U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

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Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Proposed Rule, Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021), Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen:

The U.S. Chamber of Commerce (the Chamber), provides the following comments on the proposal of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (the Corps) (collectively, the Agencies) to revise the definition of "waters of the United States" (WOTUS). 86 Fed. Reg. 69,372 (Dec. 7, 2021).

Effective, transparent, and timely federal government decision-making is necessary to support building smart, modern, resilient infrastructure. Water quality and ongoing, reliable supplies of clean, safe water are not only critical to human health and the environment, but to meeting businesses' operational objectives and reducing risks for our members and private landowners across the United States. Efficient Clean Water Act (CWA) permitting is needed to accelerate project delivery that will promote infrastructure improvements that are needed to implement the Administration's plan for economic growth, including the ambitious policy agenda on the climate, environmental stewardship, and environmental justice. The President has said that "we need to build America from the bottom up and the middle out." @POTUS, Twitter (Oct. 25, 2021, 9:35 PM). Pre-construction delays due to a protracted permitting process can add tens of thousands to millions of dollars to a project's bottom line and can even block important climate, clean energy, resilience, and water management projects from proceeding.

In this proposed rule, the Agencies claim that "[c]ontinuity with the 1986 regulations will minimize confusion and provide regulatory stability for the public, the regulated community, and the agencies, while protecting the nation's waters...." 86 Fed. Reg. at 69,416, col. 1. Unfortunately, the proposal does not take the necessary steps to minimize confusion or provide regulatory certainty. The proposal is not merely a return to the 1986 regulations[1] and the *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*) Guidance regulatory regime (the *Rapanos* Guidance regime). It would expand the *Rapanos* Guidance regime in certain respects, inconsistent with Supreme Court case law and the Agencies' stated goals, and it would do so without adequate explanation. This approach will generate more confusion and regulatory uncertainty.

If made final in its current form, the proposal would be a missed opportunity to provide the certainty that is needed. It would perpetuate, rather than take the opportunity to correct, the flaws of the *Rapanos* Guidance regime by mandating unnecessary case-by-case analyses for determining the scope of WOTUS in the field, which would cost private companies and landowners substantial time and money. If adopted in its current form, the proposal would also introduce new regulatory uncertainties that would likely exacerbate the length and unpredictability of the permitting process.

Additionally, because the U.S. Supreme Court's forthcoming decision in *Sackett v. EPA* is likely to be highly instructive on the issues at the heart of this rulemaking, including the limits of the Agencies' authority under the CWA, the Chamber urges the Agencies to suspend work on the proposed rule until the Court issues a decision. To the extent any work on the proposed rule continues, the Agencies should begin earnest and robust implementation of the Agencies' planned stakeholder engagement process, including the Chamber's proposal for a capstone national roundtable.[2] On January 24, the Supreme Court granted a petition for *certiorari* to review *Sackett*, a case in which the Court is poised to revisit *Rapanos* and address the scope of CWA jurisdiction. To continue with this rulemaking while the Supreme Court is in the process of evaluating the scope of WOTUS in a manner that may require adjustments to the proposed WOTUS definition would be a waste of agency resources, as there is a likelihood that the decision could require another amendment to the proposed WOTUS definition. Moving forward now would also waste the already strained resources and increase the confusion and uncertainty of state and local agencies and small businesses. The Agencies have repeatedly stated that they wish to craft a

[1] In 1986, the Corps consolidated and recodified the regulations defining WOTUS for purposes of implementing the section 404 program. 51 Fed. Reg. 41,216 (Nov. 13, 1986). While EPA and the Corps have separate regulations defining WOTUS, the 1986 regulations reflected the interpretation of both agencies, and for convenience, these comments will generally refer to the 1986 regulations as inclusive of EPA's comparable regulations that were recodified in 1988. 53 Fed. Reg. 20,764 (June 6, 1988).
[2] Request for a National Roundtable to Respond to Request Regarding Regional Roundtables, Docket ID No. FRL-6027.4-04-OW (Nov. 30, 2021).

durable WOTUS definition, but plowing ahead in reliance on the "significant nexus" test without the benefit of the Supreme Court's forthcoming decision in *Sackett* would likely result in more regulatory ping pong and continue the pattern of a constantly shifting WOTUS definition.

