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Attention: Docket ID No. EPA-HQ-OW-2018-014: Revised Definition of "Waters of the United States"

Dear Mr. McDavit and Ms. Moyer,

On behalf of the National Association of Towns and Townships (NATaT), thank you for the opportunity to submit comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed revised rule defining what "waters of the United States" (or WOTUS) are jurisdictional under the federal Clean Water Act (CWA).

NATaT represents over 10,000 towns and townships, many of which are regularly impacted by CWA regulation of business and residential development projects, wastewater treatment facilities, roads and bridges, and other important activities that maintain the economic health and provide for future growth of our small rural communities. As such, the scope of jurisdiction under the federal CWA is of fundamental importance not only to our membership, but also to the Nation.

Our organization believes clean water is the lifeblood of our nation – for both rural and urban areas – and we are grateful for the agencies' efforts, through this rulemaking, to clarify the long standing confusion over the definition of WOTUS. Over the years, such confusion has resulted in lengthy legislative and legal battles, including several cases before the Supreme Court of the United States since the CWA was enacted in the 1970s.

We appreciate that this is the second of a two-step process to review and revise the definition of WOTUS consistent with President Trump's February 28, 2017, Executive Order 13778 entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

It is important to note that while the George W. Bush and Obama Administrations largely based their definitions of WOTUS on the opinion of former Supreme Court Justice Anthony Kennedy in the 2006 case *Rapanos v. United States*, the Trump Administration's proposed WOTUS rule appears to be based largely utilizing the late Justice Antonin Scalia's opinion. NATaT supports this approach.

Writing for the four justice plurality, Justice Scalia made clear that the "waters of the United States" are to "include[ ] only those relatively permanent, standing or continuously flowing bodies of water 'forming

geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,' " *Rapanos,* 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection" to a relatively permanent water. *Id.* at 742.

Justice Scalia went on to say that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,"* and thus do not have the "necessary connection" to covered waters that triggers CWA jurisdiction. *Id.* at 742.

Justice Scalia further pointed out that "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id.* at 732 n.5 (emphasis in original).

An important point to be highlighted at the outset is our appreciation for a proposed rulemaking that effectively lays out the full legal and regulatory history of the tortuous twists and turns that the interpretation of the WOTUS definition has taken over the decades and has brought us to this point in time.

With regard to the development of the rule making, we are particularly appreciative of the stakeholder outreach the agencies have engaged in the rule's development – from stakeholder sessions prior to the development of the rule itself, to the early release in December of the draft, to the various listening sessions once the proposed rule was released.

The result, we believe, is a rule which, while there are opportunities for improvement as we will discuss below, establishes a regulatory structure that moves in the direction of bringing clarity to CWA regulation by establishing what categories meet the definition under WOTUS and, just as importantly, what does not.

Establishing a process under the rulemaking that provides a framework for the agencies to carry out the requirements under the rule, instead of allowing a case-by-case approach, is likely be a more effective for meeting the requirements of the definition.

In general, we believe the six categories outlined under the proposed rule that qualify as meeting the definition of WOTUS, and the eleven categories that do not, provide perhaps the clearest governing regulatory roadmap yet to be put forward regarding implementation of the CWA utilizing the definition. As such, the proposed rule would provide a significant level of certainty of falls in the definition and what does not.

As the agencies indicated in the proposed rule: "traditional navigable waters, tributaries to those waters, certain ditches, certain lakes and ponds, impoundments of jurisdictional waters, and wetlands adjacent to jurisdictional waters would be federally regulated."

For those features that are not WOTUS, the proposed rule "specifically clarifies that "waters of the United States" do not include features that flow only in response to precipitation [such as ephemeral flows, dry washes, arroyos, and similar features]; groundwater, including groundwater drained through subsurface drainage systems; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; certain artificial lakes and ponds constructed in upland; water-filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off; wastewater recycling structures constructed in upland; and waste treatment

systems. In addition, the agencies are proposing to clarify and define the terms "prior converted cropland" and "waste treatment system" to improve regulatory predictability and clarity.

We agree.

Comments and Recommendations

The following comments and recommendations focus on specific categories identified under the rule and areas where the agencies are seeking comment. While we do not respond to all areas and categories for comment, we have focused on those of most interest/concern to us.

