



February 7, 2022

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Oceans, Wetlands, and Communities Division
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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Ms. Stacey Jensen
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for Civil Works
Department of the Army
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Washington, DC 20310-0104

**RE: Proposed Rule on the "Revised Definition of "Waters of the United States"
Docket No. EPA-HQ-OW-2021-0602**

Dear Ms. Christensen and Ms. Jensen,

On behalf of the National Waterways Conference (NWC), we respectfully submit comments on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively, the Agencies) proposed rule on the "Revised Definition of Waters of the United States," as published in the Federal Register on December 7, 2021 (Docket No. EPA-HQ-OW-2021-0602).

NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation's water resources infrastructure. Conference membership is diverse and includes the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Many of our members are non-federal sponsors on Corps projects, and own and maintain water and waterways infrastructure. A vast range of our members' activities are subject to Clean Water Act regulation. We are directly and significantly impacted by the Agencies' proposal to revise the definition of "Waters of the U.S." (WOTUS).

We share the agencies' goal of protecting water quality. Indeed, our members include public utilities who are responsible for delivering clean and safe drinking water for human consumption. At the same time, NWC has significant concerns about the proposed rule in its

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current form. Even though the proposed rule states its intent to revert to the 1986 WOTUS regulations, the rule contains significant amendments which change the scope of the 1986 rule. We are specifically concerned that agencies' proposal misconstrues the "significant nexus" test articulated in Justice Kennedy's concurring opinion in *Rapanos v. United States*¹ in a manner that expands Clean Water Act (CWA) jurisdiction beyond the intent of the 1986 WOTUS regulations. Furthermore, the proposed rule contains broad definitions of "adjacent," "tributary," and other terms. As a result, the proposed rule creates new, overly broad categories of jurisdictional waters that lack a significant nexus to traditionally navigable waters. In doing so, the proposed rule is counter to several Supreme Court decisions which ruled there is a limit to federal jurisdiction.

This letter will highlight a number of those concerns as they relate to the proposed rule:

- **The Clean Water Act and WOTUS are Inextricably Intertwined**
- **Supreme Court Decisions Should Inform the Final Rule**
- **The Proposed Rule Relies on the Terms "Significant Nexus" and "Relatively Permanent" to Change the Scope of CWA Jurisdiction**
- **Greater Clarity and Specificity for Key Terms Is Needed**
- **The Agencies Assert Jurisdiction Too Broadly Over Tributaries, Ephemeral Features, Ditches and Other Features**
- **The Agencies Need to Clarify that Water Supply, Flood Control and Stormwater Facilities and Infrastructure are Exempt from WOTUS**
- **NWC Supports Continued Exclusion of Prior Converted Croplands**
- **The Agencies Should Clarify Coverage of the Waste Treatment System Exclusion**
- **Proposed Rule's Economic Analysis Significantly Underestimates Costs**
- **Suspend Further Action Pending the Supreme Court's Decision in *Sackett v. EPA***
- **The Agencies Missed a Valuable Opportunity to Create Meaningful Dialogue with Stakeholders**

Many of our members within the water and waterways infrastructure space have submitted public comments on the proposed rule. We respectfully urge the Agencies to examine and consider these comments carefully as well.

¹ 547 U.S. 715 (2006).

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The Clean Water Act and WOTUS are Inextricably Intertwined.

Traditionally, regulation of “waters” focused on interstate commerce, such as the prohibition against obstructions to navigation found in Section 10 of the Rivers and Harbors Act of 1899.² In 1972, Congress enacted landmark legislation--the CWA--to set national standards for water quality in “navigable waters” which are defined as “the waters of the United States, including the territorial seas.”³ This reference to WOTUS helped differentiate between waters regulated at the federal versus state level, and it reflected the fact that Congressional authority to regulate WOTUS is rooted in the Commerce Clause of the United States Constitution. Subsequent agency implementation and litigation expanded CWA applicability well beyond traditional notions of navigability. The past several decades have seen a series of Supreme Court cases changing and shifting our understanding of the limits of CWA jurisdiction.