Moreover, there is no urgency to complete the pending rulemaking because the 2019 Repeal Rule, 84 Fed. Reg. 56,626 (Oct. 22, 2019), is now operative as a result of the vacatur of the Navigable Waters Protection Rule (NWPR). Although the Arizona and New Mexico district courts did not address the effect of their decisions to vacate the NWPR, the general rule is that a court's judgment vacating a regulation has "the effect of reinstating the rules previously in force." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F. 2d 795, 797 (D.C. Cir. 1983); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 454 n.25 (3d Cir. 2011); *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). Accordingly, the 2019 Repeal Rule, which re-codified the 1986 regulations (implemented as informed by applicable agency guidance documents and consistent with Supreme Court decisions) and largely accomplished what the Agencies state they seek to do with the proposed rule, is already in effect. A second EPA rulemaking to return to the pre-2015 regime is not necessary, especially while the Supreme Court is in the process of reviewing the appropriate scope of CWA jurisdiction in the *Sackett* case.

The Chamber provides here a summary of its comments on the Agencies' current proposal:

- The Agencies' proposed definition, if finalized, would have many adverse real-world effects on businesses, specific industries, and states, counties, and local government.

- The proposed rule would improperly expand the scope of federal jurisdiction and would require confusing case-by-case determinations that would be difficult to implement in the field.

- Because the proposal relies on a case-by-case approach and lacks clear exemptions, the rule would not achieve durable policy and regulatory certainty.

- The proposal fails to accurately characterize the proposed action as required by the Administrative Procedure Act (APA).

- The Agencies fail to adequately consider the potential impact of the proposal on small businesses. The Chamber suggests that the Agencies implement a formal Small Business Regulatory Enforcement Fairness Act process.

I. The Agencies' Proposed Definition, If Finalized, Would Have Many Adverse Real-World Effects on Businesses, Specific Industries, and States, Counties, and Local Government.

Despite the Agencies' assurance that the rule will improve implementability by returning to a familiar regulatory regime, the proposed changes to the 1986 regulations would introduce new uncertainties that would give businesses, institutions, and landowners significant concerns about the real-world impacts it would impose. This is contrary to the goal of having effective, transparent, and timely federal permitting decisions.

For instance, a small mining company in Wyoming has incurred thousands of dollars in investigation and analysis costs to determine whether certain features were jurisdictional under the CWA and to complete the CWA section 404 permitting process. Even after this investment of time and money, the Corps determined that no 404 permit was required. Further, the relevant mining operations are in a part of the arid west where total precipitation ranges from 5 to 12 inches annually, about half of which typically falls as short duration, high intensity rainstorms and half as winter snow. As a result, most of the drainage flows only in response to these infrequent precipitation events and would be classed as ephemeral drainages, regardless of channel geometry. Any new WOTUS definition should include an ephemeral stream exclusion for the arid west to give clarity and certainty to the small business community in this region.

In addition, by choosing to propose to amend some but not other parts of the 1986 regulations, the Agencies have missed an opportunity to provide needed clarity. One clear example is the proposed revival and expansion of the "other waters" provision. A wide range of features may be determined to be jurisdictional under the proposed definition of "other waters." Codifying the use of either of the Agencies' proposed *Rapanos* standards to determine jurisdiction over "other waters" goes significantly beyond the text of the 1986 regulations and is inconsistent with the limits recognized by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*") and *Rapanos*. The "other waters" category, as described in the proposed rule, essentially provides regulators with a fallback option to assert jurisdiction over a wide range of features, including features that are far from navigable-in-fact waters and that may have only minor volumes of flow. This would likely trigger CWA section 404 permitting requirements for additional projects, subjecting project proponents to substantial permitting costs: "from $3,100 to $217,600 for general permits and from $10,900 to $2,376,800 for individual permits in 2020 dollars."[3] Moreover, due to case-by-case application, the "other waters"

[3] Brattle, Review of the Agencies' 2021 Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States'" Rule, at 10 (Feb. 2022).

definition could be applied inconsistently by different Corps Districts, creating confusion and delay and leading to additional regulatory requirements and burdens.

II. The Proposed Rule Would Improperly Expand the Scope of Federal Jurisdiction and Would Require Confusing Case-By-Case Determinations That Would Be Difficult to Implement in the Field.

