Fredric P. Andes, Coordinator
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606
(312) 214-8310

Federal Water Quality Coalition

September 3, 2021

Office of Water - Docket
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Comments on EPA's Request for Recommendations Regarding "Waters of the United States" Docket ID No. EPA-HQ-OW-2021-0328

Dear Sir or Madam:

The Federal Water Quality Coalition (FWQC or the Coalition) appreciates the opportunity to file these comments on EPA's Notice of Notice of Public Meetings Regarding "Waters of the United States;" Establishment of a Public Docket; Request for Recommendations (Notice). The Notice was published in the Federal Register on August 4, 2021. *See* 86 Fed. Reg. 41911 (August 4, 2021). The comment period ends on September 3, 2021. *Id.*

I. The FWQC's Interest

The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made by EPA and States under the Federal Clean Water Act (CWA). FWQC membership includes entities in the aluminum, agricultural, automobile, chemicals, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: The Aluminum Association; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Cargill, Incorporated; China Clay Producers Association; City of Pueblo (CO); City of Superior (WI); City of Tempe (AZ); Corn Refiners Association; Eli Lilly and Company; Freeport McMoRan Inc.; Hecla Mining Company; Kennecott Utah Copper LLC; Mid America CropLife Association; National Association of Home Builders; National Oilseed Processors Association; Orange County (CA) Sanitation District; Portland Cement Association; Shell; Treated Wood Council; U.S. Tire Manufacturers Association; Utility Water Act Group; and Western States Petroleum Association.

FWQC member entities or their members own and operate facilities located throughout the country, located on or near lakes, rivers, streams, ponds, wetlands, ditches, swales, and other features that may be defined by EPA and the Corps of Engineers (the "Agencies") as "waters of the United States (WOTUS)". Many member facilities may be located in a floodplain or riparian area, depending on how these terms are interpreted. Many member facilities have water management features on-site, including ditches, stormwater management features, fire water ponds, and cooling ponds. Some of these features may have an outlet that discharges to a lake, river, or stream. Many do not. Other member facilities store or manage drinking water. These storage facilities generally do not have an outlet to a lake, river, or stream, but may interface with groundwater. FWQC members have an interest in the WOTUS definition because that definition will directly affect their water management operations. Additionally, the WOTUS definition could affect the regulatory status of water located on FWQC members' properties. In turn, the WOTUS definition could affect FWQC members' uses of on-site water management features and their abilities to maintain those features.

The FWQC has commented on the Agencies' prior proposals defining WOTUS and generally supported the revisions that were finalized on April 21, 2020. *See* "Comment submitted by Fredric P. Andes, Coordinator, Federal Water Quality Coalition (FWQC)" (April 14, 2019), *available at* https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-4910 ; 85 *Fed. Reg.* 22250 (April 21, 2020) ("2020 Rule"). Many of the 2020 revisions were necessary to respond to serious constitutional, statutory, regulatory, administrative, and practical concerns regarding the 2015 Clean Water Rule's (2015 Rule) overly-expansive definition. For example, the categories and exclusions in the 2020 Rule better reflect the statutory limits of the Agencies' authority to regulate water quality under the CWA. By providing clear jurisdictional categories of waters, the 2020 Rule limited the need for widespread case-by-case determinations that was presented by the 2015 Rule. Additionally, the 2020 Rule's bright-line categories of jurisdictional waters adhere to the basic principles articulated in the *Riverside Bayview,*[1] *SWANCC*,[2] and *Rapanos*[3] cases and generally respect the limits of CWA authority.[4]

II. FWQC Analysis and Recommendations

The FWQC recommends that the Agencies retain the basic regulatory approach announced in the 2020 Rule, which provided clarity for the regulated community and

[1] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)
[2] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)
[3] *Rapanos v. United States*, 547 U.S. 715 (2006)
[4] In its 2019 comments, the FWQC did suggest certain improvements to the language of the proposal that eventually was issued in final form as the 2020 Rule. As the Agencies pursue their reconsideration of that rule, those potential improvements should be reviewed and carefully evaluated.

consistency in implementation.[5] In the light of the significant litigation over recent changes to the WOTUS definition and likely challenges to subsequent revisions, the FWQC is concerned that further revisions will cause unnecessary confusion, regulatory uncertainty, and delays in permitting and development. As the Agencies consider revising the WOTUS definition, they should thoroughly evaluate the legal limits on their authority. Any proposed revisions to the WOTUS rule should only be made after careful consideration, to ensure that they are consistent with the statute and caselaw and are necessary to protect water quality.

