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February 7, 2022

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Lieutenant General Scott A. Spellmon
55th Chief of Engineers and Commanding General
of the U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Submitted electronically via http://www.*regulations.gov*

RE: Comments of the American Public Power Association on the Proposed Revised Definition of "Waters of the United States" Docket No. EPA-HQ-OW-2021-0602 86 Fed. Reg. 69372 (December 7, 2021)

Administrator Regan and Lieutenant General Spellmon:

The American Public Power Association (APPA) appreciates the opportunity to submit the following comments in response to the Department of the Army, Corps of Engineers and Environmental Protection Agency's (EPA) proposed rule, "*Revised Definition of "Waters of the United States*."

As detailed in the attached comments, the Association supports a WOTUS Rule that draws clear lines of jurisdiction, provides needed predictability for the regulated community and is consistent with Clean Water Act and Supreme Court precedent. In the Association's comments, we recommend some clarifications and changes to further improve the proposed regulatory definition and its implementation.

Should you have any questions about these comments, please contact Mr. Karl Kalbacher at KKalbacher@PublicPower.org or call (202) 467-2974.

Sincerely,

Carolyn Slaughter

Carolyn Slaughter
Director, Environmental Policy

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Comments of the American Public Power Association on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule: Revised Definition of "Waters of the United States"

86 Fed. Reg. 69372 (December 7, 2021)
Docket No. EPA-HQ-OW-2021-0602

Date Submitted: February 7, 2022

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I. Introduction

The American Public Power Association (APPA or Association) offers the following comments in response to the Department of the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency's (together, the Agencies) Proposed Rulemaking: Revised Definition of "Waters of the United States" (Proposed Rule).[1]

APPA is the national service organization representing the interests of more than 2,000 not-for-profit community- and state-owned electric utilities that together provide electricity to approximately 49 million Americans and employ approximately 96,000 people. The Association advocates and advises on electricity policy, technology, trends, training, and operations. Association members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

APPA participates on behalf of its members collectively in various rulemakings and proceedings that affect public power utilities. APPA is a member of the Utility Water Act Group, and the Waters Advocacy Coalition supports their detailed technical and legal comments on the Proposed Rule.

II. APPA's Interest in the Revised WOTUS Rulemaking

The Waters of the United States (WOTUS) rulemaking has a direct impact on our member electric utility's operations. The electric industry must construct, operate, and maintain facilities that generate electricity (including renewable energy facilities, such as wind, solar, and hydroelectric facilities), transmission and distribution lines, and other system control facilities. Oftentimes, these activities require our members to cross or perform work within wetlands or jurisdictional waters that are subject to this rule. Public power utilities also have obligations to ensure a reliable, safe, and affordable supply of electricity to their customers.

APPA supports a clear and implementable definition of WOTUS. In order for the electric utility sector to construct, operate, and maintain facilities in support of the clean energy transition and meet their service obligations, the WOTUS definition must be easily understood and uniformly applied across the country. For example, APPA members use Nationwide Permit (NWP) 57 for utility lines, which provides streamlined authorization for minor discharges of dredge or fill material into WOTUS. Utilities construct projects to conform to the ½ acre limit in the NWP 57, to avoid wetlands

[1] 86 Fed. Reg. 69,372 (December 7, 2021) Department of the Army, Corps of Engineers and U.S. Environmental Protection Agency's Proposed Rulemaking: Revised Definition of "Waters of the United States" (Proposed Rule).

and streams and to avoid the need for an individual permit under Clean Water Act (CWA or Act) §404, which would require more mitigation and otherwise increase permitting costs and delays.

APPA member utilities routinely secure National Pollutant Discharge Elimination System (NPDES) permits under CWA § 402 for pollutant point source discharges to a WOTUS. Utilities use a variety of water features to manage, store, and treat water, such as stormwater runoff; contain spills; and manage and recycle wastewater. Any change in converting these industrial water features from non-jurisdictional to jurisdictional will alter the point of compliance at which any technology or water quality-based limit must be met. Such a change would create regulatory compliance issues and impose unwarranted new costs to public power utilities, others in the regulatory community, and to state and federal permit writers who will have to deal with the permitting implications. These industrial water features are essential to the production of efficient, reliable electricity. Therefore, understanding the implications of federal CWA jurisdiction is important as the Agencies revise the WOTUS definition.

Electric utility facilities that are decommissioned may be required to fill intakes and discharge channels and related features, grade the site, lay down materials, and fence the area. These types of internal water features located at an electric facility have repeatedly been determined non-jurisdictional through a formal jurisdictional determination and permits. Regulators often point to these features, but do not regulate them.

WOTUS impacts can also trigger associated compliance requirements under other federal laws, such as the National Environmental Policy Act, the National Historic Preservation Act review, and the Endangered Species Act § 7 consultation, which are then added to a range of already protective obligations under state, county, and local laws.

A. APPA's Prior Advocacy Efforts on WOTUS

APPA has over the years provided to the Agencies our position with respect to developing a clear and easily implementable WOTUS definition. The Proposed Rule marks the latest development in nearly two decades of administrative proceedings, not to mention litigation.

- 2021 Request for Recommendations, Waters of the United States, 86 Fed. Reg. 4,191 (August 4, 2021).[2]
- 2019 Proposed Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (February 14, 2019).[3]
- 2018 Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodifying the Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018).[4]

[2] American Public Power Association, Comments in response to Request for Recommendations: Waters of the United States, 86 Fed. Reg. 4,191, (August 4, 2021), Doc. No. EPA-HQ-OW-2021-0328-0174. (APPA Response to Request for Recommendations).

[3] American Public Power Association, Comments on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule, Revised Definition of "Waters of the United States" 84 Fed. Reg. 4,154 (February 14, 2019), Doc. No. EPA-HQ-OW-2018-0149-4996, (APPA Comments on the 2019 Proposed Rule).

[4] American Public Power Association, Comments on the Definition of "Waters of the United States" Re-codification of the Pre-Existing Rule; 83 Fed. Reg. 32,227 (July 12, 2018), EPA-HQ-OW-2017-0203-15401 (APPA's Comments on 2018 Supplemental Notice).

- 2017 Proposed Rule to Repeal the 2015 Clean Water Rule and Recodify the Preexisting Rule, 82 Fed. Reg. 34,899 (July 27, 2017). [5]
- 2014 Proposed Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014).[6]

III. Summary of APPA's Comments

The following provides a summary of the most relevant comments that APPA has to offer with respect the Proposed Rule.

Application of the Commerce Clause to determine WOTUS: APPA has concerns with the application of the Commerce Clause in determining whether water bodies meet one or more of the WOTUS jurisdictional tests under the Proposed Rule. Specifically, non-navigable waterways should not be subject to WOTUS jurisdiction, however, they could be regulated under state authorities.

Definition of Traditional Navigable Waterway: The pre-2015 WOTUS definition allowed for an overly broad traditional navigable water (TNW) interpretation. The Agencies claimed jurisdiction, under the 1986 regulations, over waters used by interstate or foreign travelers for recreational or other purposes, with no foundation in actual navigable waters. APPA is concerned that the Proposed Rule will unduly expand the waters that would be subject to WOTUS which will result in regulatory uncertainty for our members as they try to advance clean energy infrastructure projects.

