



*Meeting Tomorrow's Challenge*

President – Ron Thompson  
Vice President – Cheryl Zittle  
Treasurer – Thomas Myrum  
Executive Vice President – Ian Lyle

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Donna Downing  
Jurisdiction Team Leader, Wetlands Division  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Andrew Hanson  
Federalism Consultation Lead  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

RE: COMMENTS ON FEDERALISM CONSULTATION REGARDING THE DEFINITION OF “WATERS OF UNITED STATES”

Dear Ms. Downing and Mr. Hanson:

On behalf of the board of directors and members of the National Water Resources Association (“NWRA”), I thank the U.S. Environmental Protection Agency (EPA) for providing the NWRA the opportunity to participate in the April 19 Federalism Consultation meeting and to submit comments to the questions presented during that meeting.

The NWRA is a nonpartisan, nonprofit federation of state water resources associations, agricultural and municipal water providers, and water professionals dedicated to the promotion of the development, conservation, and beneficial use of the water resources of the United States. Our members provide water to more than 50 million people, providing a critical resource to both families and farms.

As an association that represents both municipal and agricultural water suppliers and water users, the NWRA has a direct interest in how “waters of the United States” is defined for the purposes of the Clean Water Act (CWA) and the potential effects associated with a change in its definition. The NWRA supports the goal of the CWA to preserve and protect of the *quality* of the country’s waters,<sup>1</sup> but it also recognizes the need for a greater level of certainty, clarity, and

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<sup>1</sup> 33 U.S.C § 1251(a)(1),(2) [“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 and it is the national goal that by July 1, 1983, wherever attainable, *water quality* be achieved which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” (emphasis added)]

reason in the permitting process tied to the conservation, development, delivery, and use of water.

To that end, the NWRA submits these comments to help guide the EPA and U.S. Army Corps of Engineers in efforts to revise the definition of the waters of the United States for the purposes of Clean Water Act jurisdiction.

### **I. Respect the Role of the States in Water and Water Management**

It is critical that the federal government respect the important role of states in water management. Through the application of their respective laws and assent to interstate compacts, states govern the appropriation, distribution, control, and use of water, whether such water originates on federally-owned or -controlled lands or elsewhere. Time and again, Congress has demonstrated a “consistent thread of purposeful and continued deference to state water law.”<sup>2</sup> In fact, “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.”<sup>3</sup>

This is of particular import to the western states, whose climate and geographical features have required substantial investment, construction, and maintenance of water infrastructure, sometimes spanning hundreds of miles, to supply water to residents, businesses, and farmers alike. Governing that use and movement is state law. “In the arid Western States. . . the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.”<sup>4</sup>

The Clean Water Act itself declares it the policy of Congress:

That the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated[,] or otherwise impaired by [the CWA]. . . [and] that nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.<sup>5</sup>

It is the recommendation of the NWRA that any revised rule should be developed in light of sections 101(g) and 510 of the CWA to ensure states’ ability to allocate waters within their jurisdiction and preserve the cooperative federalism underlying the law such that the “[f]ederal agencies shall cooperate with [s]tate and local agencies to develop comprehensive solutions to prevent, reduce[,] and eliminate pollution in concert with programs for managing water resources.”<sup>6</sup>

Moreover, it is the policy of the NWRA that Section 101(g) of the CWA should be reaffirmed as applying to all sections of the CWA and all programs thereunder, including those under sections 208, 303, 319, 401, 402, 404 and 510(2) and that the CWA not directly or indirectly create a federal water quality law or program which supersedes, abrogates, or impairs state water allocation systems or compacts and rights to water created and managed thereunder.

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<sup>2</sup> *California v. U.S.*, 438 U.S. 645, 653-664 (1978).

<sup>3</sup> *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

<sup>4</sup> S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951).

<sup>5</sup> 33 U.S.C. § 1251(g).

