



October 15, 2014

Water Docket  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**RE: Docket ID No. EPA–HQ–OW–2011–0880 – Definition of “Waters of the United States” Under the Clean Water Act**

These comments are submitted for the record to the U.S. Army Corps of Engineers and the Environmental Protection Agency (the Agencies) on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center in response to the notice of proposed rulemaking regarding Definition of “Waters of the United States” Under the Clean Water Act (Proposed Rule) published in the April 21, 2014 edition of the *Federal Register*.

NFIB is the nation’s leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the small businesses potentially affected by this proposed rule.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses.

The Proposed Regulation purports to expand federal jurisdiction under the Clean Water Act (CWA). This should raise serious concerns for three reasons: (1) the Proposed Regulation will require the Agencies to assert CWA jurisdiction over many thousands of properties, which will therein impose heavy economic costs on property owners seeking to develop their properties, or will entirely discourage economic development; (2) the Proposed Regulation—in expanding CWA jurisdiction—will place a cloud upon the title of countless other properties, therein chilling economic development and greatly devaluing property values; and (3) federal implementation of the Proposed Regulation will result in tremendous new liabilities for the federal government and the national budget.

These comments explicitly address the Agencies’ expansion of federal jurisdiction. NFIB has concurrently filed separate comments explaining how the agencies failed to meet the requirements of the Regulatory Flexibility Act.

## **The Proposed Regulation Expands Federal CWA Jurisdiction**

Though we fully recognize the importance of the CWA's goals of eliminating pollutant discharges into the waters of the United States, we have serious objections to the Proposed Regulation because it will expand CWA jurisdiction beyond the constitutional limits recognized in *Rapanos v. United States*, 574 U.S. 715 (2006). Under the Proposed Regulation the Agencies will assert newly expanded jurisdiction over properties all across the country. We expect the actual impact of the Proposed Regulation will greatly exceed the Agencies' prediction of a mere 3% increase in jurisdictional wetlands; though we do not have a metric for offering a precise measurement of the proposed jurisdictional expansion, there is no way that its sweeping categorical rules will be so limited in effect.

As we explain in further detail, the economic impact from the Proposed Regulation's jurisdictional expansion will be severe. A landowner of modest means—especially small business owners and ordinary individuals—will be hardest hit because they lack the financial resources to challenge jurisdictional assessments and or to seek necessary permits. And it is important to remember that the assertion of jurisdiction is a virtual death-knell for an individual or small business owner wishing to make reasonable use of the property in question because the required permits are prohibitively expensive.

### ***Only Congress Can Fix the CWA's Jurisdictional Pitfalls***

As Justice Alito noted in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), the “reach of the Clean Water Act is notoriously unclear.” This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. See *United States v. Riverside Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715. But, the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland. See Jonathan Adler, *Wetlands, Property Rights, and the Due Process Deficit*, *Cato Supreme Court Review*, 141 (2012).

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the Proposed Regulation, our view is that only Congress can fix this problem. The Proposed Regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny.

### ***The Agencies Cannot Use the Rulemaking Process to Reach Beyond the CWA's Constitutional Limits***

The Agencies are not writing on a blank-slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the CWA. The Agencies have been

repudiated for overreaching in the past, and will be again if the Proposed Regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos*.

While there are still grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis, *Rapanos* set the outer-limits. And the Agencies cannot exceed those limits any more than Congress could. Accordingly, the only question is whether the Proposed Regulation goes beyond what *Rapanos* would allow. For the reasons set forth below, we maintain the Proposed Regulation is inconsistent with *Rapanos* and should therefore be amended or abandoned entirely.

### ***CWA Jurisdiction Under Rapanos***

The CWA prohibits the discharge of pollutants into “navigable waters” and defines those waters as the “waters of the United States.” But, the Supreme Court has repeatedly rebuffed overly expansive interpretations of “waters of the United States.” Most recently in *Rapanos*, the Supreme Court made clear that jurisdictional wetlands must have some connection or nexus to “traditional navigable waters.”

Unfortunately, the Court offered two distinct tests for determining whether there is a sufficient connection or nexus to satisfy the constitutional requirement that CWA regulation bear some connection to interstate commerce. Under the plurality’s test, CWA jurisdiction may only be established where there is a continuous surface connection from traditional navigable waters, such that it is difficult to determine where the water body ends and the wetland begins. *Rapanos*, 547 U.S. at 742. By contrast, Justice Kennedy’s test would instead extend CWA jurisdiction to any wetland with a significant nexus to navigable waters. According to Justice Kennedy:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “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.

