April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvannia Avenue NW
Washington, D.C. 20460

Re: Revised Definition of “Waters of the United States”
Docket No. EPA-HQ-OW-2018-0149

The National Waterways Conference (NWC) submits these comments in response to the request of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (together, the Agencies) for comments on a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA).1 We appreciate this opportunity to share our views.

About NWC

NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation’s water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation’s water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation. Conference membership is diverse and includes the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Some of our members are public entities, some are private corporations, and some are individuals.

The scope of the CWA jurisdiction is of upmost importance to our members. A proper definition of “waters of the United States” (WOTUS) is critical to the efficient and effective regulation of our member’s activities. NWC has a strong desire to protect our Nation’s water resources, and we take seriously our obligation to be good stewards of the environment for ourselves and generations to come. NWC’s comments focus on the issues of greatest importance to its members, with suggestions to clarify certain aspects of the proposal.

---

Summary of Comments

1. Applicable Supreme Court precedent counsels the Agencies to limit—not expand—CWA jurisdiction.

2. The Agencies should remove speculative language regarding the availability of a water for navigation from the description of traditional navigable waters.

3. The Agencies should clarify when jurisdiction over impoundments is relinquished.

4. NWC supports the Agencies’ identification of tributaries.

5. We generally support the Agencies’ proposals for ditches, and we also urge the Agencies (a) to exclude from § 404 regulation certain artificial features such as industrial canals, bypasses at hydroelectric reservoirs, and similar constructed facilities; (b) to affirm that WOTUS and point sources are distinct and mutually exclusive categories; and (c) to affirm that the burden is on the Agencies to demonstrate that an area is jurisdictional, particularly where the source of authority is historical or otherwise not immediately apparent.

6. NWC supports the Agencies’ exercise of restraint as to particular features, namely, (a) groundwater, which has never been subject to CWA jurisdiction; (b) waste treatment systems, which have been excluded from jurisdiction since 1979; (c) agricultural lands, including prior converted cropland; and (d) artificial water features located in uplands.

1. The Mandate Under Current, Applicable Supreme Court Precedent Counsels the Agencies to Limit—Not Expand—CWA Jurisdiction.

Since the Clean Water Act first passed Congress in 1972, the language of the Act has focused on navigable waters. However, over time, expansive interpretations at the Agencies and the courts, including those in the 2015 rule,2 applied the Act ever more broadly, to a point well beyond Congressional intent.

The Supreme Court has sent clear instructions to the Agencies to limit, not expand, CWA jurisdiction. In Rapanos v. United States,3 Justice Scalia’s plurality opinion and Justice Kennedy’s concurrence offered two different tests for CWA applicability. That has since led to extensive debate about which test or tests to apply to identify the outer boundaries of the Agencies’ jurisdiction. Often lost in that debate, however, is one clear conclusion: No matter how best to interpret or reconcile the Rapanos opinions, the opinions of five Justices of the Supreme Court had the effect of


Comments of National Waterways Conference  
Docket No. EPA-HQ-OW-2018-0749  
April 15, 2019  
Page 3

vacating cases from the lower courts—in essence, overturning the jurisdictional determinations at issue—based on concerns that administrative practices at that time failed to ensure respect for the limits of CWA authority. Justice Kennedy, for example, expressed concern about “the potential overbreadth of the Corps’ regulations” and a need “to avoid unreasonable interpretations of the statute.” His concerns made clear that to assert CWA jurisdiction, a hydrologic connection had to be significant in some sense. To the extent the 2015 rule expanded Agency jurisdiction, and especially in its indiscriminate application to waters with any hydrologic connection without regard to significance, it was a clear contradiction of Rapanos and was doomed to fail in court. By contrast, the current approach of the Agencies is in keeping with the Supreme Court’s interpretation of the statute.

