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Filed electronically at www.regulations.gov

November 28, 2017

Ms. Damaris Christensen
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Stacey Jensen
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Re: Response to the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers' solicitation for written recommendations to revise the definition of "Waters of the United States" under the Clean Water Act, 82 *Fed. Reg.* 40,742 (Aug. 28, 2017)
Docket ID No. EPA-HQ-OW-2017-0480

Dear Ms. 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 pre-proposal feedback on revising the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).

The agencies have spent the last few months gathering public feedback through a series of listening sessions and an in-person meeting for small entities¹ and have opened a docket to collect additional feedback. AGC of America supports the agencies' efforts to withdraw and reconsider the 2015 WOTUS rule;² has participated and provided verbal comments during the October 10, 2017, listening session for construction and transportation; and is pleased to offer these written recommendations.

To provide background, AGC is the nation's leading construction trade association. It dates back to 1918, and today, it represents more than 26,000 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, DC 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

¹ See 80 *Fed. Reg.* 40,742, Definition of "Waters of the United States" – Schedule of Public Meetings (August 28, 2017).

² See 80 *Fed. Reg.* 37,053, Clean Water Rule: Definition of "Waters of the United States" (June 29, 2015).

works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

The precise definition of WOTUS, which dictates the scope of the federal control and CWA permitting responsibility, 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, any change to CWA regulations that would expand the agencies' jurisdiction will invariably affect our members' ability to secure financing and approval to construct new projects or maintain existing infrastructure and facilities across the nation.³

AGC's verbal comments during the Oct. 10 listening session highlighted general concerns with a broad expansion of federal authority over water and land use. AGC maintains that the federal government should not assert control over waters that have historically been protected by the states, including many ditches, conveyances, isolated waters, and other intermittently wet features. Such an expansion of the federal permitting process would increase the number of construction sites required to obtain a federal CWA permit. This would slow economic growth by delaying and increasing the cost of necessary improvements to the public and private infrastructure that forms the foundation of our nation's economy.

In the brief time allotted, AGC's verbal comments highlighted three of the association's key recommendations for a revised definition of WOTUS:

- Exclude roadside ditches and other components of a municipality's storm sewers;
- Exclude other stormwater features such as retention/detention ponds; and
- Clarify and exclude "water filled depressions" such as those caused from the use of construction equipment.

In the sections below (see sections II, III, and IV), AGC briefly restates its recommendations in writing. In addition, please note that AGC has shared these viewpoints *in depth* in prior comment letters, as the issues have repeatedly arisen during the agencies' efforts to better define WOTUS for the purposes of determining federal jurisdiction.

AGC's written comments close with responses to a series of questions for consideration, which the agencies circulated prior to the Oct. 10 listening session. In brief, AGC recommends the agencies "draw bright lines" for the regulated community and the agencies' field staff. A clear

³ 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, <http://newsmanager.commpartners.com/agcleg/downloads/AGC%20WOTUS%20Repeal%20Ltr%20FINAL%209.27.17.pdf>.

and objective rule will help both EPA and the Corps and make consistent compliance by the regulated entities far more likely.

I. AGC's prior comments on the WOTUS rewrite

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. Where applicable, this letter refers to prior AGC comment letters to the agencies and already in the public record.

Furthermore, AGC includes, by reference, prior recommendations the association submitted individually and jointly; as the insights contained within will be helpful to the agencies in setting clear lines for Federal jurisdiction. Recognizing that this pre-proposal period looks to the future definition of WOTUS, AGC's prior responses to agencies' efforts related to WOTUS remain relevant. AGC's comment letters on the draft guidance in 2011 (joint comments⁴) and on the proposed rule in 2014 (joint⁵ and individual⁶ comments) are particularly relevant on interpreting case law and in 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 in a revised definition of WOTUS. These prior comment letters challenge the agencies' past interpretations and definitions of the terms "tributary," "significant nexus," "adjacent waters," and "other waters" and set a foundation for the future definition. In particular, AGC's comments (attached) on the 2014 proposal and comments⁷ in support of the recently proposed recodification of pre-existing rules provide insight specific to the construction industry members' concerns with agency efforts to determine jurisdiction.

⁴ 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, <https://www.agc.org/sites/default/files/072911WACCommentsFinal.pdf>.

⁵ 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, https://www.uschamber.com/sites/default/files/11.14.14-waters_advocacy_coalition_comments_on_proposed_rule_waters_of_the_united_states.pdf; 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, <https://www.agc.org/sites/default/files/FSWA%20WOTUS%20Comments%20-%20FINAL.pdf>; 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, <http://newsmanager.commpartners.com/agcenv/downloads/Coalition%20of%20Real%20Estate%20CORE%20Associations%20Comments%20on%20MS4s%20WOTUS%20-%20.pdf>.

⁶ 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, attached.

⁷ 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, <http://newsmanager.commpartners.com/agcleg/downloads/AGC%20WOTUS%20Repeal%20Ltr%20FINAL%209.27.17.pdf>.

Lastly, AGC is a member of the Waters Advocacy Coalition (WAC) and incorporates by reference the comments submitted on behalf of WAC members to this docket and the principles for developing a new WOTUS definition contained therein.

II. Exclude roadside ditches and other components of a municipality's storm sewers

AGC has continued to raise serious objections to regulatory language that would claim ditches as WOTUS. The issue of ditches is critically important because they are pervasive and endemic to every type of landscape and human activity across the nation. The 2014 WOTUS proposal would have reached many ephemeral ditches that perform limited environmental function yet provide an important public safety service. The 2015 WOTUS rule exclusion(s) for specific ditches remained narrow and difficult to prove that they apply. AGC has warned that if the ditch exclusion is interpreted too narrowly, 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."⁸ 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."⁹ AGC recommends the agencies review the Coalition of Real Estate (CORE) Association's comments on the 2014 proposal for a detailed argument on why MS4s should be excluded from WOTUS jurisdiction.¹⁰

III. Exclude other stormwater features such as retention/detention ponds

The agencies must clearly exclude from federal jurisdiction those stormwater control features used to comply with the CWA's stormwater permitting program. AGC raised serious objections to language in the 2014 WOTUS proposal that would extend CWA jurisdiction to stormwater control basins and ponds. Later, the association expressed concern that the 2015 WOTUS rule's exclusion for "stormwater control features constructed to convey, treat or store stormwater and cooling ponds that are created in dry land" adds further confusion. The construction industry relies on stormwater control features to fulfill CWA permit obligations under the NPDES

⁸ 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.

⁹ 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.

¹⁰ *Ibid.*

program. These features must be maintained to continue to perform effectively. AGC's joint comments with the FSWA on the 2014 proposal highlight just how much facilities "regulated by the CWA stormwater permit program rely upon various exemptions to ensure that existing treatment ponds, drainage areas, or other 'water' features are not the regulated point of discharge into a water of the U.S."¹¹ AGC's comments on the 2014 proposal go into further detail about the nature of stormwater control features and implications and illogical results should the agencies not clearly exclude these features from jurisdiction.

IV. Clarify and exclude 'water-filled depressions' such as those caused from the use of construction equipment

The application of the exclusion for certain "water-filled depressions created in dry land ... incidental to mining or construction activity" under the 2015 WOTUS rule remains unclear. AGC commented on the 2014 proposal about how difficult it could be for the regulated community to provide evidence that an uneven surface area on the land first came about during construction activity. "Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve alleged violations of federal CWA laws. However, these tools often lack the level of resolution required to make a proper determination."¹² As AGC's letter in support of the 2017 proposal to recodify the pre-existing rules calls-out: questions remain after the 2015 WOTUS rule on key terms, such as "incidental... to construction," and eventualities such as whether depressions that later develop wetland characteristics, such as features coined "right-of-way wetlands" that often form along utility corridors.¹³

The agencies need to provide clarity as they move forward on a revised definition of WOTUS to ensure that vegetation growing in old tire tracks made from construction equipment are not considered jurisdictional waters.

