

## **Waters of the US Unwarranted Expansion & Jurisdictional Uncertainty**

**Desired Outcome:** EPA should withdraw and revise the rule to limit jurisdictional expansion thereby curtailing unaccounted for costs.

- EPA's definition of WOTUS jurisdiction in the Proposal Rule is extremely broad and lacks clarity.
- The number of jurisdictional determinations will increase, more permits will be needed, and regulatory uncertainty will result in expensive permit delays.
- As these costs have not been well characterized by EPA, and so many of the benefits purported by EPA related to the rule are bedrocked on deficient analysis, the costs and benefits are not realistic.

If the proposed rule moves forward, EPA should revise the cost-benefit analysis to provide a clearer picture of the impact of the rule and consider the deficiencies in the analysis as a reason to implement the changes below. To help ease the adjustment period, we request that OMB delay the effective date of the Proposed Rule by 180 days, and include a grandfathering provision protecting projects whose jurisdictional applications were submitted prior to the effective date of the Proposed Rule.

### **Jurisdictional Waters**

- EPA's estimate that a 2.7% of waters will be jurisdictional is an underestimated.
- Jurisdiction for a tributary should be defined by the presence of a continuous bed, bank, and current, not historical, high water mark; and relatively permanent flow directly into a navigable water. Relatively permanent flow means a flow of least three continuous months during the year.
- Jurisdiction for a wetland should be defined by the presence of a continuous surface connection to an navigable water, either directly or through a relatively permanent tributary, and a significant chemical, physical, and biological nexus. This significant nexus must be quantitatively and prescriptively defined.

### **Adjacency and Aggregation**

- These definitions of jurisdiction for tributaries and wetlands are fully sufficient. There should not be an automatic, blanket jurisdiction for adjacent waters or wetlands that do not meet these definitions.
- Jurisdiction for a water body depends on that water body alone and not on any other water body near to or distant from it. There should be no aggregation of area-wide waters for the purpose of establishing the jurisdiction of a single body of water.

### **Ditches**

- All ditches with less than perennial flow should be exempted.
- All ditches serving as part of an industrial process or waste treatment process, including ditches that hold stormwater, are a part of an industrial facility and should be exempted. We believe this exemption currently applies and should continue.

### **Waste Treatment**

- The proposed rule's exemption for waste treatment systems is unclear in that it explicitly exempts only treatment systems required by the Clean Water Act.
- All excavated ponds, lagoons, impoundments, containments, or other excavations serving as waste treatment systems under any environmental statute, including but not limited to RCRA, the Clean Water Act, and the Safe Drinking Water Act should be exempted. We believe this exemption currently applies and should continue.

### **Industrial Ponds**

- All excavations serving as ponds, lagoons, or other storage as part of an industrial process should be exempted. We believe this exemption currently applies and should continue.
- Industrial ponds used for raw water, fire water and cooling water storage should be exempted.