Tributaries

We appreciate the effort made in the proposed rule to revise and improve the definition of regulated tributaries to traditional navigable waters under the CWA, including the general exclusion of ephemeral streams and the removal of a general category of waterways that are only identified as having a streambed, two banks and an ordinary high watermark from the definition of a tributary. This new definition will allow for a clearer scope of waterways covered as WOTUS. We also appreciate the clarity in the proposed rule that tributaries, as defined, are considered perennial or intermittent. We believe it makes sense to include streams that contribute "extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year" to traditionally navigable waters as the proposed rule indicates. This would include streams that flow in whole or in part in the spring during time of snowpack run off.

As indicated above, we believe Justice Kennedy's "significant nexus" test in *Rapanos*, the basis for much of the 2015 rule, is ambiguous and would lead to an unfounded, arbitrary expansion of waters regulated under the CWA. We do agree, however, that the plurality's ruling in *Rapanos*, led by Justice Scalia, including important parts of Justice Kennedy's opinion, as the basis for much of the proposed rule, would provide much needed clarity to the definition of WOTUS, and properly and clearly focus federal regulation on what the CWA and the Commerce Clause of the U.S. Constitution originally intended to regulate as navigable waters, or "waters of the United States." We concur with the agencies in the proposed rule that the revised definition of WOTUS would also preserve the traditional sovereignty of States over their own land and water resources.

More specifically, we recommend that the term "intermittent" in the context of a tributary or stream flowing into a navigable water should be defined as one that is relatively permanent and that continuously flows at least three-months seasonally during a typical calendar year and the source of the stream should indicate that the seasonal flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow. The level of flow need not be defined by federal regulation, but rather left at the state or local level to be determined. It is important to establish a minimum time period of flow and the source of flow to ensure that both ephemeral streams are clearly delineated, as well as identifying the source of intermittent tributaries.

We concur with the proposed definition of a "typical year" as "within the normal range of precipitation over a rolling 30-year period for a particular geographic area." We also believe that times of drought or extreme floods should not be a factor when determining if a river or stream meets the conditions of the definition of "tributary."

Certain Ditches

In our view, clarity in this area is critical. As the rulemaking preamble highlights: "the regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others."

Therefore, we agree with the agencies' decision to create a separate discrete category for ditches and the classification that outlines what constitutes a ditch in the proposed rule – defining ditches as simply artificial channels used to convey water, and excluding all other features from the definition.

Further, we support the scope of the proposed rule's classification of ditches as WOTUS, specifically treating certain ditches as jurisdictional where they are traditional navigable waters, such as the Erie Canal, or subject to the ebb and flow of the tide, or where they satisfy conditions of the tributary definition as proposed and were either constructed in a tributary (as defined in the proposed rule) or built in adjacent wetlands. As such, the proposed rule would include ditches as WOTUS that are dug within the banks of an intermittent or perennial tributary, or that would relocate an intermittent or perennial tributary.

The proposed rule also would return irrigation and non-tidal drainage ditches to their historically exempt status. For irrigation ditches, which typically are constructed in upland but frequently must connect to a "water of the United States" to either capture or return flow, Congress exempted both the construction and maintenance of such facilities, and excluded agricultural stormwater discharges and irrigation return flows from the definition of point source. We concur with the proposed rule that the construction activities performed in upland areas are beyond the reach of the CWA, but the permitting exemption in the CWA Sec. 404(f) applies to the diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches to jurisdictional waters.

We concur with the proposed rule that ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as is managing water resources in the Western United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events—all activities that rely on ditches. Roadside ditches and other drainage infrastructure not constructed in a tributary or an adjacent wetland should not be considered WOTUS under the proposal.

The CWA Sec. 404(f) permitting exemption for drainage ditches, however, is limited to the maintenance of such ditches. That is because an alternate formulation would have allowed the drainage of wetlands subject to CWA jurisdiction without a permit. We recommend that irrigation drainage ditches continue to be exempted from permitting for maintenance even though they may satisfy the conditions of the proposed tributary definition, as they generally carry farm runoff from surface and subsurface sources year-round due to the timing of flow from such exempt agricultural sources.