V. AGC response to the Oct. 2017 'Construction and Transportation Listening Session' questions

In advance of the listening sessions associated with this preproposal outreach, the agencies provided a series of questions for the participants' consideration. The agencies circulated the questions below prior to the construction and transportation listening session on October 10, 2017. AGC takes this opportunity to respond to those questions, where we received direct feedback from member companies. If given more time, we may have been able to provide more comprehensive answers. However, AGC appreciates this opportunity to provide early feedback to the agencies, and we look forward to participating in the next steps to redefine WOTUS.

¹¹ 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.

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, attached.

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.

A. How does CWA jurisdiction affect your organization, as a part of the construction/transportation field?

- Member companies tend to agree that CWA jurisdiction increases project responsibilities and costs, both in design and construction; extends project schedules; and increases overall project uncertainty and risk. In road construction work, for example, the presence of jurisdictional waters increases project preparation time at the state's Department of Transportation (for obtaining section 404 permits and 401 certifications) and requires additional work by the contractors on the project (construction constraints, water quality reporting, etc.). This would apply to both maintenance activities and new construction projects. Members called for more predictability and accountability. They mentioned the need for more consistency among Corps' districts and standardized requirements. This would lead to a process that is more predictable from a scheduling standpoint. Not knowing how long it will take creates significant risk for the contractor.
- For some of the larger infrastructure projects that take years of planning and permitting, predictability and continuity are key. Jurisdiction can be subjective and often ambiguous. AGC member companies have experienced slow permit review and approval processes. The uncertainty introduced by CWA jurisdiction can make it difficult, if not impossible, to minimize impacts to resources, plan for mitigation, and construct projects in a timely or cost-effective manner. A construction company can also experience high front-end project costs due to the slow permitting process, multiple reviews, or jurisdictional disputes. For an example, a company in one scenario mentioned that they had to defend a recent jurisdictional determination. It cost the company tens of thousands of dollars in staff time and resources to resolve, but that is just a fraction of the company's estimates for CWA compliance in the coming years.
- Members also expressed the need for the Corps to take a more collaborative approach to getting the job built. One cause for the project delays is that the Corps staff do not respond to the applicant with comments/questions until the review period is nearly ended, which causes the clock to start over and slows down the permitting process even further. One member received little to no response or communication from the district Project Managers during the permitting process. For projects that are already permitted, if a minor change/addition in the field is required, it can lead to lengthy project delays, often pushing a project into one more season, which could lead to issues with Endangered Species Act or migratory bird-related compliance. More effort should be made in districts to improve effective communication between the Corps and the regulated community.

B. For purposes of the CWA, what tributaries and wetlands should be jurisdictional? **AND** Do you have feedback about how the agencies should interpret key terms in Justice Scalia's opinion, such as "relatively permanent," and "continuous surface connection"?

- Many AGC Members have expressed concern that the CWA is too overreaching. And they believe that the federal government regulates far too many drainages that are dry

for much of the season, and only flow due to a rain event. These features should be exempt from federal permitting.

- Much confusion arises when evaluating tributaries that flow intermittently. From the field perspective, there is a lack of clarity. AGC members have experienced project delays, because they have had no assurance, even when working in the desert. One member gave an example of a confusion whether a culvert replacement in a ditch that hasn't flowed with water in 10 years would be exempt from federal control. Very arid areas should not be treated like wet regions.
 - Please refer to the following principles that the agencies should consider in identifying federal jurisdiction under the CWA and based on the concurring and plurality opinions in *Rapanos v. United States*.¹⁴
 - The term "navigable waters" must be given some importance and effect (Kennedy, J., concurring);
 - Congress intended to regulate at least some waters that are not navigable in the traditional sense (Kennedy, J., concurring)'
 - To be jurisdictional, non-navigable waters must have a substantial relationship with traditional navigable waters;
 - The Corps' standard for defining tributaries went too far (Kennedy, J., concurring);
 - "Mere adjacency to a tributary" is insufficient (Kennedy, J., concurring);
 - Regulatory jurisdiction does not reach all wetlands or even "all 'non-isolated wetlands,'" (Kennedy, J., concurring); and
 - The presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone (Kennedy, J., concurring).¹⁵
 - See also discussion below regarding waters/features that AGC is recommended for exclusion.
- C. Are there particular features or implications of any such approaches that you, as an organization in the field of construction/transportation, recommend the agencies be mindful of in developing the Step 2 proposed rule?
- Obtaining a jurisdictional determination should not be such a time consuming and expensive process. AGC members are concerned the agencies are creating a situation where you need more 404 permits than the Corps can process. As indicated by member comments, the districts already have a hard time keeping the permitting process moving

¹⁴ 547 U.S. 715 (2006).

¹⁵ Waters Advocacy Coalition, 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, https://www.uschamber.com/sites/default/files/9.27.17-wac_coalition_comments_to_epa_and_usace_on_proposed_repeal_of_2015_clean_water_rule_wotus.pdf (Full citations in the original).

forward. The current extended review times is hindering projects from advancing. If the Corps is going to require current or more regulation, they need more staff to process documents on a timely fashion. For those waters under federal jurisdiction, there should be mandatory review times to get a delineation reviewed and/or a permit issued. And the agencies should encourage more general permitting.

- Agencies should communicate with each other better to avoid conflicting requirements or absurd results. The CWA Section 404 is its own permit that encompasses several other authorizations by other agencies, such as Endangered Species Act consult, National Historic Preservation Act consult, CWA Section 401 water quality certifications, etc. What is more, the construction process itself is regulated by multiple environmental laws, bringing in multiple environmental agencies. It is not uncommon to find when you are trying to build a project in a jurisdictional water that you have overlapping issues with endangered species, and you may end up with conflicting requirements. One such example, provided by a member, is when a restriction to work in only low-flow periods conflicts with restricted work times under a contractor's permit for endangered species based on fish spawning seasons.
- Many of the decisions about these waters are best left up to the states and local communities. States are better suited to make decisions on state waters based on their climate, such as the arid and semi-arid climates in the west and southwest. These regions are very different than other parts of the country that have wetter climates and they will need special considerations.

D. Are there certain waters or features that you recommend the agencies consider excluding from the proposed definition?

- In addition to ditches, other stormwater features, and water-filled depressions mentioned in sections II, III, and IV above, AGC members have also suggested the agencies consider the following, for example: (This list is not intended to be exhaustive.)
 - Exclude ephemeral streams/washes, non-relatively permanent waters, isolated wetlands, prairie potholes, wetlands due to mining activity – or quarries, and lakes or waterbodies flowing into manmade sewer systems or otherwise not directly and naturally connected to a navigable waterway.

E. Following Supreme Court cases restricting jurisdiction - *SWANCC* in 2001 or *Rapanos* in 2006 - did you experience any changes in your costs as a result of reduced assertion of jurisdiction? Can you provide any helpful information or data regarding any such changes?

- Quite the contrary, in practice AGC members have not found that to be the case. In the recent environment, members are finding the application of the Justice's decisions to be very confusing and very unclear. It is difficult for some members to understand how

WOTUS and wetlands are regulated today. They resort to hiring a consultant to figure it out, spending more money and increasing overall project costs.