Interstate Waters Designated as a Standalone Category of WOTUS: APPA does not support the designation of interstate waters as a standalone category of WOTUS. We do not concur with the Agencies position that these waters by virtue of crossing state lines can be considered WOTUS irrespective of whether they are navigable. The Proposed Rule restores interstate waters as a standalone category, once again placing such waters on equal footing as TNWs and territorial seas.

Other Waters: APPA has concerns with the Agencies proposal to include "other waters" as a category of jurisdictional waters. We believe their inclusion in the definition will result in a case-by-case application that is applied inconsistently by different Corps Districts, creating confusion, delay, and leading to additional regulatory requirements and burdens.

The Proposed Rule goes farther than the text of the 1986 regulations, by expressly asserting jurisdiction over "other waters" under the relatively permanent and significant nexus standards from *Rapanos*.[7] The "other waters" category could be applied in an exceptionally broad manner by regulators and serve as a fallback for the Agencies to assert jurisdiction over a wide range of features.

Waste Treatment System Exclusion: APPA appreciates that the Agencies have maintained the waste treatment system (WTS) exclusion from the definition of WOTUS. The WTS exclusion has been

[5] American Public Power Association, Comments on 2017 Proposed Rule to Repeal the 2015 Clean Water Rule and Recodify the Preexisting Rule, 82 Fed. Reg. 34,899 (July 27, 2017), EPA-HQ-OW-2017-0203-11677 (APPA 2017 Repeal Rule).

[6] American Public Power Association, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (April 21, 2014), EPA-HQ-OW-2011-0880-15008 (APPA 2014 Proposed Rule Comments).

[7] *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).

applied under the 1986/88 regulations, the 2015 Rule, and the NWPR, and its scope has been consistent for decades. The WTS exclusion is critical for electric utilities to provide reliable and affordable electricity across the country, including to rural areas, based on the importance of features such as cooling and settling ponds to our generation and transmission facilities. APPA recommends the agency define waste treatment systems.

IV. Concerns with the Repeal of the Navigable Waters Protection Rule

In our view the Navigable Waters Protection Rule (NWPR) satisfied the core principles that the regulated community has consistently backed for well over a decade.[8] It provided clarity and certainty for landowners and businesses and respected the line that Congress drew in the CWA between federal and state authority. More importantly, it was protective of the environment while allowing for economic activity and the use/enjoyment of land and water.

The NWPR was also far easier to implement consistently on the ground compared to prior WOTUS definitions. For example, because the NWPR largely based jurisdictional determinations on observable surface connections, landowners could more easily ascertain whether they required CWA permits for their activities. The NWPR also excluded mostly dry ephemeral features, eliminated the nebulous "significant nexus" test, and precluded the extension of jurisdiction to non-navigable, intrastate water features that were distant from any navigable-in-fact waters. As a result of the NWPR, regulated entities were better able to avoid costs associated with the uncertainties under prior WOTUS definitions.

The NWPR provided an exclusion of ephemeral features. This exclusion is critical to APPA members' ability to identify what features on their land may be jurisdictional and thus avoid significant permitting costs or losses in productivity that results from vague or more expansive definitions of WOTUS.

In short, the NWPR fulfilled our members key needs, and we believe the rule was protective and legally defensible on the merits, notwithstanding the concerns the Agencies have expressed about the rule and even though the U.S. District Court of Arizona in *Pasqua Yaqui Tribe v. EPA* remanded the NWPR to the Agencies and granted Plaintiffs' request to vacate the NWPR.[9]

In the absence of reverting back to the NWPR to implement WOTUS, we strongly urge the Agencies to:

(a) avoid interpreting WOTUS in a way that fails to give appropriate weight to the explicit statutory policy to recognize, preserve, and protect the states' traditional and primary authority over land and water use;
(b) adhere to the full history of Supreme Court precedent on the definition of WOTUS;
(c) give effect to the term "navigable" in the statutory text;
(d) draw bright lines between federal and state or tribal jurisdiction so that regulators and regulated entities can easily identify what features are subject to federal CWA jurisdiction.

[8] The Navigable Waters Protection Rule: Definition of ''Waters of the United States'' 85 Fed. Reg. 22,250 (April 21, 2020) (NWPR).
[9] *Pasqua Yaqui Tribe v. U.S. Envtl. Prot. Agency*, No. 4:20-cv-00266 (D. Ariz. 2021).

V. The Proposed Rule is Overly Broad and Disregards Important Constitutional, Statutory and Judicial Limitations on Federal Authority

The Agencies' Proposed Rule is not a return to the 1986 regulations and 2008 *Rapanos* Guidance. Rather, an expansion of federal regulatory authority incremental-through aggregation analyses that are broader than the pre-2015 regulatory regime that the Agencies are currently implementing instead of through categorical assertions. The Agencies seem to be offering theories of jurisdiction that are even broader that either of the theories that the Supreme Court rejected in *SWANCC* and *Rapanos.*[10] The Proposed Rule encompasses various non-navigable features, such as isolated wetlands, ephemeral drainages, and isolated ponds, that have previously been non-jurisdictional. Like the features at issue in *SWANCC* and *Rapanos*, these features are a far cry from the "navigable waters" over which Congress sought to exercise its commerce power. The Proposed Rule ignores the limits recognized by the Supreme Court, and once again the Agencies' expansive jurisdictional interpretations run afoul of the limits of Congress's commerce power over navigation. A final rule must implement the holdings of the *Rapanos* court by recognizing that only those waters that meet both the plurality and Kennedy test can be deemed jurisdictional on the narrowest grounds on which the justices in *Rapanos* concurred.

A. The Proposed Rule Exceeds the Limits of Congress's Commerce Power Over Navigation

The CWA was founded in federalism. The Act partners federal, state, and local government through regulatory and non-regulatory programs to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] When Congress enacted the CWA in 1972, it limited federal jurisdiction over waters to "navigable waters" and expressed its intent to "recognize, preserve, and protect" the states' primary authority and responsibility over local land and water resources.[12,13]

Jurisdictional waters must be demarcated based on the limits established in the Act by Congress and as recognized by Supreme Court decisions. Congress chose to regulate discharges only into "navigable waters," which were specifically defined as "*the* waters *of* the United States, including the territorial seas," plainly meaning those waters in which the federal government has a sufficient interest that they stand apart from other waters within the United States and are properly deemed *the* waters *of* the United States.[14] The fact that the Act provides just one example of such waters – the territorial seas – is instructive.[15] Congress chose as an example of WOTUS waters that are indeed navigable, plainly demarcated, readily and objectively discernible, and which function as highways of interstate and foreign commerce.[16]

