



South Dakota Department of Agriculture and Natural Resources
South Dakota Department of Game, Fish, and Parks
Joe Foss Building | 523 East Capitol Avenue | Pierre, SD 57501

South Dakota Department of Transportation
Becker-Hansen Building | 700 E Broadway Avenue | Pierre, SD 57501

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US EPA Comment Center
<https://www.regulations.gov>

Re: Docket ID No. EPA-HQ-OW-2021-0328 WOTUS Request for Information

Thank you for the opportunity to respond to the request for information regarding the above referenced docket. The State of South Dakota is a strong proponent of cooperative federalism and is eager to engage the United States Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) to provide meaningful insight on defining Waters of the United States (WOTUS) and specifically provide input as requested in the Federal Register. The following comments are those of the South Dakota Departments of Agriculture and Natural Resources, Game, Fish, and Parks, and Transportation. The South Dakota Department of Transportation also provides several specific comments in the attachment to the letter.

EPA is tasked with interpreting the law as written by Congress – not redefining the intent through subsequent rulemaking. EPA should ensure that any federal effort to define Clean Water Act (CWA) jurisdiction or further define WOTUS complies with the limits Congress and the U.S. Supreme Court have placed on CWA jurisdiction while providing clear and recognizable limits to the extent of CWA jurisdiction, consistent with the plurality opinion authored by Justice Scalia in *Rapanos*. South Dakota opposes federal government overreach and requests that all future changes to the Navigable Waters rule reflect the original intent of Congress.

Requested Stakeholder Engagement Discussion Topics:

1) *Implementation.*

South Dakota requests robust and meaningful participation and consultation with states in the development and implementation of any rule and for EPA and the Corp to acknowledge the inherent cooperative federalism that exists. States, tribes, and territories are NOT stakeholders. They are equal partners and should be treated as such. EPA and the Corp need to actively engage these partners to ensure the final definition is implementable and effective.

The determination of what is a “significant nexus” of wetlands to nearby, or distant, navigable water is too open to interpretation by regulatory officials. There is not one set definition within the determination of a significant nexus of a wetland to

navigable waters. For a wetland location to be within a 100-year flood plain or display a bed and bank characteristic with an ordinary high-water mark is a determinable location characteristic that can be reviewed and approved. But it is arbitrary for one regulatory official to determine that a wetland location has a chemical, physical, or biological effect on an adjacent, easily definable, navigable water. These previous interpretations have led to frustrations in development of project planning and design for transportation agencies. For example, not knowing how a regulatory official will interpret wetland jurisdiction has caused conflicts. This has led to more disagreements and confrontational situations between the regulating agencies and transportation programs. Justice Kennedy's "significant nexus" test in the *Rapanos* ruling requires a connection between waters that is more than speculative or insubstantial to establish jurisdiction. The Navigable Waters Protection Rule (NWPR) provides a better definition of regulated WOTUS and wetland nexus. These defined explanations of jurisdictional and excluded features have greatly reduced individual interpretation of agency jurisdiction and identification of WOTUS. Transportation agencies can identify and determine potential wetland impacts to WOTUS at an earlier stage of project development.

2) *Regional, State, and Tribal interests.*

Any federal effort to clarify or redefine CWA jurisdiction and define WOTUS related to states' rights must be consistent with the purpose and intent established by Congress in CWA Sections 101(b) and 101(g). The CWA is clear in its original intent and specifically states that it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

State transportation agencies have evolved in the manner they provide wetland mitigation for impacts to non-jurisdictional wetlands under the NWPR. Federally funded transportation projects under the Federal Highway Administration (FHWA) that impact non-jurisdictional wetlands still require wetland mitigation under Executive Order 11990 and 23 CFR 777. The adjustment to the increase in non-jurisdictional wetlands under NWPR required state transportation agencies and FHWA to work together and create a plan to mitigate these impacts in a timely manner in conjunction with transportation projects. Research into additional mitigation options to compensate for these impacts has led to time and effort well spent to adjust to the NWPR. To return to the pre-2015 regulatory regime would be to backtrack on any progress made in the past years.

A better definition of interstate commerce is required to eliminate regulatory interpretation within this category. To be identified as a regulated WOTUS under this category, the identified water must show a real form of commerce to the economy of the state(s) in which it lies. Real forms of commerce should include industrial or commercial uses. Recreational uses should not be considered commerce for the purpose of WOTUS. Isolated waters that are non-jurisdictional under the NWPR can show a recreational use such as boating, fishing, and hunting, but that does not determine interstate commerce.