To date the federal appellate courts are split as to which test is controlling. The Seventh, Ninth and Eleventh Circuits hold that Justice Kennedy’s “significant nexus” test controls. *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robinson*, 521 F.3d 1319 (11th Cir. 2008). Whereas the First and Eighth Circuits hold that jurisdiction may be established under either test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Baily*, 571 F.3d 791 (8th Cir. 2009). And at least one district court has held that the plurality’s “continuous surface connection” test is controlling. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

### ***The Federal Response to Rapanos***

In the wake of *Rapanos* the regulated community, and regulators alike, struggled to make sense of the fact intensive “essential nexus” and “continuous surface connection” tests. To assist

regulators in making jurisdictional assessments, the Agencies released a guidance document in December, 2008. Thereafter, the Agencies proposed a new guidance document in 2012.

As we noted in a November 16, 2012 letter to the Office of Information and Regulatory Affairs, “the 2008 guidance was much more conservative than the newly proposed 2012 guidance.” We explained that the 2008 guidance was mostly faithful in defining the contours of CWA jurisdiction in accordance with the *Rapanos* tests, whereas the 2012 guidance liberally mischaracterized the *Rapanos* tests in order to justify more expansive jurisdictional assertions. Ultimately the Agencies abandoned the proposed 2012 guidance, choosing instead to pursue this rulemaking; however, the Proposed Regulation defines CWA jurisdiction consistent with the expansive 2012 guidance. Accordingly, NFIB opposes the Proposed Regulation for the same reasons it opposed the 2012 guidance.

### ***The Proposed Regulation Would Expand CWA Jurisdiction in Contravention of Rapanos***

For the foregoing reasons NFIB contends that the Proposed Regulation exceeds federal authority by expansively asserting CWA jurisdiction. The following is a non-exhaustive list of our legal objections to the proposed guidance:

(1) The Proposed Regulation misrepresents the standard for ‘traditional navigable waters’

The Proposed Regulation defines “traditional navigable waters” as any waters that are used for commerce or that could be used for commerce in the future. But the Proposed Regulation would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the Proposed Regulation provides that the potential for commercial navigation “can be demonstrated by current boating or canoe trips for recreation or other purposes.”

The courts have made clear that the test for “traditional navigable waters” must consider *both* the “physical characteristics” of the water body and “experimentation” with watercraft or other demonstrated “uses to which the [waters] have been put.” *FLP Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (citing *United States v. Utah*, 283 U.S. 64, 83 (1931)). While the Proposed Regulation suggests that the Agencies’ assessment must take into account physical characteristics of the waterway, it ultimately provides that the water will be viewed as “traditional navigable waters” if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as “traditional navigable water” if any party can succeed in a single downstream trip—an approach that we think far too attenuated to satisfy the standard recognized in *FLP Energy Marine Hydro LLC*.

Most fundamentally, the Proposed Rule fails to make clear that “traditional navigable waters” must be conducive to interstate or foreign commerce. This omission—in conjunction with the Proposed Regulation’s liberal suggestion that navigability may be established without regard to the physical characteristics of the water body—suggests that the Proposed Regulation will lead to expansive jurisdictional assessments, without regard to the question of whether in fact the water body is susceptible to interstate or foreign commerce.

(2) The Proposed Regulation inappropriately treats all interstate waters as ‘traditional navigable waters’

The Proposed Regulation inappropriately treats all interstate waters as “waters of the United States,” regardless of whether they are in fact navigable, or even “connect[ed] to such waters.” But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact. *Rapanos*, 547 U.S. at 739.

(3) The Proposed Regulation misstates, misconstrues and changes the ‘significant nexus test’

As stated by Justice Kennedy in *Rapanos*, waters have the “requisite significant nexus, and thus come within the statutory phrase ‘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). But the Proposed Regulation expands CWA jurisdiction by distorting Justice Kennedy’s “significant nexus test,” such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result is an expansion of CWA jurisdiction.

First, the Proposed Regulation misstates the significant nexus test by replacing the conjunctive word “and” with the disjunctive word “or,” when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. *See* Proposed Regulation, P-99 (“Justice Kennedy was clear that waters with a significant nexus must significantly affect the chemical, physical, *or* biological integrity of a downstream navigable water....”) (emphasis added). This misstatement is significant because it effectively lowers the standard for establishing jurisdiction. Under the Proposed Regulation, Agencies will assert jurisdiction if they can demonstrate *either* that the subject wetland—and similarly situated lands in the region—significantly affect the chemical and physical integrity of other jurisdictional waters *or* that they affect the biological integrity of those waters. But, Justice Kennedy’s jurisdictional test was not an either or proposition. To satisfy the ‘significant nexus test,’ one must demonstrate all three factors: The subject wetland, and similarly situated lands, must have a significant effect on the (1) chemical, (2) physical and (3) biological integrity of other jurisdictional waters.