It is important to note that a change to the WOTUS definition impacts more than just the Section 404 permit program. It also would impact the National Pollutant Discharge Elimination System (NPDES); Total Maximum Daily Loads (TMDLS); State Water Quality Certification process, Spill Prevention, Control and Countermeasure (SPCC) programs; as well as other water quality standard programs, because there is only one WOTUS definition used for all CWA programs. Thus, the definition of WOTUS has important implications.

Within the domain of the CWA Section 404 permit program, the courts have generally noted that “navigable waters” goes beyond traditional navigable-in-fact waters. But the courts also have noted that there is a limit on federal jurisdiction. The precise contours of the Section 404 permit program have been subject to considerable swings and shifts in interpretation by the courts.

Supreme Court Decisions Should Inform the Final Rule.

The agencies state that the proposed rule is “informed” by U.S. Supreme Court’s decisions in several noteworthy cases that address the scope of waters protected by the CWA: *United States v. Riverside Bayview Homes (Riverside Bayview)*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, and *Rapanos v. United States (Rapanos)*.

² 33 U.S.C. § 403.

³ 33 U.S.C. § 1362(7).

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In *Riverside Bayview*, the Court upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.”⁴

In *SWANCC*, the Corps had used the “Migratory Bird Rule” to claim federal jurisdiction over an isolated, non-navigable wetland. The court noted that the word “navigable” in the CWA had been given limited effect, in the sense that the CWA could apply to wetlands and other waters that were not themselves navigable.⁵ However, the Court noted, “it is one thing to give a word limited effect and quite another to give it no effect whatever.”⁶ The court ruled that the Corps exceeded their authority because the water in question was too isolated from traditionally navigable waters (TNW) to fall under the regulatory framework provided by Congress under CWA.⁷

In the *Rapanos* case, the Supreme Court addressed the question of whether CWA jurisdiction extends to wetlands not “adjacent” to a navigable water. The opinions offered in this case included a four-member plurality opinion issued by Justice Scalia, a concurrence by Justice Kennedy, and a four-member dissent written by Justice Stevens, which may be summarized as follows:

- The Scalia plurality opinion found that “navigable waters” must be “relatively permanent, standing or continuously flowing bodies of water,” which does not include intermittent streams and tributaries that empty into navigable waters.⁸ In addition, wetlands must have a “continuous surface connection” to jurisdictional waters to be covered by the CWA.⁹
- The Kennedy concurrence established a “significant nexus” test. Under this test, for a water or wetland to constitute “navigable waters,” it must possess a “significant nexus” to waters that are or were navigable in fact (i.e., traditional navigable waters) or that reasonably could be so made.¹⁰ “[W]etlands possess the requisite nexus if

⁴ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

⁵ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’r*, 531 U.S. 159, 174 (2001).

⁶ *Id.* at 172.

⁷ *Id.* at 174.

⁸ *Rapanos v. United States*, 547 U.S. 715, 739 (2006).

⁹ *Id.* at 742.

¹⁰ *Id.* at 759.

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the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.”¹¹ In contrast, when “wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”¹²

- The Stevens dissent would have deferred to the Corps’ exercise of regulatory jurisdiction as applied in that case.

While the *Rapanos* decision has been the subject of extensive debate due to its 4-1-4 split, one aspect of the case is certain: it *limits* the agencies’ jurisdiction. Both the plurality opinion and the Kennedy concurrence agreed that the agencies had overstepped the regulatory authority available to them under the CWA. The only real question was how exactly to identify the limits of that authority. Whatever the best understanding of the *Rapanos* opinions may be, no reasonable interpretation of the case allows the agencies to expand their jurisdiction.

The Proposed Rule Relies on the Terms “Significant Nexus” and “Relatively Permanent” to Change the Scope of CWA Jurisdiction.

