

March 20, 2023

The Honorable Tom Carper  
Chairman  
Committee on Environment and Public Works  
and Public Works  
United States Senate  
Washington, DC 20510

The Honorable Shelley Moore Capito  
Ranking Member  
Committee on Environment  
and Public Works  
United States Senate  
Washington, DC 20510

Dear Chairman Carper and Ranking Member Capito:

As organizations representing a broad range of sectors from agriculture, energy, transportation infrastructure, construction and real estate, manufacturing, mining, recreation, chemical production, specialty pesticides, and many other job creators, we are incredibly invested in the scope of the 2023 “waters of the United States” (WOTUS) regulatory definition. During a hearing before your committee last week entitled, “Implementing IJIA: Perspectives on The Drinking Water and Wastewater Infrastructure Act,” there was discussion between members of the committee and Environmental Protection Agency Assistant Administrator Radhika Fox regarding the scope of this rule. We respectfully disagree with several comments made by Assistant Administrator Fox on the 2023 rule, especially her characterization of the rule as a narrower definition compared to the pre-2015 regulations, and we feel these comments merit a strong response. We have carefully reviewed the extensive preamble and regulatory text and offer the below information, which illustrates some of the areas where the new rule will **expand** jurisdiction compared to the pre-2015 regulations and 2008 post-*Rapanos* Guidance. While some of these changes were downplayed as subtle changes by Assistant Administrator Fox, they will unmistakably have significant ramifications for the industries listed above in every state.

Biden Administration’s 2023 Rule v. 2008 Guidance (pre-2015 rule):

1.) Broader Interpretation of the Relatively Permanent Test:

The new rule makes the relatively permanent standard more expansive compared to the 2008 Guidance, which interpreted “relatively permanent” to mean tributaries typically flow year-round or have continuous flow for at least one season (typically three months). The new rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months). The rule vaguely says relatively permanent tributaries have flowing or standing water year-round or continuously during certain times of the year and they do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. This subtle change will greatly expand what areas the agencies can assert jurisdiction over under the relatively permanent test.

Conversely, because the relatively permanent standard is broader than the approach described in the 2008 Guidance, fewer ditches will be excluded under the new rule. Although the wording of the ditch exclusion in the new rule appears identical to the exclusion in the 2008 Guidance, because the relatively permanent test has expanded, fewer ditches will meet the requirement in the exclusion that they do not carry a relatively permanent flow of water.

The new rule also expands the relatively permanent test by broadening which wetlands (and “other waters”) are jurisdictional because they have a continuous surface connection to a relatively permanent water.

The agencies interpret “continuous surface connection” to mean a physical connection that does not need to be a continuous hydrologic connection. Under the 2008 Guidance, wetlands would only meet the “continuous surface connection” test if they directly abut a relatively permanent tributary (e.g., are *not* separated by uplands, a berm, dike, or similar feature). The new rule, by contrast, abandons this directly abutting requirement and instead provides that wetlands have a continuous surface connection even if they are separated from a relatively permanent impoundment of a tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. Wetlands also meet the continuous surface connection requirement if they are located some distance away from a relatively permanent tributary, but connected by some linear feature such as a ditch, swale, or pipe.

### 2.) Broader Scope of Significant Nexus Test:

Under the 2008 Guidance, the agencies applied the test to a specific reach of a tributary and any wetlands adjacent to that reach. The new rule applies a broader catchment approach. The agencies would start by identifying where a specific reach flows into a higher order stream. But rather than looking just at that reach and its adjacent wetlands, the agencies would look at the combined effect of all lower order tributaries upstream of that point plus all wetlands adjacent to those lower order tributaries.

The 2008 Guidance also focused on identifying which tributaries and wetlands have a significant nexus to a “traditional *navigable* water.” The new rule, by contrast, provides that waters are jurisdictional if they significantly affect traditional navigable waters *or* interstate waters and wetlands, regardless of navigability. As a reviewing court just found, this improperly disregards the Act’s central requirement—the word *navigable*.

### 3.) New (A)(5) Category:

This catch-all, “other waters” category was not even mentioned in the 2008 Guidance. The 2008 Guidance focuses only on applying the significant nexus test to a specific tributary reach plus its adjacent wetlands, and it says nothing about how to apply the test to waters outside of the tributary system. The new rule applies the significant nexus test to this category, and even though the agencies say they will “generally” evaluate whether such waters meet the test on an individual basis, the rule on its face allows the agencies to consider whether waters “alone or in combination with similarly situated [(a)(5)] waters in the region” meet the significant nexus test.

### 4.) Several key terms and concepts are vague, lack definitions, or are contradictory:

While this certainly was true of the 2008 Guidance, the key terms used to apply the significant nexus test are incredibly vague. Terms like “in the region,” “similarly situated,” and “significantly affect” were poorly defined then and remain ambiguous now. Failing to provide these definitions gives the agencies the latitude to assert jurisdictional however they please, as does the expanded grab bag of functions and factors that regulators will consider in applying the significant nexus test. Landowners and small businesses will be forced to hire costly consultants and attorneys to determine whether their property has WOTUS and required federal permits. The impact of this expansion is not merely theoretical. As explained in a sworn declaration from The Director of the Environmental Affairs Division of the Texas Department of Transportation, Army Corps of Engineers staff in the Galveston District have

acknowledged that expansion of the significant nexus test could make many, if not all, ditches in Texas, particularly those along the Gulf Coast, newly jurisdictional. Such an expansion will dramatically increase the cost of transportation projects. The mitigation costs for one such project—the US 380 project near Princeton, Texas—could increase a whopping 27,500% from \$292,600 to \$80,591,000.

**For these significant reasons, we respectfully disagree with statements made by EPA’s Office of Water Assistant Administrator Radhika Fox to the committee, and the job creating industries that we represent are united in supporting the Congressional Review Act vote repealing the Waters of the United States rule.**

Sincerely,

American Exploration & Mining Association  
American Farm Bureau Federation  
American Road & Transportation Builders Association  
American Society of Golf Course Architects  
American Soybean Association  
Associated Builders and Contractors  
Associated General Contractors of America  
Essential Minerals Association  
Golf Course Superintendents Association of America  
ICSC  
Independent Petroleum Association of America  
Leading Builders of America  
National Association of Home Builders  
National Association of Realtors  
National Club Association  
National Corn Growers Association  
National Council of Farmer Cooperatives  
National Federation of Independent Business  
National Mining Association  
National Pork Producers Council  
National Stone Sand & Gravel Association  
RISE (Responsible Industry for a Sound Environment)  
The Fertilizer Institute  
USA Rice Federation  
U.S. Chamber of Commerce

cc: Members of the Senate Committee on Environment and Public Works