The 2015 rule pushed wetlands jurisdiction to an extreme, beyond the limits established by Congress and, in our view, the Constitution. Some want to impose wetlands regulations farther and farther inland, farther from truly navigable waters, until the hydrological connection to streams and rivers can barely be found. This amounts to transforming the § 404 program into a federal land use statute. This was never what Congress intended. Extension of regulatory authority ever farther upland necessarily intrudes on state, local, and private prerogatives. In our view, the proposed rule maintains federal protections in an appropriate manner while also enhancing regulatory certainty and providing appropriate deference to the role of the States in protecting water resources.

2. The Agencies Should Remove Speculative Language from the Description of Traditional Navigable Waters.

The proposed language describing “traditional navigable waters” remains similar to that in the 2015 WOTUS rule: “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including territorial seas and waters which are subject to the ebb and flow of the tide.” NWC members have important interests in traditional navigable waters. In fact, one important mission of NWC is to advocate for safe, effective, and efficient transportation on our Nation’s waterways. Many of our members directly provide or depend on commercial barge transportation. Our members also frequently require authorizations under § 10 of the Rivers and Harbors Act and § 404 of the CWA for work in and around traditional navigable waters.

---

4 Specifically, the case vacated Sixth Circuit opinions which had upheld CWA jurisdiction in the cases before the Court.

5 Id. at 782.

6 Id. at 784 (“Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain.”).

7 See, e.g., 84 Fed. Reg. at 4,203 (proposed § 328.3(a)(1)).
CWA jurisdiction starts with the identification of traditional navigable waters. It is critically important to correctly identify what is a “navigable” water. As Justice Kennedy noted, the statute reflects a “requirement that the word ‘navigable’ be given some importance.” Accordingly, we acknowledge and support the Agencies’ effort in the proposed rule to restore meaning to the word “navigable” as it appears in the statute.

The Agencies should remove the phrase “or may be susceptible to use in interstate or foreign commerce” from the regulatory definition. The waterways have provided for interstate commerce for hundreds of years, and the transportation infrastructure is mature and well defined at this point. Speculation as to the existence, nature, or scope of the use of our Nation’s waterways for transportation is unnecessary. Specifically, we see no reason to guess as to whether a waterway could be available for navigation if some unknown set of undescribed eventualities takes place at some uncertain future time. The waters that are available for navigation are well understood, particularly by the Corps of Engineers. We encourage the Agencies to rely on the Corps’ extensive experience with its Civil Works program. In that context, the Corps clearly delineates between navigation for commercial purposes, which generally takes place via barges and larger commercial vessels, and a project’s other purposes, such as recreation. Generally, the Corps’ operations in support of navigation at a project authorized for that purpose only take into account commercial navigation. For example, in determining the level of proposed funding for navigation projects at the beginning of the budget process, the Corps assesses how much each navigable waterway is used through metrics such as tons of goods transported and lockages by commercial vessels. It is no mystery which waterways are designated and used for that purpose. A project can also be authorized for recreation, and if so, the Corps typically accommodates smaller vessels such as canoes and kayaks for that reason, but recreational watercraft are not a major consideration as to the Corps’ operations in support of navigation.9

---
8 Rapanos, 547 U.S. at 778.
9 There is limited legislative history discussing the extent of CWA jurisdiction in relation to the Commerce Clause, and there are theories that Congressional authority under the Commerce Clause extends broadly to any water where any commerce could have ever occurred, including via smaller craft such as canoes. That Constitutional analysis, however, does not answer the statutory question of what Congress meant when it included the word “navigable” in the CWA, nor is a general Constitutional inquiry sufficient to read into the statute any conclusion that Congress intended “navigable” as referring to anything other than navigability. Further, there is every reason to believe the CWA’s use of the term “navigable” was intended to refer primarily to commercial navigation. There is a long history of Congress enacting statutes, generally codified in Title 33 of the U.S. Code, for the construction, operation, maintenance, and regulation of waterways. Those efforts focus on commercial navigation, i.e., traffic by barges and similar vessels. Pursuant to those statues, there is likewise a well-established practice at the Corps, dating back many decades, of building out and operating the commercial navigation infrastructure, which, again, means supporting barge transportation.
Thus, for purposes of the Civil Works program, the Corps has no difficulty defining and identifying which waterways are authorized and used for commercial navigation. For ease of administration and because it reflects the type of interstate commerce Congress has sought to foster, protect, and regulate since the nineteenth century, in identifying TNWs, the Agencies should focus on commercial navigation and apply the Corps’ experience and expertise from its Civil Works program to do so. At the same time, the Agencies should clarify that waters are not deemed traditional navigable waters based solely on recreational use.

