



## FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES COMMISSIONER ADAM H. PUTNAM

---

Ms. Donna Downing  
Office of Water (4502– T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW.  
Washington, DC 20460

June 16, 2017

Submitted via email: [cwawotus@epa.gov](mailto:cwawotus@epa.gov); [hanson.andrew@epa.gov](mailto:hanson.andrew@epa.gov); and hardcopy.

The Department appreciates the opportunity to provide comments on the final Clean Water Act (CWA) Rule, published June 29, 2015 (FR 80:124), as provided in Executive Order 13132, February 28, 2017. We welcome the decision by the USEPA to initiate rulemaking to define “waters of the United States” in a manner consistent with the above-referenced Executive Order.

Prior to the publication of the Clean Water Rule in 2015, the Department provided extensive comments to the docket (EPA-HQ-OW-2011-0880). The main point of the comments was that the definitions included in the proposed rule would greatly expand federal jurisdiction over water and wetlands in Florida, greatly complicating Florida’s efforts to protect water quality and quantity, and imposing costs and uncertainty on private and public entities in the state. As noted in the cover letter to the comments provided in 2014:

*These changes in definition, combined with Florida's flat topography and broad expanse of floodplains, wetlands and sloughs, could subject virtually all of Florida's water bodies to federal jurisdiction under the CWA, even concrete lined flood control conveyances and other man made systems intended to capture and treat stormwater flows. The proposed changes expand federal wetlands jurisdiction beyond what was intended by the CWA and what was envisioned in recent U.S. Supreme Court decisions.*

Despite the comments provided by the Department, and many others, the final rule retained many of the elements that would have resulted in the concerns expressed above being realized.

These include:

- The use of the concept of a “significant nexus” when determining if waters or wetlands within the 100 year flood plain of traditional navigable waters (TNW), interstate waters and wetlands, and territorial seas; or waters within 4,000 feet of the high tide line or ordinary high water mark (OHWM) are waters of the United States (WOTUS).
- The determination that if a portion of a water or wetland is determined to have a significant nexus within these boundaries, the entire water or wetland is a WOTUS.

- A definition of “adjacent” that includes water not limited to water located laterally to other waters identified as WOTUS.
- The definition of “neighboring” to include waters and wetlands within the 100 year floodplain of a jurisdictional water, or within 1,500 feet of the OHWM of a jurisdictional water.
- A definition of a tributary that does not require actual flow to occur, only have physical indicators of a bed and banks, even if the flow is ephemeral.

The opportunity now exists for the Agency to craft a rule that avoids such a massive expansion of federal jurisdiction. The new rule can be drafted with clearly defined and appropriately limited jurisdiction based on the recognition that states also regulate and protect waters and wetlands. The Clean Water Act was drafted so that the USEPA and the Army Corps of Engineers (ACOE) have limitations on their jurisdiction in regard to water and wetlands. It is not necessary for the Agencies to have almost universal jurisdiction, with the concomitant regulatory cost impacts, for water and wetlands within states to be protected. States retain the ability and responsibility to protect water and wetlands within their boundaries. Federal jurisdiction must be limited to allow states to exercise their authority and abilities, and address water resource issues unique to each state.

As EPA considers amending the rule defining Waters of the United States, several issues should be paramount: 1) keeping as closely aligned as possible to the intent of the CWA in encompassing waters that are navigable-in-fact, but recognizing that there are some waters beyond those that should be included; 2) respecting the cooperative federalism ideals of the CWA by allowing states to retain jurisdiction over waters that do not lend themselves to use in commerce and do not cross state lines; and 3) balancing the scientific foundation of the rule by recognizing that jurisdictional boundaries which are set by rule must be backed up with science-based reasoning. Science, however, must not be used to justify the over-inclusion of waters in disregard of jurisdictional limits. This was the main flaw of the prior administration’s rule, as science can be used to argue that everything is “interconnected”. It is worthwhile to revisit the previous court decisions as a guide for where the boundaries should be set and, while doing so, it should be noted that an important class of waters to focus upon are wetlands, because they are less clearly categorized as jurisdictional or non-jurisdictional.

