Nevada Association of Counties

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January 28, 2022

Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
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Submitted Via Email: OW-Docket@epa.gov

And,

Online via Federal eRulemaking Portal:
http://www.regulations.gov

And,

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 203110-0104

RE: Substantive Comments from the Nevada Association of Counties (NACO) Pursuant to Docket ID No. EPA-HQ-OW-2021-0602 Regarding a Proposed Rule for a Revised Definition of "Waters of the United States"

Dear Mr. Christensen and Ms. Jensen,

The Nevada Association of Counties (NACO) greatly appreciates the opportunity to provide substantive comments to Docket ID No. EPA-HQ-OW-2021-0602 regarding a proposed rule to revise the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA). Specifically, the proposed rule to retore the regulations defining WOTUS that were in place prior to 2015 and as amended by Supreme Court decisions. NACO provided comment on the two-prior rule-making processes as these rules and definitions have a direct impact on the daily operations and responsibilities of its member counties. Those comments have been attached and are hereby incorporated by reference.

NACO works with counties to adopt and maintain local, regional, state and national cooperation which result in a positive influence on public policy and optimize the management of county resources. Counties provide and maintain services and infrastructure pertinent to the CWA. These include, but are not limited to, roads, storm water and sewer systems, flood control facilities, land use planning, building

and safety codes and permitting, emergency management, engineering and capital projects, parks and open space, and other infrastructure and utilities. It is from this perspective that NACO, on behalf of its 16 member counties, is providing substantive comments.

On January 24, 2022, the United States Supreme Court agreed to consider *Sackett v. EPA*, a case that is directly related to the definition of WOTUS. Rather than rush adoption of a rule that may or may not conflict with the outcome of this case, NACO recommends that the Corp and EPA hold on publication of a final rule until the outcome of this case is decided.

Background:

NACO is not in support of the return to pre-2015 regulations as amended by agency interpretation and informed by Supreme Court case law. The ambiguity in the pre-2015 regulations and agency guidance has led to differing interpretations and inconsistencies in permitting. It was recognition of these inconsistencies that propelled the Obama Administration to implement change in 2015. Implementation of these proposed pre-2015 regulations as currently proposed does not resolve these inconsistencies.

NACO requests clear and consistent rules be provided. NACO continues to support the "relatively permanent" standard set forth by Justice Scalia and the plurality in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*). The "relatively permanent standard" which states that the regulatory authority under the CWA should extend to relatively permanent, standing or continuously flowing bodies of water that are connected to a traditional navigable water and to wetlands with a continuous surface water connection to such waters. Scalia's approach, along with adherence to clear and well-defined WOTUS exemptions, would address the uncertainty that often causes inaction of regulators and the regulated public.

Jurisdictional uncertainties result in States' unwillingness to assume responsibilities due to apprehension of, and past experiences with, wasteful "means to an end" battles. A simpler, bright line rule as provided by Justice Scalia will help States and local governments re-align their respective incentives and ultimately provide the protection the public seeks. While the attached previous comment letter provides NACO's suggested definition of WOTUS, the following comments cover some of the key inputs being sought in the Federal Register Proposed Rules dated December 7, 2021 (EPA-HQ-OW-2021-0602; FRL-6027.4-03-OW). These comments are arranged to match the headings and subheadings found in the proposed rule and contain NACO's general position on the various components of the proposed rule. For more detailed legal justification for these positions, please reference the attached comments previously provided.

Proposed Rule:

1. Traditional navigable waters: NACO generally supports the proposed rule definition of traditional navigable waters as defined in the 1986 regulations as this definition includes waters that are navigable-in-fact, and currently used or susceptible to use in interstate or foreign commerce.

2. Interstate Waters: NACO does not support the categorical protection of all interstate waters within the WOTUS definition. This inclusion could potentially extend jurisdiction to ephemeral waters and desert washes that may extend across state lines regardless of whether they have the potential to impact traditional navigable waters, which is beyond the central framework and protections intended under the CWA.

NACO recognizes the need to protect interstate waters that are indeed navigable or meet the relatively permanent standard and have a surface water connection to a traditional navigable water. The proposed rule should include an exemption for non-relatively permanent interstate waters.

3. Other Waters: NACO supports the inclusion of "other waters", including intrastate lakes, rivers, stream mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa or natural ponds with a continuous surface water connection to a traditional navigable water and that meet the *relatively permanent standard* as defined in *Rapanos* (2006).

NACOs previous comments suggested a definition of "relatively permanent" waters as *those waters that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards.* As such, NACO strongly supports the **exclusion** of non-relatively permanent waters, including waters with ephemeral and intermittent flow regimes, that do not meet this definition. This exclusion would include dry washes, arroyos and similar features that lack the required relatively permanent flows.

