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February 7, 2022

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

Ms. Jensen and Ms. Christensen:

Thank you for the opportunity to offer comment on the U.S. Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE) proposed *Revised Definition of "Waters of the United States"* (Proposed Rule). After reviewing the Proposed Rule, and in light of the United States Supreme Court's decision to grant certiorari in *Sackett, et al. v. U.S. Environmental Protection Agency, et al.*, I have a number of concerns.

1. **This rulemaking is premature and should be stayed during the pendency of *Sackett*.**

In 1972, Congress amended the 1948 Federal Water Pollution Control Act, creating what is known as the Clean Water Act (CWA). A critical tenet to this legislation is protection of "navigable waters," a term defined as "waters of the United States, including the territorial seas." 33 U.S. Code § 1362(7). However, the CWA provides no guidance as to the definition of "waters of the United States," or "WOTUS" as it is colloquially known. This Proposed Rule seeks to resolve one issue: how broadly should agencies interpret the term "waters of the United States" or "WOTUS," as that term is used in the CWA.

The Proposed Rule provides an exhaustive WOTUS regulatory history, and generally discusses pertinent caselaw, including the three most crucial cases addressing the definition of WOTUS: *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook*

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County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); and, most relevantly, *Rapanos v. U.S.*, 547 U.S. 715 (2006).

In *Rapanos*, the four-Justice plurality found WOTUS to include "relatively permanent, standing or continuously flowing bodies of water," connected to traditionally navigable waters. *Id.* at 739, 742. WOTUS also included wetlands with "continuous surface connection" to said water bodies. *Id.* at 742. Justice Kennedy's concurrence, however, more broadly defined WOTUS to include water or wetlands possessing a "'significant nexus' to waters that are or were navigable in fact" or that could reasonably be made so. *Id.* at 759. Justice Kennedy concluded that wetlands had a "significant nexus" if those waters "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

After reviewing the complex regulatory and legal history of WOTUS, it is clear that interpretation of "WOTUS" is a ball oft volleyed by administrations and lower courts. It is equally clear in reading the Proposed Rule that this administration would like a turn to serve that ball.

I would ask that EPA and USACE reconsider these efforts, however. The question presented in *Sackett*, as articulated by the United States Supreme Court, is which test correctly identifies WOTUS: the *Rapanos* plurality's "relatively permanent" test, or Justice Kennedy's "significant nexus" test. As such, comments on the "appropriate" test at this juncture will likely be of little value once the *Sackett* decision issues. This rulemaking process should be stayed.

2. <u>WOTUS must be defined in a manner consistent with the limited regulatory authority contemplated in the CWA.</u>

Because such a stay is not yet in place, I offer several preliminary comments in response to the Proposed Rule.

First, the Proposed Rule, which would adopt the "significant nexus" test, exceeds the scope of authority set forth by the CWA, overreaching into the jurisdiction of the states.

Except where the reserved rights or navigational servitudes of the United States are invoked, the State of Montana has authority over its internal waters. This state sovereignty was expressly recognized by Congress in the CWA.

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

This state sovereignty was recognized by Congress for good reason. Montana has a comprehensive set of water quality and appropriation statutes implemented by the Montana

Department of Environmental Quality and Montana Department of Natural Resources and Conservation. This body of state law, combined with state programming and localized administration, means that Montana can respond to constituent stakeholders, applicants, and changing environmental conditions faster than the EPA or USACE.

Adoption of the "significant nexus" test would impermissibly expand federal jurisdiction into the state's domain. By basing decisions on whether waters "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other" navigable waters, the EPA and USACE effectively expand jurisdiction over intrastate and non-navigable waters under the State's purview. This expansion is inconsistent with the CWA and threatens the efficiency and quality with which DEQ and DNRC administer state law. This, in turn, hampers the successful protection of Montana's waters.

I ask that the EPA and USACE respect Montana's sovereignty and focus their attentions toward an honest adoption of the plurality's "relatively permanent" test, as it is more aligned with the jurisdictional limitations Congress set forth in the CWA.

3. **WOTUS must be defined in a manner that ensures consistency and predictability.**

Implying that the Proposed Rule is a return to the pre-2015 regulatory landscape, simply because it uses the 1986 Regulations as a starting point, is misleading. While the Proposed Rule uses the 1986 Regulations as a base, its incorporation of ***both*** the "relatively permanent" and "significant nexus" tests in defining WOTUS opens the door to a level of expansive application never contemplated in the 1986 Regulations and introduces an unacceptable level of ambiguity into permitting processes.

Generally speaking, the Proposed Rule's interpretation of the "significant nexus" test is worded as specified waters:

> ...that either alone or ***in combination*** with ***similarly situated*** waters ***in the region, significantly affect*** the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section.

Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,449-69,450 (Dec. 7, 2021). Every emphasized word is an avenue for ambiguity, expansive and inconsistent interpretation, and the unconscionable imposition of cost.

The Proposed Rule's definition of "significantly affect" fails to cure any of this ambiguity:

> Significantly affect means more than speculative or insubstantial effects on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1), (2), or (6) of this section. When assessing whether the effect that the functions waters have on waters identified in paragraph (a)(1), (2), or (6) of this section is more than speculative or insubstantial, the agencies will consider:
>
> (1) The distance from a water of the United States;

(2) The distance from a water identified in paragraph (a)(1), (2), or (6) of this section;
(3) Hydrologic factors, including shallow subsurface flow;
(4) The size, density, and/or number of waters that have been determined to be similarly situated; and
(5) Climatological variables such as temperature, rainfall, and snowpack.

Id. What is an "insubstantial effect?" When agencies "consider" these factors, what weight will they assign to each? What "hydrologic factors" will be considered? What is "shallow" subsurface flow? What constitutes a "similarly situated" water? The Proposed Rule's reliance on additional vagaries to resolve existing ambiguity only aggravates potential due process problems and is a cold comfort to Montanans.

I ask EPA and USACE to adopt the "relatively permanent" standard as set forth by the *Rapanos* plurality, for the simple reason that it is more clear, more predictable, and can be applied more consistently. If the agencies adopt the Proposed Rule, it is the citizenry that will foot the bill for the agencies' equivocation. No Montanan, and indeed, no American, should be required to hire a consultant simply to advise whether their water is jurisdictional, and then worry whether the consultant correctly interpreted the subjective regulations. Montanans should not be precluded from pursuing their livelihoods because they cannot afford to obtain a permit in association with the pothole in the middle of their dryland farm.

Montanans deserve more than a moving target. For this reason, I request that the EPA and USACE adopt a rule that stays true to the *Rapanos* plurality's "relatively permanent" standard.

Sincerely,

Greg Gianforte
Governor