We believe the agencies should consider a ditch that appears to have been constructed in upland to be non-jurisdictional unless there is clear evidence that the ditch was in fact constructed in a natural waterway prior to the adoption of the 1972 CWA amendments. Also, where circumstances warrant, it would appear appropriate that photos, maps, and other historical data can be used to assist in identifying whether a ditch is constructed in upland or whether it was constructed in a tributary or adjacent wetland that meets the respective proposed definitions. And, we concur that if field and remote-based resources do not provide sufficient evidence to show that the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under the proposed rule.

We concur with the proposed rule's exclusion of all ditches constructed in upland, regardless of flow regime, including ditches constructed in upland (not in a tributary or adjacent wetland) that flow perennially that would be presumed non-jurisdictional under the proposal, even if they would also satisfy the conditions of the proposed tributary definition.

Certain Lakes and Ponds

We support the agencies' efforts to ensure clarity by establishing a separate category of lakes and ponds that will be jurisdictional as WOTUS, such as the Great Salt Lake in Utah and Lake Champlain on the Vermont-New York Border. Specifically, lakes and ponds would be jurisdictional where they are a traditional navigable water, contribute perennial or intermittent flow to a traditional navigable water directly or by other means that lead downstream to the jurisdictional water, or are flooded by jurisdictional WOTUS. We concur with the proposed rule that would establish that a mere hydrologic connection to a jurisdictional water cannot provide the basis for CWA jurisdiction of the lake or pond – the connection must be perennial or intermittent flow from the lake or pond.

We concur with the agencies proposal to eliminate the case-specific significant nexus review through this categorical treatment of certain lakes and ponds as "waters of the United States." We also agree with the proposal to exclude artificial ponds build on dry lands from WOTUS. This clarity is particularly beneficial for those in the agriculture community.

Adjacent Wetlands

We agree with the agencies' proposal that defines wetlands as those that physically touch, or abut other jurisdictional waters as being defined as "adjacent wetlands." Adjacent wetlands are also defined as those with a direct hydrologic surface water connection in a typical year from a "water of the United States" to the wetland. A "direct hydrological connection" would be an inundation resulting from perennial or intermittent flow between the wetland and a "water of the United States." We also concur with the proposed rule describing when wetlands are physically separated from jurisdictional waters by upland or by dikes, barriers, or similar structures and also lack a direct hydrologic surface connection to jurisdictional waters, those wetlands are not adjacent and thus not jurisdictional as WOTUS.

We believe this proposal is a fair interpretation of *Riverside Bayview*, *SWANCC*, and *Rapanos* opinions, including specifically providing regulatory certainty through categorical treatment of adjacent wetlands, rather than using the case-by-case application of Justice Kennedy's significant nexus test. We also concur with including in the regulatory text that areas must satisfy all three wetland delineation criteria (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands as that would provide additional clarity.

Further, we believe that efforts must be undertaken to use new technology in order to utilize all tools available to actively define the boundaries of measurements of adjacency. Specifically, the agencies have indicated that remotely determining whether wetlands abut a jurisdictional water can be challenging. We agree. We believe high resolution satellite imagery could be helpful in determining whether a wetland abuts a jurisdictional water, and we support the pursuit of other surface hydrology indicators that may be helpful.

We believe it is important that weather and climatic conditions (*i.e.,* review recent precipitation and climate records) should be used to ensure that adjacency is not being assessed during a period of drought or after a major precipitation or infrequent flood event. These climatic assessments could also employ important tools (i.e.satellite imagery, snowpack measurements) in order to determine whether it is a "typical year" for purposes of determining whether a tributary is jurisdictional.

In addition, we believe it is wise to not address in this rulemaking the question of subsurface hydrologic connectivity as a basis for determining adjacency of a wetland. We understand the agencies' uncertainty that the use of such shallow subsurface connection could impinge on state and tribal authority over land and water resources and thus create confusion and difficulty in implementation of the rule, including in determining whether a subsurface connection exists and to what extent.

Finally, we agree that in identifying factors regarding adjacency, distance between federal and state waters should be a factor. That distance will likely vary, and will be best determined at the local level though at least one mile would seem reasonable.

