



February 7, 2022

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

Emailed to OW-Docket@epa.gov  
Re: EPA-HQ-OW-2021-0602

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: Definition of “Waters of the United States” (Docket ID No. EPA-HQ-OW-2021-0602)

Dear Ms. Christensen and Ms. Jensen:

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, investors and related professionals in office, industrial, mixed-use and retail real estate, with 20,000 members and 48 chapters throughout the United States. On behalf of our membership, thank you for the opportunity to provide comments and recommendations on the Proposed Rule for Waters of the United States (WOTUS).

NAIOP appreciates the willingness of the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) to solicit input from the regulated community to ensure that the Proposed Rule is properly vetted. The comments and recommendations presented here are aimed at providing further clarity and consistency to affected landowners, a stated goal of the EPA and Army (Agencies).

## **1) The Proposed Rule is More Than a Mere Recodification of the Pre-2015 WOTUS Definition**

In the preamble of the proposed rule, the Agencies indicate their intent to amend the pre-2015 definition of WOTUS to reflect the Agencies' interpretations of Supreme Court case law, and the Agencies' relevant guidance, training and experience. It is unclear why such amendments are necessary, particularly considering that on more than one occasion, the Agencies previously reverted to the pre-2015 regulatory framework without amending the definition of WOTUS. For example, the 2019 rule which repealed the 2015 Clean Water Rule (CWR) recodified the pre-2015 definition of WOTUS without changes noting that the Agencies, their co-regulators and the regulated public had more than a decade of experience operating under the pre-2015 regulations informed by Agencies guidance and Supreme Court case law.

Furthermore, the preamble of the proposed rule requests stakeholder comments on numerous components of the proposed rule including potential implementation approaches related to the relatively permanent water and significant nexus standards. The 60-day comment period is insufficient for stakeholders to analyze these requests and provide meaningful feedback to the Agencies. The Agencies' proposed rule is incomplete and may change significantly based on comments received from stakeholders, particularly if the Agencies grant stakeholders sufficient time to provide meaningful input. Therefore, we recommend that the Agencies postpone further action on the proposed rule to allow for sufficient stakeholder feedback that will facilitate development of a more complete rule proposal.

## **2) Frequent Changes to the Definition of WOTUS**

If implemented, the Agencies' proposed rule would subject the Agencies, co-regulators, and the regulated public to the fourth definition of WOTUS in the past seven years. Furthermore, the Agencies have indicated that a second rule making is anticipated to further refine the definition of WOTUS. We agree that a consistent, durable definition of WOTUS is necessary; however, as evidenced by the frequent, and seemingly unending, volley of rule changes, it appears that the disparate views of the Agencies, their co-regulators and stakeholders represent a significant challenge in achieving this objective. What is clear is that the many rule changes create uncertainty that has adversely impacted short-term and long-term plans for many stakeholders.

Due to the ambiguity of each new definition, and the subjective interpretations of such definitions by the Agencies and their co-regulators, our members must engage professionals to assist with determinations of which waterbodies are potentially WOTUS, only to face the need to engage those professionals again with each subsequent new definition.

In addition, stakeholders are routinely notified by the Agencies and their co-regulators that insufficient funding/staffing, and the abundance of permit and jurisdictional determination requests result in delayed review of such requests by the Agencies and their co-regulators. We are concerned that another new definition will further exacerbate these review delays.

On January 24, 2022, the Supreme Court granted a request to review the *Sackett v. EPA* case. Specifically, the Supreme Court will review whether the Ninth Circuit Court of Appeals was correct in using the significant nexus test to determine that wetlands filled on the Sackett's property were WOTUS. The outcome of this Supreme Court review may directly affect the implementation of either the relatively permanent water standard or the significant nexus standard.

In consideration of these adverse impacts to our members and concerns relative to additional hardships anticipated with the Agencies proposed rule and ongoing litigation, we recommend that the Agencies postpone further action on the proposed rule at least until the Supreme Court rules in the *Sackett v. EPA* case. This postponement would minimize potential additional confusion and allow the Agencies to continue with meaningful engagement with stakeholders, with the common goal of developing a definition of WOTUS that is clear, implementable, and durable.

### **3) Agencies' Analysis of Alternatives**

Section V.B. of the preamble of the proposed rule analyzes the 2015 CWR, the 2019 Repeal Rule and the Navigable Waters Protection Rule (NWPR) as alternatives to the proposed rule; however, the analysis of the 2015 CWR and the 2019 Repeal Rule are limited and brief while the analysis of the NWPR is extensive. In Section V.B.3 of the preamble, the Agencies present nine pages of analysis of the NWPR to support the following conclusions:

- NWPR did not advance the objective of the Clean Water Act;
- NWPR was not consistent with best available scientific information;
- NWPR was difficult to implement and produced inconsistent results; and,
- NWPR significantly reduced Clean Water Act protections.

