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RE: Response to Proposed Revisions to the Definition of Waters of the United States, 86 *Federal Register*, 69,372 (Dec. 7, 2021); Docket ID No. EPA-HQ-OW-2021-0602

Dear Mr. Christensen and Ms. Jensen:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) (jointly, the agencies) request for public comment on proposed revisions to the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA) (the "proposal"). The definition of WOTUS directly affects permitting programs that cover activities that AGC members perform while constructing projects of all types.

AGC is the nation's leading construction trade association. It dates to 1918, and it today represents more than 27,000 member firms representing construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing developments.

The precise definition of WOTUS—which dictates the scope of the federal control and CWA permitting responsibility as well as enforcement jurisdiction—is of fundamental importance to the construction industry. AGC members perform many construction activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Construction work that involves the discharge of dredged material or the placement of fill material in a WOTUS cannot

legally commence without authorization from the federal government, which takes the form of a CWA Section 404 permit (and may require additional permissions and reporting duties under other CWA programs). Therefore, changes to CWA regulations, case law, and resultant guidance throughout the years have invariably affected our members' ability to secure financing and approval to construct new projects or maintain existing infrastructure and facilities across the nation.

Construction is an essential industry and a vital partner to the Biden Administration's goals to "Build Back Better," improve the resilience of our communities and infrastructure, modernize our public and private spaces to increase efficiency, and build safe and healthy communities.

The proposed rule runs contrary to the Administration's goals: it magnifies uncertainty, cost, and red tape for projects large and small that are vital to communities. For example, the agencies expand the use of the "significant nexus test" (for federal jurisdiction) and suggest they can take a regional or landscape approach to aggregate waters to determine impacts to navigable waters (see discussion in section III.B below). The practical implications of these changes will be that most permit applications will choose to concede jurisdiction and secure a federal CWA Section 404 permit on top of meeting their state and local rules/permits. The necessity of obtaining a federal CWA permit will increase the regulated community's compliance burden and cost for needed projects within the community and it will have a significant economic impact on small businesses that make up the bulk of the construction industry.

The industry makes a large contribution to the nation's economy and mainly comprises small businesses. In 2021, construction spending totaled nearly $1.6 trillion. The industry employed more than 7.4 million employees. Construction jobs pay well: hourly earnings for production and nonsupervisory employees in construction, mainly hourly craft workers, averaged $30.48, which was 18% more than the average for the overall private sector. Construction is a major buyer of U.S.-made materials and machinery. In 2021, U.S. manufacturers' shipments of construction materials and supplies totaled $679 billion or 11% of total U.S. manufacturing shipments. Shipments of construction machinery, mostly to the domestic construction industry, totaled $38.5 billion, or 9% of total U.S. machinery shipments. Construction firms are overwhelming small businesses. In 2018, the latest year available, there were 719,000 construction firms with employees, of which 659,000 or 92% had fewer than 20 employees. More than 99.8% of construction firms had fewer than 500 employees.[1]

AGC argues below how this proposal will be specifically challenging to small businesses by adding undue regulatory uncertainty and costs. Under the Regulatory Flexibility Act, Small Business Regulatory Enforcement and Fairness Act, EPA and the Corps are required to consider the impact on small businesses concerning their proposed changes to the definition of WOTUS and provide recommendations on regulatory alternatives to minimize the burden to businesses, organizations and governmental jurisdictions subject to the regulation. (as described further in the Waters Advocacy Coalition comments in this docket).

[1] See AGC Web site at https://www.agc.org/learn/construction-data.

I. INTRODUCTION

The CWA grants EPA and the Corps jurisdiction over "navigable waters," defined as "Waters of the United States" (WOTUS) without further clarification. Both federal agencies and courts have long struggled to define WOTUS resulting in confusion over which waters are regulated by the federal government and leaving other waters to the purview of state and local governments for protection. The CWA, as amended in 1972, focuses on eliminating discharges of pollution to navigable waters and recognizes the importance of protecting the primary responsibilities and rights of the states in pollution prevention and in the use of land and water resources.[2] Subsequently, the agencies have expanded that jurisdiction, and case law has at times either supported or halted that expansion—sometimes with conflicting opinions. For example, in *Riverside Bayview*[3] the U.S. Supreme Court affirmed that adjacent wetlands are included in the definition of jurisdictional water; however, in *SWANCC,*[4] the Court cautioned that the term "navigable" cannot be read out of the [CWA]; and in *Rapanos,*[5] that water must be "relatively permanent surface water" or there must be a "significant nexus" for a non-navigable water to be regulated—not a mere hydrologic connection.

Three regulatory regimes have applied over the last seven years alone. In 2015, EPA and the Corps finalized a definition (Clean Water Rule: Definition of "Waters of the United States" or the "2015 WOTUS Rule") that expanded federal jurisdiction over water and wetlands to encompass features that are dry most of the year and isolated and far removed from any traditional navigable water. Legal action halted the rule's implementation. In 2017, the agencies began a multi-year process to repeal the 2015 WOTUS Rule and revise the definition of WOTUS—culminating in the Navigable Waters Protection Rule (NWPR) in 2020. The 2020 rule survived multiple legal challenges (that sought a nationwide injunction without success) before a vacatur by a district court that did not judge the rule on its merits. No court currently holds that the agencies' 2020 WOTUS rule is unlawful based on an evaluation of the merits. However, due to the change of administration, the agencies requested a voluntary remand to take another run at defining WOTUS. In June 2021, the Biden administration announced it had already decided to repeal and replace the 2020 rule citing unconfirmed examples of environmental harm. AGC and others in the regulated community carefully and closely examined these examples and they do not hold up under scrutiny. Several of the examples the agencies included even provided environmental benefits including culvert replacements, stormwater controls, etc. Instead of documented cases of environmental harm, it was a list of projects that did not require permits under the NWPR (as discussed more fully in the Waters Advocacy Coalition comments in this docket).