Despite the Agencies' assurances that the proposed rule would simply return to the "pre-2015 WOTUS regime," the proposal would make major changes to the 1986 regulations. The Agencies have proposed new standards derived from *Rapanos* that are inconsistent with the limits recognized by the Supreme Court in *SWANCC* and *Rapanos* itself.

The changes the Agencies propose to the 1986 regulations establish ambiguous standards that would cause delay and inconsistent interpretations. Specifically, the Agencies propose to assert jurisdiction over tributaries, adjacent wetlands, and "other waters" where such features, on a case-by-case basis, satisfy either the Agencies' proposed "relatively permanent" standard or their proposed "significant nexus" standard. *See*, *e.g.*, 86 Fed. Reg. at 69418, col. 3 ("The proposed rule amends the 1986 regulations to delete all of the provisions referring to authority over activities that 'could affect interstate or foreign commerce' and replace them with the relatively permanent and significant nexus standards ....").

Codifying the Agencies' proposed significant nexus standard presents a number of issues. The proposed standard is inconsistent with case law and prior guidance and would be problematic to apply in the field. It would also significantly expand the federal government's jurisdiction under the CWA and substantially muddle the permitting process, causing increases in cost and delays for permit applicants. The proposal also gives inadequate weight to states' and cities' water quality requirements, which rightly protect local assets, improve water quality, and account for local interests and priorities.

Under the proposal, other waters, tributaries, and adjacent wetlands would be jurisdictional where "*either alone or in combination with similarly situated waters in the region*" they "*significantly affect the chemical, physical, or biological integrity*" of other jurisdictional WOTUS. *See*, *e.g.*, 86 Fed. Reg. at 69,449, col. 1 (emphases added). The Agencies propose to define "significantly affect" to mean "*more than speculative or insubstantial effects on the chemical, physical, or biological integrity*" of a traditional navigable water (TNW), interstate water, or the territorial seas. *Id.* at col. 3 (emphasis added). The factors that the Agencies propose will be considered in the case-specific analysis include: (1) The distance from a water of the United States; (2) The distance from a water identified in paragraphs (a)(1), (a)(2), or (a)(6) of this section; (3) Hydrologic factors, including shallow subsurface flow; (4) The size, density, and/or

number of waters that have been determined to be similarly situated; and (5) Climatological variables such as temperature, rainfall, and snowpack. *See id.* As further explained below, how these factors will be applied in practice, in any specific set of circumstances, is essentially unpredictable.

A. The proposed significant nexus standard would expand jurisdiction beyond the 2008 *Rapanos* Guidance and beyond the limits of the CWA, as described in *SWANCC* and *Rapanos*.

The 2008 *Rapanos* Guidance attempted to harmonize the 1986 regulations with the interpretation that had then recently been issued by the Supreme Court. The Guidance concluded that certain features would be jurisdictional if they significantly affected "the chemical, physical *and* biological integrity of downstream" jurisdictional waters. *Rapanos* Guidance at 1 (emphasis added). The proposal defines "significantly affect" as "more than speculative or insubstantial effects on the chemical, physical, *or* biological integrity" of downstream jurisdictional waters. 86 Fed. Reg. at 69,450, col. 3 (emphasis added). By using "or" in place of "and," the Agencies suggest that jurisdiction could be found if a water feature significantly affects the integrity of one of three characteristics of the downstream jurisdictional water.

For example, to determine whether a particular feature has a significant effect on the biological integrity of downstream jurisdictional waters, the Agencies would consider the following biological factors:

> Resident aquatic or semi-aquatic species present in the water being evaluated, ... and downstream traditional navigable waters (e.g., fish, amphibians, aquatic and semi-aquatic reptiles, aquatic birds, benthic macroinvertebrates); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the water being evaluated, and if so, whether such dispersal extends to ... the water being evaluated. In addition, relevant factors influencing biological connectivity and effects could include species' life history traits, species' behavioral traits, dispersal range, population sizes, timing of dispersal, distance between the water being evaluated and a traditional navigable water, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats.

86 Fed. Reg. at 69,438, col. 2. This expansive test would allow for broad assertions of jurisdiction that are similar to the Agencies' previous theories of jurisdiction that were rejected by the Supreme Court as too expansive and beyond the limits of the CWA,

including the Migratory Bird Rule rejected in *SWANCC* and the "any hydrologic connection" theory rejected by five Justices in *Rapanos*.