NACO strongly disagrees with assigning jurisdiction over "other waters" based on a "significant nexus standard" as there is no clear and consistent guidance on how to provide "evidence" of significance. Prior to the regulatory changes in 2015, the use of significant nexus standard resulted in confusion amongst the public and inconsistent application throughout the country and State of Nevada. When it is unclear to the public and county agencies if a water feature may significantly affect the chemical, physical, or biological integrity of a traditional navigable water, the Army Corp of Engineers (Corps) is required to make a case-specific analysis. This results in delays in jurisdictional determinations and can result in assumptions of jurisdiction and regulation of waters never intended to be regulated under the CWA. This practice drives up the costs to public agencies (i.e. counties) and landowners who must often hire consultants to assist in the request for a jurisdictional determination and causes significant delays. Currently, it can take up to a year for the Corps and EPA to provide an approved jurisdictional determination for potentially jurisdictional waters in the Sacramento District, which includes portions of Nevada. It has often become the norm for a project proponent to assume jurisdiction and proceed with permits rather than to have the Corps issue a determination, leading to unnecessary costs to the project proponent and increase workloads for the Corps. A clear definition of WOTUS along with a list of well-defined and scientifically sound exemptions should be included in this proposed rule to provide clarity of jurisdiction that is consistently applied.

4. Impoundments: NACO does not oppose the use and definition of impoundments contained in the proposed rule when it applies to waters that are relatively permanent and have a surface water connection to a traditional navigable water. It would be helpful to include a clear definition and exemptions for impoundments that are required for critical County functions such as sewer and stormwater treatment, flood attenuation, etc.

5. Tributaries: NACOs previous comments suggested a definition specific to tributaries that included, *relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters.* As such, NACO has concerns with the proposed inclusion of "intermittent flow" in the definition of WOTUS. NACO previously suggested that the definition of "relatively permanent" *are those that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards.* As such, NACO supports inclusion of this definition rather than the current definition of "intermittent flow".

NACO strongly supports the exclusion of ephemeral flows, including dry washes, arroyos and similar features that lack the required relatively permanent flow regimes to satisfy the tributary definition.

6. Territorial seas: NACO has no position on territorial seas.

7. Adjacent wetlands: NACO does not support the term "adjacent" as currently defined by the Court to mean "bordering, contiguous or neighboring", but supports the inclusion of wetlands that directly abut and are indistinguishable from traditional navigable waters and tributaries as WOTUS. The definition should include the fact that wetlands must meet the definition currently provided by the Corps.

8. Exclusions: NACO recognizes that the proposed rule does not alter statutory permitting exemptions for agriculture, silviculture, or those waters considered "generally not jurisdictional" in prior preamble language, and NACO supports the inclusion of the two exemptions within the proposed rule. However, NACO requests that the agencies bring back several of the exclusions provided in the Navigable Waters Protection Rule (NWPR) and include a written list of water features that are NOT determined to be WOTUS in the proposed rule. Clearly established exclusion of water NOT determined to be WOTUS would provide greater clarity to county agencies and landowners, increasing project efficiencies and decreasing costs. In addition to the two currently proposed exclusions, NACO requests the Corps and EPA include to the following exclusions that clearly identify waters that are NOT determined to be WOTUS.

a. Prior converted cropland: NACO generally supports this exemption for prior converted cropland. NACO is not supportive of a 5-year window for determining if such cropland is 'abandoned'. Often times, prolonged drought can result in a 5-year non-use based on a lack of water alone. Fluctuating commodity prices, change in ownership, etc. can also dictate such periods of non-use. The window for determining 'abandonment' should be a minimum of 10-years if not longer, particularly in times of prolonged drought or other hardship. In terms of evaluation of the cropland exclusion, documentation of state-managed or issued water rights should be considered in making such a determination as such rights have to be documented, filed and kept in good standing with the State.

b. Waste treatment systems: NACO strongly supports the exemption of waste treatment systems, including treatment ponds or lagoons.

c. Stormwater control features: NACO continues to support an exemption for stormwater control features from the definition of WOTUS. The definition should apply to all stormwater control features (curb and gutter, storm drains, green infrastructure, etc.) including those located within municipal separate storm sewer systems (MS4s). NACO is not advocating for elimination of the MS4 Program, as it is important to a stormwater management program in densely populated areas, rather NACO is

requesting clarity and reduction in overlap between the Section 402 and 404 programs to the greatest practical extent. The below background has been provided previously by the National Association of Counties (NACo) and is supported by NACO:

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S." They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACO is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S." EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potentially have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost-effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they

may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

The EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

d. Groundwater: NACO continues to support that groundwater should never qualify as WOTUS and it should be specifically excluded in the definition. The exclusion of groundwater in the definition should be expanded to include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface and groundwater.

e. Non-relatively Permanent Waters: NACO previously commented on, and still supports an exemption for, non-relatively permanent waters (*waters flowing less than three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards*). This includes waters with ephemeral and intermittent flow regimes. NACO supports incorporation of a specific exclusion of non-relatively permanent waters in the proposed rule. This exemption should specifically refence the exclusion of stormwater run-off, including directional sheet flow over upland areas, swales, erosional features, and arroyos.

9. Other Definitions:

a. Wetland: NACO generally supports the definition of "wetlands" within the proposed rule as it makes no changes from the 1986 and 2020 rules. However, NACO strongly suggests that the definition should include the fact that wetlands must meet the definition currently provided by the Corps.

b. Adjacent: NACO does not support the definition of "adjacent" within the proposed rule as it means "bordering, contiguous, or neighboring." As currently written, this definition has proven to be inconsistently applied and has led to sweeping extension of the agency's jurisdiction and over regulations of waters with no connection to traditional navigable waters.