Currently, the 1986/1988 regulations and relevant guidance[6] apply nationwide due to the aforementioned vacatur. This regulatory framework, however flawed, is widely considered the status quo. In this comment letter, AGC describes the "status quo" as the 1980's regulations

[2] CWA, Oct 18, 1972, Title 1, Section 101(b).
[3] 474 U.S. 121 (1985).
[4] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).
[5] *Rapanos v. United States*, 547 U.S. 715 (2006).
[6] The Corps' regulations from 1986 as well as EPA's regulations from 1988 and guidance such as the 2008 Rapanos-Carabell Guidance.

and relevant guidance. The agencies tend to refer to this set of requirements similarly or as the pre-2015 regulations.

After conducting a brief public outreach effort on the issue of jurisdiction in general, the agencies published for public comment the current proposal to revise the definition of WOTUS as a temporary measure while the agencies work on further revision to the definition in 2022—on which they are also seeking preliminary feedback through regional roundtables. This comment letter is in response to the current proposed revisions: which if finalized would be the fourth "WOTUS rule" in place over a seven-year period. The additional revision planned for 2022, which the agencies intend to be a "durable definition," would be the fifth rule in place since 2015.

AGC urges the agencies to withdraw this proposal. As discussed further in this letter, the proposal is unnecessary, distorts the baseline of the status quo,[7] and extends jurisdiction beyond the Congressional intent and Supreme Court decisions. **To be completely clear, this proposal goes well beyond what is necessary to achieve the agencies' goal[8] of returning to the pre-2015 regulatory framework before starting work on a new rule. The agencies are voluntarily choosing to put in place a controversial and expansive revision, which will be a purely temporary measure before again revising the definition of WOTUS later this year.**

A recent development in the courts further highlights the need to withdraw this controversial and expansive proposal. On January 24, 2022, the Supreme Court granted *certiorari* on the *Sackett*[9] case that will address the governing test of jurisdiction in that case. This case is expected to reduce some of the ambiguity and confusion following *Rapanos* and how to reconcile the majority and concurring opinions ---something lower courts and the agencies have struggled to understand. The agencies should withdraw this proposal until the Supreme Court provides further clarification on the very tests the agencies are once again struggling to interpret. This proposal and the subsequent rulemaking the agencies are working on will require revision following the Supreme Court's review of the *Sackett* case. Meaning that the public could be looking at not just the fourth and fifth redo of WOTUS already in the works, but a subsequent revision to follow shortly after.

[7] As discussed throughout this comment letter, the agencies refer to the proposed action as merely codifying the "status quo" when in fact the proposal expands federal jurisdiction beyond the status quo (pre-2015 regulatory framework, i.e., the 1980s regulations and relevant guidance). By insisting the status quo is unchanged, the agencies are creating confusion over the true impact of the proposed action as well as what baseline will apply in the future when they make further changes ---which they plan to do again in 2022.

[8] "[T]he agencies' intent [is] to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and anticipates developing a new rule that defines WOTUS and is informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule." June 9, 2021 Joint Statement on Intent to Revise Definition of WOTUS, online at: https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[9] *Sackett v. U.S. Environmental Protection Agency, 19-35469*, on appeal from the U. S. Court of Appeals for the Ninth Circuit.

II. AGC'S ENGAGEMENT ON THE DEFINITION OF WOTUS

AGC has long been engaged in the agencies' efforts to define what WOTUS means under the CWA, including submitting formal comments on the agencies' advanced notice of proposed rulemaking in 2003, draft agency guidance following a series of court cases in the early 2000s, as well as several related efforts in this decade to redefine jurisdiction.

AGC includes, by reference, prior recommendations the association submitted individually and jointly with other organizations as the insights contained within will help answer the agencies' questions in the preamble to this proposal. Recognizing that this proposal signifies a sharp departure from the status quo and seeks to implement controversial and incorrect interpretations of U.S. Supreme Court decisions, AGC's prior responses to agencies' efforts related to WOTUS remain relevant. The current proposal also asks multiple questions on how the agencies should interpret and implement relevant case law and brings in flawed concepts that the agencies have explored in the past—such as aggregating waters.

AGC's comment letters on the draft guidance in 2011 (joint comments[10]) and on the proposed rule in 2014 (joint[11] and individual[12] comments) are particularly relevant to interpreting case law and meeting judicial constraints. The agencies should refer to the analysis in those documents when accounting for the majority and concurring opinions of relevant case law. These prior comment letters challenge the agencies' past interpretations and definitions of the terms "tributary," "significant nexus," "adjacent waters," and "other waters." In particular, AGC's comments on the 2014 proposal and comments[13] in support of the prior administration's proposed recodification of pre-existing rules provide insight specific to the construction industry members' concerns with agency efforts to determine jurisdiction. AGC would also point the agencies to its comments providing preliminary feedback to the agencies ahead of the last revision to the definition[14] and later

[10] Waters Advocacy Coalition, Comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act, (July 29, 2011), Docket ID No. EPA-HQ-OW-2011-0409 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0409-3514.