Second, the Proposed Regulation misconstrues the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than “speculative or insubstantial.” This enables the Agencies to assert CWA jurisdiction without proving that the subject wetlands are in fact having a *significant impact* on other jurisdictional waters. This incorrectly shifts the burden of proof from the agency asserting jurisdiction to the property owner.<sup>1</sup> Under the Proposed Regulation, the Agencies will now presume jurisdiction unless proven otherwise. But Justice Kennedy made clear that the

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<sup>1</sup> In attempting to shift the burden from the agency asserting jurisdiction to the landowner contesting jurisdiction, the Proposed Regulation will place further economic strain on landowners who seek to defend their property rights.

agency must bear the burden of demonstrating substantial effects on other jurisdictional waters. *Rapanos*, 547 U.S. at 784 (Kennedy, J. concurring).

Third, the Proposed Regulation changes the significant nexus test by expanding the definition of “region.” This is significant because Justice Kennedy provided that the test should consider the affect that the wetland—“either alone or in combination with similarly situated lands in the **region**”—has on other jurisdictional waters. *Id.* at 780 (emphasis added). Logically, a narrow understanding of the term “region” will cabin relevant considerations, whereas a broad understanding will allow the Agencies to more readily assert jurisdiction. And the Proposed Regulation stretches the term far beyond the localized concerns that Justice Kennedy had in mind and far beyond the definition provided in the 2008 Guidance document. In fact, this is probably the most radical aspect of the Proposed Regulation because it defines the relevant region as the entire “watershed,” which would entail more than a million square miles—or 41% of the lower 48 states—in the Mississippi watershed alone.<sup>2</sup> *See* Proposed Regulation, P-95 (“The agencies propose to interpret the phrase ‘in the region’ to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.”).

(4) The Proposed Regulation inappropriately asserts jurisdiction over almost any ditch

The Proposed Regulation provides that any “natural, man-altered, or man-made water body” with an ordinary high water mark will be considered a tributary, and therein requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows by applying either the “continuous surface connection” or “nexus” tests. But, both *Rapanos* tests reject such an expansive interpretation of CWA jurisdiction. *Rapanos*, 547 U.S. at 731-32. Justice Kennedy’s “significant nexus test” was not intended to apply beyond wetlands to tributaries. And the plurality’s “continuous surface connection” test was intended to strictly limit CWA jurisdiction over tributaries, and would not justify assertions of jurisdiction over “ditches, channels and conduits.” *Id.* at 737-39.

(5) The Proposed Regulation erroneously bootstraps the CWA’s regulatory reach over adjacent wetlands

Under the *Rapanos* plurality opinion, the Agencies may be able to assert jurisdiction over wetlands that are adjacent to traditional navigable waters.<sup>3</sup> But in order to do so they must demonstrate that there is a continuous surface connection between such “traditional navigable waters” and the wetland, such that it is difficult to discern where the water ends and the wetland begins. *Rapanos*, 547 U.S. at 742. Yet the Proposed Regulation asserts jurisdiction over wetlands without regard to whether there is a continuous surface connection.

<sup>2</sup> *See* Army Corps of Engineers, The Mississippi Drainage Basin, <http://www.mvn.usace.army.mil/Missions/MississippiRiverFloodControl/MississippiRiverTributaries/MississippiDrainageBasin.aspx> (last viewed 10/02/14).

<sup>3</sup> The *Rapanos* plurality defined a “traditional navigable water” as a “relatively permanent, standing or continuously flowing bod[y] of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. 739.

The Proposed Regulation invokes Justice Kennedy’s significant nexus test in justifying an assertion of jurisdiction over waters adjacent to relatively permanent, non-navigable tributaries that are connected downstream to “traditional navigable water.” The Agencies therein operate on the assumption that adjacent waters are always sufficiently integrated with the ecological system of the entire watershed. This much is true in so far as the Proposed Rule defines “adjacent waters” as having a significant nexus to traditional navigable waters. But that circular definition tells us nothing as to when adjacent waters will in actuality be jurisdictional.

The fundamental problem is that the Proposed Regulation operates so as to create a presumption of jurisdiction—a presumption that may not bear out in practice. This is highly problematic because the burden should not be on the landowner to disprove CWA jurisdiction. The burden should rest on the Agencies to prove the existence of a “significant nexus” in any given case.