### **Continuous Surface Connection and Adjacency**

We propose that the definition of waters of the United States (WOTUS) be based on the idea that, for federal jurisdiction, there is a clear continuous surface connection between traditional navigable waters (TNW) and the subject water or wetland. Connections that are ephemeral, or ditches or streams that periodically drain rainfall from areas not otherwise considered a WOTUS, should not be included in the definition, and definitions must be written so that they cannot be construed to be included within WOTUS. In addition, the boundaries of a WOTUS should not be based on a fixed distance from a TNW or inclusion in the 100-year flood plain.

In all of the seminal cases on Waters of the United States, the Court repeatedly described navigable waters as “open waters,” and no rational interpretation would allow typically dry channels to be described as “open waters.”<sup>i</sup> The CWA itself includes these channels and conduits that typically carry intermittent flows of water in its definition of “point source.”<sup>iii</sup> Additionally, the CWA only authorized jurisdiction

over “waters” not “water,” the former of which is defined narrowly as water as found in bodies forming geographical features such as streams, oceans, rivers, and lakes or the flowing or moving masses, as of waves or floods, making up such streams or bodies.<sup>iii</sup> The only plausible interpretation of “waters” includes only those waters that are continuously present and fixed, “relatively permanent, standing or flowing bodies of water,” rather than “transitory puddles or ephemeral flows of water,” through which water only occasionally or intermittently flows, or channels that periodically provide drainage for rainfall.<sup>iv</sup>

Only a wetland with a continuous surface connection to bodies that are “waters of the U.S.” in their own right, such that there is no clear demarcation between “waters” and wetland, is itself a part of those “waters” and therefore adjacent to such “waters” and covered by the Act.<sup>v</sup> The inclusion of wetlands abutting such a “hydrographic feature” is legally permissible due primarily to the difficulty of drawing any clear boundary on the continuum between land and water.<sup>vi</sup> Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the U.S.” do not implicate the boundary-drawing problem and lack the necessary connection to covered waters that the Court described as a “significant nexus.”<sup>vii</sup> In expanding its definition of “waters of the U.S.” to include ephemeral streams, wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Rapanos plurality held that the Corps had stretched the term beyond the plain language of the statute to an impermissible “Land Is Waters” approach.<sup>viii</sup>

Justice Kennedy’s concurring opinion in Rapanos recognizes that waters, which are themselves non-navigable in the traditional sense and the jurisdiction of which is questionable, would fall into two categories:

1. Where the connection between the navigable and the non-navigable water or wetland is so close, or potentially so close, that the Corps may deem the water or wetland a “navigable water” under the Act; or
2. Where there is little or no connection between the traditional navigable water and the non-navigable water or wetland.<sup>ix</sup>

This analysis should bear in mind, however, the Court’s often repeated reminder that the Act uses the term “navigable” and that the term must be given some meaning, not simply interpreted in such a way that its presence in the Act is rendered meaningless.<sup>x</sup>

Further, as both Justice Kennedy in Rapanos and the court in Riverside Bayview note, the Act reserves unto each state the power to issue permits for “the discharge of dredged or fill material into the navigable waters...in its jurisdiction,” excepting those navigable waters used or susceptible to use in interstate commerce, “including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, *including wetlands adjacent thereto.*”<sup>xi</sup> Clearly, some wetlands fall under the scope of the term “navigable waters,” provided they are adjacent to a traditional navigable water or its tributary.<sup>xii</sup>

## Significant Nexus

The definition must not include the use of a “significant nexus to be determined on a case-by-case basis” as a means to determine a WOTUS. Far from creating clarity or certainty, this method of determining jurisdiction establishes an entirely new set of determinations that must be made for essentially any water or wetland anywhere in the landscape. The inclusion of this concept has already resulted in multiple legal challenges, and would, if operational, have a massive impact on state’s efforts to conserve water and protect water quality.

