

October 14, 2014

Ms. Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Docket No. EPA-HQ-OW-2011-0880

Subject: Comments on Definitions of "Waters of the United States" Proposed Rule

Administrator McCarthy:

The National Association of State Conservation Agencies (NASCA) represents the State Agencies that are responsible for soil and water conservation programs and the administrative overview of a State's conservation districts. Along with the Natural Resources Conservation Service, conservation districts, landowners, and agricultural producers, our member State Agencies are directly responsible for implementing the majority of soil and water conservation best management practices on the nation's working lands. Our member agencies strive to execute missions similar to EPA's. Simply put, we work to enhance and protect our nation's waters and natural resources.

NASCA is grateful for the opportunity to comment on the "Waters of the United States" Proposed Rule, and we applaud EPA's decision to delay the comment period from July 21, 2014, to November 14, 2014. This extension allowed stakeholders critically needed additional time to analyze the proposed rule and to predict the effects, both positive and negative, of its implementation as it is currently drafted. We are appreciative of EPA's attempt to clearly define the "Waters of the U.S." Our comments that follow are intended to help your agency do that more clearly.

NASCA believes we can best protect our nation's natural resources through voluntary, incentive-based conservation programs and practices made available to owners and operators of our working lands. We concede there are times when laws, rules, and regulations must apply as well. However, we believe a regulatory enforcement approach should be limited to those situations when landowners and operators demonstrate a blatant disregard for the law.

We have discovered and demonstrated repeatedly that landowners will manage to superior levels of environmental achievement when engaged in incentive-based, voluntary programs. In contrast, we find that these same landowners are more likely to meet only minimum standards when exposed to a regulatory environment and subject to penalties for non-compliance. Because approximately 70 percent of the American landscape is privately owned, we recognize the vital role incentive-based voluntary conservation should assume. Therefore, we oppose any increase in regulatory jurisdiction that could occur as a result of the implementation of this proposed rule.



In those cases that mandate a regulatory approach, NASCA believes clear, concise, comprehensive language is critical to eliminate ambiguity in the minds of practitioners. Unfortunately, the proposed rule, as currently drafted, fails to provide this clear, concise, comprehensive language.

Our members work with all conservation stakeholders, from landowners to regulators. We have determined, through discussions with a plethora of stakeholders, that there is not a clear nor concise understanding of this proposed rule among members of the conservation community. It appears this lack of understanding extends to some in your own agency and to the U.S. Army Corps of Engineers (USACE).

Furthermore, NASCA believes that "other waters", as defined in the rule, should be considered non-jurisdictional. As written, the proposed rule requires a case-specific significant nexus evaluation to determine if such "other waters" are subject to Clean Water Act jurisdiction. Our member agencies have found that similar "case-specific" evaluations have taken, at a minimum, months to complete, and have unnecessarily delayed water conservation projects. This certainly is not the intent of the rule, but would undoubtedly be a consequence of moving forward with the proposed rule as currently written.

Additionally, our experience is both EPA and USACE regulatory programs implementation vary greatly from region to region. The proposed rule is fraught with ambiguity, and its implementation would rely heavily on subjective interpretation and analysis on the part of regulators. This approach fails to provide certainty to the regulated community and is thus inequitable and unreasonable for the owners and operators of America's working lands.

While NASCA applauds EPA's attempt to more clearly define "Waters of the United States," we believe the proposed rule falls well short of the test of being clear, concise, and comprehensive. Because the language in this proposed rule is ambiguous, and because its implementation would rely heavily on subjective analysis, we cannot support the rule as written and respectfully request that EPA withdraw this draft and restart the process with the goal of crafting language that clearly demonstrates EPA's intent.

Sincerely,

A handwritten signature in black ink, appearing to read "Shana Joy". The signature is fluid and cursive, with the first name "Shana" being more prominent than the last name "Joy".

Shana Joy
NASCA President