The proposed rule states that the Agencies are simply codifying the pre-2015 regulatory realm with the reinstatement of the 1986 WOTUS regulations.¹³ Additionally, the proposed rule says that the Agencies are “exercising their discretionary authority to interpret” WOTUS by incorporating the terms “significant nexus” and “relatively permanent” into the WOTUS definition, which were not a part of the original 1986 definition.¹⁴

Specifically, the proposed rule states that the Agencies propose to interpret the term WOTUS to include:

Traditional navigable waters, interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the

¹¹ *Id.* at 780.

¹² *Id.*

¹³ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372, 69,373 (Dec. 7, 2021).

¹⁴ *Id.*

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*relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” that meet either the relatively permanent standard or the significant nexus standard.*¹⁵

The proposed WOTUS rule hinges on a case (*Rapanos*) where there was no clear majority decision and by using a version of Kennedy’s significant nexus, mutes the intent of Kennedy’s concurrence opinion. The agencies’ interpretation of the Kennedy test in the proposed rule effectively reads the word “significant” out of the text. The adjective “significant” is essentially comparative in nature. For one thing to be significant, other things must be insignificant. But there is little indication in the rule what types of waters would be considered insignificant, which violates the intent of Kennedy’s “significant nexus” test.

Justice Kennedy clearly stated that a “mere hydrological connection should not suffice in all cases,” because “the connection may be too insubstantial for the hydrologic linkage to establish the required nexus.”¹⁶ He also stated that mere adjacency to a ditch described in the case was not sufficient to establish jurisdiction, because “a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flows towards it.”¹⁷ So the agencies will assert jurisdiction over waters that are remote, small in volume, and individually insignificant by amassing them with other waters the agencies may deem to be “similarly situated” in a watershed.

The Kennedy opinion refers to “similarly situated” wetlands in the context of discussing one possible component of the process of determining jurisdiction in some instances.¹⁸ However, that does not justify a finding of jurisdiction over a water that itself has only an insignificant nexus, regardless of what other waters may exist in other areas.

The Kennedy concurrence clearly envisioned that there are some waters with a hydrologic connection that nevertheless are not jurisdictional.¹⁹ By contrast, virtually *any* nexus could result in a finding of jurisdiction under the proposed rule. Virtually any discernible downstream

¹⁵ *Id.*

¹⁶ *Rapanos*, 547 U.S. at 784.

¹⁷ *Id.* at 786.

¹⁸ *See id.* at 779-80.

¹⁹ *Id.* at 784-85.

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effect—such as the retention of any amount of upstream drainage, or a function resulting in the addition of any substance that the agencies may deem to be a nutrient, sediment, or pollutant—could be sufficient to confer jurisdictional status. That is not a plausible interpretation of Justice Kennedy’s opinion.

Furthermore, the proposed rule disregards key aspects of Scalia’s plurality opinion, which held that WOTUS includes “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. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁰

The agencies’ departure from the Kennedy concurrence is most clearly apparent when comparing the proposed rule to Justice Kennedy’s instructions to identify impacts to the “chemical, physical, and biological integrity” of traditional navigable waters.²¹ Where Justice Kennedy uses the conjunction “and” to refer to all kinds of impacts collectively, the agencies substitute “or,” allowing the identification of any one term to claim jurisdiction. The result of the agencies’ wordplay is an undeniably and unequivocally broader test than that articulated by Justice Kennedy.

Recommendation(s):

- **Align the final rule with the intent of the *Riverside Bayview, Rapanos* and *SWANCC* cases** which state there is a limit to federal jurisdiction under the term “navigable waters” and the term navigable must be given import.
- **Remain within the limits established by *Rapanos*** by recognizing that *only* those waters that meet *both* the plurality and Kennedy tests can be deemed jurisdictional on the narrowest grounds on which the justices in *Rapanos* concurred in the judgment. In any event, in no way should the agencies implement an interpretation that results in extension of jurisdiction where the connection to a TNW is less than significant (regardless of whether there may be other, similarly situated waters within the same watershed).

²⁰ *Id.* at 739 (internal quotations and citations omitted).

²¹ *Id.* at 779-80.