Moreover, given the breadth of these factors, jurisdictional determinations would require substantial case-by-case analysis leading to subjective, unpredictable, and inconsistent outcomes, increases in costs, lengthy delays, and heightened enforcement and litigation risks. For this and other reasons, practical, workable tools would be needed to assist small businesses and other regulated parties in better assessing how and whether to pursue jurisdictional determination decisions. The proposal does not describe such tools. Absent a change in course (which would entail further limiting and clarifying the scope of navigable waters), it seems unlikely that any such tools can be developed.

The Agencies' proposed expansion of the scope of the significant nexus test is also inconsistent with the plain language of the CWA. As explained by Justice Kennedy, "[t]he required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to 'restore and maintain the chemical, physical, *and* biological integrity of the Nation's waters.'" *Rapanos*, 547 U.S. at 779 (citing 33 U.S.C. § 1251(a)) (emphasis added). Further, Justice Kennedy held that wetlands possess the requisite nexus, and thus can be considered "navigable waters," "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, *and* biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (emphasis added). The proposed rule, however, substitutes *or* for *and*, thus lowering the threshold to establish a significant nexus.

The proposed standard also misreads Justice Kennedy's significant nexus test, as the proposed rule would assert jurisdiction when the nexus is "speculative or insubstantial." Under the everyday use of the word "significant," it is apparent that Justice Kennedy meant the nexus had to be "full of import," "important," or "weighty." *See* Webster's Third New International Dictionary of the English Language Unabridged 2116 (1993); *see also Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (stating that the commonly understood meaning of significant is "important"); *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that a "significant risk" of HIV transmission does not mean "any risk" and "must be rooted in sound medical opinion and not be speculative or fanciful"); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched "occasionally" are not "significantly viewed" channels).

Just because a connection is more than speculative or insubstantial does not mean that it is significant. The Agencies' proposed assertion of jurisdiction over waters with only a more than speculative or insubstantial effect is all too similar to the "any hydrological connection" standard that Justice Kennedy explicitly rejected. By

lowering the threshold for jurisdiction and framing the standard in this manner, the Agencies have inappropriately expanded the test that Justice Kennedy intended as limiting. In doing so, the rule would invite subjectivity into the permitting process, creating inconsistent jurisdictional determinations, and increasing costs and delays.

B. The proposed significant nexus standard is ambiguous as to what may be considered "similarly situated" waters or waters "in the region."

As noted in the proposal, there is "a range of approaches for determining the 'region' in which waters to be assessed lie." 86 Fed. Reg. at 69,439, col. 3. For example, the region could be sub-watersheds or the watershed defined by where the specific feature drains into downstream jurisdictional water. The proposal notes that the watershed could be evaluated "at a sub-watershed scale (*e.g.*, at the hydrologic unit code (HUC) 8, 10, or 12 watershed scale)." *Id.* As a threshold matter, the proposal does not articulate which of these (very different) scales the Agencies propose to use, making it difficult to provide informed comments on their proposed significant nexus standard.

The options that are presented by the proposal raise concerns about the potential breadth of jurisdiction based on an expansive significant nexus standard. The average size of a watershed at the HUC 8 level is 700 square miles. Even at the HUC 12 level, a watershed is 40 square miles on average, or 10,000-40,000 acres.[4] If "in the region" is defined using any of these scales, then evaluating whether a particular feature, in combination with other features in the watershed, has a significant effect on downstream jurisdictional waters will become a monumental task. Furthermore, this approach would lead to broad assertions of jurisdiction over remote waters with insubstantial connections to downstream jurisdictional waters, in contradiction to both *SWANCC*'s exclusion of isolated features and Justice Kennedy's assertion in *Rapanos* that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a "significant nexus."[5]

The Agencies' use of "similarly situated" raises similar concerns. The *Rapanos* Guidance interpreted "similarly situated" to mean all wetlands adjacent to the same tributary. *Rapanos* Guidance at 8. The proposed rule, however, entertains other

[4] *See* USGS, Federal Standards and Procedures for the National Watershed Boundary Dataset (WBD), at 2, *available at* https://pubs.usgs.gov/tm/11/a3/pdf/tm11-a3_2ed.pdf.