NACO requests the reinstatement of the previous interpretation of "adjacent" as applied under the NWPR to mean directly abutting a jurisdictional water or those wetlands that are (1) inundated by flooding from a jurisdictional water, 2) separated from a jurisdictional water only by natural features (e.g., a berm, bank or dun), or (3) physically separated from a jurisdictional water by an artificial structure that "allows for a direct hydrologic surface connection" between the wetland and the jurisdictional water.

c. High Tide Line: NACO has no position on this definition.

d. Ordinary High Water Mark: NACO generally supports the definition of "ordinary high water mark" within the proposed rule as it makes no changes from the 1986 and 2020 rules.

e. *Tidal Waters:* NACO has no position on this definition.

f. Uplands: NACO encourages the agencies to provide a definition of "upland" in the proposed rule to provide clarification of the jurisdictional extent of the agencies' regulations. NACO strongly suggests the following definition:

> *"Upland" refers to any land area above the ordinary highwater mark or high tide line that does not satisfy all three wetland delineation factors (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances, as described in the Corps' 1987 Wetland Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (e.g., in compliance with a section 404 permit) would be considered upland.*

NACO strongly encourages the agencies to clarify, or at a minimum, maintain that areas within the 100-year floodplain that do not meet wetland criteria and/or wetlands that have been converted to upland do not qualify under the definition of WOTUS. With Nevada being the driest state in the nation, most historic development occurred near and around perennial water. This resulted in a high density of County infrastructure (roads, ditches, wastewater treatment plants, etc.) being located within the 100-year flood plain (due to periodic flood events) that often did not contain areas that would meet wetland criteria. A clear definition of 'upland' provides regulatory consistency with regards to County critical infrastructure that is built on upland and non-jurisdictional under the CWA.

10. Significantly Affect

NACO strongly disagree definition and use of the term "significantly affect" for the purposes of determining whether a water feature meets the significant nexus standard, especially when it is applied to non-relatively permanent waters. Implementation guidance on applying the term suggests that field staff evaluate all available hydrologic information, such as gage data, flood predictions, historic records of water flow, statistical data, personal observations, etc., the vast majority of which will never be available for non-relatively permanent waters. If available, this type of analysis cannot be completed by the average landowner or local and state agency personnel, and response times for USACE and EPA determinations on jurisdiction are crippling. Landowners and regulatory agencies need a need a clear definition of WOTUS that can be applied consistently.

Rule Implementation:

1. Generally Not Considered "waters of the United States"

NACO strongly suggests that the agencies provide clear definitions of certain waters that are NOT classified as WOTUS in this proposed rule. Those waters include ditches currently exempt per regulatory guidance and those non-jurisdictional waters discussed in the regulatory preamble. This portion of the rule can be very valuable in providing clarity and certainty to counties that are responsible for providing critical services and infrastructure, and the cost of providing said services and infrastructure.

a. Certain ditches: NACO believes that a separate definition for jurisdictional ditches is helpful. Under the proposed rule, the jurisdiction of ditches is still very complicated. As previously mentioned, NACO supports an exclusion for ditches that would be used for agricultural and flood control purposes. The same concern would apply to ditches and structures utilized for flood abatement and/or stormwater control purposes including roadside ditches.

b. Certain other features:
To provide clarification of jurisdiction, NACO requests the inclusion of the following features within the proposed rule in addition to being described in preamble language or subsequent guidance letters.

Artificially irrigated areas: NACO requests a written exemption to the proposed rule for artificially irrigated areas, including irrigation induced wetlands, that would revert to uplands if irrigation ceased.

Artificial lakes and ponds: NACO requests an exemption to the proposed rule for artificial lakes and ponds constructed in uplands (see comments on proposed upland definition above).

Water-filled depressions: NACO requests an exemption to the proposed rule for water-filled depressions and believes the definition should apply to such waters located in uplands as defined in the proposed rule (see comments on proposed upland definition above).

Wastewater recycling structures and waste treatment systems: NACO strongly supports exemptions for wastewater recycling structures and waste treatment systems and believes the definition should apply to such systems located in uplands as defined in the proposed rule (see comments on proposed upland definition above).

Thank you for your attention and consideration of these comments. If you have any questions, please do not hesitate to contact me at vguthreau@nvnaco.org, or by phone at (775) 883-7863.

Respectfully,

Vinson Guthreau, Executive Director
Nevada Association of Counties

VG/jd/jm/ae

Attachment: September 1, 2021 Comment Letter from the Nevada Association of Counties (NACO) Pursuant to Docket ID No. EPA-HQ-OW-2021-0328 Regarding the Definition of Waters of the United States

cc: Brad Crowell, Director, Nevada Department of Conservation and Natural Resources
Nevada Congressional Delegation
National Association of Counties

Nevada Association of Counties

304 South Minnesota Street
Carson City, NV 89703
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September 1, 2021

Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted online via regulations.gov

U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

RE: Comments for the Nevada Association of Counties (NACO) Pursuant to Docket ID No. EPA-HQ-OW-2021-0328 Regarding the Definition of Waters of the United States

To Whom It May Concern:

The Nevada Association of Counties ("NACO") greatly appreciates the opportunity to provide substantive comment to Docket ID No. EPA-HQ-OW-2021-0328 regarding a proposed rule repeal and subsequent revised definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") Section 404 permit program. On June 19, 2017, and again on April 12, 2019, NACO provided substantive input pursuant to 'Revising the Waters of the United States Rule under the Clean Water Act'. Those previous comments are hereby incorporated by reference and have been attached.

