

## C O M M E N T S

# HOW THE TRUMP ADMINISTRATION EASED DESTRUCTION OF THE NATION'S WETLANDS AND STREAMS

by David Groves

*David Groves is Director of Business Development at The Earth Partners.*

On June 22, 2020, the Navigable Waters Protection Rule (NWPR) went into effect.<sup>1</sup> The NWPR is the most significant rollback of the jurisdictional scope of the Clean Water Act (CWA)<sup>2</sup> since its passage almost 50 years ago. Three days before its effective date, the U.S. District Court for the District of Colorado enjoined the rule in that state<sup>3</sup>; however, the NWPR is currently in place in all other jurisdictions.

Supported by the American Farm Bureau Federation, the American Petroleum Institute, and other development interests, the NWPR is based on Justice Antonin Scalia's plurality opinion in *Rapanos v. United States*,<sup>4</sup> arguing that federal jurisdiction is limited to "relatively permanent, standing or continuously flowing bodies of water" and wetlands that have a "continuous surface connection" to those waters. Since that ruling, no circuit courts have considered Justice Scalia's plurality opinion in *Rapanos* as solely controlling, but have instead followed Justice Anthony Kennedy's more expansive concurring opinion holding that federal jurisdiction also extends to waters that have a "significant nexus" to those described in the plurality opinion.

Given the interconnectivity of the wetlands and streams across the nation's landscape, and the intermittent and ephemeral nature of the majority of these waters, Justice Scalia's approach is not grounded in the scientific literature,<sup>5</sup> and will prevent the nation from achieving the goal described in the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>6</sup>

The U.S. Army Corps of Engineers (USACE) has not released any formal guidance documents for how it will implement the NWPR, leaving its interpretation up to the 38 individual USACE districts. However, with now more than six months of NWPR implementation, we are beginning to get a picture of the scale of the jurisdictional rollback and what it means for the quality of our water, the resiliency of our homes and infrastructure in the face of increasingly intense storm events and drought, and the viability of the countless commercially important species that rely on wetlands for survival.

## I. Impacts of the NWPR

The NWPR rolls back federal jurisdiction in three key ways:

(1) *Narrowly defines adjacent wetlands.* The USACE's post-*Rapanos* guidance,<sup>7</sup> based on Justice Kennedy's "significant nexus test," had been commonly interpreted by USACE staff to mean that a wetland must lie within the 100-year floodplain of a jurisdictional water to be considered "adjacent." However, the NWPR much more narrowly defines "adjacent wetlands" to be those that physically touch a navigable water or are connected through surface water in a "typical year," which is based on a 30-year rolling average of precipitation.<sup>8</sup>

Setting aside that in a rapidly changing climate—where Houston, Texas, has experienced five 500-year flood events in the past six years—the concept of a "typical year" seems impracticable, many USACE staff are now interpreting this new definition of adjacency to mean that a wetland must lie within the 10-year floodplain of a jurisdictional stream to be considered jurisdictional. To justify this course of

1. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).

2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

3. *Colorado v. U.S. Environmental Prot. Agency*, No. 20-cv-1461-WJM-NRN, 50 ELR 20151 (D. Colo. June 19, 2020).

4. 547 U.S. 715, 36 ELR 20116 (2006).

5. U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (FINAL REPORT) (2015) (EPA/600/R-14/475F).

6. 33 U.S.C. §1251.

7. U.S. EPA, USACE, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

8. 85 Fed. Reg. 22250, 22337, 22339 (Apr. 21, 2020).

action, some USACE districts cite studies<sup>9</sup> in their jurisdictional determinations that they say demonstrate how 10-year floodplain elevations are very similar to bankfull elevations (i.e., one-year floodplains).

In a practical sense, 10-year floodplains in many regions of the country are very narrow and only account for a small fraction of land within a watershed. For example, in southern Georgia, only 2.7 miles from the Okefenokee, the largest National Wildlife Refuge (NWR) east of the Mississippi River, Twin Pines Minerals (TPM) was planning to develop a titanium and zirconium mine across 12,000 acres—almost 19 square miles. The company had submitted a permit application for the first phase of the mine: a 2,414-acre tract that contains 587 acres of wetlands and 7,112 linear feet of streams.<sup>10</sup>

In February 2020, TPM withdrew its permit application. It later received a jurisdictional determination under the NWPR, where the USACE concluded that the many hundreds of acres of wetlands are nonadjacent to a navigable water and are no longer jurisdictional (and came to the same conclusion for all of the stream channels).<sup>11</sup> TPM is again moving forward with this project, despite its likely impacts to the hydrology of the neighboring Okefenokee NWR.