3. The Agencies Should Clarify When Jurisdiction over Impoundments Is Relinquished.

As the Agencies explained in the preamble to the proposed rule, the jurisdictional status of an impoundment generally reflects that of the water being impounded. The preamble also recognized a “longstanding agency practice” that impounding a WOTUS “would not change the water’s jurisdictional status, consistent with longstanding agency practice, unless jurisdiction has been affirmatively relinquished.” We urge the Agencies to clarify its procedures when relinquishing jurisdiction on the grounds that an impoundment does not contribute perennial or intermittent flow to a jurisdictional water. For example, such a determination could come in the form of a jurisdictional determination, a § 404 permit for a structure that limits flow, or correspondence from either Agency. We also urge the Agencies to ensure such a determination remains effective until explicitly changed via a final agency action.

4. NWC Supports the Agencies’ Identification of Tributaries.

We support the identification of tributaries on the basis of naturally occurring surface flows that are perennial or intermittent in nature. We specifically support the proposal to exclude ephemeral features from the definition of WOTUS. An area where flow is too infrequent, too far removed or otherwise has insubstantial effects on traditional navigable waters should not be jurisdictional. As such, excluding this feature better reflects the statutory structure and provides more regulatory certainty and clarity.

---

10 Some projects are authorized for navigation but may face various obstacles. For example, an inland waterway may become impassable due to siltation or sloughing after a storm event or if insufficient funds are available to the Corps to complete regular maintenance dredging. Based on pertinent statutes and the Corps’ historic operations, however, it is reasonably clear whether a given waterway is authorized for navigation as part of the Civil Works program, even if it is subject to maintenance or repair needs. Such a waterway could be deemed to be navigable for CWA purposes. That is a more reasonable application of the concept of a waterway that could be susceptible to use in interstate commerce, i.e., based on readily available, ordinary operational techniques.


12 Id.
5. NWC Generally Supports the Agencies’ Proposal as to Ditches But Also Has Concerns.

Given that most ditches should be excluded from jurisdiction, NWC has concerns about the proposed rule with regard to the jurisdiction it exerts over ditches. The Agencies propose to define “ditch” as an “artificial channel used to convey water” and delineate three categories of ditches that will be jurisdictional WOTUS: (1) commerce-based ditches and tidal ditches; (2) ditches built in a tributary that meet the tributary definition; and (3) ditches built in adjacent wetlands that also meet the tributary definition. Excluding ditches not otherwise within the Agencies’ proposed definition is consistent with the Agencies’ historic practice. For example, in 1977, the Corps of Engineers stated that the agency “adopted the suggestion of many commenters that [it] incorporate into [the regulatory] definition . . . the statement that nontidal drainage and irrigation ditches that feed into navigable waters will not be considered ‘waters of the United States’ . . . To the extent that these activities cause water quality problems, [the Corps explained that they] will be handled under other programs of the [CWA].”