NACO works with counties to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and optimize the management of county resources. Counties provide and maintain services and infrastructure pertinent to the CWA. These include, but are not limited to, roads, storm water and sewer systems, flood control facilities, land use planning, building and safety codes and permitting, emergency management, engineering and capital projects, parks and open space, and other infrastructure and utilities. It is from this perspective that NACO, on behalf of 16 of 17 of Nevada's counties, is providing substantive comments This letter represents the Nevada Association of Counties as the statewide organization that represents 16 of Nevada's counties, however, if NACO's comments

conflict with those provided by associated Counties, NACO would ask the Agencies to defer to the County-specific comment as the individual counties better understand their circumstances and needs.

NACO does not support repeal of the current Waters of the U.S. (WOTUS) rule (Navigable Waters Protection Rule). Nevada's Counties respectfully request that this repeal not move forward. The multiple WOTUS rule changes in recent years have resulted in a great deal of confusion, misinterpretation, and inconsistency across all levels of government. Repeal of the current WOTUS rules will only make this matter worse.

If the EPA and Corps believes revisions to the existing rule are necessary, then they should make a single revision to the current WOTUS rule rather than repealing and rewriting the rules. If this process moves forward, then NACO would refer to its previous comments attached for its initial input to any new rule making process.

Respectfully,

Vinson W. Guthreau,
Executive Director
Nevada Association of Counties

VG/jld/ae

Attachments: Previous NACO Comments to prior Waters of the United States Rule Making Processes (2)

CC: Nevada Congressional Delegation
Bradley Crowell, Director, Nevada Department of Conservation and Natural Resources

Nevada Association of Counties

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April 12, 2019

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

Submitted Via Email: OW-Docket@epa.gov

And,

Online via Federal eRulemaking Portal:
http://www.regulations.gov

And,

Jennifer A. Moyer
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

RE: Substantive Comments from the Nevada Association of Counties (NACO) Pursuant to Docket ID No. EPA-HQ-OW-2018-0149 Regarding a Proposed Rule for a Revised Definition of "Waters of the United States"

Dear Mr. McDavit and Ms. Moyer,

The Nevada Association of Counties ("NACO") greatly appreciates the opportunity to provide substantive comment to Docket ID No. EPA-HQ-OW-2018-0149 regarding a proposed rule for a revised definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") Section 404 permit program. On June 19, 2017, NACO provided substantive input pursuant to Executive Order 13778 on 'Revising the Waters of the United States Rule under the Clean Water Act'. Those previous comments are hereby incorporated by reference and have been attached.

NACO works with counties to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and optimize the management of county resources. Counties provide and maintain services and infrastructure pertinent to the CWA. These include, but are not limited to, roads, storm water and sewer systems, flood control facilities, land use planning, building and safety codes and permitting, emergency management, engineering and capital projects, parks and

open space, and other infrastructure and utilities. It is from this perspective that NACO, on behalf of Nevada's 17 counties, is providing substantive comments.

Based on previous input, NACO continues to support a pure Justice Scalia approach. Executive Order 13778 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) (*Rapanos*). A Scalia approach would address the uncertainty that often causes inaction of regulators and the regulated public.

Jurisdictional arguments result in States' unwillingness to assume responsibilities due to apprehension of, and past experiences with, wasteful "means to an end" battles. A simpler, bright line rule as provided by Justice Scalia will help States and local governments re-align their respective incentives and ultimately provide the protection the public seeks. While the attached previous comment letter provides NACO's suggested definition of WOTUS, these comments cover some of the key inputs being sought in the Federal Register Proposed Rules dated Thursday, February 14, 2019 (EPA-HQ-OW-2018-0149; FRL-9988-15-OW). These comments are arranged to match the headings and subheadings found in the proposed rule and contain NACO's general position on the various components of the proposed rule. For more detailed legal justification for these positions, please reference the attached comments previously provided.

Background:

NACO appreciates and supports the Agencies' stated baseline concept that *The agencies propose as a baseline concept that "waters of the United States" are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and* ***that not all waters are "waters of the Unites States."*** **(emphasis added).**

Traditional navigable waters: NACO generally supports this approach to the definition of traditional navigable waters as it supports a definition that includes waters that are navigable-in-fact, and currently used or susceptible to use in interstate or foreign commerce.

Tributaries: NACOs previous comments suggested a definition specific to tributaries that included, *relatively permanent, standing or continuously flowing streams, rivers, and lakes having an indistinguishable surface connection with navigable-in-fact waters.* As such, NACO has concerns with the proposed inclusion of "intermittent flow" in the definition. NACO previously suggested that the definition of "relatively permanent" *are those that flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards.* As such, NACO supports inclusion of this definition rather than the current definition of "intermittent flow".

NACO strongly supports the exclusion of ephemeral flows, including dry washes, arroyos and similar features that lack the required perennial or intermittent flow regimes to satisfy the tributary definition.

Certain ditches: NACO believes that a separate definition for jurisdictional ditches is helpful; however, including "...ditches that are constructed in a tributary or that relocate or alter a tributary, or ditches constructed in an adjacent wetland..." is concerning. This definition would capture a large majority of irrigation ditches in Nevada as they relocate or alter a tributary to provide irrigation water. As previously

commented, NACO supports an exclusion for ditches that would be used for agricultural purposes. The same concern would apply to ditches and structures utilized for flood abatement and/or stormwater control purposes including roadside ditches.