[11] Waters Advocacy Coalition, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014, corrected November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-17921; Federal Stormwater Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-15161; and the Coalition of Real Estate Associations, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-5175.

[12] AGC of America, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14602.

[13] AGC of America, Comments on the Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules, (September 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-10460; and Waters Advocacy Coalition comments (September 27, 2017) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-11027.

[14] AGC of America, Response to request for recommendations to revise the definition of "Waters of the United States" under the Clean Water Act, (Nov. 28, 2017) Docket ID No. EPA–HQ–OW–2017–0480 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0480-0632.

in support of the 2020 NWPR[15]—which appropriately balanced policy and the scientific data. Lastly, AGC references its comments[16] in response to the agencies' request for preliminary feedback on what would constitute a durable definition of WOTUS in the summer of 2021.

Furthermore, AGC is a member of the Waters Advocacy Coalition (WAC or Coalition) and incorporates by reference the comments submitted on behalf of WAC members to this docket. The Coalition comments provide a thorough analysis and discussion on key concerns related to this rulemaking, including the agencies—

- Misunderstanding of the limits of Congress's commerce power;
- Infringement on State and local authority over waters;
- Flawed reading and application of relevant case law;
- Misuse of the term "more than speculative or insubstantial" to mean "significant" – which is more correctly defined and understood as "important;"
- Departure in this proposal from the status quo and the leaps in federal jurisdiction, especially regarding the regional or landscape approach, and the application of the relatively permanent and significant nexus tests to other waters;
- Problematic "either/or" approach to the relatively permanent and significant nexus tests;
- Amorphous interpretation of relatively permanent that can sweep ephemeral features into jurisdiction;
- Problematic assertion that the very "lack of connection" of ephemeral, isolated features in itself can make those features significant for purposes of federal jurisdiction;
- Ignoring the importance of volume, duration, and frequency of flow related to ephemerals, especially in the arid West;
- Lack of discussion on the impact to other sections of the CWA;
- Ignoring of the burden that expanded jurisdiction will bring to states for setting water quality standards, administering stormwater permits, fulfilling water quality certifications, etc.;
- Deficiencies in the economic analysis;
- Lack of discussion on impacts to mitigation banking availability;
- Insufficient outreach to small businesses that will be impacted by the proposed changes;
- Insufficient time for the public to comment in general and especially when compared to that provided during recent rulemakings in this area; and
- Misrepresenting environmental harm with the 2020 rule, among other points.

[15] AGC of America, Response to Proposed Revisions to the Definition of Waters of the United States, (April 15, 2019); Docket ID No. EPA-HQ-OW-2018-0149 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6859; the Waters Advocacy Coalition comments (April 15, 2019) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6849; and Federal StormWater Association comments (April 15, 2019) online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6877.

[16] AGC of America provided verbal remarks at the public hearing (August 31, 2021) on Pre-Proposal Recommendations on the Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0328; and Waters Advocacy Coalition comments (September 3, 2021) on the same online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0316.

III. AGC'S TOP CONCERNS WITH THE PROPOSAL

A. The Proposal Changes the Status Quo and Creates Further Regulatory Uncertainty

This proposal does not simply restore the protections in place prior to the Obama-era 2015 Clean Water Rule (the "status quo"), updated to reflect consideration of Supreme Court decisions, which is how the agencies have represented this action publicly. The preamble states:

> While the 1986 regulations are a reasonable foundation upon which to build the proposed rule, the agencies are exercising their discretionary authority to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States" informed by Supreme Court decisions as discussed in section V.A.3 of this preamble.[17]

Rather, AGC maintains that the proposal is a significant and unnecessary departure from the pre-2015 definition of WOTUS (1980s regulations). It would impose a new, revised definition of WOTUS on the regulated community temporarily while the agencies work on another revision. As discussed in the sections below, the proposal is in fact more expansive than the 1980s regulatory framework and guidance. This is especially problematic for the small businesses that dominate the construction industry as it will necessitate more federal CWA permits on projects, adding to the compliance burden and cost. The agencies do not need to take such a drastic step with this proposal, there is precedent for restoring the status quo that the agencies could follow.

The agencies pose multiple questions on implementation and alternatives, propose new definitions, explore using a landscape approach to aggregate waters, and seek to apply the significant nexus test to the "other waters" category for the first time. We discuss many of these changes in the subsequent section. Any of these changes, if finalized, would drastically alter the way the agencies have considered jurisdiction in the past. If this proposal were merely codifying the existing status quo, then the agencies would not need to ask approximately 100 questions on how they should implement the proposal and/or further change it. The breadth and nature of these questions seem intended to protect the agencies from "logical outgrowth" challenges if the final version is vastly different from the proposal. However, the expansiveness of the agencies' request implies the sky is the limit for this version and the next—more aptly suited for an advanced notice of proposed rulemaking or a docket to receive preliminary feedback on the second anticipated rule, not a return to the status quo. As the preamble states:

> Through this rulemaking process, the agencies will consider all public comments on the proposed rule including changes that improve clarity, implementability, and long-term durability of the definition. The agencies will also consider changes through a

[17] 86 Fed. Reg. at 69,390.