- Over the last several years, members are reporting that more waters are being classified as jurisdictional than would have been classified as such in the past. Members have seen stricter permitting requirements, such as requiring a full wetland delineation for all nationwide permits, including permits for maintenance. They have also reported widely varied interpretations of jurisdictional determinations, permit requirements and permit timing across individual Project Managers and especially across districts. One member reported that basic maintenance or outfall nationwide permits can take over six months for approval.
- These uncertainties, permitting challenges and economic unknowns are often factored when bidding and planning transportation projects, particularly Design-Build and P3 (public-private partnership) projects. This means increased costs to the public/owner as contractors are forced to add cost contingencies resulting in higher construction costs. The determination and permitting delays can also result in late delivery, and other burden upon parties and the public at large.

F. Many construction/transportation-focused companies and organizations have requested better clarity regarding where the CWA applies. What would clarity look like to you?

- A map of WOTUS that is updated annually. Encourage states to adopt the same approach so that you have an overlay of federal and state waters.
- Clarity would look like a check list. (Here are all the things you need to include in your delineation report or permit application.)
- Clarity would mean having a definition of WOTUS that brings consistency to the application of jurisdiction: removing the subjectivity of individual regulators. Each regulatory field office should have the same federal guidance and the same interpretation of the rules and associated definitions and a clear and short resolution ladder if there are issues. Members report that different regulators in different Regulatory Field Offices have different interpretations of WOTUS or if mitigation is required or not.
- If the term "significant nexus" remains in use, a better definition would be helpful. As it stands today the definition is so broad that it is interpreted differently at each district office and even down to the reviewer. Clearer definitions will help to standardize decisions and remove some of the uncertainty.
- Increase application and use of nationwide permits.
- EPA should not have the authority to retroactively veto a final Section 404 permit decision made by the Corps.

G. Would you and your stakeholders derive greater or fewer costs/benefits from a change in the definition of "waters of the U.S." as suggested by the E.O.? Is there any information or data about costs and benefits to the construction/transportation industry that the agencies should consider in their economic analysis?

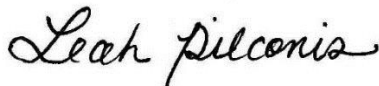
- A more defined and restricted definition of jurisdictional waterways (bright line rule) would streamline the federal 404 permitting process. This would, in turn, result in reduced project schedules, reduced project costs and reduced uncertainty. Specifically, more consistent applications, shorter review times and fewer application resubmissions would allow more vital infrastructure projects to move forward.

VI. Conclusion

In conclusion, AGC and its members are looking for a rule wherein the federal government does not assert control over waters that have historically been protected by the states, one that aligns with the majority and concurring opinions of relevant case law, as well as "draws bright lines" for the regulated community and the agencies' field staff. The agencies should then work to provide field staff with clear guidelines so that they make objective, consistent, and predictable decisions upon which the regulatory community can rely.

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,



Leah Pilconis
Senior Counsel, Environmental Law & Policy



Melinda Tomaino
Director, Environmental Services

ATTACHMENT:
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.

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ELECTRONIC SUBMISSION: www.regulations.gov

November 13, 2014

U.S. Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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

RE: AGC Comments on the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act

Dear Sir or Madam:

The Associated General Contractors of America (AGC) appreciates the opportunity to submit the following comments on the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) proposed revisions to the definition of "waters of the United States" (WOTUS) under the Clean Water Act (CWA), as published in the *Federal Register* on April 21, 2014 (hereinafter "the proposal").¹ This letter identifies practical problems with the proposal for the construction industry, based on input from AGC's membership. The Waters Advocacy Coalition (WAC), of which AGC serves on the steering committee, has submitted comprehensive comments that detail the legal, scientific, economic and procedural deficiencies associated with the WOTUS rulemaking. AGC supports and incorporates by reference herein WAC's comments on the WOTUS proposal. In addition, AGC supports — *and is a signatory on* — comment letters submitted by the U.S. Chamber of Commerce (focused on real-world business/industry impacts), the Coalition of Real Estate Associations (focused on Municipal Separate Storm Sewer Systems (MS4s) and the component conveyances within those systems that channel and discharge stormwater runoff), and the Federal StormWater Association (focused on a variety of issues that affect the CWA's stormwater permitting programs). AGC hereby incorporates by reference these additional comment letters that supplement and enhance the construction-specific issues outlined below.

I. About AGC of America

The Associated General Contractors of America (AGC) is the nation's leading construction trade association. It dates back to 1918, and today, it represents over 25,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of

¹ See 79 *Fed. Reg.* 22,188.

nonresidential construction. Through a nationwide network of 93 chapters in all 50 states, DC 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 development.

The precise scope of federal CWA jurisdiction is of fundamental importance to AGC members. Many of their activities on land and water 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.

The United States currently faces a significant backlog of overdue maintenance across its infrastructure system and a pressing need for modernization. While attentive and sensitive to the many risks of environmental degradation, AGC members must continue to support the physical infrastructure on which all Americans are heavily dependent. AGC is of the strong opinion that the proposal, as currently drafted, would lead to more confusion for regulators and the regulated community, which will have a substantial impact on future construction, as well as the investment in (and financing of) projects that require Section 404 authorization.

The proposal is simply too procedurally and legally flawed to repair. These comments identify practical problems with the proposed rule, as raised by AGC's members. AGC requests that the agencies withdraw the proposed rule and work to revise the proposal to resolve these important issues. The agencies are not issuing this rule under any legally- or statutorily-required timetable, so they have ample time to start over and write a rule that is legally defensible. Any revision of the WOTUS definition and its underlying terms must be written in a way that is clear and understandable, as well as practical and implementable in the field.

II. Introduction

The proposal would assert federal control over waters that were previously under the sole jurisdiction of the states, including many ditches, conveyances, isolated waters, and other wet features. Specifically, under the proposal, most waters would *categorically* have a "significant nexus" to traditional navigable waters and therefore would be considered jurisdictional by rule. The proposal also provides a catch-all category to sweep in any remaining waters by allowing the EPA or the Corps to establish a "significant nexus" on a case-by-case basis. The proposed criteria for establishing a significant nexus is very low and equally ambiguous — "more than speculative or insubstantial effect...." The result would increase federal control over water and land, subjecting activities that might impact these areas to more complicated and layered reviews and potential citizen suits, as explained in more detail below. This will substantially impact job creation, economic investment, and growth.

At the most fundamental level, the proposal is inconsistent with congressional intent, the language of the CWA, and U.S. Supreme Court precedent. Twice the Supreme Court has affirmed a limit to federal

jurisdiction and rejected, first, the agencies' broad assertion of jurisdiction based on the potential use of isolated waters by migratory birds and, second, the agencies' assertion of jurisdiction based on "any hydrological connection." Yet, the proposed rule defines jurisdiction as broadly as these theories rejected by the Supreme Court, and does so to such an extent that the agencies have to specifically exempt swimming pools and ornamental ponds from being regulated as a WOTUS.

Despite repeated assurances from the agencies that the proposal is merely a non-substantive definitional change, in reality the proposal would make it nearly impossible for AGC members to develop public or private land containing drainage ditches, stormwater control basins, ponds, or other isolated water features (that are arguably subject to the rule's expansive jurisdictional reach) without first obtaining a costly federal CWA permit. This would amount to an expansion of federal jurisdiction that would add new layers of federal requirements to construction activities nationwide.