Likewise, one would intuitively expect that a tidal wetland, with estuarine characteristics due to its hydrologic connection to the ocean, would be considered adjacent to a navigable water and federally jurisdictional. However, some USACE districts have been determining that a three-foot-high dune is enough to sever a tidal wetland's adjacency, as was determined for 18 separate wetlands on Galveston Island that lie within 300 yards of the Gulf of Mexico. The USACE's jurisdictional determination for this project cites a pre-NWPR finding that all of those wetlands had been jurisdictional.<sup>12</sup>

Any amount of barrier between a wetland and river can be deemed enough to sever hydrologic connectivity under the NWPR. About seven miles north of Daytona Beach, Florida, a developer is creating a master-planned community on 3,000 acres called Ormond Crossings. The site has 145 acres of wetlands, all of which were determined by the USACE to be nonadjacent and thus non-jurisdictional, despite the entire site being in the floodplain of the Tomoka River.<sup>13</sup>

The USACE has determined that even entire basins, containing multiple lakes and streams, are non-jurisdictional if they have no regular connection to a navigable water. Ten miles north of Orlando, a developer requested a jurisdictional determination for a project that will create a hydrologic connection between two lakes. The USACE determined that these lakes lie within a roughly 10-square-mile basin bounded by four roads that does not have a hydrologic connection to any jurisdictional waters, thus making the entire basin nonadjacent.<sup>14</sup> The USACE reached this conclusion despite the fact that there are more than 25 separate lakes and ponds larger than an acre within the basin, and a named tributary, Soldier Creek, that drains much of the basin into the St. Johns River.

(2) *Categorically excludes ephemeral features.* Ephemeral streams are those that only flow after rain events. Such watercourses play critical roles for the health of our society and our economy—by dissipating stream energy during storm events to reduce erosion, by recharging groundwater, by storing and transporting sediment to aid in the maintenance of the floodplain, by storing and cycling nutrients, by providing wildlife habitat, and by filtering water to improve water quality.<sup>15</sup> Recognizing their value, the USACE did not previously separate out ephemeral streams from federal jurisdiction. However, the NWPR categorically excludes ephemeral features,<sup>16</sup> which can comprise more than 50% of all streams in a watershed.<sup>17</sup>

Excluding ephemeral streams from federal jurisdiction will create a disproportionate impact on the totality of the aquatic resources in most watersheds, since small headwater streams, many of which are ephemeral, have historically endured the bulk of impacts from development.<sup>18</sup> This is a function of project developers' incentive structures. In particular, the CWA §404(b)(1) Guidelines state that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge.”<sup>19</sup> The practicable alternative threshold is easier to meet when permanently impacting a large stream channel versus an ephemeral stream. Further, there are a range of engineering challenges when impacting a large stream channel compared to small ephemeral streams. As a result, developers are much more likely to avoid impacts to large streams but are less likely to design around small ephemeral features.

9. Qina Yan et al., *Hydrogeomorphological Differentiation Between Floodplains and Terraces*, 43 *EARTH SURFACE PROCESSES & LANDFORMS* 218 (2017).

10. USACE, Joint Public Notice re: Permit Application No. SAS-2018-00554 (July 12, 2019), [https://www.sas.usace.army.mil/Portals/61/docs/SAS-2018-00554-Charlton-0712-SP%20\(HAR\).pdf?ver=f5rVmOCO8G3YaqGMJfWJw%3d%3d](https://www.sas.usace.army.mil/Portals/61/docs/SAS-2018-00554-Charlton-0712-SP%20(HAR).pdf?ver=f5rVmOCO8G3YaqGMJfWJw%3d%3d).

11. USACE, Approved Jurisdictional Determination Form for ORM No. SAS-2010-00554-NWPR (HAR) (July 29, 2020), <https://www.sas.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Posted-Approved-JDs/Article/2386410/sas-2010-00554-nwpr-har/>.

12. USACE, Approved Jurisdictional Determination Form for ORM No. SWG-2018-00959 (July 29, 2020), <https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201800959.pdf>.

13. USACE, Approved Jurisdictional Determination Form for ORM No. SAJ-2008-04425 (June 10, 2020), <https://usace.contentdm.oclc.org/utlis/getfile/collection/p16021coll7/id/15241>.