> second rulemaking that they anticipate proposing in the future, which would build upon the foundation of this proposed rule.[18]

Furthermore, the significant nexus standard that would be established by the proposal is new and an expansion in jurisdiction. It also is not the status quo. AGC is especially concerned about how ephemeral features, stormwater controls, water-filled depressions, and ditches will fare under this new standard -- as discussed below in subsequent sections. The impact on the members of the public from this change alone will be significant as more projects will require federal CWA permits. The issue of jurisdiction does not only impact the large projects that make the news. Large and small projects that could materially benefit the community from homes, schools, and shopping centers to public works would have to undergo an intense analysis---not only of their own properties but for an undefined reach beyond their property lines.

Continued regulatory uncertainty is challenging for AGC's small business members. As small businesses are reacquainting themselves with the 1980s regulatory framework and relevant guidance following the recent vacatur of the 2020 rule, AGC is concerned that the agencies are embarking on what would be the fourth set of rules the regulated community will have had to implement in seven years with a fifth rule also expected to be proposed in 2022. The change is dizzying. Following the vacatur of the 2020 rule, the uncertainty for work on public and private property is necessarily heightened. The Corps has also recently announced that the public cannot rely on jurisdictional determinations under the 2020 rule. As mentioned above, whatever rule the agencies eventually put in place will need to be revised again after the U.S. Supreme Court has issued a decision on the *Sackett* case expected later this year or early 2023. AGC advises the agencies to avoid adding even more uncertainty and controversy into the mix. The proposal in its current form is not necessary to meet this Administration's policy goals and only adds confusion.

The principle of due process applies at the most basic level: the public needs to understand what the law is. Except for a brief period during when the NWPR was in effect, AGC has had to begin each discussion with our members related to WOTUS with a summary of where we are in the process and a reminder of which rule applies and where in the country. Our members have expressed frustration at the continual tug of war between federal and state CWA jurisdiction that has extended for decades. They mention that this confusion and uncertainty will often cause project teams to just default to assuming jurisdiction: adding cost simply to avoid the considerable time that can be spent trying to figure out jurisdiction. And although there is a need for "clear rules" and a "durable definition," this proposed rulemaking is not "it" ---and the agencies do not pretend as much. Which begs the question of why they are proposing to make such sweeping changes at this stage in the process.

Deficient Small Business Review and Economic Analysis

The agencies continue to misrepresent this action as merely reinstating the status quo and in doing so have not engaged in thorough small business review nor does their economic analysis reflect the

[18] 86 Fed. Reg. at 69,374.

breadth of changes. The agencies held a meeting for small businesses on August 25, 2021, during its brief outreach to stakeholders on what an enduring definition of WOTUS should consider. The agencies have also certified that the proposal does not need to go through the Regulatory Flexibility Act (RFA) Small Business Regulatory Enforcement Fairness Act (SBREFA) process. Furthermore, their economic analysis shows only *de minimis* impacts for stakeholders with a cost and benefit impact of "zero."[19] Given the change present in the proposal and the potential for greater change should the agencies accept some of the other out limits of alternatives on which they have requested comment, a SBREFA panel is warranted as is a more thorough economic analysis. The Waters Advocacy Coalition comments in this docket go into more detail on both issues including a review of the agencies' economic analysis.

A Framework Exists for Restoring the Status Quo

The agencies could have reinstated the established status quo (the 1980s regulations and guidance) if they simply wanted a rule "on the books" in place of the 2020 rule. The regulatory framework exists. And the strategy has been employed in the recent past to help avoid confusion during an administration's changing of policy. Instead of simply reinstating the status quo temporarily as they work on an "enduring definition" of WOTUS in 2022, the agencies have chosen to change the status quo and insert their current and controversial interpretations of Supreme Court rulings creating an intentionally temporary and hybrid rulemaking.

B. The Proposal Expands the Reach of Jurisdiction

In the proposal, the agencies expand jurisdiction by applying the significant nexus standard to similarly situated or aggregated waters, elevating biological impacts, and extending jurisdictional tests to the "other waters" category. The agencies have repeatedly crossed the lines of their authority, as they do in this proposal. And although the U.S. Supreme Court decisions of the last couple of decades have created confusing tests for establishing the limits of jurisdiction, the Court has repeatedly affirmed that there are limits to jurisdiction—without which, unchecked regulations would lead to illogical results. All waters are not federal waters.

Application of Significant Nexus Standard to Aggregated Waters on the Landscape

The "significant nexus standard" would apply to waters that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the 'foundational waters')." The concern that the agencies will exceed their authority under the CWA to regulate at their discretion almost any wet area is warranted based on the proposed interpretation of "significantly affect." According to the preamble, "[t]he proposed rule defines the term 'significantly affect' for purposes of determining whether a water meets the significant nexus standard to mean 'more than speculative or insubstantial effects on the chemical, physical, or biological integrity of' a

[19] U.S. Environmental Protection Agency, *Economic Analysis of the Proposed Rule*, November 21, 2021, pp. 19-20, online at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0083.

traditional navigable water, interstate water, or the territorial seas. Waters, including wetlands, would be evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform."[20] Because the agencies are choosing to define "significant" as a "more than speculative or insubstantial effect" instead of "important" as it is commonly understood --- the bar for jurisdiction is even lower than Justice Kennedy intended under the significant nexus test. The impact would not have to be "significant" just merely "more than speculative or insubstantial." "More than insubstantial" could be read as "more than flimsy" or "more than unconvincing" or "more than tenuous or intangible."