In contrast, the Agencies, present less than one page of analysis for the 2015 CWR and the 2019 Repeal Rule to quickly conclude that those rules are not feasible alternatives based on legal concerns.

The Agencies acknowledge that "...any rule that draws lines between jurisdictional waters and non-jurisdictional waters will involve some implementation challenges...", but do not present a comparable detailed analysis of the implementation difficulties and inconsistencies of the 2015 CWR.

Given the demonstrated history of implementation and consistency challenges that exist with each new definition of WOTUS, we anticipate that the Agencies proposed amendments to the pre-2015 regulatory framework are also likely to result in implementation and consistency challenges. Furthermore, as discussed above, the Agencies extensive request for comments relative to the content of certain components of the proposed WOTUS definition and options for implementation approaches creates further uncertainty for stakeholders.

If the goal of the Agencies is to return to the familiar pre-2015 regulatory framework while they work collaboratively with stakeholders to create a durable definition of WOTUS, we recommend recodification of the pre-2015 definition of WOTUS without the Agencies' proposed amendments. The Agencies, their co-regulators and the regulated public had more than a decade of experience

operating under the pre-2015 regulations informed by Agencies guidance and Supreme Court case law.

#### **4) Codification of Exclusions**

Although the Agencies are proposing amendments to the pre-2015 regulations to codify use of relatively permanent water and significant nexus standards, the Agencies conclude that codifying the exclusions from 2015 CWR and 2020 NWPR is not necessary based on longstanding practice that the Agencies generally do not assert jurisdiction over certain features. Based on this rationale, one could conclude that the relatively permanent water and significant nexus standards also do not need to be codified based on longstanding agency implementation informed by relevant Supreme Court Case law and agency guidance. We recommend that the exclusions previously codified in the 2015 CWR and the 2020 NWPR be codified in the Agencies proposed rule. Explicitly providing in the rule exclusions that the Agencies have said are not controversial will provide a level of comfort to stakeholders and reduce potential uncertainty in implementation.

#### **5) Concern with the Agencies Decision to Rescind Approved Jurisdictional Determinations Issued Under NWPR**

In a press release dated January 5, 2022, the Agencies indicated that their actions are governed by the definition of WOTUS in effect at the time of the action. Therefore, the Agencies indicated that based on the August 30, 2021 vacatur of the NWPR, the agencies would no longer rely on approved jurisdictional determinations issued under the NWPR for new permit decisions. The U.S. Army Corps of Engineers (USACE) Regulatory Guidance Letter No. 05-02 indicates that approved jurisdictional determinations can be revised if new information merits review before the expiration date; however, the value of an approved jurisdictional determination is dependent on stakeholder confidence that the determination will remain valid for the 5-year period after the determination is issued. If all non-expired approved jurisdictional determinations are subject to revision each time a new definition of WOTUS is implemented, how can stakeholders maintain confidence in the value of such determinations? Our members engage in short-term and long-term business planning based on the confidence that approved jurisdictional determinations remain valid for a period of five years. The confidence of stakeholders relative to the validity and value of approved jurisdictional determinations has been eroded. Furthermore, as a result of this implementation approach, our members have experienced adverse financial and schedule impacts including, but not limited to, project cancellations; significant project design modifications; and, professional reassessment of the jurisdictional status of waterbodies and associated permit ramifications.

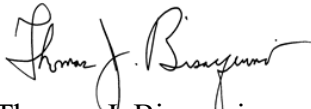
To safeguard the value of and stakeholder confidence in approved jurisdictional determinations, we recommend that the Agencies define for stakeholder review and comment narrow and specific criteria which would allow the Agencies to revise approved jurisdictional determinations.

## 6) Guidance and Training Necessary for Consistent Implementation

The inherent ambiguity in the definition of WOTUS creates implementation and consistency challenges due to subjective interpretation by the Agencies and their co-regulators not only regionally, but often between individual reviewers in a single region/office. If the proposed rule is implemented, we strongly encourage the Agencies and their co-regulators to provide clear, understandable guidance documents and training to facilitate a common understanding of the regulatory regime amongst stakeholders, the Agencies, and their co-regulators.

We appreciate the opportunity to comment on the Proposed Rule, and hope that you will consider our changes and incorporate them into the Final Rule. If I or my office can be of further assistance, please contact Aquiles Suarez, Senior Vice President for Government Affairs at (703) 674-1412 or [Suarez@NAIOP.ORG](mailto:Suarez@NAIOP.ORG).

Sincerely,



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