Under Section 404's current framework, securing individual (as opposed to nationwide or programmatic) permit coverage typically takes at least a year and costs hundreds of thousands of dollars. Such direct and indirect costs include the need to hire expert technical consultants and often lawyers to prepare permits or plans; construction delays; restrictions on land use; the cost of complying with permitting requirements, including mitigation, monitoring, and maintenance; insurance and bonding; and the risk of huge fines and penalties for noncompliance. The current 404 program also imposes certain avoidance, minimization, and mitigation requirements. In addition, the act of applying for permit coverage triggers mandatory consultation with multiple state and federal agencies under, for example, the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act.

The agencies have not fully accounted for these and other real-world costs and burdens that the proposal would impose on state and local governments, businesses, and American consumers. It is a critical error in this rulemaking that EPA has not provided any meaningful analysis of the unavoidable impacts this proposal would have on CWA programs other than the Section 404 program. In fact, the economic analysis accompanying the proposal downplays non-404 impacts, concluding that only an artificially small increase in jurisdictional waters will occur.² Many questions remain about the definitions and ambiguous exclusions used in the proposal and the impacts to most CWA programs, leaving these to become known only after the proposed rule is finalized and implementation begins.

Indeed, the term "waters of the United States" appears throughout the Clean Water Act. The new definitions would apply to many CWA programs administered by EPA, the Corps, and the states,

² See EPA's September 2013 "Economic Analysis of Proposed Revised Definition of Waters of the United States" (EPA's analysis relies on a flawed methodology for estimating the extent of newly-jurisdictional waters that systematically underestimates the incremental wetland acreage that will be impacted, excludes several important types of costs, and uses a flawed benefits transfer methodology.) Construction projects often avoid wetlands and waters during construction. During pipeline construction, in particular, companies will construct and add length to pipelines to avoid these regulated areas. EPA's economic analysis does not capture any costs for avoidance, which occurs quite frequently.

including Section 303 state water quality standards,³ Section 311 oil spill prevention control and countermeasures (SPCC),⁴ 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, as explained throughout these comments.

The penalties for failing to comply with environmental permitting, planning, recordkeeping, reporting, and other requirements (identified above) can be severe. The civil fines under the CWA, for example, can reach \$37,500 per day per violation and the criminal penalties for “negligent” violations can include \$50,000 per day, three years of imprisonment, or both. Several courts have found construction contractors liable as “operators” of construction sites for conducting discharge activities into “waters of the United States” without a permit, despite the contractor’s reliance on the owner to obtain necessary permits. In addition to CWA penalties, any claim that a project intrudes on WOTUS will raise the risk of third-party litigation pursuant to the CWA citizen suit provisions. Given the complexity of the proposed rule, such litigation could be lengthy and expensive. At a minimum, the project owner and/or the public would suffer the consequences of lengthy delay in the completion of work.

Today, the contours of the key jurisdictional term “water of the United States” are far from certain, and the uncertainty, in and of itself, has become a great burden for AGC members to bear. If the agencies are truly interested in clarity, they must further meet with stakeholders to better understand their concerns, gather further scientific evidence, and revise the proposed rule accordingly. We provide the following specific comments for consideration.

AGC members are committed to the protection and restoration of America’s water/wetlands resources. AGC does not believe, however, that it is in the nation’s interest to have federal agencies regulate ditches, culverts and pipes, desert washes, sheet flow, erosional features, and stormwater treatment ponds as “waters of the United States,” subjecting such waters to all of the federal regulatory requirements of the CWA. In that regard, the proposal is not really about clean water, it is about replacing longstanding state and local control of land uses near wet areas with centralized federal control.

³ 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.

⁴ Due to the proposed rule’s increased scope to cover ditches and manmade impoundments, as well as all features in floodplain and riparian areas, many jobsites, particularly in the arid West, would need SPCC Plans that did not need them before. Currently, when evaluating whether or not a construction site is subject to EPA SPCC rule (i.e., whether or not there is a reasonable expectation of a discharge to US waters), the original 1973 definition of “navigable waters” applies, which is significantly more narrow than the proposed revisions to that jurisdictional term.

III. Ditches

Summary: AGC has serious objections to the regulatory language that would, for the first time, *categorically* claim ditches as “waters of the United States.” Notwithstanding the exclusions in the proposal, CWA jurisdiction would reach many ephemeral ditches (e.g., roadside, irrigation, and stormwater) that perform limited environmental function and have limited value, and may flow only intermittently and indirectly over a great distance to reach navigable water. The proposal would trigger *additional* CWA requirements (e.g., Section 404 dredge and fill permits) before any construction work could be performed in the frequently dry channels that run along the 4 million miles of roads in our U.S. highway system. (Roadside ditches that make up a Municipal Separate Storm Sewer System (MS4) and drain runoff, already are covered by the CWA’s NPDES program.) This double-regulation would slow economic growth by delaying and increasing the cost of vital public and private infrastructure repairs currently underway in every state and major city across the nation. It would also put more motorists at risk and cause harm to downstream receiving waters. Permit authorization and compensatory mitigation would likely be required just to maintain the important functions of ditches that primarily serve to convey and re-distribute stormwater runoff.

The proposed rule categorically determines that tributaries have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas.⁵ Likewise, waters and wetlands adjacent to tributaries will be automatically jurisdictional, under the proposal.⁶ Specifically, any channelized feature, including ditches and other man-made conveyances, no matter how remote from navigable waters, would be jurisdictional tributaries if they exhibit a bed, bank, and ordinary high water mark (OHWM). The proposed rule’s “tributary” definition vastly expands the scope of features that are currently regulated as tributaries, extending jurisdiction to features like ephemeral drainages and stormwater conveyances (e.g., roadside ditches) that have not been and should not be jurisdictional. The proposed rule’s two narrow ditch exclusions are unclear and unlikely to provide meaningful relief.

This proposed category of jurisdiction is problematic for AGC members – and has raised many questions by construction industry professionals. First, the proposed definition declares a ditch to be a WOTUS if that ditch drains directly to another WOTUS. Ditches draining a linear facility can be quite long. Will the entire length of the ditch be considered a WOTUS, even if the majority of the ditch drains and is contained wholly in upland areas? Second, typically, roadside ditches have bed and bank features (as intended by those who designed and constructed them). Ordinary high water marks are more difficult to distinguish. Would the presence of debris and/or bent and matted vegetation be enough to declare a roadside ditch a WOTUS if they were the only indications of an OHWM? Third, the definition states that standing or pooled water in a ditch would not trigger jurisdiction. If water in a ditch flows for a portion of the year and pools for a portion of the year, would this presence of water alone cause the ditch to be

⁵ See 79 *Fed. Reg.* at 22,201.

⁶ *Id.* at 22,263.

considered jurisdictional? Fourth, if flow did not exist prior to, and was created by the excavation of a ditch, or through maintenance frequency, will the entire ditch be considered a WOTUS?

The agencies' premise that ditches and tributary water bodies are similar is deeply misplaced. Such an analogy fundamentally misrepresents the stark functional differences between ditches and "waters of the United States." Historically, federally-controlled WOTUS have provided many functions and services critical for our nation's economic and environmental health. In addition to providing habitat, rivers, lakes, ponds, and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. In contrast, ephemeral ditches (e.g., irrigation, roadside, and stormwater) primarily serve to convey and re-distribute stormwater runoff. Ditches are unique features that do not perform the same environmental function or serve the same value as those waters that have historically been afforded protection under the CWA.