<sup>6</sup> *Id.*

The development, roll out, and adoption of the 2015 “waters of the United States” rule lacked an appreciation of state primacy over water and an understanding of water management and the unique features of the arid West. As such, the NWRA welcomes President Trump’s “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule” and the opportunity to provide input during the federalism consultation process.

## **II. Unique Conditions of the Arid West**

West of the 100th meridian, where average annual precipitation is less than 20 inches a year, there are thousands of miles of arroyos, ditches, washes, dry streambeds, and ephemeral or intermittent water bodies. Many of these features rarely feature water in them. When water is present, it is often in response to large storm events and often much of the water that enters these features is absorbed into the ground. As such, the arid nature that characterizes much of the West makes the ability to access, store, and transport water through infrastructure of vital importance.

Large-scale water conveyance systems are the lifeblood of the West, without which the region’s metropolitan and agricultural areas would not exist. The Colorado-Big Thompson Project captures and delivers 200,000 acre-feet of water annually with 12 reservoirs and through 35 miles of tunnels under the Rocky Mountains and 95 miles of canals from the western slope of the Rockies to more than 600,000 acres of irrigated farmland and nearly a million people on the Front Range. The Central Arizona Project delivers Colorado River water to more than 80 percent of Arizona’s population through 336 miles of aqueducts, tunnels, pipelines and pumping plants. The 242-mile Colorado River Aqueduct delivers nearly 1.2 million acre-feet of water a year from Lake Havasu on the Colorado River to Southern California. The operation and maintenance of these projects is essential to sustaining daily lives of families and farmers across the West.

As critical to the health and wealth of the West are smaller water projects, which provide critical water supplies to farmers and rural communities. For example, the Greater Wenatchee Irrigation District (GWID) delivers water to 10,000 acres in central Washington. Constructed as part of the U.S. Bureau of Reclamation’s Chief Joseph Project 55 years ago, GWID’s fully pressurized delivery system facilitates the production of apples, pears, and cherries on lands that receive 12 inches of rain annually. Pioneer Irrigation District, situated on the western end of Idaho’s Treasure Valley, has provided water to the region for more than 100 years with storage in three reservoirs, delivery across three canals, including the 34-mile Phyllis Canal, and reuse via miles and miles of drainage ditches. Finally, the Delta Lake Irrigation District in the Rio Grande Valley of Texas delivers water to 83,000 acres of irrigated land that produces everything from cotton to sugar cane, as well as raw water to five municipalities. Running water almost all year long, the district operates more than 280 miles of lined and unlined canals, 165 miles of pipeline, and 53 relay pumps. These water providers ensure that farmers and homeowners receive the water they need to sustain their communities.

The above examples are a small sample that illustrates the complex nature of water infrastructure needed to provide a reliable supply of water in the arid West. In order to meet water supply and wastewater treatment needs, as well as stormwater control requirements, municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments include new or expanded storage reservoirs; reuse

facilities; desalinization plants; water collection, delivery, and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants.

The importance the jurisdiction of the CWA to water providers and users lies largely in its relationship to sections 404 and 402 of the CWA. The operation and maintenance of municipal and irrigation projects, on water bodies determined to be waters of the United States, can trigger the dredge and fill permit provisions of section 404 and the point source permit provisions of section 402. Invoking these provisions can, in turn, necessitate a section 401 state water quality certification and a potentially costly and time consuming review of the local initiative under the National Environmental Policy Act. Finally, the need for the issuance of federal approvals may, in turn, also trigger consultation requirements under the Endangered Species Act.

The West, in addition to facing unique water supply challenges, also faces significant challenges posed by natural disasters. In the 2014 National Climate Assessment, the U.S. Global Change Research Program stated, “Drought conditions present a huge challenge for regional management of water resources and natural hazards such as wildfire.” NWRA’s members agree that drought conditions present a huge challenge to western communities. Drought places great stress on finite water resources and generate larger and more frequent wildfires that strip the landscape of vegetation. Those conditions create massive flood events that come in the days and years after a wildfire has burned. These natural disasters affect people, communities, and water managers.