By considering the jurisdiction of a particular water "in combination with" other waters located in a broad region, every small pond or other water feature that retains stormwater would be WOTUS if the cumulative effects are deemed "not speculative or insubstantial." This not only expands CWA jurisdiction well beyond anything Congress could have intended to include in the term "navigable waters," but it leaves land users with no way to assess the status of their local water, short of undertaking a complex and costly watershed study. For example, the agencies may opt to use regional studies of large watersheds, such as the Chesapeake Bay or the California Bay Delta, to support a decision to assert federal control over all "similarly situated" waters and their adjacent wetlands/other waters —no matter how remote from the main part of the Bay/Delta —on the theory that excluding any single "similarly situated" water would adversely affect the ecological integrity of that entire watershed. Similarly, under this proposal, field staff could "aggregate" isolated depressions that do not have any noticeable hydrologic connection to the closest navigable water by finding that they perform similar functions such as flood control.

Elevates Biological Impacts

Furthermore, by switching the word "and" to "or" in the definition of "significantly affect" above, the agencies are changing the significant nexus test, which should include all three components—chemical, physical, and biological---not just one. This change is inconsistent with Justice Kennedy's test and with the text of the CWA itself. This word change elevates each impact to a stand-alone category for evaluation of significance, instead of having to meet all three. The agencies mention fish spawning in the preamble as one example of biological considerations that could be assessed to make a significant finding for ephemeral streams (even where the fish are not present and do not use the feature in question for spawning).[21] When combined with the aggregate approach across a region, enough properties could be impacted to the degree that it leads to illogical results.

Science should inform policy and not dictate it, which is why Congressionally imposed limits are so especially important in the discussion of federal jurisdiction over waters of the United States. In reading the Technical Support Document[22], the agencies are attempting to establish a scientific record for federal jurisdiction over waters that is hugely expansive and will be impossible to avoid.

[20] 86 Fed. Reg. at 69,430.
[21] 86 Fed. Reg. at 69,391-69,392.
[22] U.S. Environmental Protection Agency and Department of the Army, *Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule*, November 18, 2021, available online at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081.

If water—any water--is not significant on its own, the agencies will just consider it in aggregate. If it is not significant for hydrologic reasons (alone or in concert with other waters), then biological factors (alone or in aggregate) can be used to find significance. However, seeds or plants transported on "highly mobile animals" or on the wind moving between isolated waters[23] do not make all isolated waters in a region jurisdictional. This would elevate biological impacts well beyond what was attempted and rejected in *SWANCC*.

Broadens Other Waters Category

Furthermore, the proposal would apply the "relatively permanent" either/or "significant nexus" tests to the "other waters" category for the first time, leading to illogical results. Previously, these waters were jurisdictional only insofar as they impact interstate commerce. In the proposal, the agencies posit that not only can they apply the significant nexus test, but they could take a landscape approach to determine whether "other waters" in aggregate are significant. In addition to considering the impact of other waters collectively or in aggregate (even those completely separated from jurisdictional waters), landowners could have to evaluate aggregate biological impacts far removed from their property. This concept is problematic when applied to other (enumerated) categories of jurisdictional waters, but the other waters category magnifies the concern—due to the ambiguity of what could be considered an "other water." The agencies admit that they have not previously taken this approach (divergence from the status quo) and that applying the relatively permanent or significant nexus tests to this category would necessitate reliance on case-by-case determinations.[24]

The agencies' proposed changes for "other waters" are overbroad, ambiguous and confusing. It appears that the provision is meant to assert jurisdiction over isolated waters that have little or no connection to traditional navigable waters. The Supreme Court has determined such isolated waters are not within the agencies' authority to regulate under the CWA. The "everything is significant" approach will make it impossible to avoid jurisdictional waters, meaning that all projects within the watershed or region (depending on how broadly the agencies choose to interpret it) will need federal CWA permits, including related professional fees, permitting delays, and mitigation.

The agencies should not apply the significant nexus test to "other waters." AGC would like to call the agencies' attention to the comment letter submitted by the Waters Advocacy Coalition in this docket which goes into great depth on why the application of the significant nexus standard to "other waters" is inconsistent with the *SWANCC* and *Rapanos* decisions. In *SWANCC*, the Court found that isolated ponds that were not navigable and did not abut a navigable water were not jurisdictional. And in *Rapanos*, Justice Kenney's significant nexus test specifically applied to

[23] U.S. Environmental Protection Agency and Department of the Army, *Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule*, November 18, 2021, pp. 207-208, available online at: https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081.