14. USACE, Approved Jurisdictional Determination Form for ORM No. SAJ-2020-01345 (June 10, 2020), <https://usace.contentdm.oclc.org/utlis/getfile/collection/p16021coll7/id/15098>.

15. LAINIE R. LEVICK ET AL., *THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST* (2008) (EPA/600/R-08/134, ARS/233046), [https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral\\_streams\\_report\\_final\\_508-kepner.pdf](https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf).

16. 85 Fed. Reg. 22250, 22337 (Apr. 21, 2020).

17. LEVICK ET AL., *supra* note 15.

18. A review of ORM2 data from all USACE districts during fiscal year 2019 shows that 69.4% (2,802,965 linear feet) of authorized impacts were to small headwater streams, whereas 30.6% (1,237,053 linear feet) of impacts were to larger streams.

19. 40 C.F.R. §230.10(a) (2020).

To illustrate the extent of the jurisdictional rollback to streams, Chevron Phillips Chemical Company (CP Chem) is building a large industrial facility outside of Orange, Texas, near the Louisiana border that will destroy more than 24,000 linear feet—or more than 4.5 miles—of streams.<sup>20</sup> CP Chem had been planning to mitigate for these impacts elsewhere in the watershed. Once the NWPR went into effect, CP Chem requested a jurisdictional determination, and the USACE concluded that the project will only impact 3,000 linear feet of jurisdictional streams, an 88% reduction in needed mitigation.<sup>21</sup>

Another example can be found 25 miles northwest of Houston, where a master-planned community called Bridgeland is expanding onto a 4,240-acre tract. The USACE determined that 106,000 linear feet (over 20 miles) of ditches are non-jurisdictional due to their ephemeral nature. An additional 42 acres of wetlands were determined to be nonadjacent or are on prior converted cropland, making them non-jurisdictional as well.<sup>22</sup> This determination was made even though the perennial Cypress Creek, a primary drainage for floodwater in the Houston region, runs through the center of the tract.

It is worth noting that a primary goal of the Donald Trump Administration's promulgation of the NWPR was to reduce the need for development interests to obtain permits before impacting aquatic resources.<sup>23</sup> "Intermittent" and "ephemeral" streams had not previously been treated differently in the jurisdictional context. By separating out only ephemeral features from federal jurisdiction, the NWPR is ironically increasing the regulatory burden for developers, as there is no clear delineation between what is an intermittent versus an ephemeral stream.

In fact, a single stream can plausibly become ephemeral, intermittent, and back again several times over the landscape. Now the USACE is expected to make a determination on whether a stream is intermittent or ephemeral at various project sites, which is increasing the need for site visits and case-by-case determinations. A USACE staff member said that it is more labor-intensive to determine the difference between an intermittent versus an ephemeral stream than it was to apply the significant nexus test under the pre-NWPR regulatory regime.

(3) *Redefines prior converted cropland.* The U.S. Environmental Protection Agency (EPA) and USACE codified the exclusion of prior converted cropland (PCC) from

the CWA in a 1993 rulemaking.<sup>24</sup> The definition of PCC used in the 1993 rule came from the Natural Resources Conservation Service's 1988 National Food Security Act Manual,<sup>25</sup> which describes PCC as a wetland that "was sufficiently drained to support production of an agricultural commodity" prior to December 23, 1985 (the date of enactment of the Food Security Act of 1985).

The NWPR redefines PCC in the context of the CWA to now mean any land prior to December 23, 1985, that "was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible."<sup>26</sup> Changing the PCC definition from land that produces an agricultural commodity to land that supports agricultural products greatly expands the scope of PCC. The NWPR preamble provides land use examples that include grazing, haying, pollinator habitat, nutrient retention, and soil recovery.<sup>27</sup>

Small-scale grazing, where a landowner runs just a few head of cattle, is very common across much of the rural United States due to the beneficial tax treatment that land would then receive. Any land that contains wildflowers can be claimed as PCC, as it is providing pollinator habitat. A USACE staffer interviewed said that this change to the PCC definition could remove federal jurisdiction from "two-thirds, but more like three-quarters" of the entire state of Texas. Another said that now "word is getting out" that grazing makes land qualify as PCC, as USACE has seen a significant increase in jurisdictional determination requests making such claims.