AGC is also concerned that the proposed definition of tributary would apply CWA regulations to features that are constructed and used pursuant to meeting other federal and state regulatory programs. For example, per CWA Section 402(p) and EPA's National Pollutant Discharge Elimination System (NPDES) regulations, MS4 operators often require contractors to build structural controls to treat, store, and infiltrate runoff onsite, in order to cut back on pollutants running through the MS4 and discharging to a WOTUS.⁷ Stormwater treatment is becoming more prevalent in roadside ditches due to space constraints. Common examples employed in ditches along roadways include check dams, swales, and other biofiltration and bioretention techniques – all designed to control the velocity and volume of stormwater and settle out particles to reduce pollutant discharges.⁸ (See also discussion on stormwater control basins and ponds in Section VI of these comments.) Are stormwater ditches that are part of MS4s intended to be WOTUS under the proposal? Will the designation of a roadside ditch as a WOTUS eliminate its possible use in the management and treatment of post-construction stormwater runoff?

Likewise, AGC members are required to manage stormwater runoff in the course of building roads via ditches. Per U.S. Department of Transportation (U.S. DOT) design specifications and federal regulations, all federally-funded roads must be "designed ... and maintained to have adequate drainage, cross drains, and ditch relief drains."⁹ The United States' public road network consists of approximately 4.08 million miles of roads and includes 604,493 bridges, and federally-funded road projects are ongoing in every state

⁷ Specifically, roadside ditches that collect and convey runoff and that are owned and operated by a public agency (e.g., state, town, or DOT) are MS4s, as specifically defined in the federal rules (40 C.F.R. Part 122.2). Operators of an MS4 must obtain an NPDES permit and develop a legally-enforceable stormwater management program that addresses the discharges that enter its system — whether they are illicit or permitted such as from construction runoff (from active sites) or runoff from certain developed and/or industrial properties.

⁸ And, adding the proposed rule's definition of "adjacent waters," which includes all waters in floodplain and riparian areas, could mean that holding and recharge ponds that are part of such systems also would be jurisdictional. For example, regulators may have no choice but to require an NPDES permit for storm flows that are diverted to basins for possible water supply or a Section 404 permit for maintenance activities.

⁹ See 30 C.F.R. Part 816.151(d); U.S. Department of Transportation Federal Highway Administration, Technical Advisory: Developing Geometric Design Criteria and Processes for Nonfreeway RRR Projects, T 5040. 28, <http://www.fhwa.dot.gov/design/t504028.cfm> (Oct. 17, 1988).

and major city across the nation.¹⁰ Do the agencies intend a program that would trigger all CWA programs and requirements before any construction work could be performed along our U.S. highway system?

The issue of ditches being deemed tributaries *per se* is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the Nation. Based on input from the Association's membership, AGC's key concerns with the agencies' proposed regulation of ditches are that it would (1) deter vital infrastructure repairs, (2) run counter to public safety, (3) inhibit sediment control practices, and (4) lead to illogical outcomes — as explained more fully below.

- ***Deter vital infrastructure repairs***

The proposed regulation of ditches would deter vital infrastructure repairs. Many states seek to upgrade their public roads to incorporate multi-modal transportation needs and to meet the latest standards that move traffic more safely and efficiently — and therein helping to avoid congestion-related accidents and excessive exhaust-related emissions. According to the 2013 Report Card for America's Infrastructure, "Forty-two percent of America's major urban highways remain congested, costing the economy an estimated \$101 billion in wasted time and fuel annually.... Currently, the Federal Highway Administration estimates that \$170 billion in capital investment would be needed on an annual basis to significantly improve conditions and performance."¹¹ By another estimate, traffic congestion wasted 2.8 billion gallons of fuel in 2007 — approximately three week's worth of gas for every traveler.¹² Clearly, infrastructure improvements are critical to our economy and the environment; however, such work inevitably involves the discharge of dredged or fill material in existing roadside ditches. Construction work on these roads and ditches (per DOT requirements) would (per the proposal) encounter "jurisdictional waters" and require expensive and time-intensive Section 404 permits. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. What is more, the delay of much needed repairs and investments to our roadways and transportation infrastructure will only exacerbate air quality concerns.

- ***Run counter to public safety***

The proposed regulation of ditches would run counter to public safety. Drainage systems that remove stormwater runoff from streets and highways are an integral feature of a safe system. Water that remains on the roadway surface can contribute to vehicle hydroplaning. In the winter, standing water can freeze

¹⁰ See U.S. Department of Transportation, Federal Highway Administration, Highway Statistics 2001 § V, Roadway Extent, Characteristics, and Performance Tbl. HM-10, at <http://www.fhwa.dot.gov/ohim/hs01/hm10.htm>; U.S. Department of Transportation Federal Highway Administration, 2013 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance, <http://www.fhwa.dot.gov/policy/2013cpr/overviews.htm#part1> (2013).

¹¹ See American Society of Civil Engineers, 2013 Report Card for America's Infrastructure.

<http://www.infrastructurereportcard.org/a/#p/roads/overview>

¹² See Texas Transportation Institute, Texas A&M University, 2009 *Urban Mobility Report*, July 2009.

and cause skidding. According to the U.S. DOT, there are over 5,870,000 vehicle crashes each year, of which 23 percent are weather-related and result in more than 6,000 fatal crashes annually. The vast majority of weather-related crashes are attributed to wet pavement (74 percent).¹³ In addition to ditches and side slopes, incorrectly maintained drop inlets, pipe ends, culvert ends, head walls, and other drainage features located adjacent to the roadway may be potentially hazardous (by causing ponding to occur on road surfaces, for example).¹⁴ Under the proposal, DOTs and highway contractors would need to wait for Section 404 permit authorization to maintain their system of roadside ditches because they would be depositing “dredged or fill” material through the process of mechanized land clearing. Delaying maintenance and repair activities or threatening safety-related highway projects increases potential for injuries and fatalities to the traveling public.

In addition, DOTs would need to obtain an NPDES permit to sand, salt, or chemically treat the roadway because they would be discharging pollutants directly into a WOTUS. Already, according to the U.S. DOT, “winter road maintenance accounts for roughly 20 percent of state DOT maintenance budgets....” And “each year, state and local agencies spend more than 2.3 billion dollars on snow and ice control operations.”¹⁵ The proposal would move the point of compliance from the receiving surface water to the bank/side of the roadway. By regulating ephemeral ditches (e.g., irrigation, roadside, and stormwater) owners and operators will lose the ability to treat runoff in a cost-effective manner and the costs of winter road maintenance will be driven up. Long term, the threat of additional regulatory oversight, higher costs, mitigation, and risk will discourage the potential creation of new WOTUS and thereby discourage low-impact development strategies to manage runoff. (See discussion on stormwater controls in Section VI of these comments.)

- ***Inhibit sediment control practices and projects***

The proposed regulation of ditches would inhibit sediment control practices and projects. Past efforts to move highway and road drainage along quickly led to the installation of many straightened channels (ditches). Today, per EPA’s movement to promote low-impact development and other green design strategies, MS4s are hiring contractors to maintain, stabilize soils, and control flow in roadside ditches, as well as introduce a natural or curvilinear channel character. The proposal would inhibit the ever-increasing practice of retrofitting past, less natural ditch designs to use practices — such as bioretention — intended to filter out particles in the runoff that has entered a ditch before the runoff reaches a surface receiving water. Moreover, as stated above, roadway personnel would not be legally authorized to maintain the sediment controls built into their ditches — for the primary purpose of protecting the quality of receiving waters — without first securing a federal permit.¹⁶ (Interestingly, environmental advocates

¹³ See U.S. Department of Transportation, Road Weather Management Program http://www.ops.fhwa.dot.gov/weather/q1_roadimpact.htm.