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- **Confirm that TNWs** are limited to those waters traditionally understood to be navigable-in-fact waters.

Greater Clarity and Specificity for Key Terms Is Needed.

Under the proposed rule, tributaries of TNWs, interstate waters, including interstate wetlands, impoundments and territorial seas would be jurisdictional if they meet either the “relatively permanent” or the “significant nexus” test.²² However, it is important to note that the term tributary itself remains undefined, beyond the preamble which stated that tributaries include natural, man-altered or man-made waterbodies that flow directly or indirectly into a jurisdictional water listed above. Yet, the Agencies note that tributaries themselves need to be assessed on a case-specific basis to determine whether they meet the “relatively permanent” or the “significant nexus” test and notes that jurisdictional tributaries could include both intermittent (seasonally) flows as well as ephemeral streams if found jurisdictional under the significant nexus standard.²³

Under the proposed rule, “adjacent” means bordering, contiguous, or neighboring.²⁴ The rule goes on to state that “wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”²⁵ The plurality opinion in *Rapanos* noted that wetlands with “only an intermittent, physically remote hydrologic connection” to a WOTUS “lack the necessary connection to covered waters” to maintain jurisdictional status.²⁶ We are concerned that the agencies’ approach to determining adjacency again relies on vague and ambiguous criteria, which will result in inconsistent and unnecessarily stringent application in the field. In particular, where a wetland is not adjacent in the usual sense to a traditionally navigable water, but the agencies deem it to be jurisdictional based on some comparison to other, unconnected waters or using other criteria, it is hard to imagine a sufficiently significant nexus to a TNW for purposes of the *Rapanos* plurality or the Kennedy concurrence.

²² 86 Fed. Reg. at 69,373.

²³ *Id.* at 69,404.

²⁴ *Id.* at 69,428.

²⁵ *Id.*

²⁶ 547 U.S. at 741-42.

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This case-by-case determination, coupled with the “relatively permanent” or the “significant nexus” tests will significantly slow down reviews of projects in a time where both the Agencies and permit holders have limited funds and time to complete work in the timely manner.

Recommendations:

- **Redraft definitions with robust stakeholder input to ensure they are clear, concise and easy to understand.**
- **Clarify that adjacent wetlands are limited to wetlands that abut and have a continuous surface connection to a water that is otherwise jurisdictional under the CWA.**
- **Define Impoundments as an enclosure of a geographic area that encompasses a preexisting WOTUS (e.g., an artificial lake overlapping a stretch of a river), not an upland or isolated feature filled with water from a WOTUS (e.g., an isolated pond filled with water pumped from that river).**

The Agencies Assert Jurisdiction Too Broadly Over Tributaries, Ephemeral Features, Ditches and Other Features.

The plurality opinion in *Rapanos* expressed concern about the extension of CWA jurisdiction to “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.”²⁷ Justice Kennedy likewise was critical of agency practice allowing “wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it.”²⁸ As Justice Kennedy observed, CWA jurisdiction does not necessarily apply “whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters.”²⁹ Clearly, then, *Rapanos* provides a clear signal for the agencies to exercise restraint in attempting to regulate ephemeral features and ditches. The agencies’ proposal, however, moves too far in the opposite direction from the warnings provided in both the *Rapanos* plurality and concurrence.

²⁷ *Id.* at 734.

²⁸ *Id.* at 781.

²⁹ *See id.* at 778-79.

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NWC's members maintain a variety of infrastructure that work in direct service of both our members' activities and the public good. Ditches, trenches, and other conveyances may be necessary for important purposes such as irrigation and movement of water. Particularly in the arid West, it is necessary for some drinking water utilities to inundate certain areas when water is available to provide for groundwater recharge. Roadside ditches are ubiquitous and typically only carry water in response to precipitation, or water may stand for some period of time depending on how they are graded. Features of this nature generally provide little or no value for the communities of fauna and flora the CWA is designed to protect. Rather, they serve primarily agricultural, public utility, industrial, or other purposes geared toward meeting social or commercial needs. In areas like that, overregulation and vague standards that require expensive, specialized analysis add unnecessary cost and burden to activities that are useful, productive, lawful, and beneficial to society--with no commensurate environmental benefit.

