THE PETROLEUM ALLIANCE
OF OKLAHOMA

February 7, 2022

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

Jaime Pinkham
Principal Deputy Assistant Secretary of the Army for Civil Works
Department of the Army
441 G St., NW
Washington, DC 20314-1000

Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments on EPA-HQ-OW-2021-0602; FRL-6027.4-03-OW, Revised Definition of "Waters of the United States"

Dear Mr. Pinkham and Mr. Regan:

The Petroleum Alliance of Oklahoma (The Alliance) appreciates the opportunity to submit comments to the U.S. Department of Army and the U.S. Environmental Protection Agency (EPA) (collectively referred to as the Agencies) regarding Docket ID# EPA-HQ-OW-2021-0602, Revised Definition of "Waters of the United States" (Proposed Rule).

Our members support a rule that follows the Clean Water Act (CWA) and the U.S. Supreme Court's decisions; establishes clear boundaries of jurisdictional Waters of the U.S. (WOTUS); and provides regulatory certainty, consistency, and predictability for our members; however, we do not think the Proposed Rule meets those requirements. In addition, on January 24, the U.S. Supreme Court announced that it will hear arguments in the case of *Sackett v. EPA*. This case is significant and has the potential to affect the Agencies' Proposed Rule if finalized before that decision. As such, we request the Agencies withdraw or defer the Proposed Rule until after the U.S. Supreme Court issues their decision regarding that case. Finally, the 60-day comment period (released over the holidays and during the surge in the pandemic) was not adequate for such an important rulemaking and did not allow our members the opportunity to thoroughly review all the information and provide fully informed comments. If the Agencies do not withdraw or defer its Proposed Rule, at a minimum, the comment period should be extended for an additional 60-days.

The Alliance is the only trade association in Oklahoma to represent all sectors of the state's oil and natural gas industry. Representing more than 1,300 individuals and companies and their tens of thousands of employees, the Alliance's membership includes oil and natural gas producers, service providers to the oil and natural gas industry, midstream companies, refiners, and other associated

businesses, and our members include companies of all sizes, ranging from small, family-owned companies to large, publicly traded corporations. The Alliance addresses industry issues of concern and works toward the advancement and improvement of the domestic oil and gas industry. We support and advocate for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the state and throughout the United States. Our members are committed to extracting, producing, transporting, and refining crude oil and natural gas in a safe and environmentally-sound manner, and protecting waters resources is important to our members.

The Proposed Rule affects many CWA programs—including water quality standards, impaired waters and total maximum daily loads, oil spill prevention, preparedness and response programs, the state and tribal water quality certification programs, National Pollutant Discharge Elimination System programs, and dredge and fill programs. The Proposed Rule will have significant and direct impacts on our members' business operations as it relates to CWA Sec. 404 permits and Spill Prevention, Control and Countermeasure Rule requirements.

The Agencies state they are exercising their discretion under the statute to return "generally" to the "familiar" pre-2015 definition that has bounded the CWA's protections for decades; however, the Agencies' Proposed Rule goes far beyond the pre-2015 rule, and as such, we provide the following comments.

1. **The Agencies Should Withdraw or Defer the Proposed Rule Until the U.S. Supreme Court Rules on *Sackett v. EPA* -** On January 24, the U.S. Supreme Court announced it would hear arguments in the *Sackett v. EPA* case. This case has the potential to affect the Agencies' Proposed Rule, if finalized before that decision, and as such, the Agencies would have to undergo yet another rulemaking to incorporate that decision into a new rule. We request the Agencies withdraw or defer its Proposed Rule until after the U.S. Supreme Court rules on this case. There would be no environmental impacts in withdrawing or deferring the Proposed Rule as the Agencies are currently implementing the pre-2015 WOTUS rule, and states are regulating waters under their jurisdiction. In addition, this would minimize confusion for stakeholders and reduce workload on the Agencies. We request the Agencies withdraw or defer their rulemaking until after the U.S. Supreme Court releases its decision.

2. **At a Minimum, the Agencies Should Extend the Comment Period for an Additional 60-Days** - The Proposed Rule was released on December 7, just prior to the holidays during a surge in the COVID-19 omicron variant. The 60-day comment period is unreasonable as it does not allow our members adequate opportunity to review the information and rationale, and provide meaningful and fully informed comments on:
   a. The 79-page Proposed Rule;
   b. The 177-page economic analysis document;
   c. The 283-page supplementary material to the economic analysis;
   d. The 250-page technical support document (TSD);
   e. The 284-page appendices to the TSD; and
   f. The 61-page supplementary materials to the TSD.