Justice Kennedy’s “significant nexus test” states that “to constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”<sup>xiii</sup> Justice Kennedy then revises the usage of the term “significant nexus” by stating that it requires establishment, on a case-by-case basis, that bodies of water or wetlands have a significant nexus if, either alone or in combination with similarly situated lands in the region, they significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.<sup>xiv</sup> However, as Justice Stevens observed, that which is most problematic with the significant nexus test when he noted in his dissent is that “Justice Kennedy’s approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they will need to get § 404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications.”<sup>xv</sup> Uncertainty was one of the chief complaints made regarding the current regulatory process and was one of the most concerning issues presented by the final rule and it is also its most significant flaw.

Justice Kennedy’s concurring opinion recommended remand of the Rapanos case back to the Sixth Circuit Court of Appeals to consider all the factors necessary to determine whether the wetlands in question had the requisite nexus with the navigable waters.<sup>xvi</sup> The plurality opinion takes exception to the test, stating:

*Only by ignoring the text of the statute and by assuming that the phrase of SWANCC (“significant nexus”) can properly be interpreted in isolation from that text does Justice Kennedy reach the conclusion he has arrived at. Instead of limiting its meaning by reference to the text it was applying, he purports to do so by reference to what he calls the “purpose” of the statute. Its purpose is to clean up the waters of the United States, and therefore anything that might “significantly affect” the purity of those waters bears a “significant nexus” to those waters and thus (he never says this but the text of the statute demands that he mean it) is those waters.<sup>xvii</sup>*

Justice Scalia highlights the inaccuracy of attributing the “significant nexus” case-by-case application to Riverside Bayview, where the Court explicitly held that the determination of ecological significance rests on whether a wetland is contiguous, or physically connected, with a “water of the U.S.,” rather than any independent ecological determination.<sup>xviii</sup> Justice Scalia then reiterates that the Supreme Court’s usage of

“significant nexus” was to specifically hold that “[w]etlands are ‘waters of the United States’ if they bear the “significant nexus” of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”<sup>xxix</sup>

Thus, application of the significant nexus test in the manner which EPA and the Corps have applied it since Rapanos went too far, necessitating an expensive, highly technical, and time consuming case by case analysis of waters adjacent and not adjacent to waters that are navigable in fact. Waters that are included should have a continuous hydrologic surface connection.

### **Scientific Basis for the Rule**

The previous rule was, and this rulemaking must, be based upon sound, peer-reviewed science on the connectivity between waters in order to support and establish the jurisdiction of the “waters of the United States.” In drafting the previous rule, EPA commissioned the drafting of a scientific report on connectivity.<sup>xx</sup> The science report came to three main conclusions:

1. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.
2. Wetlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g. wetlands and open-waters in riparian areas and floodplains) are physically, chemically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter.
3. Wetlands in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity. The functions and effects of this diverse group of wetlands, which they refer to as “unidirectional wetlands,” affect the condition of downstream waters if there is a surface or shallow subsurface water connection to the river network. However, this conclusion is qualified – the literature reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings. Evaluations of individual wetlands or groups of wetlands could be possible by a case-by-case analysis. Further, other unidirectional water bodies (e.g., ponds and lakes that lack surface water inlets) may provide the same functions and similarly benefit downstream water quality and integrity.<sup>xxi</sup>

Based on these conclusions, the agencies can make a solid case that all water is interconnected and affecting one water body, in either quantity or quality, may affect another water, which is either neighboring or remote. However, a scientific basis for the rule only goes so far in providing a justification for the scope of jurisdiction under the CWA. The science seems to indicate that all water will be inevitably connected and physically mixed through subsurface connection, groundwater connection, and

even through the processes of evaporation, condensation, and precipitation. The agencies have extrapolated that, by virtue of that inevitable connection, the CWA authorizes regulation of all water so that every molecule of water is prevented from coming in contact with pollutants that may degrade its biological, chemical, and physical integrity, and that will then ultimately degrade other waters. However, there are legal and constitutional bounds to the federal government's reach under the CWA.

