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

Re: Docket ID No. EPA-HQ-OW-2021-0602

The USA Rice Federation (USA Rice) welcomes the opportunity to provide comments concerning the notice published December 7, 2021, in the Federal Register by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) collectively referred to as "the Agencies" proposing to revise the definition of the term "waters of the United States" (WOTUS) under the Clean Water Act (CWA).

USA Rice is the global advocate for all segments of the U.S. rice industry with a mission to promote and protect the livelihood of farmers, millers, merchants, and allied businesses. USA Rice members are active in all rice-producing states. The USA Rice Farmers, USA Rice Council, USA Rice Merchants' Association, and the USA Rice Millers' Association are all members of USA Rice.

Introduction

USA Rice is concerned with the overall regulatory uncertainty that the proposed rule effectively resurrects. The Navigable Waters Protection Rule (NWPR) provided rice farmers, millers, merchants, and allied businesses with a reliable, uniform, clear definition of WOTUS. In contrast, the proposed rule falls short in this regard, subjecting stakeholders to a case-by-case, jurisdictional battle that offers no standard for stakeholders to work from. This will ultimately result in confusion and concerns as to the Agencies' objectives and interpretations, which are not well-defined. Additionally, the lack of a clear standard places the burden and financial strain on the rice industry to hire their own consultants and scientists and retain legal counsel to match the vague standards set by the rule under threat of noncompliance. USA Rice urges the Agencies to embrace the standard set by the NWPR and advance this process in a procedural manner that will withstand challenges in the courts.

Given the shift away from the NWPR, USA Rice supports the framework established in the Clean Water Act which recognizes the role of state regulators and local officials in regulating non-navigable waters will impact water quality. The CWA and the NWPR worked in tandem to consolidate the respective regulatory powers of the federal and state and local governments to keep waters clean. Prior to promulgation of the NWPR, stakeholders and state officials were shut out of the review and approval processes that have historically been crucial to this effort. At the start of the current regulatory process, the Agencies seem to have returned to the practice of moving forward without requesting input from these stakeholders as evidenced by the assertion harm associated with state regulated projects without the benefit

of adequate review. USA Rice is also concerned that the proposed rule lacks a reasonable economic analysis of impacts, and by the unusually short period offered to the public to review and comment on the impacts of this proposal. USA Rice urges the Agencies to maintain the clear and consistent definition of WOTUS offered by the NWPR and involve stakeholders and local officials in a truly meaningful and comprehensive dialogue to assess the best way forward.

Notwithstanding our concerns about the content and lack of adequate stakeholder involvement in this current regulatory process, the recent announcement by the Supreme Court of The United States to review the case *Sackett v. EPA* will undoubtedly have a significant impact on any regulations promulgated by the Agencies. Given the significance of this case in defining the limits of federal jurisdiction, it would be irresponsible to proceed with this rulemaking until all parties are given clear guidance from the court on this fundamental question. USA Rice strongly encourages the Agencies to suspend action on this rulemaking until a decision is handed down by the Court.

The NWPR worked to keep waters clean

The agencies justification to withdraw the NWPR is unclear or unfounded. The Agencies use three determining factors to assess this: (i) increase in number and proportion of Jurisdictional Determinations (JD) where resources were found to be non-jurisdictional; (ii) increase in determinations that 404 permits are not required for specific projects; and (iii) increase in requests to complete approved Jurisdictional Determinations (AJDs) instead of preliminary Jurisdictional Determinations (PJDs).

Prior to the NWPR, negative JDs accounted for between 27% and 45% of all JDs in any given year, whereas 75% of JDs were negative under the NWPR. In New Mexico and Arizona, 100% and 99.5%, respectively, of the 1,525 (NM) and 1,518 (AZ) streams were found non-jurisdictional in year one of the NWPR. In the five preceding years, on average, about 94% of streams (138 out of 147) were found to be non-jurisdictional under the significant nexus test.

