NATIONAL RURAL WATER ASSOCIATION

NRWA *America's Largest Utility Membership*

To: Environmental Protection Agency and U.S. Army Corps of Engineers
From: National Rural Water Association (contact: Mike Keegan, Analyst)
Date: October 4, 2021
Re: Comments on "Request for Recommendations: Waters of the United States" (EPA-HQ-OW-2021-0328) and Federalism Consultation Comment Period

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The National Rural Water Association (NRWA) appreciates the opportunity to comment on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (USACE) Federal Register notice, "Request for Recommendations: Waters of the United States" (EPA-HQ-OW-2021-0328).

Headquartered in Duncan (Oklahoma), NRWA is the non-profit association of the federated state rural water associations with a combined membership of over 30,000 small and rural communities. NRWA is the country's largest water utility association and the largest community-based environmental organization. State Rural Water Associations are non-profit associations governed by board members elected from the membership. Our member utilities have the very important public responsibility of complying with all applicable U.S. Environmental Protection Agency (EPA) regulations and supplying the public with safe drinking water and sanitation every second of every day.

Most U.S. water utilities are small; 94% of the country's approximately 50,000 drinking water supplies serve communities with fewer than 10,000 persons, and 80% of the country's approximately 16,000 wastewater supplies serve fewer than 10,000 persons. Small and rural communities often have difficulty providing safe, affordable drinking water and sanitation due to limited economies of scale and a lack of technical expertise. Similarly, when it comes to providing safe water and compliance with federal standards, small and rural communities have a difficult time due to their limited customer base. This is compounded by the fact that small and rural communities often have lower median household incomes and higher water rates compared to larger communities. As a result, the cost of compliance is often dramatically higher per household.

Through our partnerships with the U.S. Department of Agriculture, EPA, and state agencies, NRWA provides on-site assistance and training to all small and rural communities, including compliance with all EPA water regulations and implementation of locally supportive and environmentally progressive source water protection plans. These source water protection plans protect the groundwater and surface water sources that supply public drinking water systems with their source water.

As our source water protection initiative demonstrates, rural and small communities want to ensure quality drinking water, manage wastewater and protect their local environment. After all, local water supplies are operated by people who are locally elected and whose families drink the water every day. By our very nature, we strive to take every possible action to protect consumers (ourselves), our water resources, and our natural environment.

Definition of “Waters of the United States” (WOTUS)

NRWA appreciates the opportunity to comment on the joint rulemaking between U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to define “Waters of the United States” (WOTUS), and to more clearly delineate which waters are subject to federal jurisdiction under the Clean Water Act (CWA). The CWA, along with other environmental laws, state environmental laws, and local environmental laws and ordinances, are critical to protecting our nation’s water resources, including our drinking water supplies. While we encourage the federal government to protect U.S. water supplies and resources, small and rural communities respect the limited authority provided to the federal government by the U.S. Constitution and the CWA.

The Supreme Court of the United States (SCOTUS) has interpreted the limits of federal authority in regulated water resources under the U.S. Constitution and the CWA. For example, in the 2001 Supreme Court case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the court ruled that the agencies have no jurisdiction over non-navigable, isolated, and intrastate waters:

> *Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." §1251(b)...*
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> *We thus decline respondents' invitation to take what they see as the next ineluctable step after Riverside Bayview Homes: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute ... does not have any independent significance." Tr. of Oral Arg. 28. 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. As said in Riverside Bayview Homes that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. 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. See, e.g., United States v. Appalachian Elec. Power Co., 311 U. S. 377, 407-408 (1940)...*
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> *These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule " would result in a significant impingement of the States' traditional and primary power over land and water use. See, e.g., Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a*

> *desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States... to plan the development and use... of land and water resources... ." 33 U.S.C. §1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.*

The Supreme Court further clarified the limits of the federal government's authority to regulate waters of the U.S. in its 2006 decision, *Rapanos v. United States* (67. 547 U.S. 715 (2006)). *Rapanos* established two important tests for determining the meaning of the phrase "waters of the United States," resulting in a 4-1-4 plurality opinion in the case. One test was articulated by the plurality, and one test was created by Justice Kennedy—the "significant nexus" test. However, the plurality opinion appears to be the simplest solution. In his opinion, Justice Scalia offered a simple bright-line rule based on the specific characteristics of the water with a "physical connection" to traditionally covered waters and "relative permanence." The regulated community (e.g., local governments) deserves a clear definition of EPA jurisdiction with a bright-line rule due to concerns about cooperative federalism, regulatory efficiency, resource allocation of the EPA, stewardship of intrastate waters, and avoidance of civil penalties.

NRWA respectfully urges the Agency to propose a rule that is consistent with the Constitution and CWA – and respects the States' primary responsibility for the lands and waters within their borders, and gives local communities clear guidance as to when the CWA's requirements apply.