3) *Science. Consistent with Executive Order 13990.*

South Dakota supports the statement in EO 13990 that the Biden Administration must listen to the science, improve public health, protect the environment, ensure clean air and water, and limit exposure to dangerous chemicals and pesticides.

4) *Environmental justice interests.*

The scope of the CWA is set by Congress and has been interpreted by the U.S. Supreme Court. Environmental justice concerns should be handled by Congress as amendments to the CWA or litigated in court. It is not the role of EPA or the Corps to include issues outside the authority and scope of the CWA by incorporating them into WOTUS.

5) *Climate implications.*

The scope of the CWA is set by Congress and has been interpreted by the U.S. Supreme Court. Climate implication concerns should be handled as amendments to the CWA or litigated in court. It is not the role of EPA or the Corps to include issues outside the authority and scope of the CWA by incorporating them into WOTUS.

6) *The scope of jurisdictional tributaries.*

EPA and the Corps should not make individual case-specific significant nexus determinations unless they are being contested or appealed by the entity requesting the determination. As stated previously, the determination of significant nexus is too open to interpretation and is not clear and concise. By utilizing certain physical characteristics that can be readily identified by the public and reviewing agencies, the number of appeals to federal agency determinations may be reduced. For transportation agencies, being able to easily review wetland features prior to a federal agency determination of jurisdiction can keep a project on its timeline for construction. If transportation agencies must depend on an individual determination of significant nexus, the uncertainty would significantly slow the process of project delivery. This was evident under the pre-2015 regulations.

The pre-2015 regulations did not define “tributary” but considered a tributary to be jurisdictional. The 2015 rule added language that would automatically include anything with a defined bed and bank that contributed flow to a traditional navigable water, interstate water, or territorial sea. The 2020 NWPR rule specified that the tributary must provide perennial or intermittent flow and notably excluded ephemeral streams. South Dakota agrees with the scope of jurisdictional tributaries in the NWPR rule. While bed and bank are important hydrological features of waterbodies, the presence of water is the ultimate indicator whether a waterbody is navigable. Ephemeral streams clearly are not navigable and should not be included in WOTUS. Additionally, in South Dakota, ephemeral waters are considered waters of the state and are protected under existing state law.

The current exclusions by the NWPR have helped to streamline transportation projects through the regulatory review process. Agencies can better interpret excluded features before requesting federal regulatory review of identified wetlands. Federally-regulated wetland features require a significant amount of high

ratio mitigation to compensate for impacts by transportation projects. These regulated wetland mitigation requirements can sometimes require our own federal transportation agencies to purchase five times the acreage of impact that occurred with the highway improvements. FHWA is compensating for low quality wetlands adjacent to highway systems (road ditches) with managed high-quality wetlands at extremely high ratios. These ratios are set in place by federal regulatory oversight based on their interpretation of impacts to wetland features. Again, interpretation needs to be eliminated as much as possible and replaced with clear and concise information. As for impacts to excluded features, state and federal transportation requirements under EO 11990 and 23 CFR 777 ensure that mitigation occurs that includes only a “net gain” to wetlands on at least an annual basis. This is a huge savings to our taxpayers when there are limited ratios placed on mitigation requirements for excluded features. It also ensures that agencies know upfront what mitigation needs and requirements will be required for an individual project without going to a federal agency for a determination.

7) *The scope of jurisdictional ditches.*

Ditches should be considered jurisdictional if the intended or existing uses are consistent with the Clean Water Act Section 101(a)2 goals to provide for protection and propagation of fish, shellfish, and wildlife and provided for the recreation in and on the water; and support the quantity and duration of water necessary for navigation or are directly adjacent to navigable waters. Ditches should not be considered jurisdictional if their intended or existing purposes are for non-CWA uses, such as conveying irrigation water.

8) *The scope of adjacency.*

South Dakota supports the 2020 scope of adjacency defined as wetlands that abut or have a direct hydrological surface connection to jurisdictional waters on a typical year. We do not support the 2015 scope of adjacency that included “neighboring” waters as within 100 feet of jurisdictional waters or within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high-water mark.