Certain lakes and ponds: NACO doesn't believe that a separate definition for lakes and ponds is warranted or provides additional clarity. This definition could be incorporated into the definition of tributaries.

Impoundments: NACO generally does not oppose the use and definition of impoundments contained in the proposed rule. However, some should be excluded. One example of an impoundment that should be considered for exclusion are stormwater impoundments designed to capture and slow storm/flood water in tributaries that are ephemeral or flow less than three consecutive months in a typical water year.

Adjacent wetlands: NACO previously commented that it supports wetlands that directly abut and are indistinguishable from traditional navigable waters and tributaries that qualify as WOTUS. As such, NACO supports that the term "waters" was not included in this definition and the fact that wetlands must meet the definition currently provided by the Army Corps of Engineers.

Waters NOT classified as "Waters of the US": NACO supports the concept of clearly defining certain waters that are NOT classified as water of the US in this proposed rule. This portion of the rule can be very valuable in providing clarity and certainty to counties that are responsible for providing critical services and infrastructure, and the cost of providing said services and infrastructure.

Excluded waters: NACO supports the specific exclusion of *waters or water features that are not identified as being jurisdictional under the TNW, tributaries, ditches, lakes and ponds, impoundments and adjacent wetlands definitions are excluded.*

Groundwater: NACO previously commented and still supports that groundwater should never qualify as WOTUS, and that the definition should include groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface and groundwater.

Ephemeral features: NACO previously commented and still supports that channels through which waters flow intermittently (*waters flowing less than three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards*) or ephemerally should never qualify as WOTUS. As such, NACO supports the exclusion of ephemeral features contained in the proposed rule and explicitly stating the inclusion of stormwater run-off, including directional sheet flow over upland areas, swales, erosional features and arroyos.

Certain ditches: NACO appreciates the inclusion of an exemption for certain ditches. In previous comments, NACO supported the concept of excluding ditches, conveyances and other structures, manmade or otherwise, used for: agricultural, flood abatement or stormwater control purposes. As such, NACO does not support the concept of ditches excavated in uplands but with perennial or intermittent flow qualifying as a tributary. NACO would re-iterate its support for excluding ditches based on a particular use, including agricultural use, irrigation, flood abatement and stormwater control purposes (including roadside ditches). NACO also supports the inclusion of all current Agricultural Exemptions

under the proposed rule. In terms of determining if a ditch is artificial, versus being constructed in a tributary or adjacent wetland, all historic maps, photos and historical accounts should be available to make such a case.

Prior converted cropland: NACO generally supports this exemption for prior converted cropland.

NACO is not supportive of a 5-year window for determining if such cropland is 'abandoned'. Often times, prolonged drought can result in a 5-year non-use based on a lack of water alone. Fluctuating commodity prices, change in ownership, etc. can also dictate such periods of non-use. The window for determining 'abandonment' should be a minimum of 10-years if not longer, particularly in times of prolonged drought or other hardship. In terms of evaluation of the cropland exclusion, documentation of state-managed or issued water rights should be considered in making such a determination as such rights have to be documented, filed and kept in good standing with the State.

Artificially irrigated areas: NACO generally supports this exemption for artificially irrigated areas, and believes the definition should not be isolated to certain crops.

Artificial lakes and ponds: NACO generally supports this exemption for artificial lakes and ponds, and believes the definition should apply to such waters located in uplands as defined in the proposed rule (see comments on proposed upland definition below).

Water-filled depressions: NACO generally supports this exemption for water-filled depressions and believes the definition should apply to such waters located in uplands as defined in the proposed rule (see comments on proposed upland definition below).

Stormwater control features: NACO strongly supports the proposed exemption for stormwater control features from the definition of WOTUS and believes the definition should apply to all stormwater control features (curb and gutter, storm drains, green infrastructure, etc.) including those located within municipal separate storm sewer systems (MS4s). NACO is not advocating for elimination of the MS4 Program, as it is important to stormwater management program in densely populated areas, rather NACO is requesting clarity and reduction in overlap between the Section 402 and 404 programs to the greatest practical extent. The below background has been provided previously by the National Association of Counties (NACo) and is supported by NACO:

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned by a state, tribal, local or other public body, which discharge into "waters of the U.S." They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost-effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are

jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Wastewater recycling structures and waste treatment systems: NACO strongly supports these exemptions for wastewater recycling structures and waste treatment systems and believes the definition should apply to such systems located in uplands as defined in the proposed rule (see comments on proposed upland definition below).

Definitions: NACO understands that many of these definitions are very nuanced and will require additional detail as the new rule is implemented and associated regulations are developed or revised. NACO strongly supports the inclusion of the State of Nevada and local government in implementing and developing further regulation that will dictate application of these approaches in Nevada once a final rule is in place.

Perennial: NACO generally supports the current definition of perennial as meaning, *surface water flowing continuously year-round during a typical year.* This support is contingent upon a more clear definition of "typical year" and the "geographic area" that is based upon.