The FWQC also notes that expanding the scope of jurisdiction does not necessarily correlate with improving water quality. The argument that expanding the scope of jurisdictional waters will inevitably improve water quality is a reductive concept that is not based in science. For example, in its challenge to the 2020 Rule, the South Carolina Coastal Conservation League (SCCCL) argues that "damage to the nation's waters" is occurring simply because the 2020 Rule resulted in "an increase in projects for which [Clean Water Act] Section 404 permits are no longer required." *See South Carolina Coastal Consv. League, et al. v. Michael Regan, et al.*, No. 2:20-cv-01687-BHH (July 12, 2021), at p. 4. This argument is common among opponents of the 2020 Rule and proponents of an overly expansive WOTUS definition. The argument incorrectly assumes that an increase in projects for which Section 404 permits are not required necessarily correlates to degradation of water quality. SCCCL and others, however, fail to make the connection between expanded jurisdiction and improved water quality. Proponents of expanded jurisdiction also tend to overstate the environmental harm associated with development projects. Indeed, many projects—such as waterway rehabilitation projects or maintenance projects—are necessary to preserve biological integrity and prevent environmental harms from occurring.

On the one hand, expanded jurisdiction does not stop projects from going forward; it simply means that the project will need to meet certain requirements for a permit. On the other hand, projects that are outside the scope of Clean Water Act jurisdiction are not necessarily unregulated. For example, states and local governments often regulate projects that would not require a Section 404 permit. Accordingly, the FWQC urges the Agencies to resist the misguided concept that expanded jurisdiction improves water quality and narrower jurisdiction degrades water quality. Any proposed revisions to the WOTUS definition should be carefully targeted, should be determined to be necessary to improve water quality, and must be in keeping with the statutory language and intent.

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[5] We understand that one Federal court, in Arizona, has recently decided to vacate the 2020 Rule, in contrast to other courts considering the issue, which have remanded the Rule to the Agencies for reconsideration without vacatur. The FWQC recommends that the Agencies appeal the Arizona decision, which we believe to be in error. If that decision is to be applied, that should be done in as limited a fashion as possible, to limit disruption and confusion while the Agencies conduct their reconsideration of the Rule.

A. Process for Revision

The FWQC seeks clarity from the Agencies regarding the process for potential revision of the WOTUS definition. The need for and relationship between the two new rulemakings that the Agencies propose is unclear. As to the first proposed rulemaking, the FWQC is not clear as to what it means to "restor[e] the longstanding regulations that were in place for decades prior to 2015, as amended to be consistent with relevant Supreme Court decisions." Additionally, the first rulemaking is likely to be time-consuming, disturb the regulatory certainty that the 2020 Rule provides, and prompt numerous legal challenges. As to the second rulemaking, it is unclear how it will build upon the regulatory foundation of the first rulemaking. Even if the Agencies intend to revise the jurisdictional scope of the WOTUS definition in a second rulemaking beyond the pre-2015 guidance and Supreme Court precedent, a first rulemaking is not necessary.

Rather than promulgating an initial rule, the FWQC recommends that the Agencies expend resources evaluating whether or not there is a need for specific amendments to address particular issues that stakeholders raise during this comment period, while maintaining the 2020 Rule during this evaluation period. If the Agencies identify specific amendments that are necessary, a single rulemaking could follow, to make targeted revisions to the 2020 Rule based on stakeholder input. Conducting a single rulemaking to address any specific issues with the 2020 Rule will be more efficient and will maintain the consistency and clarity that is critical to enabling regulated entities to comply with the Clean Water Act.

B. Clarity in Implementation

The Agency has requested stakeholder input regarding their experiences implementing the various WOTUS regulations. FWQC have found that the 2020 Rule minimized much of the regulatory uncertainty associated with case-by-case determinations by establishing clear jurisdictional categories and exemptions. Notably, the FWQC supported the 2020 Rule's elimination of the "significant nexus" test, as well as other revisions aimed at re-focusing the scope of the WOTUS definition on water quality. The WOTUS definition itself should provide sufficiently clear guidance to the regulated community without the need for significant agency or judicial intervention. Accordingly, the FWQC recommends that the Agencies maintain the clarity provided in the 2020 Rule as opposed to reverting to more multi-factor tests and case-by-case assessments to determine jurisdiction. These types of tests create regulatory uncertainty and unnecessarily burden both regulators and regulated entities, without necessarily improving water quality.