USA Rice remains concerned that the Agencies justification for moving forward with repeal and replacement of the NWPR is based on a simple listing of more than 300 projects that were non-jurisdictional without the Agencies explanation of the actual harm caused by each of these projects. Had the Agencies consulted with stakeholders in affected areas of these 333 projects allegedly causing environmental harm, it is questionable whether the Agencies would have been able to demonstrate adequate justification for this potentially disastrous pivot from the NWPR. There is no demonstration or evidence that water quality is impacted because more JDs are coming back as non-jurisdictional than in the previous five years. The Agencies assume, without proving, that more certainty/confirmation about what features are non-jurisdictional necessarily equates to environmental harm.

Had the Agencies collaborated with stakeholders, local, and state officials in conducting a transparent, fair, and fact-based review, there would have been no need to begin this time-consuming, costly, and wholly unnecessary regulatory process.

"Navigable" must hold meaning to provide clarity for stakeholders

USA Rice is aware of and would support an alternative proposal to define WOTUS jurisdictional waters as those that "must have a relatively permanent flow that reaches a traditional navigable water; wetlands must have a continuous surface connection to navigable waters; and such flow or connections must be sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of traditional navigable waters".

Assertion of jurisdiction over a wetland "requires two findings: first, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water *connected to traditional interstate navigable waters*); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends, and the 'wetland' begins." *Rapanos*, 547 U.S. at 742. By using the term "traditional interstate navigable waters," the court was referring to waters that are navigable in fact (or readily susceptible of being rendered so) that form part of a continued waterborne highway of interstate commerce.

For instance, in the proposed rule the Agencies remove the requirement that a relatively permanent water be connected to a "traditional interstate navigable water." In contrast, the proposal applies the standard to assert jurisdiction over relatively permanent tributaries and other waters by virtue of their connection to non-navigable interstate waters as well as relatively permanent other waters that are connected to non-navigable tributaries.

The Agencies further misapply the court's decision by using a "flow at least seasonally" approach. The court indicated it would not necessarily exclude the 290-day, continuously flowing stream (*Rapanos*, 547 U.S. at 732 n.5). But that does not mean tributaries that flow for one season can automatically be *included*.

The Agencies continue to interpret the court's use of the term "continuous surface connection" as not requiring surface water to be continuously present between the wetland and the tributary. While the presence of water at all times may not be what the court had in mind, it is not enough for wetlands to have "only an intermittent, physically remote hydrologic connection to 'waters of the United States'" because such wetlands "do not implicate the boundary-drawing problem of *Riverside Bayview*" (*Rapanos*, 547 U.S. at 742).

The Agencies' interpretation of "significant nexus" is untenable

The Agencies assert that Justice Kennedy's "Significant Nexus" standard allows for the Agencies to exert their jurisdictional claims to any body of water, no matter the size, if they can identify any possible connection, however remote or scientifically questionable between that body to another body of water in the region, evaluate the cumulative effects of all of those features over time, or find "more than speculative or insubstantial" connection to a traditional navigable water, interstate water, or the territorial seas. This broad interpretation heeded warning from Justice Kennedy in *U.S. Army Corps of Engineers v. Hawkes Co.*, that, based on the government's interpretations, "the reach and systemic consequences of the Clean Water Act remain a cause for concern" and that the Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation" 136 S. Ct. 1807, 1816-17 (2016).

The Agencies also categorize all waters in fitting under the Significant Nexus standard. This deviates from Justice Kennedy's interpretation of only wetlands as applicable. Justice Kennedy explained that "[w]etlands possess the requisite nexus . . . 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" (*Rapanos* 547 U.S. at 780). This alone should serve as a rebuke to the rule.

The Agencies' lean on the "Tributary Reach and Aggregation" approach that allows them to assert jurisdiction over minor bodies of water that are far removed from traditional navigable waters (no matter if they are dry or not for most of the year). However, this notion is further removed from Justice Kennedy's concurrence. Using a reach-by-reach assertion, presumably, the Agencies could qualify waters miles and miles upstream of a water source as part of a reach whose downstream confluence has a significant nexus to a traditional navigable water or to exhibit the characteristics of a relatively permanent water.

