



County of San Diego

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Donna Downing
Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue NW
Washington, DC 20460

Via e-mail to CWAwotus@epa.gov, Hanson.Andrew@epa.gov

COMMENTS FOR THE DEFINITION OF “WATERS OF THE US” (WOTUS) – ENVIRONMENTAL PROTECTION AGENCY (EPA)

Dear Ms. Downing,

The County of San Diego (County) has reviewed the request for comments regarding the definition of the Waters of the U.S. (WOTUS). The County appreciates the opportunity to review the project and offers the following comments for your consideration.

As a result of President Trump’s February 28, 2017 Executive Order (EO) 13132 on “Restoring the Rule of Law, Federalism, and Economic Growth”, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), collectively referred to as the agencies, are reviewing the ‘Waters of the United States’ (WOTUS) Rule. The EO directs the EPA and the Corps to revisit and rewrite the 2015 WOTUS rule and to obtain state and local government official’s perspectives. The National Association of Counties Organization (NACo) and other national, state and local government associations met with the agencies on the upcoming WOTUS rulemaking. During the meeting, the EPA and the Corps provided a presentation that outlined six questions for feedback; the below comments address each of the six questions.

For reference, the following agencies’ questions and County comments cite a 2006 U.S. Supreme Court case, *Rapanos v. United States* (hereinafter referred to as “*Rapanos*”). Justice Antonin Scalia authored a written plurality opinion of the case, which is referenced here in the agencies’ questions and County comments.

- 1. How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented? How would you like to see the agencies interpret “consistent with” Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?*

It is important for definitions to remain consistent over time and between administrations. The County would like to see an interpretation of Scalia’s opinion consistent with a policy that continues to protect the county’s rivers, streams, and tributaries without undue regulation on infrastructure.

The most important aspect of regulation of Waters of the United States (WOTUS) is consistency over time and between regulations. The definition of WOTUS has remained consistent since the 1972 amendments to the Clean Water Act (CWA), with the exception of key Supreme Court decisions, namely *Rapanos* (2006). Redefining WOTUS to be consistent with Scalia's opinion in *Rapanos* would be the first major change to the definition of WOTUS in 25 years, and would initially create regulatory uncertainty.

To minimize uncertainty with this proposed change, the County recommends that the EPA create a rule consistent with the main purpose of the CWA, to "restore and maintain the chemical, physical and biological integrity of the nation's waters," and the existing definition of WOTUS (33 CFR 328.3), which clarifies terms that have caused contention and uncertainty in the past. Specifically:

- a. The definition of "adjacent" should be clarified, and non-distinct terms such as "neighboring" should be further defined.
- b. A simplified definition of "tributary" should be provided, and it should be clarified that this term does not include ditches created in uplands or stormwater conveyance facilities and treatment facilities.
- c. The County recommends that the three-parameter definition of wetlands (hydrology, hydric soils, and hydrophytic vegetation), and the definition of ordinary high water mark not be changed to retain current delineation practices, which would avoid regulatory uncertainty.
- d. Regarding the definition of "relatively permanent," the County would support the EPA's proposed definition option of "perennial plus streams with seasonal flow," which would retain protection for the County's seasonal rivers, streams, creeks, and tributaries that contain continuous flow during some months of the year but no flow during dry months. Removal of features with intermittent hydrology from WOTUS would jeopardize the important services provided by these features, especially in southern California, and would be inconsistent with the purpose of the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."
- e. The County would support a definition that recognizes regional variation, similar to the Corps' Wetland Delineation Manual, Regional Supplements. A new rule should define how these supplements would be utilized, changed, or eliminated.

2. *What opportunities and challenges exist for your state or locality with taking a Scalia approach?*

Opportunities: The County sees an opportunity to improve predictability in identifying WOTUS and make the process clearer, simpler, and faster.

- a. The current review of WOTUS, to align with Justice Scalia's approach, provides an opportunity to simplify definitions, clarify the scope, and improve predictability of WOTUS. Under current regulations and guidance, many waters in the County are subject to case-specific jurisdictional analysis to determine whether a "significant nexus" to a Traditional Navigable Water (TNW) exists, which is a time and resource intensive process that can result in inconsistent interpretation of CWA jurisdiction. The County continues to support new regulations that make the process of identifying waters protected under the CWA clearer, simpler, and faster.