[24] "Thus, the proposed rule would provide for case-specific analysis of waters not addressed by any other provision of the definition to determine whether they are "waters of the United States" under the relatively permanent or significant nexus standards. In light of agency guidance discussed below, the agencies have not in practice asserted jurisdiction over "other waters" based on the 1986 regulations' provision since *SWANCC*." 86 Fed. Reg. 69,418-69,419.

wetlands---not other waters. Furthermore, Justice Kennedy highlighted the importance of proximity to navigable waters and flow characteristics (e.g., quantity and duration). The Coalition comments demonstrate the difference between "similarly situated" in reference to evaluating an individual wetland similarly situated to others in a landscape and using "similarly situated" as a foothold to taking a landscape approach to aggregate all waters in a watershed to force significance through the sheer number of isolated, remote waterbodies.

C. The Proposal Impacts Features That Should Be Categorically Excluded

Without limitations on federal jurisdiction, there would be many opportunities for Corps field staff and EPA inspectors to assert federal control over ephemeral ponds and basins that were built to serve as stormwater control devices, water-filled depressions, and ditches in addition to other waters or wet features on the landscape.

Stormwater Controls

Under the proposed rule, CWA jurisdiction would arguably extend to stormwater control basins and ponds of various sizes and functions that ultimately drain to an otherwise regulated WOTUS. This result would stem from the agencies use of significant nexus test at a landscape scale under the open-ended "other waters" category. The 1980s regulatory regime does not include exclusions beyond prior converted cropland and wastewater treatment. The lack of exclusions that were provided in the 2015 and2020 rules combined with the expansion of jurisdiction through "other waters" means that stormwater impoundments and other features, upland features, green infrastructure, water-filled depressions, could all run the risk of being lumped into the "other waters" category.

EPA's CWA Section 402 permit for active construction sites (which serves as a model for the nation) requires contractors to "design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities." Contractors also are required to "control stormwater volume and velocity" to minimize pollutant runoff and streambank/channel erosion. On a large majority of regulated construction sites, these requirements have led contractors to build temporary basins to hold rainwater that has "run off" the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage systems. At present time, ponds and basins are the most reliable and proven way of containing sediment-laden water on a construction site. Ponds and basins are a "best management practice" (BMP) to protect surface water. (Prior to 2012, the federal Construction General Permit mandated sediment basins on all construction sites where the total disturbed drainage area at any given time was 10 acres or more.) After the soil disturbance (earth-moving) phase of the project, it is quite common for the property owner or contractor to clean out and modify the basin to function as a permanent stormwater management pond for the completed site, either as a detention pond or a retention pond. Additionally, the permanent pond must be maintained on a life-cycle basis to ensure that it is functioning properly.

There has been an explosion in the number of stormwater ponds dotting the suburban landscape. Most have been created to satisfy local government requirements to retain/infiltrate stormwater discharges (onsite) at newly developed and redeveloped sites. Requirements that municipalities (MS4s) use so-called "green infrastructure" as part of their stormwater management programs are becoming more common in local and state permitting procedures and regulations, administered by the NPDES program.

In addition, the Supreme Court's recent decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund* (*Maui*),[25] which held that discharges to groundwater that eventually reach WOTUS by means of a "functional equivalent" of a direct discharge are subject to the NPDES permitting program, has only added to the importance of, among other things, determining whether a permit is even needed for historically exempt discharges now potentially covered by *Maui*.

Water-Filled Depressions

Water-filled depressions are also in danger of being considered jurisdictional in an aggregate or regional approach to other waters. These depressions include for example utility corridors where compaction from construction equipment creates a localized hardpan that holds water and aquatic vegetation. In some parts of the country, these are called right-of-way (ROW) wetlands and they are prevalent along utility corridors. Over the years, AGC has urged the agencies to provide clarification that these depressions are not jurisdictional. The 2015 and 2020 rules included exclusions for these features.

Ditches

Section 404 permitting requirements can be a significant burden on transportation project development, especially for minor maintenance and construction activities that only impact man-made wetlands or ditches located adjacent to roads. AGC has repeatedly expressed concern over ditches being treated as WOTUS when they are often point sources—built and maintained as part of a roadway drainage system or MS4. Under the proposed rule, "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States."[26]

The agencies' proposal does not give contractors sufficient clarity concerning ditches — so as to avoid retaining experts or engaging in time-consuming consultation with state or federal agencies. And the burden of proof that a ditch is not jurisdictional is once again placed on the project proponent. The terms "wholly in uplands" and "relatively permanent" are confusing and easy to misinterpret. Indeed, "uplands" itself is once again undefined. The agencies also appear unclear how they will interpret "relatively permanent" related to tributaries, the category under which the agencies have indicated they will assess ditches. The agencies are also unclear how they will handle ditches with standing water or ditches in uplands that have begun demonstrating characteristics of

[25] *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020).
[26] 86 Fed. Reg. at 69,433.

wetlands. The Waters Advocacy Coalition comments in this docket provide background on how ditches have historically been regulated. That letter also highlights a concern AGC shares on how the agencies plan to address ditches that cross a wetland or "non-upland" area; is the entirety of the ditch then jurisdictional?