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[10] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *Rapanos* v. United States, 547 U.S. 715 (2006) (*Rapanos*).
[11] CWA § 101(a), 33 U.S.C. § 1251(a),
[12] Id. § 101(b), 33 U.S.C. § 1251(b),
[13] Id. § 101(g), 33 U.S.C. § 1251(g),
[14] The CWA prohibits the "discharge of any pollutant" into "navigable waters," CWA § 502(7), 33 U.S.C. § 1362(7), except in compliance with specified provisions of the statute, including §§ 402, 404, 33 U.S.C. §§ 1342, 1344.
[15] *See id.*
[16] It would have been equally instructive had Congress decided to include ditches, remote wetlands, or industrial ponds as additional examples in the definition of "navigable waters," but Congress did not. Congress did address ditches, channels and pipes, but did so by including them in the definition of a "point source" from which pollutants may be discharged into "navigable waters"; not by including them in the definition of "navigable waters." 33 U.S.C. § 1362(14). Congress's

As the Supreme Court explained in *SWANCC*, the constitutional authority for the CWA is Congress' "commerce power over navigation."[17] The Supreme Court cases establish that, although Congress intended the CWA "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term," regulation of such waters must be based on a close interrelationship with waters that are navigable in the traditional sense.[18]

The Supreme Court thus emphasized that Congress' use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority.[19] The term "navigable" has import. To comply with the statute, Congressional intent, and Supreme Court case law, any new rule defining WOTUS must include only those waters that are or have a close interrelationship with waters that are navigable in the traditional sense.

Based on the foregoing analysis of congressional intent in their drafting the CWA and Supreme Court precedent on the scope of WOTUS, we have concerns with the application of the Commerce Clause in determining whether water bodies meet one or more of the WOTUS jurisdictional tests under the Proposed Rule. Specifically, non-navigable waterways should not be subject to WOTUS regulation, however, could be regulated under state authorities. In addition, a new WOTUS definition should:

- Be developed with consideration of the roles states play in water resource management;
- Recognize that clear boundaries are necessary to allow states to effectively regulate land and water use within their borders; and
- The determination of WOTUS jurisdiction should be the primary responsibility of the states who are much more knowledgeable with respect to the navigability of waterways.

In recognition of these limits on federal regulatory authority under the CWA, the Supreme Court has several times curtailed the Agencies' overbroad interpretations of the Act. In *SWANCC*, for example, the Court characterized the Corps' assertion of jurisdiction over sand and gravel pits based on their use by migratory birds as "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[20]

choices must be given effect.

[17] *SWANCC*, 531 U.S. at 168 n.3, 172, Congress may regulate three categories of activity through its commerce power: (1) "channels of interstate commerce," (2) "instrumentalities of interstate commerce," or (3) activities that "substantially affect" interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995); U.S. Const. art. I, § 8, cl. 3 (Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[18] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133-34 (1985) ("*Riverside Bayview*") (emphasis added) (*e.g.*, wetlands that actually abutted and were "inseparably bound up with" navigable waterway); *SWANCC*, 531 U.S. at 167, 171-72.

[19] *SWANCC*, 531 U.S. at 171 (citing *Riverside Bayview*, 474 U.S. at 133),

[20] *SWANCC*, 531 U.S. at 174,

Indeed, the Corps' attempt raised "significant constitutional questions," such that extending CWA jurisdiction to such isolated, non-navigable waters "would result in a significant impingement of the States' traditional and primary power over land and water use."[21] Not only did *SWANCC* emphasize the importance of the term "navigable" in holding that the text of the statute does not allow the court "to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water."[22] The court reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows.[23]

The Agencies indicate in the Proposed Rule that the definition of WOTUS is based on the Commerce Clause of the Constitution and the statutory history of the CWA. The Agencies state that there have been no changes to the interstate waters section of the pre-2015 regulations in the Proposed Rule. As such, under the Proposal, the Agencies would continue to assert jurisdiction over interstate waters, including interstate wetlands.

The Agencies further contend that "Congress intended to subject interstate waters to CWA jurisdiction without imposing a requirement that they be water that is navigable for purposes of federal regulation under the Commerce Clause themselves or be connected to water that is navigable for purposes of federal regulation under the Commerce Clause."[24] In addition, the Agencies note that the CWA is clear that interstate waters that were previously subject to federal regulation remain subject to federal regulation.

B. The Proposed Rule Constrains the Role of States

The Agencies are also limited by Section 101(b) of the CWA in applying the WOTUS definition particularly with respect to making determinations on the navigability of waterways. Congress made clear in Section 101(b) that the primary responsibility for preserving, and protecting WOTUS rests with the states, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities 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 Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act."[25]

The Agencies assert Section 101(b) is best read a recognition of states' authority to address water pollution and to support EPA's exercise of authority to advance the Act's objective, not as a general policy of deference to state regulations to the exclusion of federal regulation.[26] The Agencies interpretation does not give sufficient weight to the policy's explicit refence to preserving and protecting states' primary responsibilities and rights to *plan the development and use of land and water resources,* which the Supreme Court emphasized in rejecting the government's broad interpretation of

[21] Id.
[22] Id. at 168 (emphasis in original).
[23] *SWANCC*, 531 U.S. at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).
[24] Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States'" Rule at page 12. US EPA and Department of the Army, November 18, 2021.
[25] Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).
[26] 86 Fed. Reg. at 69,400-01,

WOTUS in *SWANCC*. [27]

C. The Agencies Inconsistently Applied *Rapanos*

APPA supports a WOTUS definition that reflects Congress's focus in the CWA protecting "navigable waters." We also recognize that a WOTUS definition must also be consistent with and account for all Supreme Court decisions on the geographic reach of WOTUS, including both Justice Scalia's plurality and Justice Kennedy's concurring opinions in *Rapanos*. Our assessment of the Proposed Rule, however, is that the Agencies have inconsistently applied both Justice Scalia's plurality and Justice Kennedy's concurring opinions in Rapanos when making determinations of WOTUS.

The Agencies claim that "[c]ontinuity with the 1986 regulations will minimize confusion and provide regulatory stability for the public, the regulated community, and the agencies, while protecting the nation's waters. . . ." [28] The Proposal, however, is not simply a return to the 1986 regulations and *Rapanos* Guidance. Rather, the Proposal expands the prior regime, is inconsistent with Supreme Court case law and the Agencies' stated goals and proposes various changes in the law without adequate explanation.

The Proposal's approach to determining WOTUS based on application of *either* the plurality's or Justice Kennedy's standards is inconsistent with interpreting *Rapanos* on "narrowest grounds" principles.[29] The plurality specifically rejected Justice Kennedy's view that jurisdiction may be established based on case-by-case "significant nexus" determinations, demonstrating that such an approach is not within the narrowest grounds on which those justices concurred in the judgment, yet the Proposed Rule would establish WOTUS jurisdiction on that very basis.