C. Tributaries

The Notice solicits stakeholder comment regarding factors that should inform jurisdictional determinations for tributaries. The FWQC supported the 2020 Rule's definitions of "perennial," "intermittent," and "ephemeral," because the definitions resolved much of the confusion that the 2015 Rule created

relative to the jurisdictional status of ephemeral streams. Again, the FWQC recommends against imposing a multi-factor test or "significant nexus" test to determine whether an ephemeral stream is jurisdictional, as the practice would unnecessarily increase the regulatory burden on the Agencies and on regulated entities. Moreover, the FWQC has serious concerns over whether the Clean Water Act authorizes the Agencies to regulate ephemeral streams as jurisdictional waters and whether doing so would actually improve water quality. Accordingly, the FWQC recommends that the Agencies maintain the 2020 definitions of perennial," "intermittent," and "ephemeral," with ephemeral streams being categorically excluded from jurisdiction. The FWQC urges the Agencies to consider carefully the legal bases for expanding the category of tributaries to include ephemeral streams; whether such expansion is necessary to protect water quality; and how the Agencies can provide clear regulatory directives so that regulated entities can reasonably comply without agency intervention.

D. Ditches

The Agencies have asked for stakeholder input regarding ditch characteristics that can provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches. The FWQC supports the 2020 Rule's presumption that ditches are not jurisdictional unless they meet specific criteria. The demonstration required to establish that a ditch is not jurisdictional should not be onerous, especially if the ditch has existed for a long time. The FWQC does not recommend that flow or biological indicators be used to categorize ditches. The discharge of water from a ditch to downstream waters would already be covered by the Clean Water Act, and the existence of certain biological indicators in a ditch do not necessarily mean that the ditch will affect the integrity of the Nation's waters. Any revisions to the WOTUS definition should clearly exempt ditches that route through "dry land," ditches that flow primarily as a result of irrigation or stormwater, and any point sources (which are already regulated through the NPDES program) that would otherwise meet the definition of a ditch.

E. Adjacency

Regarding adjacency, the FWQC supported the 2020 Rule's definition of "adjacent wetlands" to mean wetlands that abut or have a direct hydrologic connection to a WOTUS. At a minimum, the Clean Water Act requires that a direct hydrologic connection exist in order for an "adjacent" water to be jurisdictional. The Agencies do not have authority under the Clean Water Act to expand the scope of adjacency to include waters that lack the required hydrologic connection. FWQC members have found that the definitive identification of adjacent wetlands expressed in the 2020 Rule—based on the satisfaction of three criteria—created much more certainty and consistency that the previous "significant nexus" test. Again, the FWQC urges the Agencies to consider carefully the legal bases for expanding the concept of adjacency; whether such expansion is necessary to protect water quality; and how the Agencies can provide clear regulatory directives so that regulated entities can reasonably comply without agency or judicial intervention.

F. Exclusions

The Agencies have requested feedback regarding the exclusions in the 2020 Rule and in the pre-2015 guidance. The FWQC generally supported the exclusions in the 2020 Rule because they provided clarity regarding the scope and types of non-jurisdictional waters and reduced many of the unnecessary regulatory burdens associated with the 2015 Rule and pre-2015 regulations and guidance.

The Agencies have requested feedback specifically on the definition of prior converted cropland. The FWQC supports the current definition of prior converted cropland because the exclusion is defined such that it applies to land used for any purpose, including non-agricultural purposes, so long as it is "used for, or in support of, agricultural purposes" at least once within the duration of the abandonment period. FWQC members have found this definition to be understandable and implementable.

The Agencies have also requested feedback on the definition of waste treatment systems. The FWQC also supports this definition. The exclusion from the WOTUS definition for waste treatment systems has been in place for many years. It covers many systems that are critical for improving water quality and complying with the Clean Water Act, including industrial and municipal wastewater treatment structures and cooling ponds. To now subject these systems to coverage as "waters of the United States" would create unnecessary and unjustified regulatory burdens, for little or no environmental benefit.[6] Waters upstream of the waste treatment system are still considered jurisdictional where they meet the definition of "waters of the United States." The waste treatment systems definition is clear, implementable, consistent with longstanding practice, and consistent with the purposes for which these systems have been constructed and operated. The FWQC does not recommend changes to the definition.

III. Conclusion

The FWQC appreciates the opportunity to submit these comments on the Notice. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.

Fredric P. Andes
Coordinator

[6] Moreover, in some situations, an applicant has received a permit to impound a water of the United States in order to construct a waste treatment system; in such a situation, the Agencies have affirmatively relinquished jurisdiction over the resulting waste treatment system, as long as it is used for this permitted purpose.