Congress cannot regulate outside of its constitutionally enumerated powers, which in this context is its power to regulate interstate commerce, and executive agencies like the Corps and the EPA cannot promulgate rules which extend beyond those powers or which establish jurisdiction beyond the reach of the enacted language of the CWA. The Supreme Court has held that “[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”<sup>xxii</sup> The Court has warned that the scope of the interstate commerce power “must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>xxiii</sup>

As the agencies evaluate how to define WOTUS, the most important guidelines to bear in mind are: 1) the extent of constitutional powers granted under the CWA; 2) cooperative federalism and the fact that states retain jurisdiction and do regulate waters that are contained within their territorial boundaries; 3) the ability of the scientific data and conclusions to support the boundaries enumerated in any proposed rule; and 4) regulatory certainty and the level of technical expertise necessary to determine a water's jurisdictional or non-jurisdictional status. Clarity is critical to landowners, who cannot reasonably bear the burden of applying subjective, confusing definitions and trying to anticipate how regulators might use “desktop analyses” to override actual field observations.

Our recommendations for specific provisions in a revised rule are:

- Adjacent wetlands should be defined as in the rule existing prior to the 2015 definition, that is bordering, contiguous, or neighboring wetlands, including wetlands separated by man-made dikes or barriers, natural berms, etc.; with the specification that wetlands without such a barrier have a continuous surface water connection to a TNW. The hydrologic connection should be present at least once per year except in extended periods of below average rainfall, and should not include ephemeral streams. Federal jurisdiction should not extend to non-navigable, isolated/intrastate waters and wetlands. Nor should it extend to any ordinarily dry features, such as ephemeral streams.
- Wetlands that periodically overflow into what would be considered adjacent wetlands, for example, during extreme rainfall events, should not be considered adjacent, unless, as provided above, a continuous surface water connection occurs routinely, except in extended periods of below average rainfall. Wetlands should only be considered WOTUS when they are immediately adjacent to traditional navigable waters and their tributaries, meaning they directly touch or share a common border with those waters.

- Tributaries should be defined as features that contain flowing water on a regular basis that reaches a WOTUS; except in extended periods of below average rainfall.
- Features that exist or are created to remove rainfall from forests, agricultural or ranchland are not WOTUS if they are not otherwise created in a WOTUS, and they are separated from a WOTUS by a water control structure that provides for control of the release of rainfall. (Note: State water quality protections still apply in these cases).
- Connections, either natural or man-made, between waters or wetlands that otherwise would not be a WOTUS cannot be considered a WOTUS.
- All existing exemptions in the CWA regarding dredge and fill and stormwater permitting should be retained in the new rule.
- Ditches that are expressly exempt and are necessary for landowners to support existing operations should be excluded.

If the agencies keep to the above-described principles, the resulting rule will not only withstand legal challenge but will also serve its users well.

Please let me know if you need any more information on these recommendations.

Sincerely,



Steven Dwinell  
Director

cc: Mike Joyner  
Lorena Holley  
Jim Karels

---

<sup>i</sup> Rapanos v. U.S., 547 U.S. 715, 735 (2006) (quoting Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 167-68, 172 (2001); U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-34 (1985) [hereinafter Rapanos, SWANCC, and Riverside Bayview]).

<sup>ii</sup> Id.

<sup>iii</sup> Id. at 732.

<sup>iv</sup> Id. at 732-33.

<sup>v</sup> Id. at 742.

<sup>vi</sup> Id. at 724-725; Riverside Bayview, 474 U.S. at 132.

<sup>vii</sup> SWANCC, 531 U.S. at 167.

<sup>viii</sup> Rapanos, 547 U.S. at 734.

<sup>ix</sup> Id. at 767.

<sup>x</sup> See SWANCC, 531 U.S. at 172.

<sup>xi</sup> 33 U.S.C. § 1344(g)(1) (emphasis added).

<sup>xii</sup> Rapanos, 547 U.S. at 768.

<sup>xiii</sup> Rapanos, 547 U.S. at 759 (quoting SWANCC, 531 U.S. at 167).

<sup>xiv</sup> Id. at 782.

xv Id. at 809.

xvi Id. at 787.

xvii Id. at 755 (emphasis in original).

xviii Id. at 753-54 (citing Riverside Bayview, 474 U.S. at 134-35).

xix Id. at 755 (emphasis in original).

xx See Draft Scientific Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Section 6.1.

xxi Id.

xxii U.S. v. Morrison, 529 U.S. 598, 608 (2000) (quoting United States v. Lopez, 514 U.S. 549, 556-557 (1995)).

xxiii Id.