The *Rapanos* plurality detailed why those justices expressly rejected defining WOTUS based on case-by-case significant nexus determinations. Noting that Justice Kennedy's approach would require the Corps to "establish . . . on a case-by-case basis" that wetlands adjacent to non-navigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" the plurality stated that *Riverside Bayview* "explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically connected wetlands are covered . . . . case-by-case determination of ecological effect *was not the test*."[30]

The pre-2015 regulations allowed for an overly broad TNW interpretation. Under the 1986 regulations the Agencies claimed jurisdiction over waters used by interstate or foreign travelers for recreational or other purposes, with no foundation in actual navigable waters. The guidance adopted by the Agencies post-*Rapanos* was also ambiguous and applied inconsistently across corps districts.[31]

In APPA's experience, the Agencies' 2008 *Rapanos* Guidance allowed for unpredictable case-by-case

[27] *SWANCC*, 531 U.S. at 172-74,
[28] 86 Fed. Reg. at 69,416,
[29] *Marks* v. *United States*, 430 U.S. 188 (1977) (interpreting split decisions based on the narrowest grounds on which a majority of justices concurred in the holding).
[30] *Rapanos*, 547 U.S. at 753-54,
[31] EPA and Corps Guidance "CWA Jurisdiction Following *Rapanos* v *U.S* and *Carabell* v *U.S*", December 12, 2008 (2008 *Rapanos* Guidance).

significant nexus determinations and allowed for much broader assertions of WOTUS jurisdiction than the Supreme Court cases support. For example, under the *Rapanos* Guidance, the Agencies' significant nexus evaluations included an assessment of flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affected the chemical, physical and biological integrity of downstream TNW. The significant nexus evaluation also included consideration of hydrologic and ecologic factors. These site-specific evaluations relied heavily on the use of professional judgement, which led to inconsistent and unpredictable decisions.

APPA recognizes that the Proposed Rule in essence formalizes the longstanding practices of the Agencies in making WOTUS determinations. However, this approach will neither advance nor simplify the jurisdictional determination process beyond what the Supreme Court has articulated under *Rapanos*. Underscoring the complexities involved with certain jurisdictional determinations using the pre-2015 regulatory regime, the Proposed Rule contains a lengthy discussion of the Agencies' "Implementation of the Proposed Rule."

Reliance on the "relatively permanent" or "significant nexus" standard has historically led to significant uncertainty when it comes to jurisdictional determinations for ditches, intermittent and ephemeral streams, wetlands, and other open waters that may be considered adjacent to those jurisdictional waters. As such, APPA members who regularly have to comply with CWA §402 and §404 permitting requirements will remain subjected to continual regulatory uncertainty with respect to WOTUS compliance.

Drawing clear jurisdictional lines with respect to WOTUS jurisdiction is critically important to ensure APPA's members can continue to provide affordable power to their customers across the nation. Within each subsection of our comments on categories of jurisdictions are examples of how application of the significant nexus tests in determining a WOTUS will result in inconsistent decisions which will result in project delays and higher costs to complete projects.

VI. APPA's Comments on the Proposed Jurisdictional Categories of WOTUS

Agencies are generally proposing to return to the pre-2015 WOTUS Rule, as amended to be consistent with relevant Supreme Court decisions. The Proposed Rule repeals the definition adopted by the Agencies in 2019 and for the most part adopts the prior 1986 regulatory definition of WOTUS while incorporating the Supreme Court's jurisdictional tests for WOTUS as described in *SWANCC* and *Rapanos*.

The Agencies propose to assert jurisdiction over all features that meet the definition of traditional navigable waters (TNW), interstate waters, territorial seas, and impoundments of most WOTUS. The Agencies would also assert jurisdiction over tributaries, adjacent wetlands, and "other waters" where such features satisfy either the *Rapanos* plurality's "relatively permanent" standard or Justice Kennedy's "significant nexus" jurisdictional test.

The Proposed Rule also maintains the exclusions from the 1986 regulations for waste treatment systems (WTS) and prior converted crop land but eliminates many of the other exclusions provided in the NWPR.

APPA has concerns with returning to a pre-2015 WOTUS definition. We believe the Proposed Rule could delay projects or result in fewer opportunities to install green energy infrastructure because the pre-2015 regulations asserted broad jurisdiction in some respects and, in other respects, left substantial room for discretion and case-by-case variation, which caused uncertainty and confusion. The application of the pre-2015 regulations was also complicated by the overlay and application of guidance documents that attempted to address Supreme Court precedent, but often increased uncertainty. APPA provides the following comments on aspects of the Proposed Rule with the greatest importance to the public power utilities.

A. Traditional Navigable Waterways

APPA recognizes that the Proposed Rule would assert jurisdiction over all features that meet the definition of TNW, interstate waters, territorial seas, and impoundments of most WOTUS. However, we oppose the expansion of the definition of TNW to include waters that were historically used, or susceptible to being used for commercial navigation, including for strictly recreationally purposes.

The Proposed Rule defines WOTUS to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," which is consistent with 1986 rules. The Agencies are not changing their longstanding position that TNWs include not only Rivers and Harbors Act waters, but also (i) waters determined by a court to be navigable-in-fact under any federal law; and (ii) waters currently used, historically used, or susceptible to being used for commercial navigation, including commercial recreation.

It is the Association's position that the Agencies' TNW category cannot be squared with either the plurality or Justice Kennedy's opinions in *Rapanos*. Both of those opinions equate the TNW category with the longstanding two-part test for navigability under The *Daniel Ball* (and *RHA* case law): (i) navigability-in-fact; and (ii) part of a continuous waterborne highway used to transport commercial goods in interstate or foreign commerce. A water should not be a TNW for CWA purposes merely because it is determined to be navigable-in-fact under federal law for any purpose. We also believe a waterway that is only used for recreational purposes does not fulfill the criteria established for a TNW.

We also note that the preamble to the Proposed Rule refers to U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D to support TNW decisions.[32] Although the Agencies are not proposing changes to the regulatory text for this category, the reference to Appendix D may signal a broader approach. In the past, Appendix D has been applied by the Agencies to allow for regulation of waters well beyond the TNWs under the relevant case law, including those that are not actually navigable by vessels engaged in commerce under ordinary conditions, but may merely be used in commerce rather than used for the transportation of goods in interstate commerce. For example, in reliance of Appendix D, the Agencies previously made TNW determinations based merely on potential recreational use by out-of-state visitors of a waterbody's potential to float a canoe or kayak. Because jurisdiction for many smaller WOTUS features (e.g., tributaries, adjacent wetlands) is established based on their relationship to TNWs, interpreting the TNW category more broadly would result in more features being treated as jurisdictional.

[32] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, May 30, 2007, See. https://www.nap.usace.army.mil/Portals/39/docs/regulatory/jd/jd_guidebook_051207final.pdf (JD Guidebook).

APPA members often site electric generation facilities next to TNWs to facilitate access to water to withdraw for cooling and other purposes. These facilities also often discharge into TNW in compliance with NPDES permits. Any expansion of the application of the TNW based on reliance of Appendix D Jurisdictional Determination Instructional Guidebook would result in lost time and higher cost to our members completing infrastructure projects. We respectfully request that the Agencies clarify their intention and the conditions that would trigger the use of the Guidebook in making TNW jurisdictional determinations.

B. Interstate Waters

APPA does not support the designation of interstate waters as a standalone category of WOTUS and we do not concur with the Agencies position that these waters by virtue of crossing state lines can be considered WOTUS irrespective of whether they are navigable.