For these reasons, we are concerned about the agencies' intent "to continue implementing the approach to ditches described in the *Rapanos* Guidance," which excluded ditches from jurisdiction only if they were excavated wholly in uplands and do not carry a relatively permanent flow.³⁰ We are concerned that this will result in an unnecessary expansion of jurisdiction over areas that provide little to no ecological services. This approach is contrary to the agencies' past practices³¹ and should be avoided.

Finally, we would emphasize again here the importance of clarity in the agencies' definitions. As federal agencies go, the Corps of Engineers is relatively decentralized. Standards that are ambiguous or vague can lead to disparate applications from district to district. Further, when the regulated community is uncertain, that leads to an unfortunate choice between spending money for environmental consulting services that are likely unnecessary or risking civil and even criminal liability if the regulations are later applied in an unforeseen manner.

Recommendations:

- **Confirm that most ditches are exempt** under the final rule.

³⁰ 86 Fed. Reg. at 69,433.

³¹ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States, 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980); Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

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- **Create a national map** that clearly shows which waters and their tributaries are considered jurisdictional.
- **Narrow the tributary category** to exclude ephemeral features.
- **Exclude ditches and conveyances** intended for public safety.
- **Provide a clear-cut exemption** for routine maintenance activities.

The Agencies Need to Clarify that Water Supply, Flood Control and Stormwater Facilities and Infrastructure are Exempt from WOTUS.

For nearly 40 years, the Agencies have excluded man-made water supply, flood control, and stormwater treatment infrastructure from the definition of WOTUS. The Agencies have done this on an “in practice basis” and since 2015, expressly via modification to the regulatory definition of WOTUS. This was reaffirmed in the 2020 WOTUS rule.

Since water supply, flood control and stormwater facilities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities would be classified as WOTUS under the proposed rule.

For example, under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into “waters of the U.S.” are required to obtain a permit for releases. While the system itself may not be a WOTUS, EPA has indicated there could be a WOTUS designation within a NPDES. This is especially relevant for governments that have a municipal separate storm sewer system (MS4; covered under NPDES), if a natural stream is channeled within a MS4. This designation could be interpreted to include the MS4 as a whole. This would mean that MS4 holders would be responsible not only for the pollutants that leave the system, but also when a pollutant enters the system.

Moreover, Section 402 NPDES permit holders are often required to treat the water before it is released into a WOTUS. However, treatment of water is not allowed within a WOTUS. This automatically sets up a conflict between the requirements of the NPDES and the WOTUS. If part of the NPDES system is deemed a WOTUS, how could treatment occur within the system?

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Furthermore, water supply, flood control, and stormwater infrastructure uses construction detention and retention basins constructed on dry land for overflow flooding, water recycling, groundwater recharge basins, and percolation ponds. These features collect water, which then absorbed slowly into groundwater. Both the 2015 and 2020 WOTUS rules explicitly exempted these activities.

Recommendations:

- **Confirm that ditches cannot be both a WOTUS and a point source at the same time.**
- **Exempt the following water supply, flood control, and stormwater infrastructure:**
 - **Water storage, conveyance and treatment systems, including terminal reservoirs, aqueducts, canals, ditches, storage ponds, and treatment ponds;**
 - **Groundwater recharge, water reuse, and wastewater recycling infrastructure, including detention, retention, and infiltration basins or ponds; and**
 - **Stormwater control systems** constructed to convey, treat, infiltrate, or store stormwater, including low impact development projects and stormwater capture and use projects.

NWC Supports Continued Exclusion of Prior Converted Croplands.

The agricultural community has long relied on the exclusion from prior converted cropland as long as a given area remains under cultivation and wetland conditions have not returned. In our view, the 2020 Navigable Waters Protection Rule (NWPS) represented a laudable effort to provide clear guidance for rural landowners. We encourage the agencies to consider implementing a similar approach.