[5] *Rapanos*, 547 U.S. at 778-79 ("[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."); *id.* at 781 ("[T]he breadth of th[e Corps'] standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.").

possible interpretations, including those waters that are "providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together," 86 Fed. Reg. at 69,439, col. 1, and notes that "the best available science supports evaluating the connectivity and effects of streams, wetlands, and open waters to downstream waters in a cumulative manner in context with other streams, wetlands, and open waters." *Id.*

In addition, the aggregation approach proposed by the Agencies would result in further overreach and uncertainty. In applying the proposed significant nexus standard to "other waters," the Agencies would aggregate "other waters" within the region and consider the cumulative effect on navigable waters. 86 Fed. Reg. at 69,418. The numerous types of water features listed in the proposed "other waters" provision are far too varied to be considered "similarly situated." The Agencies' aggregation concept is simply too broad to be used in this context, as it allows agencies to aggregate very different features that may be miles apart and far away from downstream navigable waters and have different flow regimes and characteristics.

C. The Agencies' reference to Appendix D would create additional confusion during implementation of the rule as to what is a Traditional Navigable Water.

Although the Agencies are proposing no changes to the regulatory text for "traditional navigable waters" (TNWs), the reference to Appendix D[6] in the preamble may signal a broader and more subjective approach. *See* 86 Fed. Reg. at 69,416-17. Appendix D allows for the Agencies to make TNW determinations based merely on potential recreational use by out-of-state visitors. Recreational boating or canoe trips are not sufficient evidence to demonstrate that a water is susceptible for use as a waterborne highway used to transport commercial goods and therefore qualifies as a TNW. Because jurisdiction for many smaller WOTUS features (*e.g.*, tributaries, adjacent wetlands, and certain ephemeral features) is established based on their relationship to TNWs, interpreting the TNW category in this way could result in more features being treated as jurisdictional and could result in more inconsistent application nationwide.

On a related but separate note, the preamble also states that "the 1977 Act established for the first time a mechanism by which a state, rather than the Corps, could assume responsibility for implementing the section 404 permitting program, but only for waters 'other than' *traditional navigable waters and their adjacent wetlands*. *Id.* at 1344(g)(1)." 86 Fed. Reg. at 69,377, col. 1 (emphasis added). This interpretation of

[6] Appendix D is an attachment to the Corps Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance, available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2316. The *Rapanos* Guidance was updated in 2008, but Appendix D has remained unchanged since 2007.

33 U.S.C. § 1344(g)(1) is inaccurate. The language used by Congress to define the Corps' retained waters in § 1344(g)(1) has significant historical context. Based on the statutory text and the legislative history of the 1977 CWA amendments, it is clear that this language refers to those waters regulated under section 10 of the Rivers and Harbors Act of 1899 (RHA) – navigable waters that have been regulated by the Corps for more than 100 years – and adjacent wetlands.[7] Interpreting the Corps' retained waters to include CWA TNWs, coupled with the Agencies' interpretation of those TNWs and the application of Appendix D, would unlawfully expand retained waters beyond what Congress intended. For example, within the Corps' Kansas City District, which includes parts of Colorado, Kansas, Nebraska, Iowa, and Missouri, there are 887 stream miles of RHA section 10 waters. Adding the Corps-defined CWA TNWs, many of which are too small to qualify as TNWs under the RHA, would nearly triple the scope of retained streams from 887 stream miles to 2,476 stream miles. EPA, NACEPT, Assumable Waters Subcommittee Meeting Sept. 28–29, 2016, *Meeting Summary*, at 12–13. Therefore, the Agencies should clarify that when a state assumes the 404 program, the Corps does not retain "traditional navigable waters and their adjacent wetlands"; the Corps retains waters that are jurisdictional under RHA section 10 (excluding those waters deemed "navigable" solely because of their past use to transport interstate or foreign commerce) and their adjacent wetlands to an administrative boundary agreed to by the state and the Corps. *See* Corps, CWA Section 404(g) – Non-Assumable Waters Memorandum (July 30, 2018).

D. The Agencies' discussion of how to implement the rule demonstrates the unnecessary complexity of the proposal.

The Agencies claim that the resources and tools described in the preamble, *see* 86 Fed. Reg. at 69,440-44, would address some of the concerns raised in the past about timeliness and consistency in jurisdictional determinations. But these resources, rather than simplifying the analysis, would add to the complexity of what one must consider to determine whether a wetland or stream on one's property has a significant nexus to downstream jurisdictional waters.