The Proposed Rule restores interstate waters as a standalone category, once again placing such waters on equal footing as TNW and territorial seas. The Agencies state that "Until 1972, the predecessors of the Clean Water Act explicitly protected interstate waters independent of their navigability."[33] The 1948 Water Pollution Control Act declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement."[34] However, the inclusion of interstate waters in the WOTUS definition runs counter to the holding in *Georgia v. Wheeler*, which held that interstate waters exceeded the Agencies' authority and was inconsistent with the CWA and with Supreme Court law, such as *City of Milwaukee*.[35, 36]

APPA recognizes that by the Agencies proposing to designate interstate waters as "foundational waters," an interstate water need not be navigable so long as it crosses a state line. However, such waters which are in fact not navigable should not be included in the WOTUS definition. These waters have no nexus or connection to a navigable water or commerce; and are not adjacent to and do not contribute flow to a navigable water. The Agencies further compound the interstate water designation by claiming jurisdiction over tributaries to interstate waters; wetlands adjacent to interstate waters; relatively permanent "other waters" with a continuous surface connection to interstate waters; and "other waters" that "significantly affect" interstate waters either by themselves or in combination with similarly situated waters in the region.[37]

We also believe that the Proposed Rule fails to address the legislative history that the NWPR cited to support elimination of the standalone interstate waters category.[38] Moreover, the Proposal's reliance on Supreme Court cases involving interstate navigable waters is misplaced – none of those cases addressed the question of whether "interstate waters" and "navigable waters" are distinct categories of jurisdictional waters under the CWA, nor did the court need to consider whether the CWA applied to non-navigable interstate waters.

[33] 86 Fed. Reg. 6941.
[34] 86 Fed. Reg. 69417.
[35] *Georgia v. Wheeler* ,418 F. Supp. 3d 1336 (S.D. Ga. 2019).
[36] *Illinois v. City* of *Milwaukee*, 406 *U.S.* 91 (*1972).*
[37] 86 Fed. Reg. 69,418.
[38] 85 Fed. Reg. 22,283.

C. Other Waters

APPA has concerns with the Agencies proposal to include "other waters" in the WOTUS rule. We believe their inclusion in the rule will result in a case-by-case application that is applied inconsistently by different Corps Districts, creating confusion, delay, and leading to additional regulatory requirements and burdens.

The Agencies propose to restore the "other waters" category from the 1986 regulations, with changes that they state are informed by Supreme Court precedent. Other waters would include: "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," that are either (1) "relatively permanent" bodies of water with a continuous surface connection to another WOTUS (*Rapanos* plurality), or (2) "either alone or in combination with similarly situated waters in the region" "significantly affect the chemical, physical, or biological integrity" of other jurisdictional WOTUS (Justice Kennedy concurrence in *Rapanos*).

"Other waters" would be jurisdictional if (i) they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a TNW, interstate water, or the territorial seas; or (ii) they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a TNW, interstate water, or the territorial seas.[39]

The Proposed Rule goes farther than the text of the 1986 regulations, by expressly asserting jurisdiction over "other waters" under the relatively permanent and significant nexus standards from *Rapanos*. The "other waters" category could be applied in an exceptionally broad manner by regulators and serve as a fallback for the Agencies to assert jurisdiction over a wide range of features. Furthermore, the proposed rule would also lead to case-by-case determinations of CWA jurisdiction over "other waters" based on a specific analysis to determine whether they are WOTUS.

APPA is concerned that due to case-by-case application, the "other waters" definition could be applied inconsistently by different Corps Districts, which will create confusion, delay, and lead to additional regulatory requirements and burdens. APPA member electric utilities use a wide range of features within their facilities footprint that may be determined to be jurisdictional under the proposed definition of "other waters." APPA members' generating facilities often use ponds or other collection basins to store water for cooling, to control storm water and for treatment of process water. APPA members' plants sometimes draw in water from lakes or basins to use for cooling purposes, and transmission and distribution lines sometimes require § 404 permits to cross lakes and ponds.

APPA does not support the inclusion of the "other waters" category in the Proposed Rule. The Agencies claim the proposal essentially codifies the definition/framework they are currently implementing (i.e., a regulation that lacks this category) and thus, there is no appreciable cost or benefit difference and no expected impacts on small entities. The Agencies further state they have not used the (a)(3) "other waters" category since 2003. If these statements are true, this new "other waters" category can only be viewed as an expansion of authority.[40]

[39] 86 Fed. Reg. 69,423.
[40] 86 Fed. Reg. 69,395.

APPA also believes that the Agencies should not apply the significant nexus test to "other waters." The Agencies have not adequately provided the rationale for considering various features that could be considered "other waters". We are concerned with how the Agencies will apply the "similarly situated" concept to "other waters." Waters within this category could have very different effects on downstream foundational waters and should not be aggregated for purposes of determining significant nexus.

The aggregation concept is also too broad to the extent it allows Agencies to aggregate very different features that may be miles apart and far away from downstream navigable waters and have different flow regimes and characteristics. Last, the "other waters" category is difficult to reconcile with the holding in *SWANCC* which did not allow the extension of jurisdiction to ponds that were not adjacent to open water.

D. Impoundments

APPA supports the exclusion of impounded "other waters" from this category. As the Agencies note, there is no lawful basis to assert jurisdiction over tributaries or adjacent wetlands by virtue of their connections to "other waters" and thus, there is no basis to deem an impoundment of an "other water" as per se jurisdictional.[41]

The Agencies propose to restore the impoundment category but narrow it by clarifying that all impoundments of waters otherwise defined as WOTUS are jurisdictional other than impoundments of "other waters."[42] The Agencies base the inclusion of impoundments in the "other waters" category on case law. They cite *S.D. Warren (S Ct.) and United States v. Moses* (9th Cir.) to support the interpretation that damning or impounding a WOTUS does not remove jurisdiction.[43] But the Agencies acknowledge that they can legally authorize a change of jurisdictional status (e.g., by issuing a 404 permit to fill a WOTUS such that it is no longer a WOTUS).[44] The Agencies should clarify ambiguities in this category, e.g., how the Agencies define impoundment.

E. Adjacent Wetlands

The incorporation of the significant nexus standard and the relatively permanent approach in the analysis of whether an adjacent wetland is considered WOTUS is problematic for APPA members. While we recognize that the proposed WOTUS rule retains the definition of "adjacent" from the 1986 regulations, it also includes a new requirement that adjacent wetlands be classified WOTUS if they meet either of these standards.

The Proposed Rule would restore the 1986 definition of "adjacent" which means bordering, contiguous, or neighboring. Wetlands that are separated from other WOTUS by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands. would be considered jurisdictional.[45] The Proposed Rule would include wetlands as jurisdictional if they are adjacent to: (i)

[41] 86 Fed. Reg. at 69,420.
[42] Id. at 69,420.
[43] *S. D. WARREN CO. v. MAINE BD. OF ENVIRONMENTALPROTECTION* (No. 04-1527) 2005 ME 27, 868 A. 2d 210, affirmed, and *U.S. v. Moses*, 513 F.3d 727 (7th Cir. 2008).
[44] Id. at 69,420.
[45] 86 Fed. Reg at. 69,379.