The preamble to the 1993 rule describes how land will lose its PCC status and become federally jurisdictional again unless "[f]or once in every five years the area has been used for the production of an agricultural commodity."<sup>28</sup> The NWPR preamble effectively removes this requirement, as it states that "cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use."<sup>29</sup> Almost any land that was manipulated prior to December 1985 and remains undeveloped could now be exempt from federal jurisdiction.

As an example of this new PCC application, the same CP Chem project on the Texas coast referenced above, in addition to its stream impacts, will be destroying more than 280 acres of wetlands.<sup>30</sup> The project developers had been planning to mitigate for these impacts as well as the stream impacts; however, most of the wetlands are on land that has been used in the past for cattle grazing, although the jurisdictional determination states that many of these

20. USACE, Public Notice re: Permit Application No. SWG-2018-00957 (Dec. 4, 2019), [https://www.swg.usace.army.mil/Portals/26/docs/regulatory/PN%20Dec/PN\\_201800957.pdf?ver=2019-12-04-182056-067](https://www.swg.usace.army.mil/Portals/26/docs/regulatory/PN%20Dec/PN_201800957.pdf?ver=2019-12-04-182056-067).

21. USACE, Approved Jurisdictional Determination Form for ORM No. SWG-2018-00957 (July 29, 2020), <https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201800957.pdf>.

22. USACE, Approved Jurisdictional Determination Form for ORM No. SWG-2019-00446 (July 29, 2020), <https://www.swg.usace.army.mil/Portals/26/docs/regulatory/JDs/SWG201900446.pdf>.

23. Exec. Order No. 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (Mar. 3, 2017).

24. Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008 (Aug. 25, 1993), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi/200054D3.PDF?Dockey=200054D3.PDF>.

25. Natural Resources Conservation Service, National Food Security Act Manual (5th ed. 2010), <https://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=29340>.

26. 85 Fed. Reg. 22250, 22339 (Apr. 21, 2020).

27. 85 Fed. Reg. at 22326.

28. 58 Fed. Reg. at 45034.

29. 85 Fed. Reg. at 22320.

30. USACE, Public Notice re: Permit Application No. SWG-2018-00957, *supra* note 20.

fields have not been used for this purpose since 2004. Regardless, all but six of the 280 acres of wetlands on the site were just deemed non-jurisdictional, mostly due to the PCC exclusion.<sup>31</sup>

## II. Where Can We Go From Here?

Understanding the critical role of the nation's aquatic resources in maintaining our health and our economy, President George H.W. Bush articulated a goal of "no net loss" of wetlands. In his first 100 days in office, President Joseph Biden should issue an Executive Order rearticulating this no-net-loss national objective, so that we can once again move toward the goal that the U.S. Congress established in the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

President Biden should also instruct the U.S. Department of Justice to stop defending the NWPR in the many cases brought against it in federal courts, and federal attorneys should inform any relevant courts that the NWPR is under review.

USACE headquarters should send a regulatory guidance letter (RGL) to its 38 districts with NWPR implementation instructions. While terms are defined in the NWPR, it is always difficult to describe the wide array of

natural features across a landscape. This has the effect of giving USACE staff significant discretion. For example, a RGL from headquarters should instruct USACE staff how to apply the adjacent wetlands definition, and interpret it as any wetlands that are within the 100-year floodplain of a stream that is hydrologically connected to a navigable water. A RGL should also instruct USACE staff to interpret the phrase "for the purpose, or having the effect, of making production of an agricultural product possible"<sup>32</sup> to mean only for the production of an agricultural commodity.

Most important, President Biden should instruct his EPA Administrator and Secretary of the Army to immediately begin the process of repealing the NWPR, so that federal jurisdiction can return, as quickly as possible, to the pre-NWPR status quo, which is based on the 2008 *Rapanos* guidance and related documents.<sup>33</sup> President Biden should also instruct the EPA Administrator and Secretary of the Army to begin the process of issuing a new federal rule to codify the jurisdictional scope of the CWA that follows the science of the connectivity of our nation's waters, as described in EPA's meta-analysis of the literature on this subject.<sup>34</sup> The new rule should be consistent with Justice Kennedy's concurring opinion in *Rapanos* so that it is durable to future court challenges.

---

31. USACE, Approved Jurisdictional Determination Form for ORM No. SWG-2018-00957, *supra* note 21.

32. 85 Fed. Reg. at 22339.

33. U.S. EPA, 2008 *Rapanos* Guidance and Related Documents Under CWA Section 404, <https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents-under-cwa-section-404> (last visited Jan. 25, 2021).

34. U.S. EPA, *supra* note 5.