Disaster response requires the ability to act quickly and creatively. The NWRA recommends the EPA should provide an exemption for infrastructure, such as stormwater runoff control facilities, which are necessary to hold back debris and sediment from burn scar areas.

Because of the West’s arid conditions, economic success is predicated upon storing and moving water. Water conveyance, treatment systems, and off stream storage in the West are manmade and should be considered as such for the purposes of CWA jurisdiction.

### **III. Principles To Govern Jurisdiction**

The plurality opinion in *Rapanos et al v. United States*, 547 U.S. 715 (2006), authorized by Justice Scalia, sets forth several key principles that should guide the redevelopment of the “waters of the United States” rule:

#### ***Limit jurisdiction to “relatively permanent, standing or flowing bodies of water.”***

The plurality in *Rapanos* distinguishes relatively permanent waters, which are subject to the Clean Water Act, from “ordinarily dry channels through which water occasionally or intermittently flows.”<sup>7</sup> Waters of the United States are “relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’” and excluded “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”<sup>8</sup>

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<sup>7</sup> *Rapanos et al v. United States*, 547 U.S. 715, 733 (2006).

<sup>8</sup> *Id.* at 734.

The EPA has asked state and local governmental entities how they would like to see the concept of “relatively permanent” defined and implemented. The NWRA is drafting specific language to define this term in line with the principles set forth herein and will submit it during phase 2 of the EPA’s review and revision process.

***Avoid a “Land Is Waters” approach.*** The NWRA encourages the development of a rule that excludes dryland features common in the West. In his plurality opinion, Justice Scalia noted that the U.S. Army Corps of Engineers, as a practice, typically determined that dryland features such as “arroyos, coulees, and washes,” which are found across the arid West, as well as other “channels that might have little water flow in a given year” were in fact waters of the United States. Determining that it is not a “permissible construction of the statute” under *Chevron*,<sup>9</sup> Justice Scalia argued that the plain language of the CWA did not authorize such a broad assertion of jurisdiction and that, by asserting jurisdiction over those dryland features, the Corps had “stretched the term ‘waters of the United States’ beyond parody.”<sup>10</sup> He then stated, “The plain language of the statute simply does not authorize [a] “Land Is Waters” approach to federal jurisdiction.”<sup>11</sup> The NWRA agrees with Justice Scalia’s assertion.

***Address water quality, not other water “functions”.*** The Clean Water Act is not a land use statute. One of the CWA’s statutory goals is “*water quality* which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water. . . .”<sup>12</sup> The CWA protects water quality, which in turn provides many benefits to people and wildlife; it does not regulate habitat, migration routes, or riparian zones. The “significant nexus” language proposed in the 2015 rule strayed far and wide from the CWA’s task of protecting water quality by incorporating the consideration of discrete functions—such as sediment trapping, nutrient recycling, retention of flood waters, runoff storage, contribution of flow, or the export of organic material—into its delineation of jurisdiction. The NWRA recommends that any category of jurisdiction, or rationale justifying jurisdiction, under the new rule be directly tied to the quality of water in line with the explicit language of the statute.

***Exclude geographic and conveyance features characteristically found in arid lands.***

Justice Scalia lists geographic features that the NWRA recommends be specifically excluded from the definition of the waters of the United States: arroyos, coulees, washes, as well as other channels with little water flow are not waters of the United States for the purposes of the Clean Water Act. More specifically, ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches are also not waters of the United States.

In addition, the NWRA recommends the EPA explicitly exclude manmade water conveyance structures (with the exception of on-stream storage) from CWA jurisdiction. For example, irrigation and drain ditches are manmade conveyances regularly maintained for the purpose of delivering irrigation water or draining agricultural lands. Irrigation and drainage facilities cannot fairly be characterized as streams, rivers, lakes, or other bodies of water forming *natural*

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<sup>9</sup> *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

<sup>10</sup> *Rapanos* at 734.