TNW, interstate waters, or territorial seas; (ii) relatively permanent, standing, or continuously flowing impoundments or tributaries with a continuous surface connection to such waters; or (iii) impoundments or relatively permanent tributaries if the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a TNW, interstate water, or territorial sea.[46] Wetlands adjacent to "other waters" would also need to be assessed as "other waters" to determine if they meet the relatively permanent or significant nexus standards.

Under the application of the relatively permanent approach constant hydrologic connection is not required. Instead, the continuous surface connection requirement can be satisfied by other physical connections.[47]

According to the Agencies Proposed Rule, jurisdiction is appropriate under the plurality's test even without a constant hydrologic connection. Wetlands are "adjacent" if one of the three is satisfied: (i) there is an unbroken surface or shallow subsurface connection to jurisdictional waters and at least an intermittent hydrologic connection; (ii) wetlands are physically separated by man-made dikes or barriers or natural breaks; or (iii) proximity to a WOTUS is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. [48]

Under the application of the significant nexus test, the Agencies are proposing to consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to the tributary in evaluating whether a significant nexus is present. The Agencies will also assess various functions performed by tributaries and their adjacent wetlands (e.g., pollutant trapping, floodwater retention) in making a jurisdictional determination.

The complexity of having to apply either one or both of the standards to determine if a wetland should be considered a WOTUS will lead to inconsistent decisions and will both delay projects and cost more money to complete projects that cross wetlands that are determined to be WOTUS. APPA member utilities must construct generating facilities and transmission line corridors that often have to cross features that could be deemed jurisdictional wetlands, including on broad adjacency concepts such as "neighboring" a WOTUS. The proposal would create a broader category of adjacent wetlands, leading to additional regulatory requirements for our member activities that cross or impact such features and impact our member's ability to bring online renewable energy and resilient systems which support the Administrations Clean Energy initiatives.

1. APPA's Concerns with the Plurality Approach to Wetlands

APPA is concerned with the reliance on the plurality approach to make WOTUS determinations of wetlands. We believe application of the approach will lead to inconsistent determinations which will be more costly.

In articulating the continuous surface connection requirement in *Rapanos*, the plurality emphasized that the connection must "mak[e] it difficult to determine where the 'waters' ends, and the 'wetland'

[46] Id. 69,373.
[47] Id.
[48] Id. 69,435.

begins."[49] It further stated that wetlands "with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*." [50]

It is APPA's position that the provisions in the Proposed Rule with respect to determining whether a wetland is WOTUS cannot be squared with the plurality's test. In discussing the definition of "adjacent" within the context the plurality standard, the Agencies effectively confirm they will assert jurisdiction over wetlands with only intermittent, physically remote hydrologic connections, such as asserting jurisdiction based on shallow subsurface connections or based on "reasonably close" proximity and an inference of ecological interconnection. They improperly convert the "continuous surface connection" requirement into a "physical connection or ecological connection" test. Moreover, the criteria for establishing whether a wetland is "adjacent" are vague and overly broad.[51]

The Agencies also do not define what it means to be a "shallow" subsurface connection or how to distinguish such connections from groundwater. Moreover, the term introduces significant implementation challenges and establishing adjacency based on such connections comes dangerously close to the "any hydrological connection" test rejected in *Rapanos*. Similarly, we question how will the Agencies determine "reasonably close" "proximity"? The "ecological interconnection" test is inherently vague and even more expansive than the "any hydrological connection" test. In our view, the continuous surface connection must be to a relatively permanent water connected to a traditional interstate navigable water. It is improper to assert jurisdiction over wetlands adjacent to relatively permanent impoundments if such impoundments are not themselves connected to a traditional interstate navigable water.

2. APPA's Concerns with the Significant Nexus Approach to Wetlands

APPA has similar concerns with the application of the significant nexus test in determining wetlands to be WOTUS. The Agencies' approach of aggregating impacts of all wetlands in the region is inconsistent with Justice Kennedy's opinion. Justice Kennedy neither aggregated the wetlands at issue, nor did he instruct lower courts to determine jurisdiction over the wetlands at issue by aggregating impacts of all wetlands surrounding those at issue. Instead, he emphasized the need to look at distance, quantity, and regularity of flow for each wetland.[52]

The preamble to the Proposed Rule provides that waters, including tributaries and wetlands, would be evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform.[53] The aggregation concept exceeds Justice Kennedy's concurrence to the extent it would allow assertions of jurisdiction over very different features that may be miles apart and far away from downstream navigable waters and have different flow regimes and characteristics. Justice Kennedy rejected the Agencies' assertion of jurisdiction over non-navigable waters based on "any hydrological connection" to navigable waters. Further, Justice Kennedy repeatedly expressed concern about remote, insubstantial, or minor flows as insufficient to establish a

[49] *Rapanos*, 547 U.S. at 742.
[50] 86 Fed. Reg at 69,372 and 60,373.
[51] 86 Fed. Reg at 69,428.
[52] *Rapanos*, 547 U.S. at 784-87.
[53] 86 Fed. Reg. at 69,43.

"significant nexus."[54] He emphasized distance, quantity, and regularity of flow for a particular wetland.[55] Indeed, every impacted water body must be judged in *its own right* to determine whether it (and it alone) has a significant nexus to traditional navigable waters is the central feature of Kennedy's jurisdictional test. The Agencies should not interpret "similarly situated" to allow aggregation in this manner.

F. Tributaries

APPA does not support inclusion of the significant nexus standards from *Rapanos* in determining if a tributary should be subject to WOTUS. The proposed rule would codify a tributary provision extending jurisdiction to tributaries of TNW, interstate waters, impoundments, or the territorial seas, if the tributary meets either the relatively permanent or the significant nexus standards from *Rapanos*.

The term tributary is not defined, but the Agencies' longstanding interpretation includes natural, man-altered, or man-made waterbodies, such as rivers and streams, lakes, and ponds, which flow directly or indirectly into a TNW, interstate water, the territorial seas, or impoundments of jurisdictional waters."[56]

Tributaries of TNW, interstate waters, impoundments, and territorial seas would be considered jurisdictional if they (i) are relatively permanent, standing, or continuously flowing; or (ii) either alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of TNWs, interstate waters, or territorial seas.

The Agencies "are not reaching any conclusions, categorical or otherwise, about which tributaries . . . meet either the relatively permanent or the significant nexus standard."[57] Instead, such determinations are to be made on a case-specific basis.

The Agencies describe two approaches to determining if a tributary meets the definition of WOTUS. Under the Relatively Permanent Approach tributaries would be considered WOTUS if they include perennial streams and intermittent streams that have continuous flow at least seasonally (e.g., typically three months).[58] They do not include ephemeral streams that flow only in response to precipitation or intermittent streams without continuous flow at least seasonally.[59]

As stated in the 2008 Guidance, a tributary includes the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream.)[60] If, however, the flow regime at the downstream limit is not representative of the entire tributary, then the flow regime that best characterizes the entire tributary is used. The Agencies will consider the relative lengths of segments with differing flow regimes.