The issue of ditches is critically important because they are pervasive and endemic to every type of landscape and human activity across the nation. Like other stormwater features, ditches are often constructed to comply with regulations and other legal requirements. AGC has warned that if ditches are considered jurisdictional, it could hinder the construction industry's ability to maintain safe operations by preventing flooding and damage to roadways. Furthermore, insofar as roadside ditches are a component of a Municipal Separate Storm Sewer System (MS4), the MS4 itself is regulated under the CWA's National Pollutant Discharge Elimination System (NPDES) program. "MS4 systems often include ditches and other manmade structures …. designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to traditionally jurisdictional waters."[27] AGC continues to maintain, "…to the extent that ditches (and other system components) are mapped and identified as part of an MS4, and subject to an NPDES permit governing the MS4 of which they are a part, then such ditches (and components) should not be WOTUS under the exclusion for waste treatment systems."[28] In addition to its own comments referenced in section II above, AGC recommends the agencies review the Coalition of Real Estate (CORE) Association's comments on the 2014 proposal[29], as well as, the Federal Stormwater Association's comments on the proposed revision to the definition of WOTUS submitted to the docket in April 2019[30] for detailed arguments on why MS4s should be excluded from WOTUS jurisdiction.

Prior AGC comments[31] have discussed the illogical results that ensue when ditches and MS4s are considered WOTUS. One of the best illustrations of this is related to water quality standards. If roadside ditches are WOTUS, then CWA Section 303 would require states to establish water quality standards and "designate uses" for them. The main purpose of an MS4 is to transport stormwater; however, that use would plainly violate EPA's regulations that state "in no case shall a State adopt waste transport … as a designated use for any water of the United States."[32] Likewise, if an MS4s were WOTUS, then states would need to develop EPA-approved WQSs and "designate uses" for storm sewer systems, as well as water quality criteria (WQC) that protect the designated use.[33] If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum

[27] Federal Stormwater Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880.
[28] Coalition of Real Estate Associations, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880.
[29] *Ibid.*
[30] Federal StormWater Association Comments Regarding the Revised Definition of "Waters of the United States", (April 15, 2019) Docket ID No. EPA-HQ-OW-2018-0149 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-6877.
[31] AGC of America, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880 online at: https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14602.
[32] 40 C.F.R. Part 131.10(1).
[33] 40 C.F.R. § 131.11(a).

daily load (TMDL) for the waterbody.[34] Interpreting the CWA in a manner that construes MS4s to be WOTUS would force states to develop WQC and TMDLs for storm systems designed to transport stormwater. Moreover, if an MS4 were somehow deemed a WOTUS, then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water.

States, state departments of transportation, road commissions, and MS4s would all struggle under the administrative strain of setting water quality standards alone. The example did not even factor in the need for Section 404 permitting and mitigation, spill plans, or other requirements that would apply.

Clarify Exemption for Work in Roadside Ditches. The agencies must take care to not impose any obstacles (or delays) to the critically important and routine maintenance activities in jurisdictional ditches, which would not only affect flood control and public safety but would also impact the ability of an MS4 to meet its CWA NPDES permit requirements. In the past, the agencies have referred AGC to the statutory exemptions under CWA Section 404(f)(1)(C) for maintenance, which allow for the maintenance (but not construction) of non-excluded irrigation and drainage ditches without a Section 404 permit from the Department of the Army.[35] However, past EPA and the Corps interpretations of Section 404(f)(2)—the so-called exemption to the exemption or "recapture provision" (recapturing the exempted activity back under CWA regulations)—have limited the application and utility of the maintenance exemptions, according to AGC members. For example, many Corps reviewers have been apt to reject an exemption for "maintenance of drainage ditches" if vegetation and sediment have accumulated in a constructed channel or basin or if the ditch is in the vicinity of protected wildlife species habitat.

AGC requests that the agencies take this opportunity to make it clearer that the ditch maintenance exemption applies (and has historically applied) to all drainage ditches, including drainage ditches adjacent to roads. In Regulatory Guidance Letter (RGL) 07-02,[36] "drainage ditch" is broadly defined as "a ditch that conveys water (other than irrigation related flows) from one place to another." AGC believes this definition is applicable to most, if not all, roadside ditches and asks that the agencies make that point in the final WOTUS rule preamble. AGC is concerned that the CWA exemption is too narrowly applied, and often inconsistently applied, by Corps districts throughout the country. Indeed, the Corps has required contractors to obtain 404 permits for activities that AGC believes should have been covered by an exemption (or exclusion).

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[34] 33 U.S.C. § 1313(d).
[35] In addition, CWA Section 404(f)(1)(B) exempts additional dredge and fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." *See* 33 CFR Section 323.4(a)(3) and 40 CFR Section 232.3(c)(3).
[36] "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act" (July 4, 2004) - https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1463.

D. Continued Disputes and Expected Legal Challenges

The agencies have given little indication about how they might again redefine the definition of WOTUS to create a "durable" rule. What is more, this first step of promulgating a "foundational rule" to restore the 1980s definition does not make a reasoned argument that the text of CWA unambiguously prohibits the current Navigable Waters Protection Rule. (As stated above, no court currently holds that the agencies' 2020 WOTUS rule is unlawful based on an evaluation of the merits.) Even a temporary return to the 1980s regulatory regime is arbitrary and capricious in the absence of substantial and detailed justification for a new policy (in this case, the continued effort to implement the Biden administration's policy preferences in the wake of legal decisions and current challenges).

