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June 19, 2017

Andrew Hanson
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

San Gabriel Valley Council of Governments: Informal Comments Submitted in Response to Environmental Protection Agency Call Re: Waters of the United States

Dear Mr. Hanson,

The San Gabriel Valley Council of Governments (SGVCOG) is a joint powers authority made up of representatives from 31 cities, 3 Los Angeles County Supervisorial Districts, and 3 Municipal Water Districts located in the San Gabriel Valley of Southern California. The COG seeks to address important issues impacting our member cities, in this case, access to safe and clean drinking water, as well as the proper treatment of stormwater and urban runoff. We understand that protection of the environment must be an overarching goal. In balancing these, the COG takes special interest in regulatory decisions that affect interpretation of the Clean Water Act.

Our Water Policy Committee has followed very closely the various court cases and interpretations of Waters of the United States (WOTUS), including the Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (USACE) 2008 *Rapanos* Memorandum, as well as the 2015 Clean Water Rule. These decisions have great bearing on how the San Gabriel Valley is able to treat and convey stormwater and urban runoff. The Los Angeles County flood control system is an amalgamation of under-street storm drains, open channels, and river beds, both concrete lined and natural. Most segments of this system are regulated by water quality standards, so any changes to the interpretation and reach of federal jurisdiction have major impacts on our member cities and their ability to use the flood control system, as intended, to convey stormwater.

Attached please find our submission to your informal call for comments expressed in the attached PowerPoint the EPA circulated. We are thankful for your collaborative approach to addressing this very difficult issue. If you have questions or would like to consult with our staff please contact Eric Wolf, Senior Management Analyst, at ewolf@sgvcog.org, 626 457-1800.

Sincerely,

A handwritten signature in blue ink, appearing to read "Phil Hawkey".

Phil Hawkey
Executive Director
San Gabriel Valley Council of Governments

ATTACHMENTS

Attachment A: EPA PowerPoint

Attachment B: SGVCOG Informal Comments in Response to WOTUS Call

The Definition of “Waters of the U.S.”

E.O. 13132 Federalism Consultation Meeting

April 19, 2017

Purpose & Agenda

Purpose:

- Initiate Federalism consultation to obtain state and local government officials’ perspectives
- Provide an overview of potential changes under consideration for the definition of “Waters of the U.S.”

Agenda:

- Federalism overview
- “Waters of the U.S.” over time
- The Executive Order
- Proposed two-step process
 - Step 1
 - Step 2
- Discussion of Potential Approaches
- Next steps

E.O. 13132, Federalism

The Order requires that Federal agencies consult with elected state and local government officials, or their representative national organizations, when developing regulations that have federalism implications.

The agencies are consulting due to strong interest on the part of state and local governments on this issue over the years and potential effects associated with a change in the definition of “waters of the U.S.”

“Waters of the U.S.” Over Time

From the 1970s through the 1990s, the majority of federal courts, as well as the agencies, consistently interpreted a broad scope of Clean Water Act jurisdiction.

Supreme Court decisions in 2001 and 2006 held that the scope of navigable waters must be linked more directly to protecting the integrity of waters used in navigation. The justices in the 2006 *Rapanos* decision were split on how this was to be accomplished.

The agencies have been working since these Supreme Court decisions to provide clarification and predictability in the procedures used to identify waters that are – and are not – covered by the Clean Water Act.

The 2015 Clean Water Rule was an effort to provide that needed clarification and predictability. Many stakeholders, including many states, expressed concerns with the 2015 Rule.

The agencies are now embarking on another effort to provide clarity and predictability to members of the public.

The Executive Order

On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule...”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*. Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

Two-Step Process

The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

Step 1: Withdraw 2015 Clean Water Rule

While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

Step 2: Develop New Rule Consistent with the Executive Order

The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.

Potential Approaches to “Relatively Permanent” Waters

Perennial plus streams with “seasonal” flow

Current practice: seasonal flow = about 3 months (varies regionally)

Perennial plus streams with another measure of flow

Use appropriate, implementable metrics, e.g., frequency of flow, intersecting water table