¹⁴ See http://safety.fhwa.dot.gov/local_rural/training/fhwasa09024/.

¹⁵ See U.S. Department of Transportation, Road Weather Management Program http://www.ops.fhwa.dot.gov/weather/q1_roadimpact.htm, also references “Highway Statistics Publications, Highway Finance Tables SF-4C and LGF-2,” 1997 to 2005, <http://www.fhwa.dot.gov/policy/ohpi/hss/hsspubs.cfm>.

¹⁶ See, e.g., <http://lakeerie.ohio.gov/Portals/0/LEPF/LEPF%20Final%20Report%20415-11.pdf>.

have incorrectly concluded that expansive federal control over small streams and wet areas is needed to curb pollution that would otherwise flow downstream to vital fish habitat.)

- ***Lead to illogical results***

The proposed regulation of ditches would lead to illogical results (see related discussion in Sections V and VI below). For example, the construction industry would face increased spill and emergency response reporting requirements whenever a roadside ditch receives a spill — due to roadway work or accidents — or whenever it rains during a paving operation. Paving contractors would need to immediately report an oil spill to the National Response Center every time it rains on their project site because the water leaving the roadway would run into the roadside ditch and cause a film or “sheen” on the surface of a WOTUS, which would trigger the reporting requirements of the Discharge of Oil regulation.¹⁷

What is more, 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.”¹⁸

On top of meeting CWA Section 404 permit requirements for ditch maintenance and related roadwork (as explained above), Section 404 permittees would need to provide mitigation to ensure “no net loss” of waters whenever they maintain the millions of miles of ditches along our nation’s roadway system. Costs will significantly increase in densely populated areas where mitigation opportunities are non-existent and the only options are “unlike” and “out of kind.”

AGC maintains that EPA should not require compensatory mitigation for the maintenance of ditches — including maintenance for the safety of public roadways or to maximize sediment control practices — where the primary function of the ditch is to convey stormwater. The fact that a ditch often develops wetland characteristics over time, and in between scheduled maintenance activities, is ancillary to its primary function. The development of wetland characteristics in ditches is very different from that of compensatory mitigation sites, where recruitment of ecological receptors is the primary function and goal.

IV. The Ditch Exemptions

Summary: AGC has serious concerns with the wording and potential implementation of the proposed ditch exemptions. In addition to shifting the burden of proof from the government to the public, the two narrow exclusions for ditches are not clear and, in practice, they are not likely to exclude many ditches from jurisdiction. The exclusions use terms that are undefined, which further adds to the confusion. The agencies’ proposal

¹⁷ See <http://newsmanager.commpartners.com/agcenv/issues/2006-12-29/3.html>.

¹⁸ 40 C.F.R. Part 131.10(1).

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.

The proposed rule's categorical assertions of jurisdiction shift the burden of proof for permit decisions and jurisdictional determinations. Under current practice, the agencies must “document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus,” including the physical indicators of flow and information regarding the functions of the tributary and any adjacent wetlands.¹⁹ The agencies must “explain their basis” for finding a significant nexus.²⁰ But, under the proposed rule with its categories of *per se* jurisdictional waters, the agencies do not have to make this showing. The proposed rule effectively shifts the burden of proof to the public to prove that the water or feature at issue *does not* meet the proposed rule's broad “tributary” or “adjacent water” definitions or that it meets one of the narrow exclusions.

For example, a landowner who believes a ditch on his property is not a jurisdictional tributary will have to try to prove to the agencies that the ditch qualifies for one of the narrow ditch exemptions. He will have to show, through “[h]istorical evidence, such as photographs, prior delineations, or topographic maps,” that either: (1) the ditch was excavated wholly in uplands *for its entire length*, drains only uplands, and has less than perennial flow, or (2) the ditch does not contribute flow to a jurisdictional water.²¹ Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. The agencies do not acknowledge the burden this imposes on applicants in either the rule or the economic analysis. Indeed, the agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public.

To make matters worse, the first proposed ditch exclusion includes terms like “wholly in uplands” and “less than perennial flow” that remain undefined in CWA regulations. Indeed, “uplands” itself remains undefined. In relatively flat terrain, it would be very difficult to discern between areas that fit these undefined terms and those that do not. 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.

To qualify for the second exclusion, the ditch must contribute *zero flow*, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country. For that reason, this exclusion is virtually useless.

¹⁹ 2008 *Rapanos* Guidance, at 11.

²⁰ 2008 *Rapanos* Guidance, at 11.

²¹ See 79 *Fed. Reg.* at 22,203.

V. MS4s Are Point Sources, Not WOTUS

Summary: AGC maintains that MS4s should not be WOTUS, as they are already regulated under CWA Section 402 NPDES permits. To avoid double regulation, and shifting the point of compliance from the MS4 outfall to the roads and ditches at the system's periphery, MS4's should be categorically *excluded* from being WOTUS.

MS4s play important roles in collecting and treating stormwater discharges from industrial and commercial operations. In the entire proposed rule, nowhere do the agencies mention MS4s — much less the elaborate CWA regime that governs and regulates these systems across the United States. Regulations define MS4s as “a conveyance or *system of conveyances* ... designed or used for collecting or conveying storm water.”²² The component “conveyances” within a larger MS4 “system” collect and channel runoff through “roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains.”²³

As stated in Section III above, AGC is very concerned that the overly broad proposed definition of “tributary” may improperly treat MS4s not as conveyance systems, but as jurisdictional waters. AGC urges the agencies to clarify that WOTUS jurisdiction does not reach MS4s and the component conveyances that comprise these systems, as further detailed in the comment letter already submitted by the Coalition of Real Estate Associations (an informal group that includes AGC).

- ***Lead to illogical results***

Classifying any components of an MS4 — but ditches and stormwater control basins/ponds, in particular — as WOTUS would yield illogical results (see related discussions in Sections III and VI). As explained other sections of this letter, maintaining the conveyances within the MS4 (including clearing vegetation, removing silt/sediment, and stabilizing banks, draining ponds, etc.) would require a Section 404 permit. Stormwater discharges into the ditches may require Section 402 permitting or, in combination with other discharges, trigger area-wide TMDL requirements under Section 303.

Specifically, if 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.²⁴ If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum daily load (TMDL) for the waterbody.²⁵ 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. Of course, Congress required permits for discharges from point sources into

²² 40 C.F.R. § 122.26(b)(8) (emphasis supplied).

²³ *Id.*

²⁴ 40 C.F.R. § 131.11(a).

²⁵ 33 U.S.C. § 1313(d).

WOTUS — not for discharges from a WOTUS to a WOTUS.²⁶ It is also important to note that MS4 operators have NPDES permit liability for implementing their stormwater programs to control their point source discharges into WOTUS. If the MS4 system itself becomes “waters of the United States,” then the point of compliance would shift from the nearby surface water to the ditch on the side of the roadway. For reasons such as these, the structure of CWA Section 402 and EPA’s regulations make clear that MS4s are point sources and not WOTUS.

Excluding MS4s from WOTUS jurisdiction will not lower protection of aquatic resources, because pollutant discharges from these systems are fully covered by the comprehensive and exhaustive NPDES regime. Direct or indirect discharges — from MS4 outfall points into WOTUS — must be permitted under all of the Section 402 authorities and implementing regulations controlling additions of pollutants from point sources.