Moreover, the "significant nexus" test does not appear in the text of the CWA. This may present constitutional challenges under the "void-for-vagueness doctrine."[37] This doctrine "guarantees that ordinary people have 'fair notice' of the conduct a [law] proscribes" and "guards against arbitrary or discriminatory law enforcement by insisting that a [law] provide standards to govern the actions of police officers, prosecutors, juries, and judges."[38]

CWA violations carry the risk of serious civil and even criminal penalties. Going ahead without a permit may put both landowners and construction contractors at risk of several penalties and even possible jail time. The rule of lenity should be asserted as another statutory, interpretive bar to the agencies' first step proposal.

IV. OTHER CONCERNS

A. Comment Period Is Insufficient

The agencies have not provided enough time for comment. Through the Waters Advocacy Coalition,[39] AGC requested an extension to the 60-day comment period, which the agencies have not provided. In practice, this comment period has been the shortest time provided compared to previous related actions. On top of the already compressed timeframe for comment, the public and regulated entities have had to juggle multiple federal holidays and the outbreak of the Omicron variant of the Covid-19 virus, which has reduced participation in the workforce in December of 2021 and January of 2022 (and continues today).

Furthermore, the agencies have begun soliciting feedback on the next rulemaking in this area. There has simply not been enough time to engage with members companies, update them on the most current actions, review and analyze the many changes to the 1986 and 1988 regulations and relevant guidance, check agency interpretations, evaluate the more than 100 questions and alternatives as well

[37] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).
[38] *Id.*
[39] Waters Advocacy Coalition, Request to Extend Comment Period, (December 20, 2021), Docket ID No. EPA-HQ-OW-2021-0602, online at: https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0117.

as and new definitions and the more than 100 supporting documents. Furthermore, as noted above, the proposal is not merely a reinstatement of the status quo. The agencies are proposing significant changes with serious ramifications for the impacted public and their properties.

B. Impact on Other CWA Programs

The regulatory uncertainty associated with the definition of waters of the United States extends to other CWA programs. In prior comments, AGC has expressed concern about the impact of changing jurisdiction of federal waters on other CWA programs such as Section 402 for stormwater permitting. The term "waters of the United States" appears throughout the CWA. This revision –as well as the next and the one in response to the pending *Sackett* case -- would apply to many CWA programs administered by EPA, the Corps, and the states, including Section 303 state water quality standards, Section 311 oil spill prevention control and countermeasures (SPCC), Section 401 state water quality certifications, Section 402 National Pollutant Discharge Elimination System (NPDES) discharge permits, and the Section 404 dredge and fill permit program — as well as various reporting requirements under the National Contingency Plan for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Oil Pollution Act (OPA). These programs regulate many types of construction activities across the nation and will therefore have a direct and significant impact on AGC members' operations. The expansion of jurisdictional waters of the U.S. is also likely to result in a greater number of "impaired" federal waters under section 303, with additional burdens on states to evaluate and list these waters, and a greater likelihood that active constructions sites and completed industrial facilities with runoff will fall under total maximum daily load "budgets" that may significantly impact industry operations.

The agencies have not accounted for the economic impact of the expansion of jurisdiction, in general, much less as it is applied across CWA programs. Much of the work related to updating these programs to include the expanded jurisdiction over other waters will fall on state agencies, whether that is to evaluate water quality, set total maximum daily loads, or to administer stormwater permits. And much of the burden of compliance will fall on regulated entities and members of the public who want to make use of their properties. AGC again points the agencies to the Waters Advocacy Coalition comments in this docket which provide a detailed critique on the economic analysis.

C. Overlap with State, Local and Tribal Requirements

The further the agencies extend the reach of federal jurisdiction over broad swaths of the landscape overlap with state and local requirements will become more prevalent. Over the decades, the network of federal, state and local requirements has become intertwined—not only for water, but also related to species and other environmental protections. Members have expressed concern over the increasing overlap in regulations. For example, when overlapping requirements related to vernal pools became an issue in certain New England states, the Corps and state officials had to work together to reconcile contradictory protection standards. Vernal pools are confined basin depressions and isolated from other waters, which would call their federal jurisdiction into question. Beyond this example, federal jurisdiction can trigger more species reviews and overlap with state

species and wetland rules, stormwater requirements, and other natural resource protection standards. Other waters are already typically under the purview of the state. This duplication and overlap can be confusing---and costly, especially with mitigation requirements.

D. Grandfathering

The proposed rule does not address grandfathering issues or how the rule's changes would affect existing or pending jurisdictional determinations (JDs). AGC recommends that the agencies clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule. Having an explicit grandfathering provision in the rule is especially important given the January 5, 2022, notice from the Corps about the unreliability of permits under the 2020 rule. Following the vacatur of the 2020 rule, individuals without an approved jurisdictional determination in hand had to reevaluate their projects and resume under the 1980s regulatory framework. Without grandfathering provisions, the agencies are setting up the same scenario for projects moving through the process now—some of which may have already had to start over once before. The agencies included grandfathering provisions in prior rulemakings as well.

V. CONCLUSION

AGC recommends the agencies not finalize the proposed rule. It unnecessarily provokes controversy, did not provide enough time for comment, contrary to Congressional intent, expands jurisdiction beyond Supreme Court decisions, applies jurisdictional tests for "other waters" for the first time, and seeks to take a landscape approach to aggregate waters in a region. It goes beyond what is needed to meet the Biden administration's policy goals at the expense of regulatory clarity and consideration of small businesses.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at tomainom@agc.org or (703) 837-5415.

Respectfully,

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