On January 13, The Alliance submitted a request for an additional 60-days to the comment period. This additional time will provide the Agencies better stakeholder input and will assist the Agencies in their decision-making process. There is ample precedent for the Agencies to provide an extension of time to the comment period. In addition, the requested extension of time will not cause hardship on the Agencies, and as previously stated, there is no environmental emergency as the Agencies and states are regulating waters under their jurisdiction. If the Agencies do not withdraw or defer the Proposed Rule as previously requested, we request an additional 60-days to the comment period.

3. **The Agencies Cannot Use Science to Circumvent the CWA and U.S. Supreme Court Case Law -** The Agencies rely heavily on science throughout the Proposed Rule, state the Proposed Rule is supported by a wealth of scientific knowledge, and reference the 2015 report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. The Proposed Rule uses the term connectivity many times and states that the Agencies will use science to make determinations of whether a water meets its jurisdictional standard and is therefore a regulated WOTUS. However, in the 2020 Navigable Waters Protection Rule (NWPR), the agencies took an opposite position and stated: "While science informs the agencies' interpretation" of the phrase "waters of the United States," "science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions." 85 FR 22271, April 21, 2020; see also id. at 22314 ("the line between Federal and State waters is a legal distinction, not a scientific one"). Even in the current Proposed Rule, the agencies agree with this statement, but then attempt to justify expanding their jurisdiction under the guise that science is the only way to interpret Congress' intent and meet the objectives of the CWA. If Congress had intended for the Agencies to undertake protracted determinations that would result in a significant portion of surface waters, intermittent streams, groundwater, and dry land to be WOTUS, they would have stated such. As with the 2015 WOTUS rule, the Agencies cannot use science to expand their jurisdiction in a manner that supersedes the CWA and case law.

4. **The Agencies Proposed Rule Encroaches on State's Jurisdiction -** The Agencies' Proposed Rule should be narrowly defined, respecting cooperative federalism that acknowledges the important role of states in managing and protecting their land and water resources. States, as compared to the Agencies, are in the best position to address their unique water, geographical and regional weather conditions and are better able to enact and implement appropriate laws and regulations to effectively manage and protect state waters while balancing their specific interests and needs. States may choose to enact more stringent regulations than EPA's requirements. It is not within the Agencies' jurisdiction to develop a federal rule to protect surface waters under every possible scenario that infringes on state's jurisdiction. The Agencies do not have the workforce or the funding to manage such efforts whereas, states like Oklahoma, have established laws and regulations in place, highly qualified personnel, funding, state-specific knowledge and understanding of the surface waters, geography and weather conditions while balancing the needs of the state. An expansive, nationwide, one-size-fits-all definition of WOTUS that attempts to cover all surface water scenarios is inappropriate, unnecessary, and would encroach on state's water jurisdiction. We request the Agencies narrow their scope in defining WOTUS.

5. **The Proposed Rule Lacks Regulatory Clarity, Predictability, Consistency and Certainty for Effective Implementation -** The Proposed Rule does not provide a practical, cost-effective way to identify and determine WOTUS nor does it provide the necessary regulatory clarity, predictability, consistency, and certainty for effective implementation by federal agencies, states, tribes, the regulated community, landowners, and the public.

   a. **The Proposed Rule Lacks Clear Boundaries/Bright Lines that Define WOTUS -** The Agencies Proposed Rule adds the relatively permanent and the significant nexus standard when determining whether adjacent wetlands, tributaries, and other waters are WOTUS. These standards are independent of each other for determining federal jurisdiction i.e., relatively permanent or have a significant nexus to WOTUS. The definition provided in the Proposed Rule regarding "significantly affect" states that the agencies will consider such things as distance from WOTUS, hydrological factors including shallow groundwater, size, density, and/or number of waters that have been determined to be similarly situated along with climatological variables. The significant nexus standard requires case-specific determinations that will send developers down a "rabbit hole" to determine whether the water significantly affects the chemical, physical, or biological integrity of a WOTUS. This is completely impractical and unworkable process for developers (especially small businesses) to undertake. It will require that developers hire experts to conduct an analysis and make a determination that will unnecessarily increase costs for projects, and these cost increases will be especially impactful on small businesses. And, even with an expert's determination, the subjective criteria could lead to different results as compared to the Agencies' determination. Finally, the Agencies are making the identification of WOTUS too complicated for a layperson. Anyone should be able to easily and confidently assess whether a water body is a WOTUS. We request the Agencies develop a final rule that is more practical to implement and does not make WOTUS determinations a science project.