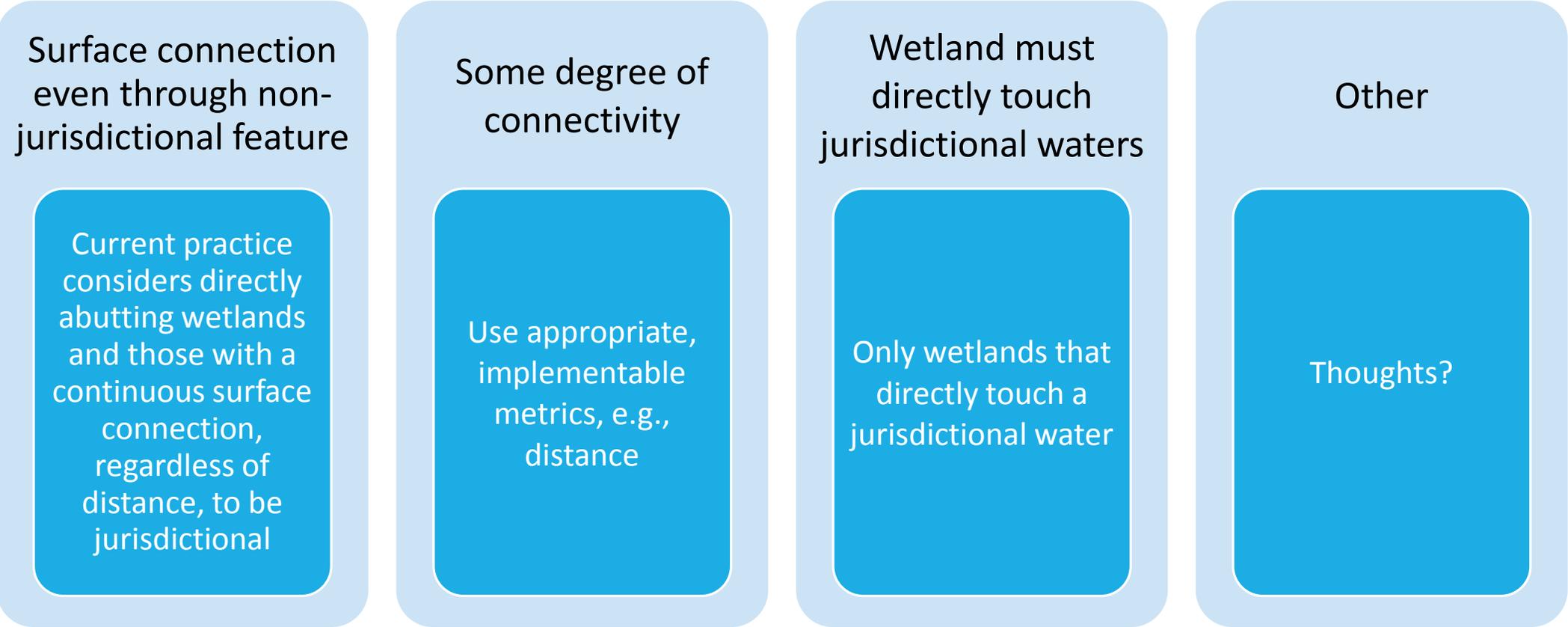
Perennial streams only

Streams that carry flow throughout the year except in extreme drought

Other

Thoughts?

Potential Approaches to Wetlands with a “Continuous Surface Connection”



Discussion:

The change in jurisdictional waters will vary across states and localities and with the options suggested above. Given that:

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?
2. What opportunities and challenges exist for your state or locality with taking a Scalia approach?
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?
4. The agencies’ economic analysis for step 2 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?

Next Steps

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

- If so, please provide.

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

Comments will be due to the EPA in approximately 8 weeks, June 19, 2017.

Please send written comments to: CWAwotus@epa.gov and copy Hanson.Andrew@epa.gov

Contacts

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San Gabriel Valley Council of Governments

Response to the Environmental Protection Agency (EPA) Informal Call for Comments on Redefining Waters of the United States (WOTUS)

1. How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented?
 - “Relatively permanent” and “continuous surface connection” should be defined according to Justice Scalia’s statement in *Rapanos*, without further applying the “significant nexus” test. Scalia stated that relatively permanent waters do not include tributaries “whose flow is ‘coming and going at intervals... broken, fitful.’”¹
 Engineered waterways within the San Gabriel Valley consist of various under-street storm drains, open boxed-shaped concrete channels, and trapezoidal concrete rivers. They were designed to capture, contain, divert, and/or rapidly convey urban runoff and stormwater either downstream or into spreading grounds. The entire system is under continuous control of the Los Angeles County Flood Control District and subject to release of upstream water and urban runoff at times set by them and to destinations of their choosing. These engineered channels do have a continuous surface connection to both upstream and downstream navigable waters but the highly engineered nature of the system subjects water flows to the discretion of the Flood Control District. For this reason, the flow is ‘coming and going at intervals... broken, fitful.’”
2. How would you like to see the agencies interpret “consistent with” Scalia?
 - The agencies should interpret Scalia strictly, without applying the “significant nexus” test.
3. Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the Step 2 proposed rule?
 - As the agencies develop the proposed rule they should consider how application of WOTUS jurisdiction to flood control systems impacts the intended use of those systems.
4. What opportunities and challenges exist for your state or locality with taking a Scalia approach?
 - Strictly defining jurisdictional waters according to Scalia, as relatively permanent waters which do not include tributaries “whose flow is ‘coming and going at intervals... broken, fitful,’ provides the opportunity to repeal regulatory control over the flood control system. Declassifying this system as WOTUS removes the requirement to establish and meet CWA standards.
5. 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?
 - The application of WOTUS jurisdiction to flood control infrastructure has already brought about the requirement to control upstream non-point source pollution (stormwater and urban runoff) at the source. In order to do this, the existing flood control infrastructure must, to some extent, be replicated at the city level. It is hoped that by rescinding CWA jurisdiction over flood control infrastructure, those facilities may continue to be used for the efficient conveyance of stormwater and urban runoff.

¹ 547 U.S. 715 (2006)