Any agency interpretation or field determination that subjects MS4s and the conveyances within them to WOTUS jurisdiction would enormously disrupt state and local government programs and responsibilities to maintain, manage, and treat stormwater discharges under Section 402(p). It would federalize a vast network of storm sewer systems within state and local control — plainly upsetting the goal and policy of federal-state balance that Congress announced in CWA Section 101(b).

VI. Stormwater Control Basins & Ponds

Summary: AGC is opposed to any regulatory language that would extend CWA jurisdiction to stormwater control basins and ponds that contractors build to satisfy another section of the Clean Water Act — for example, the NPDES permitting requirements within Section 402’s regime. It is unclear whether or not such stormwater controls would qualify for any of the exclusions in the proposal. On a majority of regulated construction sites, current NPDES permit requirements have led contractors to build temporary or permanent 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. EPA is now pushing cities to require contractors to build permanent structural controls to treat, store, and infiltrate runoff onsite before it enters the municipal storm sewer system. Increasingly common biofiltration and bioretention systems — all designed to control the velocity and volume of stormwater and settle out particles to reduce pollutant discharges — could become WOTUS. Under the proposal, construction site operators would be forced to create federally jurisdictional waters on their property to meet other requirements of the CWA.

²⁶ Moving pollutants within the same waterbody is not a “discharge” because no pollutants are added, and hence do not trigger CWA permitting obligations. See, e.g., *LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmted., Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

Under the proposed rule, CWA jurisdiction would arguably extend to stormwater control basins and ponds of various sizes and function that ultimately drain to an otherwise regulated WOTUS. This result would stem from the agencies' finding that all "tributaries" and "adjacent waters including wetlands" have a significant nexus to WOTUS by definition and are thus jurisdictional by rule. Specifically, as discussed above, the proposed rule defines "tributary" based on some evidence of flow, however indirect, to a traditional navigable water, interstate water, or territorial sea. The origin of the water, whether natural, man-altered, or manmade, expressly does not matter. Similarly, waters and wetlands adjacent to tributaries (e.g., a seasonally wet pond or swale) are categorically jurisdictional. An "adjacency" determination includes waters and wetlands with a confined surface or shallow subsurface connection to jurisdictional water. The agencies' proposed "other waters" category would give the agencies the discretion to capture any wet feature (even geographically isolated ones) that cannot be found jurisdictional under the "tributary" or "adjacent water" categories, as discussed in Section VII below.

- ***NPDES Program calls for contractors to build basins, ponds***

EPA's NPDES 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.

It is worth noting that EPA's 2012 Construction General Permit for Stormwater²⁷ does not consider "stormwater control features" (MS4s and parts thereof) as "surface waters" for purposes of the 50-foot natural buffer requirement.

Recently, there has been an explosion in the number of 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

²⁷ See http://www.epa.gov/npdes/pubs/cgp2012_finalpermit.pdf (CGP Part 2.1.2.1 Provide Natural Buffers or Equivalent Sediment Controls – noting that EPA does not consider stormwater control features (e.g., stormwater conveyance channels, storm drain inlets, sediment basins) to constitute "surface waters" for the purposes of triggering the requirement to comply with this Part).

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.²⁸

Most filtration basins have under-drain systems; they may also have outlet control structures and emergency spillways, depending on the variety and purpose. The under-drain gradually dewateres the sand bed and discharges the runoff to a nearby channel, swale, or storm sewer. Infiltration basins would be the only instance where all outflow goes back into the ground. This type of system does not normally have a structural outlet to discharge runoff or an under-drain system. It is very challenging to apply on most sites, however, because it is only effective in relatively small drainage areas with permeable soils. Therefore, infiltration basins are typically combined with an extended detention basin to provide additional runoff storage for both stormwater quality and quantity management. Detention basins, which need to be cleaned out on a regular basis, trap sediment and deleterious matters before entering the infiltration system, thereby extending the life of the system.

Under the proposed regulatory framework outlined above, 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, merely because those devices drain (e.g., via a shallow groundwater flow or a seasonally wet ditch that may flow a great distance, etc.) to a navigable water only in storm events.

- ***Not otherwise exempt***

The proposal excludes the following from the “waters of the United States” definition:

- *Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.*
- *Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.*

Unfortunately, these exclusions are too amorphous to address AGC’s serious concerns. It is highly questionable and open to interpretation whether or not stormwater control basins/ponds would meet the criteria for these listed exclusions on a consistent or occasional basis.

Stormwater control basins/ponds are designed to help protect areas from flooding by reducing how fast runoff enters nearby surface waters. Most ponds (and certainly temporary or permanent sediment basins) also function to trap pollutants in runoff such as sediment nutrients and metals. Pollutant reduction is achieved through settling, capture by indigenous wetland plants and vegetation, and filtration through soil. The basins/ponds must be cleaned out in order to remove the captured pollutants. It is unclear whether stormwater control basins/ponds would qualify as “waste treatment systems.” No “treatment” (chemical or otherwise) is typically occurring, as is the case with other waste management programs. What is more,

²⁸ See <http://cfpub2.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=66&minmeasure=4>.

stormwater (e.g., rain, snowmelt) is not the same as wastewater (sewage); each is covered under a separate NPDES permit program.

Moreover, the basins/ponds that contractors build on active construction sites, and later modify to serve as permanent stormwater control structures, are not “used exclusively for... settling basins.” While all types of “green infrastructure” effectively retain and infiltrate rainfall, these practices also can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, provide wildlife habitat and sequester carbon while also providing communities with aesthetic and natural resource benefits.²⁹

- ***Lead to illogical results***

Extending CWA jurisdiction to stormwater control basins and ponds would lead to illogical results (see related discussions in Section V). In meeting the goals of the NPDES program, contractors build stormwater control basins and ponds to protect WOTUS both during construction and for permanent, long-term water resource protection. Does EPA intend to regulate these features as WOTUS, or are they intended to be exempted? As explained above, AGC finds that they would not meet the proposed exemption criteria on a consistent or occasional basis.

Stormwater control basins/ponds are a widely used BMP that must be designed, constructed and maintained to function properly. Basin/pond maintenance is often dictated by local laws and is necessary to prevent downstream pollutant loadings, erosion, and flooding. Yet, under the proposal, contractors and property owners/managers would need to obtain a Section 404 permit to authorize them to repair outlet structures, clear vegetation, remove sediment, stabilize the pond banks, or drain the pond. (They would also need a Section 404 permit to convert a temporary basin to a permanent pond.) In addition, the stormwater discharges into the basin/pond may require a separate NPDES Section 402 permit. Further, CWA Section 303 requires states to adopt and submit to EPA water quality standards (WQSs) which “consist of a designated use or uses for the waters of the United States”³⁰ If stormwater control basins/ponds were WOTUS, then state-developed and EPA-approved WQSs would need to designate “uses” for those basins/ponds. In turn, the state would need to develop a pollutant-specific TMDL for any basin/pond that failed to meet its use.³¹

Where maintenance of stormwater BMPs is hampered, the BMPs may fail to function as designed. Flood control structures will lose flood storage, and infiltration BMPs installed for water quality will fail to treat runoff as designed, which could in turn cause MS4s to be out of compliance with their MS4 permits. What is more, in a case where the basin/pond fails to meet a CWA water quality standard, a construction contractor in a design-build contract scenario could be held responsible for design or construction flaws or defects.

²⁹ See <http://water.epa.gov/infrastructure/greeninfrastructure/index.cfm>.

³⁰ 33 U.S.C. § 1313; 40 C.F.R. § 131.3(i).

³¹ 33 U.S.C. § 1313(d).