(a) Application to Particular Features

The Agencies seek comment on whether the ditch exclusion should focus on particular ditch use, such as roadside, railway, agriculture, irrigation, water support or other similar uses, and if so, why. We urge the Agencies to consider clarifications to exclude from §404 regulation certain artificial features such as industrial canals, bypasses at hydroelectric reservoirs, and similar facilities. Such a feature may be immediately adjacent or connected to a TNW or tributary, but also be primarily of artificial construction for a particular purpose that is essentially incompatible with common biological functions. For example, a bypass may be needed at a dam for operational reasons and is likely to be constructed primarily of concrete, metal, and other hardened materials. Such a feature could facilitate flows to provide ecological benefits like fish passage, oxygenation, or flow supplementation. However, the structure itself does not directly support biota in the sense of providing a place where rooting, nesting, feeding, or similar functions are necessary or appropriate. To the contrary, should aquatic vegetation seek to take root, it could contribute to erosion and create a maintenance or safety issue. For structures of this nature, application of §404 serves no reasonable purpose, but it can impede proper maintenance and complicate projects that are necessary for reasons of safety and efficiency. Pouring concrete to maintain, repair, or otherwise work on a structure of this nature should not require a §404 permit.

(b) A “Navigable Water” Is Not a Point Source.

We urge the Agencies to affirm that a ditch cannot be a “point source” and “navigable water” simultaneously. The plurality opinion in Rapanos correctly explained

---


14 A given project could invoke §10 for different reasons.
that they are “separate and distinct categories.”15 The CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, 

ditch,

channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”16 Because of this distinction, the Court reasoned the following:

The definition of “discharge” would make little sense if the two categories [i.e., point source and navigable waters] were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]” [included in the statutory definition of ‘point source’]—which are terms used to describe the watercourses through with intermittent waters typically flow—shows that these are, by and large, not “waters of the United States.”17

(c) Burden of Proof to Demonstrate a Navigable Water

The proposed rule places the burden on the Agencies to determine whether a ditch was constructed in a tributary or an adjacent wetland. If evidence to that effect is lacking, the Agencies would consider the ditch non-jurisdictional. Evidence includes the physical appearance and functionality of the current ditch and available evidence regarding when the ditch was constructed and the nature of the landscape before and after construction. NWC agrees that it is reasonable to consider information like that and to exclude from jurisdiction areas where the evidence, on balance, does not affirmatively support that determination. Particularly where the basis to find jurisdiction is historic in nature and does not reflect apparent, current conditions, the Agencies should bear a heavy burden of proof prior to asserting jurisdiction.

6. NWC Supports the Agencies’ Exercise of Restraint as to Particular Features.

(a) Groundwater

The proposal excludes groundwater, “including groundwater drained through subsurface drainage systems.”18 NWC strongly supports the Agencies retaining this exclusion. It is consistent with the CWA, longstanding agency practice, and the case law.

(b) Waste Treatment Systems

NWC supports codification of the exclusion for waste treatment systems, which have been referenced in the Agencies’ regulations since 1979. We also specifically

15 Rapanos, 574 U.S. at 735.
16 Id. (emphasis added).
17 Id. at 735-36.
support the inclusion of settling ponds and cooling ponds. This approach is consistent with the notion, noted above, that a given water cannot be both a WOTUS and a point source. In the case of a wastewater treatment pond, a contrary interpretation would create the absurd result of requiring a § 402 permit to put wastewater into the wastewater treatment pond.

(c) Agricultural Lands

The Agencies propose revised regulatory text on the longstanding exclusion for prior converted cropland. NWC supports the Agencies effort to continue to exclude prior converted cropland from CWA jurisdiction and ensure that the exclusion applies as the Agencies envisioned when they originally codified it in 1993.\(^\text{19}\)

(d) Artificial Water Features in Uplands

Under the exclusion for “artificial lakes and ponds,” the Agencies propose to exclude features like farm and stock watering ponds, but only if they are constructed in upland and do not meet the criteria for jurisdictional lakes or impoundments.\(^\text{20}\) NWC generally supports this exclusion, but encourages the Agencies not to limit the exclusion to features constructed on dry land.

Thank you for this opportunity to comment. Please feel free to contact me if I may provide additional information.

Respectfully submitted,

Amy W. Larson, Esq.
President

---

\(^\text{19}\) See 58 Fed. Reg. 45,008, 45,032 (Aug. 25, 1993) (clarifying that an area remains prior converted cropland even if it is no longer used in agricultural production or is put to a non-agricultural use.)