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[54] *Rapanos*, 547 U.S. at 778-79.
[55] Id. at 784-87.
[56]JD Guidebook at 8-9.
[57] 86 Fed. Reg. at 69,398.
[58] Id. at 69,435.
[59] Id.
[60] Id. at 69,430.

Under the significant nexus approach the Agencies first will determine the relevant reach of the tributary being assessed—namely, the entire reach of the stream that is of the same order, and the Agencies will assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a TNW.[61] If there are no adjacent wetlands, the Agencies will evaluate the flow characteristics and functions of only the tributary to determine whether it has a significant effect on the chemical, physical, and biological integrity of downstream waters. If there are adjacent wetlands, the evaluation will consider both the tributary and its adjacent wetlands.[62] If so, then both the tributary and all of its adjacent wetlands are jurisdictional.

The Agencies emphasize that certain ephemeral tributaries in the arid West have a significant nexus to downstream TNWs because of the various functions they serve, as the *Rapanos* guidance explained.[63] Ephemeral streams that meet the significant nexus test would also be jurisdictional tributaries. In this respect, the proposal is much broader than the NWPR, which categorically excluded ephemeral tributaries from jurisdiction. Under the NWPR, only those tributaries that were perennial or intermittent in a typical year are jurisdictional.

1. APPA's Concerns with Including Tributaries under the Relatively Permanent Standard

APPA member facilities are often located next to tributaries for the purposed of both withdrawing water for cooling and discharging into tributaries in compliance with NPDES permits. In addition, APPA members often require § 404 permits to construct transmission and distribution lines that cross features that meet the tributary definition. The broader tributary definition conveyed in the Proposed Rule will mean that more features are likely to be jurisdictional tributaries, and thus may trigger additional regulatory requirements.

Asserting jurisdiction over relatively permanent tributaries based on indirect connections to a TNW does not satisfy the plurality's test in *Rapanos*. This would allow for jurisdiction over tributaries that are too remote from TNWs and is too close to the "any hydrological connection" standard that the plurality rejected.

The "at least seasonal flow" requirement does not meet the plurality's standard either. In addition to the concerns noted above, seasonal flow could encompass ephemeral features that flow during a season, but not necessarily for three months (which itself is too short under the plurality's test). For the same reasons, the Agencies should not use the NWPR's approach to "intermittent" to implement the relatively permanent test. The NWPR sought to "incorporate important aspects of Justice Kennedy's opinion, together with those of the plurality."[64] Its approach to intermittent was not based solely on the relatively permanent standard.

The "entire reach" approach also presents considerable implementation challenges – reaches may stretch for miles across dozens or hundreds of landowners' properties. Determining what flow regime best characterizes the entire reach may be practically difficult or impossible for project applicants. This is particularly true for linear infrastructure project proponents.

[61] Id. at 69,437.
[62] 86 Fed. Reg. at 69,437.
[63] Id. at 69,437-69,438.
[64] 84 Fed. Reg at 4,178.

2. APPA's Concerns with Including Tributaries under the Significant Nexus Standard

The Agencies analysis for determining the extent a tributary would be determined to be WOTUS is problematic for APPA.[65] The Agencies appear to assume the entire reach of a tributary is jurisdictional based only on an analysis of significant nexus at the point of confluence (i.e., where there is likely to be the most flow). It is not appropriate to assume, without analyzing, that the entire reach upstream is jurisdictional, even if it meanders for several miles. This effectively allows jurisdiction to extend to remote upstream waters based on little more than a mere hydrological connection.

The discussion of ephemeral tributaries in the arid West fails to provide a reasonable justification for distinguishing between swales/erosional features and jurisdictional tributaries. And by seemingly disregarding volume, duration, and frequency of flow, it invites overly expansive assertions of jurisdiction. Finally, the discussion of transitional areas and ecological functions makes little sense, as the same can be said of non-jurisdictional upland areas. This confusing and vague approach has led to improper assertions of jurisdiction based on "significant nexus."

APPA recommends the Agencies appropriately recognize the limited scope of the tributary category to those streams that contribute perennial or intermittent flow to a WOTUS or territorial sea. This limitation reflects the appropriate balance between states and federal rules under the CWA, preserving states' land use authority over features that are wet only periodically.

VII. WOTUS Jurisdictional Exclusions

A. APPA Supports the Continued Exclusion of Waste Treatment Systems from the Definition of WOTUS

The Agencies propose to retain the WTS exclusion and "return to the longstanding version of the exclusion that the agencies have implemented for decades."[66] Although APPA supports the retention of the exclusion, we recommend that the Agencies finalize the version of the exclusion from the NWPR, including the first ever definition of the term "waste treatment systems."
The WTS exclusion has been applied under the 1986/88 regulations, the 2015 Rule, and the NWPR, and its scope has been consistent for decades.

The NWPR did not change the scope of the WTS exclusion, but it provided important clarity. It appropriately defined those features that qualify for the exclusion to include cooling and settling ponds, confirmed that the exclusion applied to the system as a whole, including related conveyances; confirmed that features need not perform active treatment to qualify, and made other needed ministerial changes. The Proposed Rule does not address why the Agencies plan to return to the 1986 regulations' WTS exclusion language without providing clarity on the scope of the exclusion as was offered in the NWPR.

[65] 86 Fed. Reg. at 69,439.
[66] 86 Fed. Reg. at 69,426.

The Proposed Rule's exclusion, however, falls short in two ways. First, the Agencies propose to add a comma that would limit the exclusion to systems "designed to meet the requirements of the Clean Water Act."[67] The addition of this comma is problematic, as it could be interpreted to mean that systems that were constructed prior to 1972—and thus, could not possibly have been designed to meet the requirements of a statute that Congress had not yet enacted—do not qualify for the exclusion. This is not merely a "ministerial" change, and it could have significant consequences for APPA's members that operate waste treatment systems constructed prior to 1972. Rather than finalize this change, the Agencies should follow the approach in the NWPR, when they made it clear that the exclusion applies "to all waste treatment systems constructed prior to the 1972 CWA amendments." [68]

Second, the Proposed Rule's exclusion eliminates the additional clarity that the NWPR provided by expressly stating that an excluded system includes "all components" of a system and that the exclusion applies to both active and passive treatment prior to a wastewater discharge (or the elimination of such a discharge).[69] These helpful clarifications, which the NWPR codified, are consistent with longstanding agency practice and did not expand the exclusion in any way.

We would like to highlight the reasons we support this decision and the importance to public power.

1. WTS Are Critically Important to Electric Utilities

The WTS exclusion is critical for electric utilities to provide reliable and affordable electricity across the country. The importance of this exclusion will continue as APPA members lead the transition to renewable energy sources and technologies and a more capable and resilient grid.

The electric utility industry relies on many water features to handle various types of wastewater. These features include storm water sedimentation ponds, cooling ponds and associated conveyances to and from those features. The purpose of these industrial features is to contain, control and treat waste streams in order to make productive use of internal features and prevent pollution of external waters. WTS features often dissipate heat and control total dissolved solids before wastewater reaches the facility's NPDES-permitted discharge into WOTUS.

