and the Corps to especially examine and minimize the impact new definitions could have on state permitting programs, voluntary conservation efforts, and the agricultural community.

NASDA appreciates the opportunity to continue working with EPA and the Corps throughout this process and to ensure the rule maintains the same level of clarity as achieved by the NWPR.

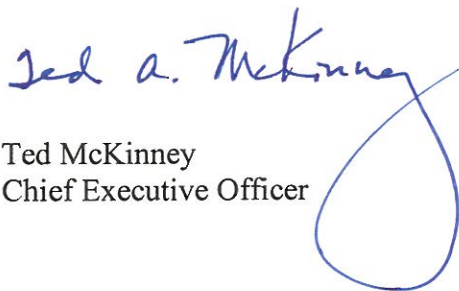
Should EPA and the Corps seek to fulfill the agency's obligations to evaluate states' effectiveness of regulating non-jurisdictional water as justification for repealing then replacing the NWPR, then it is the administration's responsibility to fully assess the risks and benefits of the rule before initiating a new rulemaking process. This cannot be done fairly and transparently without consulting state departments of agriculture. As mentioned before, several of these projects demonstrate environmental benefits, not harm, which shows more analysis should have been done before initiating a new rulemaking process.

Conclusion

There is no denying that clean water is essential. NASDA encourages the administration to prioritize clear, administrable definitions and respect state authority while furthering the mission of protecting clean water. We also encourage EPA and the Corps in coordination with USDA and state departments of agriculture to examine and minimize the impact new definitions could have on voluntary conservation efforts and state permitting programs. In addition, the potential impacts to the community of farmers and ranchers who feed us and provide the raw materials necessary for clothing, housing and so much more should especially be considered. A thriving agriculture industry is important for people everywhere, helping to provide life's necessities at affordable prices and in a healthy, sustainable manner. It's time to calm the waves and allow a clear path forward for farmers and ranchers looking to care for their land.

NASDA appreciates the opportunity to continue working with EPA and the Corps throughout this process and to ensure the rule maintains the same level of clarity as achieved by the NWPR. Thank you again for the opportunity to comment. Please reach out to RJ Karney (rj.karney@nasda.org) if you have further questions.

Sincerely,



Ted McKinney
Chief Executive Officer