<sup>11</sup> *Id.*

<sup>12</sup> 33 U.S.C. § 1251(a)(2) [emphasis added].

geographical features. But for the application of irrigation water to produce crops, these channels would otherwise be dry.

There are other water management features in the West, including ditches or a water reuse facilities, can take on characteristics of natural geographical features, such as wetlands. However, these manmade features are not “‘geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’” contemplated by the plurality in *Rapanos*, but in fact tools of water conveyance or treatment. Clear exemptions should also be provided for water recycling, reuse and recharge systems.

**“Navigable” Means “Relatively Permanent.”** Under any new jurisdictional rule, the concept of “navigability” must remain intact. Although the Supreme Court has stated that the word “navigable” for the purposes of the Clean Water Act is of “limited import” in *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 133 (1985), Justice Rehnquist emphasized that “it is one thing to give a word limited effect and quite another to give it no effect whatever.”<sup>13</sup> He went on to state:

We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute . . . The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.<sup>14</sup>

And for the plurality in *Rapanos*, “That limited effect includes, at bare minimum, the ordinary presence of water.”<sup>15</sup> “Justice Scalia states clearly, “The [CWA’s] use of the traditional phrase “navigable waters” (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water.”<sup>16</sup>

**Wetlands must have “continuous surface connection” to bodies that are waters of the United States to be considered a water of the United States.** The NWRA also supports a definition of “continuous surface connection”, for the purposes of wetlands adjacent to a water of the United States, which applies *only* to wetlands whose *surface* water directly touches such a jurisdictional water “so that there is no clear demarcation between ‘waters’ and wetlands.”<sup>17</sup> Under the 2015 rule, any water adjacent to a water of the United States is considered jurisdictional. The NWRA asserts that, under the Scalia framework in *Rapanos*, such an expansive application of “adjacency” is beyond the bounds of the plain meaning of the CWA and should be limited only to wetlands.

#### IV. Potential Regional Approach to Jurisdiction

The West’s unique geographical and hydrological features, as well as some of its water conveyance infrastructure, differ from the East’s. A jurisdictional rule that accounts for those differences is welcome. There are differences in geology, precipitation, hydrology, soil and

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<sup>13</sup> *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001).

<sup>14</sup> *Id.*

<sup>15</sup> *Rapanos* at 734.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 742.

geography that may serve as a basis for considering regional variations. As such, the NWRA—in principle—supports a regional approach to the development of rule and its application.

It is important to note that NWRA members recognize the importance of water quality and take efforts every day to ensure that the water we supply and put to use is safe and clean. All states have, at some level, statutes that protect water and address water quality issues. In fact, most of these protections are more stringent than federal requirements and exceed the protections offered under the federal CWA. In addition, many municipalities and water districts undertake additional efforts to protect water quality, often at great cost, without a federal requirement to do so. It is also important to note that each state, through its legislature or ballot process, has the ability to expand existing protection efforts.

## **V. Conclusion**

In sum, the development of a new jurisdictional rule should:

- (1) Respect state primacy over water and water management;
- (2) Account for the arid conditions of the West, possibly through a regional approach to jurisdiction;
- (3) Limit jurisdiction to “relatively permanent, standing or flowing bodies of water”;
- (4) Avoid a “Land Is Waters” approach;
- (5) Address water quality, not other water functions;
- (6) Exclude geographic and conveyance features found in arid lands;
- (7) Retain navigability in its definition; and
- (8) Require that the concept of adjacency only apply to wetlands and that it require a have continuous surface connection to a jurisdictional water.

The NWRA appreciates the work and outreach efforts of the EPA on this matter and looks forward to continuing to provide feedback on the rule and its development.

Respectfully,

A handwritten signature in black ink, appearing to read "Ronald W. Thompson". The signature is fluid and cursive, with the first name "Ronald" being the most prominent.

Ron W. Thompson  
President  
National Water Resources Association