      As mentioned above, states, as compared to the Agencies, are in the best position to address their unique waters, geography and regional weather conditions and are better able to enact and implement appropriate laws and regulations to effectively manage and protect state waters while balancing their specific interests and needs. However, the lack of clear boundaries/bright lines between federal and state jurisdiction creates unnecessary conflicts. The Agencies should provide clear boundaries/bright lines that will provide effective environmental protection of surface waters and provide regulatory certainty for states and the Agencies.

   b. **The Agencies Should Identify Additional Non-Jurisdictional Waters -** The Agencies' Proposed Rule contains only two examples of waters that are not federally regulated as WOTUS (i.e., waste treatment systems and prior converted cropland). Including only two examples of non-jurisdictional waters is inadequate and does not offer stakeholders practical or reasonable limitations of WOTUS. In addition, it does not provide stakeholders the regulatory clarity, predictability, consistency and certainty to be able to easily determine if certain features are excluded from federal regulation. The 2020 NWPR included the two examples provided in the Proposed Rule; however, it included other features excluded from federal regulation (see below). The 2020 NWPR addressed the longstanding issues that many developers had encountered over the years. Identifying these features provided

stakeholders an easy and practical way to determine if certain features were federally regulated, and it allowed the Agencies to prioritize and focus their efforts on those waters under federal jurisdiction. We encourage the Agencies include in its final rule additional features (like the ones below) that are not WOTUS.

In addition, the first four items are of particular interest to our members as they encounter or construct such features. We request the Agencies include these features in its final rule.

i. **Ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools;**
ii. **Artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters;**
iii. **Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;**
iv. Groundwater recharge**, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters;**
v. Water features not identified as jurisdictional waters;
vi. Groundwater, including groundwater drained through subsurface drainage systems;
vii. Diffuse stormwater runoff and directional sheet flow over uplands;
viii. Ditches that are not traditional navigable waters, tributaries or constructed in adjacent wetlands, subject to certain limitations;
ix. Artificially irrigated areas that would revert to upland if artificial irrigation ceases; and
x. Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff.

6. **Pre-2015 WOTUS Jurisdiction Expansion -** The Agencies state they are exercising their discretion under the statute to return "generally" to the "familiar" pre-2015 definition that has bounded the CWA's protections for decades. However, prior to the 2015 rule, the Agencies had inappropriately implemented practices that ignored the Supreme Court decisions under *Rapanos* and *SWANCC* and expanded the 1986 WOTUS Rule beyond its original intent.[1] As previously stated, the Agencies must follow the CWA and the Supreme Court decisions in defining WOTUS.

Conclusion

The Agencies should not return to a definition of WOTUS that has long been problematic for all stakeholders, especially project developers. The 2020 NWPR is a result of many years of developer's frustration with the definition of WOTUS, and how the Agencies were interpreting and implementing the CWA and the various court cases. The Agencies should not return to the requirements that initiated the 2020 NWPR. Instead, if it moves forward with a final rule, it should build on the 2020 NWPR to refine and make improvements that benefit all stakeholders.

[1] Gale, Barry, "Six Years After RAPANOS – What's Changed? (Answer: Not Much)", *Federal Regulation of Cultural Resources, Wildlife, and Waters of the U.S.*, Paper No. 13, Pg. 16-17 (Rocky Mt. Min. L. Fdn. 2012)

THE PETROLEUM ALLIANCE
OF OKLAHOMA

The Alliance appreciates the opportunity to provide the Agencies our comments regarding the Proposed Rule. If you have questions, please contact me at angie@okpetro.com or 405-601-2124.

Thank you for your consideration of our request.

Sincerely,

Angie Burckhalter

Angie Burckhalter
Senior V.P. of Regulatory & Environmental Affairs