Intermittent: NACO has concern with the current definition and use of "intermittent" as currently defined:

> *Surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated or when snowpack melts. Continuous surface flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained.*

In Nevada, expressions of groundwater at the surface can take multiple seasons or years to occur making the 'typical year' determination difficult if not impossible in many cases involving groundwater-influenced waters. NACO previously supported, and still supports, a definition of relatively permanent waters that codifies: *flow for at least three contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards* as the minimum flow requirement for a WOTUS.

Ephemeral: NACO generally supports the current definition of ephemeral as meaning, *surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall.*

Typical year: NACO has concern with the current definition of "typical year" included in the proposed rule. In the proposed rule, a 'typical year' is defined to mean within the **normal range of precipitation** over a rolling thirty-year period for a **particular geographic area**. To determine whether the year in

question is a typical year, the agencies presently use observed rainfall amounts and compare it to tables developed by the Corps using data from NOAA. The agencies consider a year to be typical **when the observed rainfall from the previous three months** falls within the 30th and 70th percentiles established by a 30-year rainfall average generated at NOAA weather stations (**emphasis added**).

First, the geographic area would need to be better defined (see below comment). Second, the ecoregions found in Nevada experience tremendous fluctuations in terms of drought and extreme storm events. There are many areas of the state that experience no precipitation in a given 3-month period or where a single storm or storm series can easily exceed the noted percentiles. This definition is going to be difficult to apply consistently and practically in an area with such extreme and variable weather patterns. Finally, there are many areas in the arid west where NOAA weather stations are not available.

Geographic Area (within a typical year): NACO has concern with the current definition of "geographic area" currently included in the proposed rule. As presented, 'geographic area' would be defined on a watershed-scale basis to ensure specific climatic data are representative of the landscape in relation to the feature under consideration for meeting the tributary definition. However, there is no clarity or direction as to what specific 'scale' of watershed this would be based upon.

In Nevada, some watersheds are extremely large and span an extreme diversity of geography and elevation which results in a vastly different profile of "typical year" when considering precipitation. As such, if the definition remains, it would need to specify the scale of watersheds to be considered and account for the vast variations of a typical water year (particularly across elevation gradients) within the Great Basin and Mojave ecoregions.

Upland: NACO generally supports the definition of "upland" currently included in the proposed rule:

> *"Upland" in the proposed rule refers to any land area above the ordinary highwater mark or high tide line that does not satisfy all three wetland delineation factors (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances, as described in the Corps' 1987 Wetland Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (e.g., in compliance with a section 404 permit) would be considered upland.*

NACO strongly encourages the agencies to clarify, or at a minimum, maintain that areas within the 100-year floodplain that do not meet wetland criteria and/or wetlands that have been converted to upland do not qualify under the definition of upland. With Nevada being the driest state in the nation, most historic development occurred near and around perennial water. This resulted in a high density of County infrastructure (roads, ditches, wastewater treatment plants, etc.) being located within the 100-year flood plain (due to periodic flood events) that often did not contain areas that would meet wetland criteria. As the 'upland' definition pertains to many of the exceptions provided to critical infrastructure, NACO would like to ensure the definition is not revised to include the 100-year floodplain and/or historic wetland areas.

Thank you for your attention and consideration of these comments. If you have any questions, please do not hesitate to contact me at dstapleton@nvnaco.org , or by phone at (775) 883-7863.

Respectfully,

Dagny Stapleton
Executive Director

DS/jd

Attachment: June 19, 2017 Comment Letter from the Nevada Association of Counties RE: Substantive Input from the Nevada Association of Counties Pursuant to Executive Order 13778 on Revising the Waters of the United States Rule under the Clean Water Act

cc: Nevada Division of Environmental Protection
Nevada Department of Conservation and Natural Resources
Nevada Congressional Delegation
National Association of Counties

Attachments

Nevada Association of Counties

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June 19, 2017

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RE: Substantive Input from the Nevada Association of Counties Pursuant to Executive Order 13778 on Revising the Waters of the United States Rule under the Clean Water Act

Dear Ms. Downing and Mr. Hanson,

The Nevada Association of Counties ("NACO") greatly appreciates the opportunity to provide substantive input on the new "waters of the United States" ("WOTUS") definition under the Clean Water Act ("CWA") Section 404 permit program. NACO works with counties to adopt and maintain local, regional, state and national cooperation which will result in a positive influence on public policy and optimize the management of county resources.

Counties provide and maintain services pertinent to the CWA. These services include roads, storm water and sewer systems, flood control facilities, land use planning, building and safety codes and permitting, emergency management, engineering and capital projects, parks and open space, and other infrastructure and utilities. It is from this perspective that NACO, on behalf of Nevada's 17 counties, is providing substantive input.

I. "Waters of the State" Presumption

Our waters must be protected, and it is the States that have the jurisdictional responsibility to protect the entirety of those resources within their boundaries. The State of Nevada has existing statutes that provide for protection of all waters in Nevada, called "waters of the State." This program is administered through Nevada's Department of Environmental Protection ("NDEP").

The Agencies should adopt a rebuttable presumption that all waters are "waters of the State" unless and until the EPA and Corps can prove the implicated waters are WOTUS. For those waters that are not WOTUS, should the EPA and Corps wish to assist with State water programs, the Agencies should consider grant or other funding mechanisms that are not tied to a WOTUS classification.