### **The Proposed Regulation Will Impose Heavy Economic Costs on Development for Newly Regulated Properties All Across the Country**

As explained more fully in the previous section, the Proposed Regulation should be rejected because it improperly requires assertions of jurisdiction in contravention of Supreme Court precedent. But, our concern is over the real-world impacts that the Proposed Regulation will have on countless landowners across the country. Because the Proposed Regulation so greatly expands CWA jurisdiction, it will have severe practical and financial implications for many affected landowners.

If a portion of a property is deemed jurisdictional wetland, the owner cannot make use of that segment of his or her property. Indeed, the owner will face devastating fines of up to \$37,500 per day if he or she begins to develop. *See Sackett v. EPA*, 132 S.Ct. 1367, 1370 (2012). As a result, most landowners—especially individuals of modest means and average small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property.

In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. As of 2002, the average CWA permit cost over \$270,000. *See Rapanos*, 547 U.S. at 720 (plurality opinion) (citing Sunding & Zilberman, *The Economics of Environmental Regulation and Licensing: An Assessment of Recent Changes to Wetland Permitting Process*, 42 Nat. Res. J. 59, 74-76 (2002)).

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses and individuals of modest means are without recourse. Usually their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses and individuals suffer greatly because they have usually tied up much of their assets into their real estate investments and they can neither afford necessary permits or legal representation to challenge improper jurisdictional assertions.

## **The Proposed Regulation Will Chill Development and Devalue Countless Other Properties**

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the Proposed Regulation is finalized. Landowners are already aware that the Agencies have taken an aggressive posture in making jurisdictional assertions in recent years; however, the regulated community is greatly concerned that the Proposed Regulation—if approved—signals a dramatic shift toward an even more aggressive jurisdictional reach. As a result, landowners are understandably concerned about the potential for the Agencies to use the Proposed Regulation to justify jurisdictional assertions.

The NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the Proposed Regulation is finalized in its current form. Indeed, if any amount of water rests or flows over a property—at any point during the year—the owner may have cause for concern that the Agencies might assert CWA jurisdiction.

Unfortunately the Proposed Regulations will do little to make CWA jurisdiction clearer for these property owners. It is true that the Proposed Regulation offers a veneer of simplicity in asserting categorical jurisdiction over many waters. But many landowners will question whether the agency is overreaching in applying these *per se* rules. And of course, the Proposed Regulation does nothing to clear up confusion with regard to “other waters,” which will still be assessed on a case-by-case basis. Further, the Proposed Regulation is still extremely complicated—so much so that landowners will still have to retain experts in many cases in order to determine whether a property may be developed.

Importantly, properties swept into the CWA’s jurisdictional net will depreciate greatly in value under the Proposed Regulation. Even in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might potentially be viewed as jurisdictional. And that is a risk that most reasonable individuals would be unwilling to take. Indeed, they face fines of up to \$37,500 per day if they are mistaken. And for this reason any property that might be viewed as containing a jurisdictional wetland is greatly devalued.

## **Implementation of the Proposed Regulation Will Result in New Federal Liabilities**

Finally, we must stress the importance of avoiding unnecessary liabilities. The federal government cannot afford to exacerbate its budgetary problems by adopting the Proposed Regulation because it will result in incalculable litigation costs and inverse condemnation liabilities. Not only will the Proposed Regulation result in lost economic opportunities—for reasons explained in the previous section—but it will result in a tremendous amount of litigation.

Since the Proposed Regulation requires the Agencies to make expansive assertions of jurisdiction, litigants will predictably challenge their jurisdictional assessments. Moreover, these expansive jurisdictional assessments will take away the right of many landowners to make any

beneficial use of their properties. And the federal government will therein incur takings liability under the Fifth Amendment for these properties.

### **Conclusion**

We maintain that the Agencies' Proposed Regulation represents bad public policy because it increases regulatory burdens on small business landowners by expanding the jurisdictional reach of the Clean Water Act. This is especially inappropriate given the Supreme Court's repeated admonition against overly expansive jurisdictional assertions. And because we submit that the Proposed Regulation will expand the Agencies' jurisdictional reach beyond what Supreme Court precedent allows, NFIB urges the Agencies to withdraw the Proposed Regulation at this time.

We appreciate the opportunity to comment on the proposed rule. Should the Agencies require additional information, please contact the NFIB's Small Business Legal Center's senior staff attorney, Luke Wake, at 916-448-9904.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Austin".

Amanda Austin  
Vice President, Public Policy  
NFIB