



# The U.S. Shorebird Conservation Partnership

*Building Collaborative Action for Shorebird Conservation*

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14 November 2014

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20310

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army, Civil Works  
108 Army Pentagon  
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Assistant Secretary Darcy:

The Council of the U.S. Shorebird Conservation Plan Partnership represents a broad collective of individuals, agencies, and organizations interested in the long-term conservation of North American-breeding shorebirds. A central goal of the U.S. Shorebird Plan is to “stabilize populations of all shorebird species known or suspected of being in decline due to limiting factors occurring within the U.S., while ensuring that stable populations are secure”. Because shorebirds depend on high-quality wetlands, particularly shallow wetlands, throughout their annual cycle, the primary purpose of the Clean Water Act, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”, has strong implications for the long-term conservation of migratory shorebirds, a Federal Trust Resource.

We understand the need for agencies to develop a clear and understandable rule that protects the Nation’s waters, and is supported by science and consistent with the law. To that end, we believe Ducks Unlimited (DU) has provided you with a substantiated, scientific response to the proposed definition for “Waters of the United States”. As well, DU’s comments offer an analysis of the legal, biological, and societal implications of the final rule. The U.S. Shorebird Conservation Partnership urges you to carefully consider the recommendations they provided.

The understanding of connectivity of wetland systems throughout the U.S. is still emerging, and we support DU’s recommendation for you to use a “weight of evidence approach” for evaluating the science of wetland connectivity. We found their presentation of Justice Kennedy’s example of the Gulf of Mexico hypoxia zone as strong evidence for carefully considering implications of wetland connectivity and downstream water quality. DU provides numerous suggestions on how to provide greater clarity to definitions of “adjacent waters” and “floodplains”, and we concur

with the idea, as supported by Justice Kennedy, of considering functional adjacency in defining the Nation's waters and not restricting the definition to physical proximity. We also support the recommendation of comprehensively mapping (a)(1) through (a)(3) waters to provide interpretive clarity. Mapping would also provide a basis for establishing a systematic approach to conducting significant nexus analyses for "other waters" on an ecoregional basis. More clarity should be provided in defining a significant nexus in the final rule, particularly when considering how cumulative impacts to "other waters", including geographically isolated wetlands, could affect downstream waters in the future.

The scientific literature clearly documents that many other wetlands and wetland subcategories falling within the proposed rule's "other waters" classification have similar types of significant nexuses with downstream navigable waters and should be designated as jurisdictional by rule. Abundant water resources not only support the economically important outdoor recreation industry, including hunters, anglers, and birders, but also alleviate economic burdens associated with the increasing frequency of damaging floods, harmful algal blooms, and environmental restorations. Additionally, surveys of the public from across the country demonstrate that a very large majority supports wetland conservation and clean water goals.

We realize a final rule must balance science and pragmatism such that the purposes of the Act are fulfilled and are consistent with the weight of the scientific evidence. The extent to which the final rule relies upon case-by-case analyses will be more impractical and costly for all entities, and perhaps open the door to increased litigation to dispute facts that are drawn and interpreted from various perspectives. In light of the extensive amount of science that demonstrates significant nexus for many classes of "other waters" within their regional contexts, designation as "jurisdictional by rule" will most often be more scientifically accurate than designation as "non-jurisdictional until determined to be so" via a case-specific significant nexus assessment that would suffer from the inherent shortcomings imposed by scientific and administrative realities.

We appreciate the opportunity to comment on the proposed definition of "Waters of the United States" and its impact on a Federal Trust Resource.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad A. Andres". The signature is fluid and cursive, written over a white background.

Brad A. Andres, National Coordinator  
U.S. Shorebird Conservation Partnership