- b. Under current regulation, ditches (even roadside ditches excavated wholly in and only draining uplands) that transport relatively permanent flow directly or indirectly into TNWs can be considered jurisdictional and therefore subject to CWA regulation. The County maintains and monitors infrastructure including roadside ditches, flood control channels, and drainage conveyances, which are used to safely guide water away from homes, businesses, properties, and roads. The inclusion of some ditches as WOTUS triggers the need for regulatory permits to conduct necessary maintenance, often delaying work and potentially jeopardizing public safety. The County continues to support the clear exclusion of ditches and other features that require maintenance and oversight by the County.
- c. The 2015 Rule (had the stay not been implemented) would have a significant effect on County lands / resources / development processes / maintenance / operations because Justice Kennedy's "significant nexus" to traditionally navigable waters could include County-maintained ditches and other water infrastructure. Federal regulation of these features could inhibit the County's ability to operate and maintain infrastructure, as needed. Therefore, the revised definition of WOTUS should contain exemptions to facilitate easy maintenance of these features to ensure public safety and health. The definition of "relatively permanent" waters should exclude man-made features, such as County-maintained ditches and other water infrastructure, so the County is able to operate and maintain these features without federal involvement.
- d. Furthermore, the County requests that any new definition of WOTUS exempt the full range of conveyances, green infrastructure, water quality treatment features, storage, and infiltration facilities necessary to comply with CWA Section 402 National Pollutant Discharge Elimination System (NPDES) programs or other state and local water quality requirements. The new rule should explicitly and categorically exclude from the definition of a WOTUS municipal separate storm sewer systems (MS4s), conveyances, and related engineered infrastructure designed for stormwater management and treatment. Without clear exemptions, many features of MS4s could be potentially considered WOTUS, making it difficult to locate water quality treatment and maintain conveyances.

Challenges: The Scalia rule could result in a reduction of federally regulated waters and present challenges with other state and federal regulatory programs that currently rely heavily on this federal authority for streamlining.

Two specific challenges, with reduced federal authority, have specifically been identified: a) compliance with the Endangered Species Act and, b) compliance with the State of California's Porter-Cologne Act.

- a. California has the second highest number of federally listed threatened and endangered plant and animal species in the nation with 301 species are listed in California, of which 44 occur within San Diego County. Many of these listed species are commonly found in or immediately surrounding WOTUS and require consultation pursuant to the Endangered Species Act (ESA). Projects that have the potential to impact listed species, that also require a CWA 404 permit from the Corps for impacts to WOTUS, receive take authorization through the Corps' streamlined Section 7 consultation process. However, when no Corps permit is required or other federal nexus is preset, the County is required to consult with the U.S. Fish and Wildlife Service (USFWS) pursuant to Section 10 of the ESA, which does not have a codified timeline and can take a year or more to complete. Additionally, Section 10

has more stringent mitigation requirements increasing costs, delaying implementation of necessary infrastructure maintenance or improvements, and potentially reducing public safety.

- b. Although a reduction in federal CWA jurisdiction would likely result in a reduction in need for Corps permits under Section 404, it is likely that permits, required pursuant to California's Porter-Cologne Water Quality Control Act of 1969 (Porter-Cologne Act), would proportionally increase. The Porter-Cologne Act governs actions that may affect any surface water, including saline waters, within the state of California. Existing Porter-Cologne Act jurisdiction includes all WOTUS under current federal jurisdiction as well as any waters that would be considered isolated. Implementation of the Porter-Cologne Act for dredge and fill activities currently relies heavily on the federal CWA Section 401 Water Quality Certification (401 WQC) program run by California's State Water Resources Control Board (SWRCB). While dredge and fill has been a regulated activity under Porter-Cologne since it was enacted, there is not currently a well-developed or streamlined process to permit these impacts to waters of the state. Currently, for projects that impact WOTUS, state waste discharge requirements (WDR) under Porter-Cologne are incorporated into the 401 WQC permitting process. Projects that only impact waters of the state, and not WOTUS, are required to apply for, obtain, and follow WDRs, but the current permitting process is cumbersome, requires approval by the SWRCB, and generally takes two years to complete. This would cause substantial delays as compared to the streamlined nationwide permit program under the CWA that allows project proponents to obtain permits for dredge and fill in approximately two to six months, and provides an option for non-reporting permits for small impacts. There is no option for non-reporting under Porter-Cologne for dredge and fill to waters of the state. Should federal CWA jurisdiction be reduced, the County may need to receive a larger proportion of Porter-Cologne Act WDRs from the SWRCB, potentially resulting in longer permit processing times and delays in implementing essential public projects and necessary maintenance.

3. *Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, statutes or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402 and 404)? If so, what types of actions do you anticipate would be needed?*

With a Scalia rule, it is anticipated that federal jurisdiction over wetlands and waters would be reduced; in order to continue to provide protection for water resources, the scope of state and local regulations may proportionally be increased.

Currently, implementation of state programs, including the Porter-Cologne Act, rely heavily on the well-established procedures for processing permits associated with the federal CWA programs. With the potential reduction in federal jurisdiction, state and local programs may no longer rely on these well-established procedures resulting in processing delays and potentially increased permit application fees.