Key to understanding the WTS exclusion is that discharges from these features that introduce pollutants into WOTUS are regulated by the NPDES program. Treating internal industrial waste control features themselves as WOTUS is unnecessary, duplicative, inefficient, and would create excessively high costs for electric utilities and their customers. For example, requiring a CWA §404 permit to install a pump in a cooling water pond or a NPDES permit to convey water from one cooling pond to another is costly and unnecessary, particularly since ultimate discharges from such a WTS into WOTUS will be regulated by a NPDES permit. Under the NWPR, these types of features are properly recognized as WTS and excluded from the definition of WOTUS.

The additional costs, delays and burdens that could result from a change to the WTS exclusion could constrain resources and hinder the electric utility industry's ability to transition to renewable energy sources and technologies and a more capable and resilient grid and would not result in corresponding

[67] 86 Fed. Reg. at 69,426.
[68] 85 Fed. Reg. at 22,325.
[69] 85 Fed. Reg. at 22,341.

environmental benefits because the ultimate discharge from the facility will be appropriately regulated by a NPDES permit.

As a practical matter, if WTS were not excluded from the definition of WOTUS it could result in thousands of sites with settling ponds may having to secure § 402 and § 404 dredge and fill permits. This mass influx of sites subject to permitting would overwhelm the 47 state environmental agencies that are authorized to implement water quality programs under the CWA and EPA in its role as the CWA permit writer for three states, the District of Columbia, and territories.

Already the NPDES and Section 404 permitting process is overwhelmed and not capable of issuing NPDES permits every five years for permittees who wish to continue to discharge into WOTUS. EPA has even created a NPDES backlog website which tracks the backlog of NPDES permits that have not been renewed on time. As of September 30, 2021, EPA reported on their web site that there are 284 EPA-issued NPDES Individual Permits that have passed their expiration date and are awaiting reissuance and 22 applications for new EPA-issued NPDES Individual Permits awaiting issuance that are 180 days or more old. [70]

WTS ultimate feed into a facility's NPDES-permitted discharge into WOTUS. There is no need to duplicate the permit process by including waste treatment systems as WOTUS. We urge its continued exclusion. In the time the NWPR was in effect, it has been APPA members' experience that the application of the WTS exclusion had been largely the same as under prior regimes, with more clarity and consistency in the exclusion's application.

APPA strongly encourages the Agencies to maintain the clarifications to the WTS exclusion made in the NWPR, which are consistent with pre-NWPR application of the WTS exclusion but have provided important clarity and certainty.

B. The Agencies Should Restore the NWPR Ditches Exclusion Or Make Clear Most Ditches are Not WOTUS.

APPA supports the Agencies approach to generally excluding ditches from the WOTUS definition. Consistent with the *Rapanos* Guidance,[71] the proposal states that "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States." [72] These features are generally not considered WOTUS "because they are not tributaries, or they do not have a significant nexus to downstream traditional navigable waters." [73] Consistent with previous practice, ditches constructed wholly in uplands and draining only uplands with ephemeral flow would generally, not be considered WOTUS.

Ditches are constructed and used as part of the construction, operation, and maintenance of electric generation facilities, transmission and distribution lines, transportation- related infrastructure, flood

[70] U.S. Environmental Protection Agency NPDES Permit Status Report, See https://www.epa.gov/npdes/npdes-permit-status-reports.
[71]US Environmental Protection Agency and US Army Corps of Engineers Memorandum, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v United States & Carabell v. United States*, December 2, 2008, Page 1 (*Rapanos* Guidance).
[72] Id at Page 1.
[73] Id at page 12.

control, rural drains and roads, and railroad corridors located across the country. Drainage ditches play a major role in all these activities, ensuring that storm water is properly channeled away from facilities and land where it would otherwise converge to create ponds, thereby interfering with the intended use of the land and facilities. Drainage ditches are frequently crossed or created for construction, maintenance, and repair of transmission facilities and distribution facilities, including poles, transformers, wires, towers, and switchgear. These lines require a dedicated right-of-way to conduct these activities. If the ditches and associated features were jurisdictional, a utility could be required to obtain a permit every time it constructed, repaired, or even maintained a right-of-way. This would be extremely burdensome and costly.

Most ditches are also already subject to federal, state, and/or local management and permitting for other purposes, including flood control, NPDES, municipal separate storm sewer systems (MS4), and/or stormwater permitting. To provide clarity, and consistent with the Agencies' historical treatment of ditches and the NWPR, the Agencies should exclude most ditches, including roadside, agricultural, irrigation, industry-site, and other stormwater, process water, and wastewater ditches from jurisdiction.

C. Additional Exclusions

APPA notes that the only other exclusion in the proposed regulatory text is prior converted cropland. We appreciate that the Agencies intend to continue to exclude these various features as discussed in the preamble to the 1986 Rule and in the *Rapanos* Guidance.[74]

- Artificially irrigated areas which would revert to upland if the irrigation ceased
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are exclusively used for such purposes as stock watering, irrigation, settling basins or rice growing
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of WOTUS

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow). The Agencies distinguish these features from ephemeral streams because they lack any indicators of an ordinary high-water mark (OHWM).

APPA supports finalizing these additional exclusions in the regulatory text to promote clarity, so long as they are not overly narrow. APPA also supports the NWPR's exclusions over the exclusion in the 2015 Clean Water Rule. The NWPR excludes numerous features that were constructed in either upland or a non-jurisdictional water. There is no legal or scientific basis for asserting jurisdiction over a water feature that is constructed in a non-jurisdictional water. The swales/erosional feature exclusion is too narrow. In arid areas, for instance, the OHWM is not a reliable indicator of flow, much less having any

[74] Id. at 69,378.

indicator of an OHWM. Features should not be considered ephemeral streams (and thus, subject to the significant nexus test) merely because of a single indicator of an OHWM.[75]

VIII. Conclusion

APPA appreciates the Agencies consideration of these comments on the Proposed Rule. A proper definition of WOTUS is critical to ensuring utility activities are not delayed or impact our members' ability to meet their public service obligation. APPA supports the Agencies stated goal of issuing a durable WOTUS definition. We believe the recommendations outlined in our comment will assist in furthering that goal.

The U.S. Supreme Court is also poised to weigh in on the proper test for determining whether wetlands are 'Waters of the United States' under the Clean Water Act in the *Sackett v. EPA* case.[76] The court's ruling in the case will be highly instructive as to the proper test for jurisdiction and set the appropriate regulatory text to implement the jurisdictional test. In furtherance of developing a durability definition the Agencies should pause it rulemaking process until the Supreme Court issues its decision.

Please contact Karl Kalbacher at (202) 467-2974 or email KKalbacher@PublicPower.org for any questions regarding these comments.

[75] 2013 Corps Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes at 17.
[76] *Sackett v. EPA*, No. 21-454 (January 24, 2022). Supreme Court order granting *certiorari*.