We are concerned an expansive rule could result in expanded litigation for small and rural communities, as explained by the American College of Environmental Lawyers (ACOEL) in their September 11, 2014, *"Memo on Waters of the U.S. under the CWA to the Environmental Council of the States (ECOS)"*:

> *"While the proposed rule's preamble continues to cite to the Commerce Power, the new regulations, as discussed below, rest on a different legal justification. The potential impact of this shift in the justification for the proposed rules is subject to competing interpretations and could result in litigation. Some practitioners agree with the Agencies that the scope of the proposed rule is narrower than under existing law and guidance, while others believe that some of the changes will expand jurisdiction in relation to certain waters, particularly when compared to the current guidance."*

NRWA members are concerned about the scope of what waters fall under federal regulation since many communities own and maintain public water infrastructure with ditches, swales, water channeling systems, flood control channels, stormwater systems, and drainage systems that are used to channel water away from low-lying areas and water treatment infrastructure and prevent flooding.

In 2015, EPA and the Corps offered new definitions for "tributaries," "other waters," etc., under the proposed rule. We are concerned that under ambiguous or undefined terms, definitions, and concepts used in the proposal, routine operation and maintenance of drinking water, wastewater, and stormwater conveyances, aqueducts, canals, impoundments, and treatment facilities could potentially be subject to federal jurisdiction. The ACOEL analysis finds a similar dilemma in their reading of the proposed rule:

> *"Practitioners disagree about the extent to which the case-by-case determinations*

and exclusions outlined above reduced CWA jurisdiction as a practical matter. Some practitioners argue that, even with case-by-case determinations, the Agencies continued to assert jurisdiction over most if not all of the tributary system and only limited their jurisdiction over wetlands and other waters. Other practitioners believe that the case-by-case determinations resulted in more limited assertions of jurisdiction over more remote, less permanent tributaries, as well as wetlands and other waters that would be reversed by the proposed rule."

We do not believe that a new rule should result in changing the historic regulatory understanding for coverage of water infrastructure. Any final rule should retain the current exclusion (33 CFR 328.3(a) and 40 CFR 122.2) for "waste treatment systems" and clarify that the exclusion includes similar practices implemented by drinking water treatment systems. Community storm sewer systems (MS4s) should be excluded from the final rule in a similar manner as waste treatment systems. Some communities' storm sewer system conveyance facilities include channels that may discharge to traditional waters of the U.S.

State rural water associations and the National Rural Water Association have been advocating for local communities and governments to adopt water protection measures for decades. We have directly assisted communities with technical resources to complete and implement source water protection plans. Over 1,500 communities have completed the rural water process and are actively protecting their source water. Consider how many contamination events may have been prevented in these communities as a result of proactive source water protection planning.

The 2020 rule circumscribed the federal regulatory power over U.S. waters compared to the 2015 rule, which circumscribed the previous rule after the Supreme Court ruled it was a federal overreach in the 1989 Supreme Court's Rapanos ruling. Critics of the 2020 rule argue it is not supported by science, citing EPA's Science Advisory Board (SAB) that concluded the 2020 rule *"decreases protection for our Nation's waters and does not provide a scientific basis in support of its consistency with the objective of restoring and maintaining 'the chemical, physical and biological integrity' of these waters."* However, it would be more accurate to say it decreases "federal regulation," not "protection" of the waters. The two terms are not synonymous. Eliminating federal regulation does not necessarily leave the waters unprotected. State and local governments retain all powers to protect or regulate the intrastate waters no longer covered by the federal government. State and local governments could always take the advice of the EPA, their SAB, or any scientific academy. American federalism allows the very people affected by a policy to decide that policy. If a water body is wholly within a state, it should be those people who determine the content of the regulation through their local democratic processes. They are the only ones who are affected, pay the cost, and can balance the value of economic advancement with environmental preservation. Even the dissenters in Rapanos believed some waters were entirely intrastate.

We urge the Agencies to delay any final action on a proposed rule until the Supreme Court completes its review of the September 22, 2021, Petition for Writ of Certiorari for Sackett v. EPA, No. 19-35469, 8 F.4th 1075 (9th Circuit, August 16, 2021). Further Supreme Court adjudication in this case could clarify the appropriateness of justifying a new rule based on the two 2006 Rapanos' opinions. It would seem premature to propose a rule and subsequently have a Supreme Court opinion that provides greater clarity on the Constitutionality of the provisions under the CWA for regulating waters of the U.S.

We appreciate the opportunity to comment on the Agencies' proposal and look forward to collaborating with the Agencies in the implementation of the final rule.

The National Rural Water Association is the country's largest public water utility organization with over 30,000 members. Safe drinking water and wastewater service are generally recognized as the most essential public health, public welfare, and civic necessities.