For example, to determine whether a feature has a significant effect on the physical integrity of a downstream water, the Agencies suggest analyzing "USGS stream gage data, floodplain maps, statistical analyses, hydrologic models and modeling tools such as USGS's StreamStats … or the Corps' Hydrologic Engineering Centers River System Analysis System (HEC–RAS), physical indicators of flow such as the presence and characteristics of a reliable OHWM with a channel defined by bed and banks, or other physical indicators of flow including such characteristics as shelving, wracking, water staining, sediment sorting, and scour, information from NRCS soil surveys,

[7] *See* EPA, Nat'l Advisory Council for Envtl. Pol'y & Tech. (NACEPT), Final Report of the Assumable Waters Subcommittee, app. F (May 2017).

precipitation and rainfall data, and NRCS snow telemetry (SNOTEL) data or NOAA national snow analyses maps." 86 Fed. Reg. at 69,443, col. 1. This extensive review of data is recommended just for assessing physical integrity. To assess whether a feature has a significant effect on the chemical or biological integrity of downstream waters, there are further databases and inventories to examine. *See* 86 Fed. Reg. at 69,443, cols. 2-3.

Therefore, under the Agencies' proposal, permit applicants would be required to hire expensive consultants and pay significant fees for their time to review and analyze these resources, regardless of the size of the feature on their property.

III. Because the Proposal Relies on a Case-By-Case Approach and Lacks Clear Exemptions, the Rule Would Not Achieve Durable Policy and Regulatory Certainty.

Due to the uncertainty and subjectivity described above, this proposal is unlikely to be a durable solution to the confusion over the scope of the federal government's CWA authority, especially given regional variations in climate and hydrology. A WOTUS framework that requires a continuous stream of ad hoc case-specific determinations will not result in predictability and consistency.

A. The Agencies concede that the proposal would not provide certainty.

The Agencies note that "while a fact-dependent jurisdictional analysis of whether a water meets either the relatively permanent standard or the significant nexus standard does not necessarily provide categorical certainty, case-specific determinations of the scope of Clean Water Act jurisdiction are not unique." 86 Fed. Reg. at 69,398, col. 3. As an example, the Agencies point to the "functional equivalent" standard for determining when an NPDES permit is required for a point source discharge directly or indirectly *into* WOTUS as a model approach to establishing jurisdiction over which features *are* WOTUS (the issue here), as reflected in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). There, "the Court established a standard [– albeit in interpreting a very different provision of the Clean Water Act –] that, like the significant nexus standard, does not establish bright lines marking the bounds of federal jurisdiction and instead requires an inquiry focused on the specific facts at issue …." 86 Fed. Reg. at 69,398-99. The Agencies appear to acknowledge that without bright lines, the proposal would require a burdensome, highly discretionary (and therefore unpredictable) assessment of a number of jurisdictional factors that would be difficult to implement in the field. This approach, unfortunately, would lead to inconsistent interpretations and permitting delays, as demonstrated with the implementation of the 2008 *Rapanos* Guidance.

B. The proposal lacks clear exemptions.

The lack of clear, codified exclusions would result in onerous case-by-case jurisdictional determinations and would create confusion or uncertainty, including for features that the agencies have previously determined to be outside the scope of WOTUS. For example, the proposal's preamble (not the proposed regulatory text) notes that certain ditches are generally not considered WOTUS. *See* 86 Fed. Reg. at 69,433, col. 2. The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the United States. Millions of miles of ditches are encountered, built, and relied on every day by the Chamber's members, as part of the construction, operation, and maintenance of homes, pipelines, electric generation facilities and transmission and distribution lines, agricultural irrigation, rural drains and roads, railroad corridors, and mines located across the country.

Consistent with the *Rapanos* Guidance, the proposal states that "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." 86 Fed. Reg. at 69,433, col. 3. These features are generally not considered WOTUS "because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters." *Id.* at 69,433, col. 3. However, the Agencies would typically assess a ditch's jurisdictional status based on whether it could be considered a tributary.

Both the *Rapanos* plurality and Justice Kennedy's concurrence made it clear that many ditches should not be subject to CWA jurisdiction. The plurality emphasized the plain language of the CWA in regulating "navigable" waters and strongly rejected regulating ditches, drains, and desert washes far removed from navigable waters. *Rapanos*, 547 U.S. at 733-34. The plurality interpreted WOTUS to include only relatively permanent waters and would exclude "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. On this matter, Justice Kennedy concurred with the plurality opinion and criticized the dissent, stating that it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters," and concluded that "[t]he deference owed to the Corps' interpretation does not extend so far." *Id*. at 778-89.