In addition, it is likely that there would be reduced protections for regionally specific water features including headwaters, small streams, and isolated waters such as vernal pools. These resources would likely still be considered important by the County, and local programs may need to be strengthened to continue to provide adequate protection. Development and implementation of protection programs would have associated costs that would be incurred locally.

4. *The agencies' economic analysis intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your region, state or locality that could be affected but would not be captured in such an economic analysis?*

EPA's economic analysis should include and account for additional costs at the state and local levels. At a minimum the economic analysis should account for the following:

- a. Additional cost associated with the development and the implementation of additional processes and protections at the state and local levels to continue to provide protection for resources no longer covered under federal jurisdiction.
- b. Current projects will require additional time and funds to update WOTUS delineations, effects analysis, environmental documentation, and permits.
- c. Temporary costs associated with training of local staff, consultants, and regulators.
- d. The likelihood that the USFWS staff will not be increased to handle the additional workload in ESA Section 10 Habitat Conservation Plans (HCP), resulting in increased costs and delays.
- e. The likelihood that the local Regional Water Quality Control Board (RWQCB) staff will not be increased to handle the additional Porter-Cologne permit processing workload, resulting in increased costs and delays potential litigation on the County associated with delays.
- f. Any expansion of state programs in response to the reduction in federal would likely result in the costs being passed down to the local jurisdictions.
- g. Lost capacity or function of infrastructure due to delays caused by additional ESA Section 10 and Porter-Cologne processing times and the likelihood of USFWS and RWQCBs being unable to get the funding needed to handle the increased permit load.
- h. Reductions to federal WOTUS jurisdiction will likely lead to an increase in impervious surfaces, which has been shown to increase flood flow peak heights and reduce water quality in WOTUS. This will lead to additional costs to clean public water to meet drinking water standards, state water quality mandates, and additional costs to contain flood flows and reduce flood risk to an acceptable level.

5. *Do you have any additional information that the EPA should be aware of?*

The County believes it is important for the EPA to be aware of California state regulations governing waters of the State. In particular, the Porter-Cologne Act (California Water Code Section 13000, et. seq.) which governs actions that may affect any surface water, including saline waters, within the State of California. Due to California's broad regulation over surface waters, any changes at the federal level would likely have both positive and negative impacts on how regulations are implemented at the state level. As discussed in the County's response to Question #1, this is why consistency over time, with regulations and definitions, is critical in creating the least amount of uncertainty. Any changes at the federal level would directly affect the state's regulations.

6. *Do you have any other approaches that you would like the agencies to consider?*

- a. The County encourages the agencies to recognize the regional variability and conditions when considering new approaches. Regional differences in climate, geology, soils, hydrology, plant or animal communities, and other factors, are important to the identification and functioning of streams and wetlands. The County receives limited rainfall, most of which occurs during a small number of winter storms. This results in many seasonal features that hold or convey continuous flow during only a portion of most years. These seasonal features provide important services such as flood retention, water supply, nutrient fixing, heavy metal fixing, and habit for native species.
- b. The Scalia judgement noted that the reference to “relatively permanent” did not necessarily exclude seasonal rivers which contain continuous flow during some months of the year but no flow during dry months. Removal of features with intermittent hydrology from WOTUS would jeopardize the important services provided by these features, especially in southern California, and would be inconsistent with the stated purpose of the CWA to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters”. Recognizing that no single national approach can adequately capture the regional variability throughout the U.S., the County encourages the agencies to consider using a regional or sub-regional approach, similar to what has been implemented with the Regional Supplements to the Corps of Engineers Wetland Delineation Manuals.
- c. Developing a “Waters of the U.S.” definition using only Scalia’s opinion could potentially reduce or eliminate involvement of the Federal government on County lands (e.g., CWA 404 permits for impacts to wetlands/waters). Depending on the adopted definitions of “relatively permanent” and “continuous surface connection” Federal jurisdiction could be limited to major waterways and adjacent wetlands. However, please consider that the arid southwest (i.e. the County) is unique in that most of our “relatively permanent” waters exist underground, below the bed and bank of major streams and only break the surface during storm events and extremely wet seasons. The County recommends that “Waters of the U.S.” in the Arid West such as wetlands still be defined using the Arid West Regional Supplement to the Army Corps of Engineers Wetland Delineation Manual.

The County appreciates the opportunity to comment on this project. We look forward to receiving future documents related to this project and providing additional assistance at your request. If you have any questions regarding these comments, please contact Timothy Vertino, Land Use / Environmental Planner, at (858) 495-5468, or via email at timothy.vertino@sdcounty.ca.gov.

Sincerely,



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