The Eleven Features that Are Not Waters of the U.S.

As a general matter, we appreciate the clarity the proposed rule provides by defining not only what categories are covered by the proposed definition of WOTUS as discussed above, but also those that are definitively not WOTUS.

Specifically, the proposal would exclude from the definition of "waters of the United States" eleven features, including:

1) Any water not enumerated in paragraphs (a)(1) through (6) of the proposed rule would not be a "water of the United States;"
2) Groundwater, including groundwater drained through subsurface drainage systems;
3) Ephemeral surface features and diffuse storm water run-off, such as directional sheet flow over upland;
4) Ditches that do not meet the proposed conditions necessary to be considered jurisdictional WOTUS (e.g. most farm and roadside ditches would not be considered WOTUS);
5) Prior converted cropland (with the clarification that the designation would cease to apply if the land is reverted to wetlands after not being used for five years);
6) Artificially irrigated areas that would revert to upland if artificial irrigation ceases;
7) Artificial lakes and ponds constructed in upland, such as certain water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds;
8) Water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel;
9) Storm water control features excavated or constructed in upland to convey, treat, infiltrate, or store storm water run-off;
10) Wastewater recycling structures constructed in upland (the exclusion clarifies the agencies' current practice that waters and water features used for water reuse and recycling would not be jurisdictional when constructed in upland); and,
11) Waste treatment systems (defined for the first time in the proposed rule).

While we recognize the scope of these categories and believe they adequately cover all of the subject categories that are not WOTUS, some clarifications are needed.

Ditches whose purpose is to move water and which do eventually reconnect to the tributary system, even if built in a tributary or adjacent wetland, should still qualify for the CWA Sec. 404(f) permit exclusion for construction and maintenance (upland) and maintenance of drains as discussed above. Also, constructed upland ditches that are perennial or intermittent in nature and connect to a jurisdictional water should not be considered a tributary, especially if such ditches are controlled by man-made structures and are used to convey water to areas where such sources do not exist but for the constructed ditch.

Also, the groundwater exclusion should instead read, "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems." In some instances, constructed subsurface drainage systems are not used in draining agricultural lands, but shallow subsurface flows over an underground hardpan layer of clay or other impervious substance work in the same manner to channel such flows to constructed drainage ditches, and should be not classified as WOTUS, even though such flows can be perennial or intermittent in nature. Many times drainage

ditches constructed as part of an agricultural irrigation system are built in natural ephemeral and possibly intermittent washes or arroyos, and should not be classified as WOTUS.

In addition, the exclusion for ditches should be clarified to spell out particular ditch use, including, but not limited to roadside, railway, agriculture, irrigation, drainage, water supply, and related uses. While we realize a general listing of uses increases the possibility of inadvertently omitting a type of ditch, we think it is important to specify the types of ditches that should be excluded so that regulators do not inadvertently bring ones under the WOTUS definition that would otherwise be excluded.

We believe the five-year determination for abandoned cropland, while based largely on the 1993 regulation preamble, should be re-evaluated both in terms of timeframe and criteria. We recommend the Corps consult with and utilize the Natural Resource Conservation Service (NRCS) at the Department of Agriculture as the lead agency in developing the appropriate timeframe and criteria for such a determination, in consultation the farming community. In terms of the type of documentation a landowner should maintain to demonstrate that cropland has not been abandoned, or the land has been used for, or in support of, agricultural purposes at least once in the immediately preceding five years, we believe the documentation would be what one would reasonably expect to maintained or be available in the course of doing business for agricultural purposes (i.e. crop sale receipts, photos, etc.)

Conclusion

Improving and maintaining water quality in this Nation can and should be achieved through partnerships carried out at the local, regional, state, and federal levels. The proposed rule represents a very good start by the federal government in providing clarity and certainty in defining what waters are truly federal "waters of the United States." We stand ready to work with the EPA, the Corps, and other agencies as appropriate in promulgating and finalizing this rule. Most importantly, these partnerships must continue to be nurtured and maintained as we navigate the implementation of a final rule in the months and years ahead.

Thank you for the opportunity to comment.

Sincerely,

Bryan Smith
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Executive Director, Township Officials of Illinois