The proposal's failure to address ditches in the regulatory text exacerbates the confusion and inconsistency that will be experienced determining jurisdiction over ditch features. Without a clear exclusion for ditches in the regulatory text, as there was under the NWPR, *see* 85 Fed. Reg. at 22,338, col. 2, more ditches are likely to be considered jurisdictional or potentially jurisdictional under the proposal. This means that companies whose activities cross or otherwise utilize ditches would need to expend additional resources to determine whether the feature is jurisdictional and could then be subject to additional regulatory requirements and permitting delays.

In addition, the Agencies reference the following features in the preamble as "generally not WOTUS" but fail to propose exclusions in the regulatory text for these features, as were provided in the 2015 and 2020 Rules: (i) artificially irrigated areas, (ii) artificial lakes or ponds, (iii) water-filled depressions, and (iv) erosional features, such as swales or gullies. To ensure clarity, these exclusions should be codified in the regulatory text.

Finally, the proposal eliminates clarifying regulatory text that was provided by the NWPR for the prior converted cropland (PCC) and waste treatment system (WTS) exclusions. The NWPR included the PCC exclusion in the regulatory text and added a PCC definition to provide "much needed" clarity about this exclusion and "to provide regulatory certainty over when such lands are no longer eligible for the CWA exclusion." 85 Fed. Reg. at 22,321, col. 2. While the proposed rule includes the 1993 version of the PCC exclusion in the regulatory text, 86 Fed. Reg. at 69,449, col. 2, the proposal eliminates the definition of PCC that was codified in the NWPR. Moreover, the preamble suggests that the Agencies would plan to implement the problematic "change in use" policy from a 2005 Natural Resources Conservation Service (NRCS) and Corps memo, which is inconsistent with the Agencies' longstanding application of the abandonment principle under the 1993 regulations. *See* 86 Fed. Reg. at 69,425. Removing the definition will cause further confusion for landowners as to which areas of their property are subject to CWA jurisdiction. And reinstatement of the "change in use" principle would be a significant change in agency practice that is inconsistent with law.

The NWPR also defined "waste treatment system" to codify longstanding agency interpretations and eliminate confusion. The proposal maintains the WTS exclusion, returning to the 1986 regulatory version with purported ministerial changes from the NWPR. However, the proposal would remove the essential definition of what constitutes and comprises a "waste treatment system" that was included in the NWPR. The NWPR's definition of "waste treatment system" was helpful in codifying longstanding positions including, among other things, that the WTS exclusion applies to the system as a whole, including related conveyances, and that waste treatment system features can perform "active" and/or "passive" treatment methods to convey, retain, settle, reduce, or remove pollutants from wastewater (including, for that matter, systems that achieve zero discharge). These clarifications helped to avoid confusion and improve implementability. Without a codified exclusion, many of the water features typically used to manage and treat wastewater at facilities would be inappropriately regulated as WOTUS. Failure to include the WTS definition in this proposal is another missed opportunity to provide clarity and eliminate confusion.

In addition, the purported ministerial changes could be misinterpreted to significantly narrow the scope of the waste treatment system exclusion. For example, the Agencies propose to add a comma that would limit the exclusion to systems "*designed to meet*

the requirements of the CWA." *See* 86 Fed. Reg. at 69,426, col. 3. This creates significant unnecessary confusion for systems that predate the CWA, *i.e.*, that were constructed prior to 1972, and thus could not have been "designed to meet" the CWA. If these older systems serve a treatment function as identified through the NPDES permitting process, they absolutely should fall within the scope of the exclusion. The Agencies explain in the preamble that "designed to meet the requirements of the [CWA]" means the system "is constructed pursuant to a [CWA] section 404 permit... *or* where it is incorporated in an NPDES permit as part of a treatment system." *See* 86 Fed. Reg. at 69,427, col. 3 (emphasis added). But the Agencies should make the regulatory text equally clear. Otherwise, older systems that perform a vital treatment function may be deprived of the treatment exclusion.