Justice Kennedy's basis for "significant nexus" is the relationship between the traditional navigable water and an upstream wetland, based on the role the wetland plays in the physical, chemical, **and** biological integrity of the traditional navigable water.

By defining "significantly affect" as "more than speculative or insubstantial effects," the Agencies ignore that Justice Kennedy's test was meant to be a limiting principle. More than speculative or insubstantial does not equate to "significant" and does not reflect any attempt to ascertain whether effects are substantial or important. And the Agencies' illustrative examples of waters that do not meet the significant nexus test seem to only confirm that the Agencies continue to assert jurisdiction so long as there is *any* connection, in disregard of *Rapanos*.

The proposed rule lacks a quantifiable metric used by the Agencies to determine what a significant nexus is. This interpretation potentially allows the Agencies to assert federal jurisdiction without providing tangible direction to stakeholders.

In another example, the Agencies misconstrue Justice Kennedy's exclusive "significant nexus" standard. The standard requires chemical, physical, **and** biological effects. The Agencies take an overreaching inclusive interpretation of chemical, physical, **or** biological effects. This interpretation lacks scientific basis and represents an attempt at federal overreach.

Prior Converted Cropland (PCC)

USA Rice supports the Agencies' recodifying of the 1993 version of the exclusion of PCC. Although the language has never been defined in regulatory text, the 1993 rule explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]" *id.* at 45,032.

The general recognition is that PCC have been modified extensively as a result of human activity, no matter if the land was made so by agricultural use or not, still rendering it to be classified as PCC. *United*

States v. Hallmark Constr. Co., 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998) upholds this classification.

If the land is abandoned, meaning it is not used for agricultural production at least once in five years, it does not automatically become subject to CWA regulation under the 1993 rule. Instead, this land becomes eligible for CWA regulation. If wetland conditions have returned to the area, does it remain PCC?

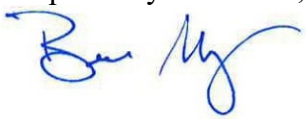
USA Rice opposes the implementation of the PCC exclusion for CWA purposes, consistent with the USDA's "change in use" principle. This concept derives from the 1996 Farm Bill, formally the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127), to satisfy USDA *wetlands* certifications but remained unincumbered by the Agencies' determination of WOTUS for CWA purposes. If the Agencies incorporate a "change in use" policy into the PPC exclusion, it will render roughly 30 years of consistent implementation obsolete, in accordance to the 1993 rule. USA Rice recommends that the Agencies retain the following clarifications from the NWPR, which will help reduce confusion over how the PCC exclusion is implemented: (i) formal withdrawal of the 2005 Joint Guidance and any other guidance that is inconsistent with the 1993 regulations; (ii) a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs; and (iii) PCC designations are retained so long as land has been used for a broad range of agricultural purposes at least once in the preceding five years.

Conclusion

While USA Rice supports the establishment of a consistent, clear definition of WOTUS as was promulgated by the previous administration with the NWPR, the proposed rule poses many questions challenging the likelihood of success in achieving this goal. The arguments used by the Agencies do not follow the consistent science and pragmatic approach offered by the NWPR and do not support the cost-benefit analysis of this proposed rule.

Seeking reasonable input and collaboration from stakeholders with reasonable time periods to formulate input should be the norm. Likewise, seeking expertise and foresight from local and state officials should be paramount in any rulemaking process as complex as this one. If the Agencies desire to establish a durable definition of WOTUS, then they must collaborate with the agriculture community to achieve this result. Through an open dialogue with agriculture stakeholders and local and state officials, the Agencies can achieve the result necessary to maintain clean and healthy waters for the future.

Respectfully submitted,



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