



September 3, 2021

Ms. Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: E.O. 13132 (Federalism) State/Local Government Pre-proposal Recommendations Regarding the Definition of “Waters of the United States” Submitted via Email to CWAwotus@epa.gov and usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil.

Dear Ms. Christensen and Ms. Jensen:

The National Association of Towns and Townships (NATaT), on behalf of the more than 10,000 communities we represent, appreciates the opportunity to submit our E.O. 13132 (Federalism) State/local government pre-proposal comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), also referred to as “the agencies”, on the proposed first rulemaking to restore the longstanding pre-2015 regulations in place prior to the 2015 Clean Water Rule, amended to be consistent with relevant Supreme Court decisions. These comments also reflect our general views and concerns on revising the definition of “waters of the United States” (WOTUS) under the federal Clean Water Act (CWA). NATaT representatives participated in the Federalism outreach sessions in August 2021 in Washington, DC, and have concerns with the proposed action to develop a revised definition of WOTUS.

NATaT represents a large group of towns and townships that are regularly impacted by CWA regulation of business and residential development projects, wastewater treatment facilities, and other important activities that maintain the economic health and provide for future growth of our small rural communities. As such, the scope of jurisdiction under the CWA is of fundamental importance not only to our membership, but also to the Nation.

Proposed Federal Actions

On June 9, 2021, the agencies announced their intent to initiate a new rulemaking process that restores the regulations in place prior to the 2015 Clean Water Rule defining “waters of the United States,” amended to be consistent with relevant Supreme Court decisions. The agencies also anticipate developing a second rulemaking informed by states, tribes, and stakeholder feedback that further refines and builds upon that regulatory foundation. A second E.O. 13132 (Federalism) stakeholder consultation will be initiated as the agencies move closer to working on that second rule. The agencies most recently revised these regulations in 2020 with the *Navigable Waters Protection Rule: Definition of “Waters of the United States,”* 85 Fed. Reg. 22,250 (April 21, 2020), which amended the regulations found at 33 CFR Part 328 and 40 CFR Part 120.

On January 20, 2021, President Biden signed Executive Order 13990; Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (published January 25, 2021, signed January 20, 2021). Executive Order 13990 directed federal agencies to review rules including the *Navigable Waters Protection Rule*, issued during the prior four years that are, or may be, inconsistent with the policy stated in the order. Consistent with this Executive Order, the agencies have completed their review of the *Navigable Waters Protection Rule* and have decided to initiate a new rulemaking to revise the definition of “waters of the United States,” as referenced above.

Overview of NATaT Concerns with the Pre-2015 Regulations

NATaT over the past two decades has engaged in administrative efforts aimed at “clarifying” the application and interpretation of the CWA. These efforts included guidance developed by the George W. Bush Administration following the U.S. Supreme Court’s *SWANCC* and *Rapanos-Carabell* decisions, and the development of the Obama Administration’s *Clean Water Rule* (2015 Rule). During this time, our organization consistently advocated for clearly written regulations that state what categories meet the definition of WOTUS subject to CWA Section 404 jurisdiction and, just as importantly, what does not. We have concerns with the foundational rule, not only regarding restoring the pre-2015 regulations and guidance but with how the agencies plan to amend those regulations to reflect the relevant Supreme Court decisions.

SWANCC Decision

One issue involving long-standing controversy and litigation is whether isolated waters are properly within the jurisdiction of Section 404. Isolated waters that are wetlands which are not physically adjacent to navigable surface waters often appear to provide only some of the values for which wetlands are protected, such as flood control or water purification, even if they meet the technical definition of a wetland. On January 9, 2001, the Supreme Court ruled on the question of whether the CWA provides the Corps and EPA with authority over isolated waters. The Court's 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* held that the Corps' denial of a 404 permit for a disposal site on isolated wetlands solely on the basis that migratory birds use the site exceeds the authority provided in the Act.

The full extent of impacts on the regulatory program resulting from this decision remained unclear, even five years after the ruling, in part because of different interpretations of *SWANCC* reflected in subsequent federal court cases.