Recommendations:

- **Withdraw the 2005 Joint Guidance and any other guidance** that is inconsistent with the 1993 regulations.

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- **Confirm that an affirmative determination of prior converted cropland status** is not determinative of jurisdictional status.
- **Provide a bright-line rule that prior converted cropland status** remains valid so long as the land is used for agricultural purposes at least once in the preceding five years.

The Agencies Should Clarify Coverage of the Waste Treatment System Exclusion.

The 2020 Navigable Waters Protection Rule took the welcome step of codifying existing practices and clarifying the scope and applicability of the exclusion from CWA jurisdiction for waste treatment systems. We appreciate and support the agencies' declaration of intent to "retain the waste treatment system exclusion from the 1986 regulations" in the current proposed rule.³²

The agencies have proposed two administrative revisions, which we support. First, the agencies proposed to remove an obsolete reference to waste treatment systems created in areas that were not previously jurisdictional.³³ Language on that issue has been suspended since 1980 and has essentially never been effective. We agree with the decision to update the regulatory text to reflect the reality that the features that may have existed prior to the construction of a waste treatment system do not have a bearing on current CWA applicability. Second, the agencies also proposed to delete an obsolete reference to a definition for cooling ponds at § 423.11(m), which is inaccurate in that the definition does not exist.³⁴ We concur in that proposed action and urge EPA to state clearly that the waste treatment system exclusion applies to cooling ponds. We also urge the agencies to clarify that the exclusion applies to zero-discharge systems that typically recycle water instead of discharging treated wastewater.

The agencies should take this opportunity to clarify that the waste treatment exclusion does not cease to apply when the closure process for a waste treatment system begins. For example, many ash ponds at power plants are in the closure process under EPA's regulations for coal combustion residuals (CCR) at Part 257, Subpart D, or soon will be. The closure process is regulated in detail under the CCR rule, which ensures an opportunity for EPA (or state agency) oversight. EPA has not suggested in that context or in this proceeding that a 404 permit is or

³² 86 Fed. Reg. at 69,426.

³³ *Id.* at 69,427

³⁴ *Id.*

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should be required for earth-moving activity inside the footprint of the unit, such as excavation and redeposition of ash into a stable configuration to support installation of the protective cap. However, the agencies' preamble includes vague language about the potential consequences if the system is "abandoned or otherwise ceases to serve the treatment function for which it was designed." We urge the agencies to clarify that waste facilities remain within the exclusion when they transition in status from operations to closure and post-closure. Such facilities would, of course, continue to remain regulated under other applicable authorities, such as the closure provisions of the CCR rule and CWA permitting for any discharge of treated wastewater to a jurisdictional water. Imposition of a 404 permitting obligation on top of that would serve no ecological purpose and would only add to the administrative burden on the agencies and the owner-operator of the unit.

Recommendations:

- **State that waste facilities remain within the exclusion when they transition in status** from operations to closure and post-closure.
- **Clarify that the WOTUS exclusion** also applies to cooling ponds, as well as zero-discharge systems that typically recycle water instead of discharging treated wastewater.

Proposed Rule's Economic Analysis Significantly Underestimates Costs

The agencies' cost-benefit analysis of the proposed rule significantly underestimates potential costs and, in fact, estimates that the rule would have "zero impact" since the calculation is based on CWA's Section 404 dredge and fill permit program.³⁵ Additionally, the document states that the Agencies were only able to use one year of CWA 404 data to determine potential costs.³⁶ We believe this calculation is in error, especially since the economic analysis states that, "There are uncertainties associated with both the estimation of benefit and cost estimates" due to lack of data.³⁷

³⁵ EPA & Dep't of the Army, Economic Analysis for the Proposed "Revised Definition of 'Waters of the U. S.'" Rule, at ix (Nov. 17, 2021).