As noted above, Justice Kennedy’s “significant nexus” test in *Rapanos* required a connection between waters that was more than speculative or insubstantial to establish jurisdiction. Federal CWA jurisdiction efforts should quantify “significance” or “adjacency” to ensure the terms’ usage does not extend jurisdiction to waters with a de minimis connection to jurisdictional waters and should be applied to individual waters and not a watershed basis.

South Dakota agrees that to protect WOTUS, protections must also exist for adjacent waters. However, we recommend EPA and the Corps use a conservative approach and limit the geographic scope of “adjacent” to comply with the intended scope of the Clean Water Act.

9) *Exclusions from the definition.*

Any federal effort to clarify or define federal CWA jurisdiction should specifically exclude waters and features outside the scope of CWA jurisdiction, including:

- (a) Man-made conveyances and related control features for water supply, stormwater and flood water management, including but not limited to: (i) agricultural irrigation canals, laterals and ditches and drains; (ii) municipal and industrial water supply pipelines, conduits, and aqueducts; (iii) storm sewers, drains, and flood flow bypass features; (iv) roadside barrow pits, ditches, and culverts.
- (b) Man-made impoundments on ephemeral or intermittent streams (or off stream impoundments), such as farm and stock ponds, dugouts and similar features; and
- (c) Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
- (d) Isolated, non-navigable, intrastate waters and wetlands, including prairie potholes and playa lakes, as well as intrastate terminal lakes, individually or in combination with similarly situated waters; and
- (e) Arroyos, coulees, washes, and similar features.

The definitions of prior converted cropland and waste treatment systems under the NWPR are appropriate and easy to understand. The current issue lies with the determination of prior converted cropland and proof to use locations as excluded features from the CWA. Current guidance does not define how and where the burden of proof lies in the determination of prior converted cropland. The United States Department of Agriculture's Natural Resource Conservation Services holds documentation of recorded prior converted croplands for landowner use. For outside agencies, such as transportation agencies, this information is not accessible without written landowner permission or contribution by the landowner. Regulatory agencies currently require this documentation to determine prior converted cropland as excluded features. If this documentation cannot be provided, then this exclusion may become irrelevant. Additional resources are needed to facilitate the public and state agencies in obtaining documentation of prior converted cropland as an excluded feature.

Congress and the Administration should ensure that any federal effort to clarify or define CWA jurisdiction and WOTUS provides for mapping of jurisdictional waters. This mapping effort should be a joint federal/state/tribal effort, employing the best available data and tools, and providing appropriate provisions and processes for ongoing maintenance of the map.

Other General Suggestions for Improvements:

- 1) Any proposed revisions should strongly reflect the original intent of Congress in the use of the "navigable waters" terminology. While the CWA does regulate some waters that are not truly "navigable," the term "navigable" must be considered and provide some limitation on what is regulated as it is expressly cited in the Clean Water Act. Federal courts have ruled that the 2015 definition was more expansive than the Clean Water Act and the Constitution allow. SD recommends that EPA reflect on any lessons learned from the 2015 definition and not attempt to repeat the same government overreach.

- 2) EPA and the Corps should understand that in most states, including South Dakota, state law defines waters of the state, and is a very inclusive definition that covers ephemeral streams and wetlands. These waters are currently protected under state law with state water quality standards. Exempting these waters from federal jurisdiction does not mean they will be exempt from state regulation and protection.
- 3) The current rule, while reducing the extent of waters considered WOTUS, leaves a gap in waters regulated under Clean Water Act Section 404. SD requests that EPA assist states, tribes, and territories by providing the tools necessary to protect these waters, not simply expand the extent of WOTUS. Recommended tools include maps that delineate and identify WOTUS, with appropriate provisions and processes for map layer maintenance, and guidance for a basic permitting structure that can be administered at the state level.
- 4) The substantial and recurring changes to the definition of WOTUS create uncertainty for co-regulators and the regulated community. This uncertainty is leading to unreliable results, indecision, inconsistency, and lawsuits.

Again, thank you for the opportunity to provide responses to the questions regarding potential WOTUS rule changes. South Dakota looks forward to working with EPA and the Corps to develop rules that are consistent with science, implementable, and protective of our water resources.

Regards,

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Hunter Roberts, Secretary
SD Department of Agriculture and Natural Resources

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Kevin Robling, Secretary
SD Department of Game, Fish and Parks

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Joel Jundt, Secretary
SD Department of Transportation