Rapanos-Carabell Decision

On February 21, 2006, the Supreme Court heard arguments in two cases brought by landowners (*Rapanos v. United States*; *Carabell v. U.S. Army Corps of Engineers*) seeking to narrow the scope of the CWA permit program as it applies to development of wetlands. The issue in both cases had to do with the reach of the CWA to cover "waters" that were not navigable waters, in the traditional sense, but were connected somehow to navigable waters or "adjacent" to those waters. (The CWA requires a federal permit to discharge dredged or fill materials into "navigable waters.") Many legal and other observers hoped that the Court's ruling in these cases would bring greater clarity about the scope of federal regulatory jurisdiction.

The Court's ruling was issued on June 19, 2006 (*Rapanos v. United States*, 126 S.Ct. 2208). In a 5-4 decision, a plurality of the Court, led by the late Justice Antonin Scalia, held that the lower court had applied an incorrect standard to determine whether the wetlands at issue are covered by the CWA. Justice Kennedy joined this plurality to vacate the lower court decisions and remand the cases for further consideration, but he took different positions on most of the substantive issues raised by the cases, as did four other dissenting justices.

We believe in this case that the Scalia decision provided a basis for concluding that such man-made facilities as roadside ditches, irrigation ditches and drainage canals do not qualify as jurisdictional WOTUS because they do not conduct "continuous flow" nor possess a "significant nexus" to traditional navigable waters, based on the Court's plurality decision (authored by Justice Scalia) and elements of Justice Kennedy's concurring opinion.

We also recommend that any post-*Rapanos-Carabell* guidance or regulations beyond the exemptions provided by the CWA should conclude that the construction, operation, maintenance, repair, and rehabilitation of man-made ditches and canals is not subject to 404 jurisdiction because these facilities do not qualify as jurisdictional "waters of the United States" in that they do not conduct "continuous flow" (per the Scalia test), nor possess a "significant nexus" to traditional navigable waters (under the Kennedy test) for assertion of jurisdiction.

NATaT is concerned about any possible expansion of the CWA that could bring isolated wetlands or other waters not connected to navigable waters under federal jurisdiction – states should continue to be in the lead in protecting these state waters.

NATaT believes that expanded federal CWA jurisdiction would negatively impact the functions of towns and townships in many ways; therefore, we recommend that any amendments to the pre-2015 regulations and guidance be based on Justice Scalia's opinion limiting jurisdiction to relatively

permanent waters and those with a continuous surface connection to a “water of the U.S.” The agencies should use the entire docket of case law from Supreme Court cases such as *Rapanos*, *SWANCC*, and *Riverside Bayview* in developing this approach to amending the pre-2015 regulations and guidance on defining WOTUS under the CWA.

General Pre-Proposal Concerns Over New WOTUS Rulemaking

NATaT was generally supportive of the approach taken in the most recently completed *Navigable Waters Protection Rule* during the previous Administration, more so than the approach used in the 2015 Clean Water Rule. In general, we believe the six categories outlined under the 2020 Rule that qualify as meeting the definition of WOTUS, and the eleven categories identified that do not, provided perhaps the clearest governing regulatory roadmap yet to be put forward regarding implementation of the CWA utilizing the definition. NATaT believed the *Navigable Waters Protection Rule* provides a significant level of certainty regarding what falls in the definition of a WOTUS and what does not. Now that the agencies are once again planning to craft yet another version of the WOTUS rule, NATaT believes they should follow some basic tenets important to our member communities.

The Need for Clarity

NATaT believes any new WOTUS definition should bring more predictable clarity to the administration of the CWA. For instance, if our member communities were to be required to obtain CWA permits for every project considered by agency officials to be jurisdictional, such as those affecting roadside ditches, including road work, culvert replacements, ditch cleaning and the like, our communities would suffer from the lack of well-maintained roads and bridges, as such projects would grind to a halt awaiting expensive and time-consuming CWA permits. Also, economic development and job growth in our member communities would be negatively impacted as residential and business development projects would become mired in red-tape and extensive, and expensive CWA permitting processes. The value of clarity in defining jurisdictional waters cannot be stressed enough in these cases. In the past, the CWA has been used as a weapon to stop development and public works projects. By providing clarity in a new definition of WOTUS, the agencies will prevent confusion and reduce subjective regulatory interpretations of the CWA that can slow or even stop necessary public and private projects that can benefit our small member communities.