IV. The Proposal Fails to Accurately Characterize the Proposed Action as Required by the APA.

Courts may "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

Here, the Agencies have failed to consider and address an important aspect of the rulemaking: the baseline from which they are regulating (*i.e.*, the current regulatory regime). The baseline is arguably the 1986 regulations without modification, which is what was codified in the 2019 Repeal Rule. While the Arizona and New Mexico district courts remanded and vacated the NWPR, they did not vacate the 2019 Repeal Rule. The baseline, therefore, for evaluating the impact of this proposed rule is the regulatory text codified by the 2019 Repeal Rule – the 1986 regulations.

Furthermore, when a federal agency changes its position, it must provide a "reasoned analysis," *State Farm*, 463 U.S. at 42, or "reasoned explanation" for the change. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). To do so, of course, the agency must "display awareness" that it is changing its position. *Id.* Thus, if an agency departs from a prior policy without acknowledging the change, it would generally be viewed as arbitrary and capricious.

The proposed rule suggests that the Agencies are simply reverting back to the pre-2015 regulatory regime. As discussed above, this is not the case. In addition to reverting to the pre-2015 regulatory regime, the proposal would also codify aspects of the *Rapanos* Guidance and new provisions that were not included in the *Rapanos* Guidance (*e.g.*, the "other waters" category). Thus, the Agencies' proposal does not comply with APA requirements because it does not adequately acknowledge or

address the proposed changes in agency regulations and in agency practice. To address these deficiencies, the Agencies must provide the public with a new proposal that accurately describes the agency action – one that includes the appropriate baseline and acknowledges the Agencies' change in position – and must provide the public with a meaningful opportunity to comment on these changes.

V. The Agencies Fail to Adequately Consider the Potential Impact of the Proposal on Small Businesses.

The Agencies' inadequate description of the proposed rule ignores the true economic impact of this rule and violates the Regulatory Flexibility Act (RFA). 5 U.S.C. §§ 601-612. The RFA requires agencies to analyze the impact that a rule may have on small business, and, if that impact is substantial, the agency must seek a less burdensome alternative. *Id.* § 604(a)(4). The Agencies conclude that the "proposed rule will not have a significant economic impact on a substantial number of small entities under the RFA." 86 Fed. Reg. at 69,447, col. 2. This conclusion, however, is based on a description of the rule that is divorced from reality and does not reflect a legally adequate consideration of the true impacts of the rule. *See*, *e.g.*, 86 Fed. Reg. at 69,375, col. 1 ("[T]he proposed rule would provide protections that are generally comparable to current practice; as such, the agencies find that there would be no appreciable cost or benefit difference."); 86 Fed. Reg. at 69,375, col. 2 ("The agencies' primary estimate is that the proposed rule would have zero impact."); 86 Fed. Reg. at 69,406, col. 2 ("[T]here would be no appreciable cost or benefit difference between the proposed rule and the regulatory regime that the agencies are currently implementing.").

As noted above, this proposed rulemaking would make significant changes to the 1986 regulations by incorporating the relatively permanent and significant nexus standards into the WOTUS definition. Thus, it would be incorrect to conclude that the final rule would have "no appreciable cost or benefit difference" from the status quo. Indeed, small businesses, such as ranchers, land developers, and manufacturers, would incur significant costs to comply with the proposed rule. The expansion of jurisdiction would require more companies to obtain permits under section 404 of the CWA, and the cost and time to prepare jurisdictional determinations would increase as consultants and regulatory agencies would struggle to determine whether certain features satisfy the significant nexus standard. These foreseeable burdens must be adequately considered by the Agencies by convening a small business review panel in accordance with the RFA and the Small Business Regulatory Enforcement Fairness Act. Indeed, the Agencies would do well to convene such a panel even if it were not legally required.

VI. Conclusion

In sum, the Agencies should pause work on this rulemaking until the Supreme Court issues a ruling in the *Sackett* case. If the Agencies insist on moving forward with this rulemaking, however, the Chamber urges the Agencies to do so with caution, and to engage stakeholders fully and comprehensively with the goal of receiving appropriate and needed feedback on the economic, administrative, legal, and practical challenges with implementation. The Chamber also encourages the Agencies to make the recommended changes to the proposed rule – including issuing a supplemental proposal as noted herein –to help provide needed certainty and predictability regarding the scope of CWA jurisdiction.

Sincerely,

Chuck Chaitovitz
Vice President,
Environmental Affairs and Sustainability
U.S. Chamber of Commerce