³⁶ *Id.*

³⁷ *Id.*

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The choice to focus on Section 404 permitting activity over the course of one year may introduce another bias. Since the WOTUS definition has changed several times in the past seven years, it is impossible to speculate if the year chosen faced higher (or lower) project costs compared to other years, as well as jurisdictional determinations delays, which may have delayed costs. Additionally, jurisdictional determinations may have fallen at a greater rate due to the changing WOTUS definitions.

The agencies' chosen baseline to measure economic effects does not reasonably represent a normal level of permitting activity for purposes of evaluating the proposed rule's economic impact. The economic analysis is therefore fundamentally flawed.

Recommendation:

- **The Agencies should undertake a more detailed and comprehensive analysis** on how WOTUS definitional changes will directly and indirectly impact all CWA programs.
- **Work with water and waterways stakeholders to compile up-to-date cost and benefit data** for all CWA programs.

Suspend Further Action Pending the Supreme Court's Decision in *Sackett v. EPA*.

On January 24, 2021, the U.S. Supreme Court announced that it would revisit *Sackett v. EPA*, No. 21-454, a decade after it first reviewed the case.³⁸ *Sackett* asks the court to review its 4-1-4 ruling in *Rapanos v. United States*, which resulted in two competing tests for defining WOTUS (discussed more below in the section on "Supreme Court Decisions and WOTUS").³⁹ Through *Sackett*, the court will assess the limits of federal authority over wetlands and other waterways.

Whatever the Court may say about the extent of CWA jurisdiction will be controlling. Unless the agencies guess exactly right and issue a rule that perfectly aligns with the Court's rationale, it is possible and perhaps probable that another rulemaking will be necessary after the Court issues a decision in this case. To continue with this proposal only to redo the entire exercise a short time later is a waste of the agencies' resources. Such a course also would add needless unnecessary burdens to all those who review the agencies' proposals, conduct research and

³⁸ *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), cert. granted, No. 21-454 (U.S. Jan. 24, 2021).

³⁹ *Id.*

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analysis to anticipate potential effects, and draft comments. We urge the agencies to wait and see what the Court does, at least as to those issues potentially implicated by the case.

Recommendation:

- **NWC supports the Agencies intent to craft a durable WOTUS definition and urges the Agencies to wait to issue a final rule until after *Sackett* is decided by the Supreme Court.**

The Agencies Missed a Valuable Opportunity to Create Meaningful Dialogue with Stakeholders

Due to all of the reasons listed above, NWC, as well as other stakeholder groups, requested that the Agencies extend the public comment period beyond 60 days for this proposed rule. This request was denied. This is puzzling since the proposed rule is more than just a simple reinstatement of the 1986 regulations. Even the Obama Administration provided 207 days in total to comment on the 2015 WOTUS rule. Even if the Agencies do believe this is a simple recodification of 1986 WOTUS regulations, which it is not, if the Agencies truly want to create a workable and durable rule, robust and thoughtful public comments are needed. 60 days to review a complex rule, plus the 100-plus documents uploaded to the docket, does not give the regulated public adequate time to review and analyze potential costs as well as benefits to the proposal. The Agencies should respect the calls asking for more time.

Recommendation:

- **Extend the current WOTUS proposed rule public comment period a minimum of 90 days to allow for thoughtful analysis and comments on potential costs as well as benefits.**

Conclusion

In summary, NWC urges the agencies not to finalize the rule as proposed. The proposed rule exceeds the proper scope of the agencies' authority as provided by the CWA and subsequently clarified by the courts. Most fundamentally, the Kennedy concurrence in *Rapanos* requires the establishment of a "significant" nexus to traditionally navigable waters. The proposed rule exceeds Justice Kennedy's instructions and would assert jurisdiction on the basis of other types of connections.

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We urge the agencies to reconsider and adopt a more reasonable construction of the Kennedy concurrence and narrower definitions of several key terms.

Thank you for the opportunity to provide these comments. Please feel free to contact me if I may provide additional information.

Sincerely,

A handwritten signature in black ink that reads "Julia A. Ufner". The signature is written in a cursive style with a large, flowing "J" and "U".

President and CEO
National Waterways Conference