Roadside Ditches, Agricultural Canals and Drains

Irrigation and agricultural ditches typically have operational spills and overflows that flow back to a navigable water, interstate water, or territorial sea, either directly or indirectly through another water and as such, most could probably be considered “tributaries” and subsequently a “water of the U.S.” under the 2015 rule. Section 404(f) specifically exempts from CWA permitting requirements discharges of dredged or fill material into “waters of the U.S.” associated with the construction and maintenance of irrigation ditches and maintenance of drainage ditches, and as such, any new definition of WOTUS should clearly exclude such activities as well as exclude ditches, canals, and agricultural drains from jurisdiction consistent with the provisions in the CWA.

Roadside ditches, swales, and other constructed water drainage or retention features should be clearly excluded from CWA regulation as a WOTUS under any new definition. The overly broad “tributary” definition in the 2015 rule was a concern for those ditches that flow directly or indirectly through another water to a jurisdictional water, and making them a WOTUS, especially if a ditch has perennial flow. The 2015 definition of a “tributary” specifically included “man-altered or man-made” water bodies, including “ditches”. The final 2015 rule failed to clearly articulate exempt ditches and left decisions to exclude some ditches to subjective interpretation, lengthening timelines for construction and maintenance projects and impacting our member communities’ economic health and wellbeing.

Ephemeral ditches must not be considered a “water of the U.S.” Intermittently flowing ditches that do not drain jurisdictional wetlands into traditional navigable waters should also not be considered a WOTUS. A new definition of WOTUS should exclude other ephemeral features, non-wetland swales, and stormwater control features constructed in dry land to include certain roadside ditches designed to capture and retain stormwater.

Recommendations:

1. Distinguish and specifically exclude constructed irrigation canals and laterals, and ditches including roadside ditches, swales, depressions and other appurtenances associated with constructed roads and bridges.
2. Certain agricultural drains that drain uplands do have perennial flow, mostly due to the timing of agricultural return flows in the form of groundwater that are exempted by the CWA and should be excluded.
3. A new WOTUS definition should ensure there is no confusion regarding the CWA exemption for construction and maintenance of irrigation ditches and maintenance of agricultural drains.
4. Provide blanket exclusions for first-order ephemeral/intermittent streams. Arroyos, dry creeks and washes should also be excluded from federal CWA jurisdiction.

Waste Treatment and Other Excluded Features

Many times, our member communities either operate or are ratepayers of wastewater treatment facilities serving their towns or townships. Any new definition of WOTUS must exempt such constructed facilities from further CWA jurisdiction as a WOTUS. These facilities are already regulated under federal and state clean water laws pertaining to their point source outfalls, and thus should not be regulated as WOTUS.

Recommendations:

The new WOTUS definition should exclude exempt constructed wastewater management and treatment infrastructure, as well as other facilities with similar attributes to these waste treatment systems, such as:

1. Water reuse and recycling infrastructure, and artificial ponds.

2. Water treatment lagoons, and other appurtenances.
3. Artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. “green infrastructure”) used and managed to remove nutrients and improve water quality.
4. Artificially constructed groundwater recharge basins designed to percolate excess surface water into groundwater basins.

Conclusion

In conclusion, NATaT appreciates the agencies’ outreach under E.O. 13132 (Federalism), but we are concerned about what a new WOTUS definition will look like. NATaT believes a new rule should exclude the features we list above from CWA jurisdiction, much like the *Navigable Waters Protection Rule* did. Jurisdictional waters should include traditional navigable waters as stated in the CWA, waters with a continuous surface connection to these waters, and be relatively permanent as to flow. Man-made ditches, canals, agricultural drains, roadside ditches, swales, water management and treatment ponds and basins, and other water management features should clearly be excluded as jurisdictional waters in a new definition. And, we believe the Supreme Court has provided the basis for such determinations in the broad suite of court decisions affecting the administration of the CWA.

We believe we represent our membership of 10,000 towns and townships across the country by saying that we stand ready to work with the EPA, the Corps, and our local, regional, and state governments in protecting water quality on a common sense, practical and collaborative basis for our future and the future of our nation’s water resources.

Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in blue ink that reads "Mike Koles". The signature is fluid and cursive, with the first name "Mike" and last name "Koles" clearly legible.

Mike Koles
NATaT President
Wisconsin Towns Association Executive Director