NACO asks that the Agencies work closely with the State of Nevada to identify duplicative processes, expand grant program eligibility to include State programs, and work with the State to assume programs where requested.

II. The Scalia Approach

NACO supports a pure Justice Scalia approach. Executive Order 13778 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) (*Rapanos*). A Scalia approach would address the uncertainty that often causes inaction of regulators and the regulated public.

Jurisdictional arguments result in States' unwillingness to assume responsibilities due to apprehension of, and past experiences with wasteful "means to an end" battles. A simpler, bright line rule as provided by Justice Scalia will help States and local governments re-align their respective incentives and ultimately provide the protection the public seeks.

A. Please see the attached "Proposed Definition, 'Waters of the United States'"

This attachment represents NACO's substantive input and is a result of an intra and inter-state effort to provide a definition that is "consistent with" Scalia, and that fleshes out the concepts of "relatively permanent" and "continuous surface connection." This final rule provides a tiered approach and takes into consideration the various challenges discussed with Nevada's conservation districts, flood control districts, planning departments, consultants, environmental attorneys, national associations and counties across various states including in Idaho, California, Nevada, Utah, Arizona, and Wyoming.

Major topics incorporated include:

- Tributaries
- Ephemeral Streams and Washes in the Desert Southwest
- Man-made conveyances and facilities, in particular Municipal Separate Storm Sewer System (MS4) infrastructure such as ditches, channels, pipes, and gutters
- Groundwater
- Intrastate bodies of water, whether navigable or not

The first tier addresses "navigable in fact," as the most basic qualifying waters. The second tier addresses waters that are tied, by an "indistinguishable surface connection," to waters that are "navigable in fact." This second tier ties in the concepts of "relatively permanent" and "continuous surface connection" so that in Nevada the definition is not so expansive that it extends to the entire Nevada landscape, including ephemeral streams and washes, flood zones, groundwater, and manmade conveyances and facilities. Rather, those tributaries that are included should flow for at least three contiguous months per regular water year. The term "regular water year" is determined by USGS, so that science leads the discussion. The third and final tier addresses wetlands and adopts the analysis posed by the 1987 Wetlands Delineation manual.[1] This approach requires that all three basic wetlands criteria, vegetation, soil, and hydrology, must be present for an area to be designated a wetland. Finally, the proposed rule clarifies what are never WOTUS, pointing to those instances that are often unclear.

It is important that the Agencies re-evaluate regional approaches to ensure consistency and conformance with the rule and national guidance. This issue should be discussed by region and state during the rule making process.

B. Implications of a Scalia Approach

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[1] Corps of Engineers Wetlands Delineation Manual: Technical Report Y-87-1. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. 1987, *retrieved at* http://el.erdc.usace.army.mil/wetlands/pdfs/wlman87.pdf.

It is important to avoid duplicative services and instead work together in a streamlined and efficient manner by drawing clear, long-lasting jurisdictional lines. Therefore, it is extremely beneficial to know where one jurisdiction ends and the other begins. This is why we advocate for Justice Scalia's plurality in *Rapanos*.

The Supreme Court of the United States settles the extent of the federal government's jurisdiction and authority to regulate the environment. Because the Constitution does not speak directly to the environment, the federal government may enact laws regulating the environment only to the extent that it relates to Interstate Commerce, under the Commerce Clause. It is the states that hold the expansive authority to manage the environment, as the states and local governments are not limited as the federal agencies are by the U.S. Constitution. Justice Scalia, in *Rapanos*, spoke directly to the EPA and Corps authority under the CWA. Justice Scalia very helpfully tackles key questions, balances what are clearly not waters of the U.S., and provides several examples to help draw the line.

Justice Kennedy also spoke to this question, but the "significant nexus" analysis has proven too difficult to measure. This has caused unnecessary conflicts over jurisdictional authority. It is clear from *Rapanos*, and Justice Kennedy agrees, based on his concurrence, that a "mere hydrological connection" is not enough. Yet Justice Kennedy's approach allows the Agencies to claim jurisdiction if they can prove there is a "significant nexus" between the land in question and navigable waters. This connection can be direct or cumulative, and the Agencies in the past have construed this to mean that even a single molecule of water is WOTUS if it could affect the "physical, chemical, or biological" integrity of navigable waters. Thus, the distinction between the terms "hydrological connection" and "significant nexus" in practice have not made a difference. Justice Scalia foresaw this expansive interpretation and criticizes the approach as an "all lands are water" approach, which would render the jurisdictional limitations set forth by Congress and the Constitution meaningless.[2] NACO agrees.

III. The Scope of State and Local Programs and the Economic Impacts Analysis

Currently, there is no way to measure the change in regulatory scope, as jurisdictional determinations have been inconsistent, and in favor of regulation. The EPA and Corps have issued statements that they will not develop a GIS map for WOTUS. Yet there is great need for such a map. It is imperative that this occur for an accurate picture of the scope of federal jurisdiction. Only then can a meaningful analysis of the change of scope occur. NACO urges the EPA and Corps to devise a schedule, and to work closely with the State on these important questions before adopting a final rule.

A. Do you anticipate any changes to the scope of your state or local programs regarding CWA Jurisdiction?

NDEP currently manages the waters of the State, so the scope of jurisdiction will not change. Thus, "rolling back" the WOTUS rule does not mean there will be a gap in protection over Nevada's water resources.[3] State and local governments are responsible for the health and safety of their citizens, which includes water quality, environmental, and flood management.