Some state NPDES construction stormwater permits require contractors to direct turbid or sediment-laden waters to a temporary or permanent sedimentation basin or pond. For example, the Minnesota Construction Stormwater Discharge General Permit (MNR 100001, issued August 1, 2013) states: “The permittee(s) must discharge turbid or sediment-laden waters related to dewatering or basin draining (e.g., pumped discharges, trench/ditch cuts for drainage) to a temporary or permanent sedimentation basin on the project unless infeasible.” See Exhibit 1 below.

Finally, if construction activity in/around a basin/pond causes a sheen on surface (possibly because of fuel and fluid in earth moving equipment), the construction site operator would need to immediately report an oil spill to the National Response Center — pursuant to EPA rules in place for a discharge of oil into waters of the United States.

VII. Other Waters & Landscape Jurisdiction

Summary: 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 virtually no way to assess the status of their local water, short of undertaking a complex and costly watershed study.

The agencies’ proposed “other waters” category is designed to capture any wet feature that cannot be found jurisdictional under the “tributary” or “adjacent water” categories. Under the proposed rule, the agencies will assert jurisdiction over “other waters, including wetlands,” if they “alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus” to a (1) traditional navigable water, (2) interstate water, or (3) territorial sea.³²

For the first time, the proposal would allow regulators to consider all isolated waters and wetlands together within a large landscape area to support a jurisdictional determination. New definitions including the new concept of “a single landscape unit” leave ambiguity about what portion of each watershed is beyond the reach of federal regulators under the CWA. The proposed rule provides that such waters are “similarly situated” when they “perform similar functions and are located sufficiently close together or sufficiently close to a WOTUS so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical and biological integrity” of a waters identified in category (1)-(3) above. Under this definition, agency reviewers will have great discretion in identifying and evaluating isolated water-filled depressions (see Section VIII below), vernal pools, prairie potholes, and the like, together within a large “landscape unit.”

³² 79 *Fed. Reg.* at 22,263.

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 during the wet season.

The agencies’ proposal for “other waters” is overbroad, ambiguous and confusing. It is without question the provision is meant to assert jurisdiction over isolated waters that have little or no connection to traditional navigable waters. The science does not support the proposed assertion of jurisdiction over these “other waters,” and the Supreme Court has determined such isolated waters are not within the agencies’ authority to regulate under the CWA.

VIII. Water-Filled Depressions

Summary: The proposed language that would exclude “water-filled depressions created incidental to construction activity” from the definition of WOTUS is ambiguous. This is particularly problematic for AGC members because it will ultimately be up to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during construction activity — or face complicated and layered reviews, costly penalties, or even citizen suits. Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve alleged violations of federal CWA laws. However, these tools often lack the level of resolution required to make a proper determination.

The proposed revisions to the definition of WOTUS would introduce many new ways for the federal government to regulate isolated waters that are normally wet only during seasonal rain events. It is likely that new types of waters will be regulated by the federal government. In this regard, the public will frequently face the difficult task of proving, on a case-by-case basis, that the water or feature at issue qualifies for one of the limited and ambiguous exclusions. This point is particularly prominent with regard to the exclusions for “water-filled depressions incidental to construction activity” and “water-filled depressions excavated on dry land for the purposes of obtaining sand and gravel.” AGC notes that this exclusion provides yet another example of this rulemaking being overly broad and ambitious in scope, so much so, as to require an exclusion for waters this small — the implication being that without this exclusion these waters would be jurisdictional WOTUS.

As proposed, the language of the “water-filled depressions” exclusion is ambiguous. The agencies do not clarify what is meant by “incidental to” or “construction activity.” Depressions are commonly created in the course of construction for various reasons, including borrow pits, retention basins, architectural landscaping, diversion of stormwater run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created in the course of constructing something other than a

structure or a facility? It is also unclear whether the exclusion survives beyond the period of the actual construction activity.

AGC members are also concerned that the burden will fall to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during a construction activity and should not be regulated. A failure to prove this fact would carry important regulatory implications that could significantly affect the utility and value of land, as well as the jurisdiction of state and federal agencies. Proving that a land depression was created by a construction operation will require historical information.

In many instances, a series of old maps and aerial photographs from different dates may provide the only opportunity to determine the origin of a particular wet area or water, in cases where there is some doubt as to whether or not they were man-made. Old maps may include topographic sheets, soil, geology, and land surveys. Even still, they may not be sufficient to identify small water bodies, wetlands, and wet soils, or, alternatively, to document their absence.

In an outreach meeting with AGC members, the agencies shared the opinion that general contractors would have “easy access” to topography maps and aerial photos to demonstrate the creation of “water-filled depressions incidental to construction” — if/when any jurisdictional issues or challenges would arise. AGC disagrees and finds that the agencies are oversimplifying what it will take to demonstrate the presence or absence of water-filled depressions. Historically, topographic maps and aerial photographs have been useful in identifying well-defined areas with wetland characteristics (i.e., true wetlands). However, with the proposed rule and the strong potential for the inclusion of more isolated depressions, these tools lack the level of resolution required to make a proper determination. AGC members have shared reports of former construction, industrial, and logging sites where wetland plants have become established within areas as shallow as 3 to 4 inches (e.g., tire tracks, poor grading practices, and natural settlement of non-compacted areas) from the surrounding landscape. In many instances the wetland vegetation is sparse and often comingled with grasses, such as reed canary grass. This unique characteristic, in addition to the flat topography that is often associated with water-filled depressions, make it nearly impossible to classify some areas using topographic maps and/or aerial photos.

IX. Grandfathering Issues

Summary: 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.

In outreach meetings, the agencies have stated that existing JDs issued by the Corps will continue to be valid and that the agencies will not be re-reviewing existing, valid determinations. But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the agencies’

intent. In addition, the agencies' statements fail to address JDs and permit applications that are already pending (and may be close to being issued).

The agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule. Accordingly, the agencies should clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule.

X. Conclusion

In the preamble to the proposed rule, EPA and the Corps state that key U.S. Supreme Court decisions "resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA" and that, through this rulemaking, the "agencies are providing clarity to regulated entities as to whether individual water bodies are or are not jurisdictional and discharges are or are not subject to permitting." AGC disagrees with this finding. The proposal leaves many key concepts unclear, undefined, or subject to agency discretion.

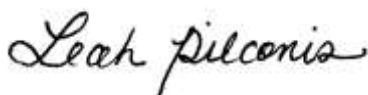
The agencies' broad assertion of federal jurisdiction over roadside ditches, sediment basins and ponds, and water-filled depressions will result in project delays due to the need for permits for dredging, filling, discharge or hazardous substances releases that may not previously have been required.

The proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the Supreme Court. In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability, and raises practical concerns with regard to how the rule will be implemented.

Without clear definitions to guide field staff, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical infrastructure and private projects.

AGC recommends that the agencies withdraw the WOTUS proposal, consult with stakeholders, including AGC, and work to revise the proposed rule to resolve these important issues. Thank you for considering these comments and recommendations. If you have any questions, please contact me at pilconisl@agc.org or (703) 837-5332.

Sincerely,



Leah F. Pilconis
Senior Environmental Advisor to AGC of America

Exhibit 1: Examples of Ponds as a Best Management Practice To Protect Surface Waters

Example 1: Use of pond during construction (illustrates stormwater trapped during 4 inch rain event); same pond cleaned out, shaped, and stabilized for permanent resource protection.



Example 2: Use of pond during construction; same pond cleaned out, shaped, and stabilized for permanent resource protection.