If the State of Nevada is willing to voluntarily assume federal programs, then the federal Agencies should consider shifting to a more supportive role. Even where the federal agencies have clear jurisdiction, strategically the State has the plenary power to

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[2] "…a clear statement rule can carry one only so far as the statutory text permits. Our resolution, unlike Justice Kennedy's, keeps both the overinclusion and the underinclusion to the minimum consistent with the statutory text. Justice Kennedy's reading-- despite disregarding the text--fares no better than ours as a precise "fit" for the "avoidance concerns" that he also acknowledges. He admits, post, at 782, 165 L. Ed. 2d, at 205, that "the significant-nexus requirement may not align perfectly with the traditional extent of federal authority" over navigable waters--an admission that "tests the limits of understatement," *Gonzales v. Oregon*, 546 U.S. 243, 286, 126 S. Ct. 904, 932, 163 L. Ed. 2d 748 (2006) (Scalia, J., dissenting)--and it aligns even worse with the preservation of traditional state land-use regulation. *Rapanos*, 547 U.S. at 738.

[3] "It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U.S.C. § 1251(b), are in any way inadequate for the goal of preservation." *Rapanos*, 547 U.S. at 745.

comprehensively manage all of the water and wetlands within the State. The CWA acknowledges this fact. This could be used to the public's advantage through a meaningful partnership and expanded grant programs.

We understand that there may be states that do not regulate runoff as the State of Nevada does, and that a State or local jurisdiction might even *want* to request a waterway, which would not otherwise qualify for WOTUS under the new definition, be designated as a WOTUS. This may occur for features such as intrastate lakes, or within a National Park, for example, that the State or local jurisdiction may not wish to have the responsibility for. Justice Scalia takes a position on this question as well, stating:

> "it makes no difference to the statute's stated purpose of preserving States' "responsibilities and rights,' § 1251(b), that some States wish to unburden themselves of them. Legislative and executive officers of the States may be content to leave 'responsibilit[y]' with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests. That, however, is not what the statute provides." *Rapanos*, 547 U.S. at 737.

As federally regulated waterways are reduced through refinement of this definition, particularly in the arid Southwest, state and local jurisdictions *will* bear new responsibilities for monitoring and regulating waterways. However, these responsibilities are preexisting.

The emphasis here is on State leadership and responsibilities. Thus, appropriate funding mechanisms, perhaps through grants issued to States based on need, could be considered to ensure States and/or local municipalities have the appropriate resources to re-assume these programs.

B. Economic Impact Analysis

A reduced jurisdictional scope will result in reduced costs to the federal Agencies, the States, local governments, and the regulated public with respect to this specific federal program. This would free up significant funding to implement State-based programs and develop priority projects that could not previously be developed with one consistent regulatory agency.

Costs to the State should only be calculated for those costs directly associated with federal permitting processing, such as the current cost of staff working with the EPA and Corps or of additional permitting processes for State and local government-owned facilities. This cost will be reduced if the scope of federal jurisdiction is reduced.

The cost of a State's expanded program should not be included in the economic impacts analysis. Again, the State is responsible for water quality standards regardless of federal jurisdiction. These costs should not be calculated as part of the rulemaking process because the State is responsible for water quality, whether or not the federal government also implements a water quality program. Again, "it makes no difference …that some States wish to unburden themselves of" their responsibility to provide water quality, because it is 'attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests,' if the statute does not provide the authority in the first place. *Rapanos*, 547 U.S. at 737. The Agencies should not look at the cost to the State of re-instating a past shift to the EPA, because really the Agencies never had the authority. The State was placing the cost of its own program on the EPA in the first instance. The EPA would no longer assume that cost, so it should instead be calculated as savings and perhaps be re-allocated to needs-based grant programs.

Once an accurate picture of current jurisdictional waters is provided, the following should be measured:

- The reduced cost to the State from duplicative permitting and staff resources
- The reduced cost and time for the regulated public to work exclusively with the State
- The reduced cost to the federal Agencies
- The reduced cost of litigation due to fewer decisions/jurisdictional determinations

The following should not be measured:

- ❖ A State's decision to expand the scope of its programs to meet its own water quality responsibilities
- ❖ Changes in programs, such as grant programs, that can be adjusted along with the Rule

Conclusion

NACO again appreciates the opportunity to provide substantive input at this early juncture, and looks forward to working with the Agencies as they propose and finalize a new WOTUS definition. NACO supports Justice Scalia's approach in *Rapanos* for the reasons stated above. There is so much existing confusion over jurisdictional waters that many localities choose not to update key infrastructure or take a leadership role in CWA programs. Justice Scalia's approach will provide certainty, will remove an expensive duplicative process, and will encourage the State to step up locally and potentially assume the 404 and other federal programs under the CWA.

Opportunities exist through more local control of water resource management, including a relatively nimble decision-making process for evaluation, conservation, and development projects. Again, NACO urges the EPA and Corps to devise a schedule, and to work closely with the State and counties on these important questions before adopting a final rule.

Thank you for considering these important issues. If you have any questions, please do not hesitate to contact me at jeff@nvnaco.org, or by phone at (775) 883-7863.

Respectfully,

Jeffrey Fontaine
Executive Director

JF/ts

Cc: File