



February 7, 2022

Damaris Christensen  
Oceans, Wetlands and Communities Division  
Office of Water (4504-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Stacey Jensen  
Office of the Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0104

**Re: Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Revised Definition of Waters of the United States**

**Docket ID No. EPA-HQ-OW-2021-0602**

## **I. Introduction**

Distinguished associations comprising the U.S. golf industry (hereinafter, the "golf industry") submit these comments on the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' ("Agencies") proposed revised definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act"), 86 Fed. Reg. 69,372 (Dec. 7, 2021) (hereinafter, "Proposed Rule").



The golf industry opposes the Proposed Rule, which will relegate the 2020 Navigable Waters Protection Rule and return federal jurisdiction of water to the rule and guidance in place prior to the 2015 Clean Water Rule (which has been repealed). This will return permitting decisions to an unpredictable case-by-case determination of jurisdiction by the Agencies, thereby subjecting golf course professionals to considerable confusion about what features on their lands may be jurisdictional.

Golf is a major industry with a profound and positive impact in the U.S. economy. Golf's economic engine *contributes \$89 billion annually* to the economy. Nearly 2 million American jobs are tied to the golf industry. Yet, the game remains widely accessible to the public: 75% of golf courses in the U.S. are open to the public with 95% of those facilities falling under the threshold for small business set by the Small Business Administration - \$15 million in annual revenue. Additionally, the average greens fee was only \$61 in 2020. As a result, golf provides millions of Americans the opportunity during the COVID-19 pandemic to improve their physical and mental fitness in a sport that meets all social distancing guidelines.

Of the 151 acres on an average golf course, 6.36 are comprised of streams, ponds, lakes, and/or wetlands for a total footprint of 159,072 acres nationwide. Efforts to change the definition of WOTUS over the years have had an impact on our operations, stewardship efforts, and livelihoods. Golf course superintendents are professionals who utilize agronomic and environmental best management practices to focus on protecting the environment, including water quality by reducing the movement of sediment, nutrients, and pesticides to water.

**The 2020 Navigable Water Protection Rule provided the golf industry with needed clarity.** The golf industry has provided numerous comments over many years with one consistent message: Golf requires a clear and consistent regulatory environment and wants to maintain cooperative federalism. The 2020 Navigable Waters Protection Rule (NWPR) did so by:

1. Limiting the definition of tributaries to surface water conveyances that contribute perennial or intermittent flow during the year.
2. Limiting the definition of adjacent wetlands to those that either touch or have a hydrological connection to a water covered by the CWA.
3. Limiting ditches included under federal jurisdiction to only those that 1) fall into the category of traditional navigable waters; 2) are constructed in tributaries or relocate or alter tributaries; or 3) are constructed in adjacent wetland and meet the tributary definition.

However, on January 20, 2021, President Biden issued Executive Order 13990, which directed agency heads "to review and, as appropriate and consistent with applicable law, take action to



address the promulgation of Federal regulations and other actions during the last 4 years that conflict” with the policies articulated in the Executive Order. On June 9, 2021, the Agencies announced that they had completed the review and intended a two-step process: a repeal of the NWPR followed by a replacement rule that redefines WOTUS under the CWA.

Unfortunately, in addition to repealing the NWPR, the Proposed Rule also goes further and provides a definition of WOTUS, something not expected until the second step. So, not only would the NWPR be repealed but the Agencies would go beyond the pre-2015 rule and look at other sources for guidance in determining federal jurisdiction of waters, including Justice Kennedy’s significant nexus test from *Rapanos v. United States*, which was not adopted by the majority of the Supreme Court. This step backwards sets the stage for confusion as to jurisdictional waters and unnecessary regulation of isolated waters and other drainages that do not impact primary WOTUS thereby impacting the golf course industry.

The Proposed Rule is also premature in light of the Supreme Court’s recent decision to grant certiorari in the case of *Sackett v. Environmental Protection Agency*. This case will focus on the question of the appropriate test of determining a WOTUS for a property that contains wetlands. The Agencies should postpone any further rulemaking actions until the Supreme Court determines an appropriate test under the CWA. Otherwise, the possibility exists for additional rulemaking, and even greater uncertainty.

## **II. Critique of the rule**

As noted, the golf industry requires a clear and consistent definition of WOTUS. One must look at a golf course to see why: Of the 151 acres on an average golf course, 6.36 are comprised of streams, ponds, lakes, and/or wetlands for a total footprint of 159,072 acres nationwide. Efforts to change the definition of WOTUS will have a major impact on our operations, stewardship efforts, and livelihoods.

**Vague definitions of tributaries, wetlands, and other waters.** What this rule does is repeal a rule that provided clarity across the 50 states and replace it with the vague definitions of tributaries and wetlands that prompted rulemaking in the first place. Further, it creates a new and overbroad definition of “other waters” that can include many features on a golf course. Finally, it includes two different standards for determining whether waters fall into these categories: the “relatively permanent standard” and the aforementioned “significant nexus standard”.



1. The “tributaries” category is defined to include “relatively permanent, standard or continuously flowing bodies of water”. This vague language unfortunately could include man-made features, such as the ditches that are found on many golf courses. And there’s no guarantee that this would not include features that are wet only for part of the year. The definitions of “High tide line” and “Ordinary high-water mark” are not helpful, either. High tide line, for example, is defined as “in the absence of actual data, by a line or oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gauges, *or other suitable means that delineate the general height reached by a rising tide*” (emphasis added). The definition of ordinary high-water mark starts with “physical characteristics such as clear, natural line impressed on bank” but then goes on to include “other appropriate means that consider the characteristics of the surrounding areas”. Challenges occur when water features do not exhibit these indicators and are deemed jurisdictional. Without a clear line or better definition and application of boundaries, uncertainty will exist and that does not promote water protection.
2. Similarly, “wetlands” is ill defined. The Proposed Rule states that “they are areas inundated or saturated by surface or ground water at a frequency and prevalence to support...a prevalence of vegetation”. This definition of wetlands requires professional environmental jurisdiction determinations (what is hydric soils, hydrology, and wetland plants) and is not easily interpreted by golf professionals seeking to determine if there are wetlands on, over or near their courses. Determinations by outside professionals contribute significantly to costs for jurisdiction determinations regardless of permitting and mitigation requirements, only to be unnecessary for non-jurisdictional waters/wetlands. Additionally, “adjacent” is so expansively written, it even includes wetlands that are physically separated by other waters of the United States, by “natural river berms” and even “man-made dikes or barriers”. Such an expansive definition is all encompassing and will unnecessarily include features that do not contribute to the watershed or primary WOTUS. Isolated wetlands may not significantly, on either an individual basis or taken in conjunction with jurisdictional waters within a watershed, contribute to the primary WOTUS function or function within a watershed itself. Isolated waters in the golf course environment may be “adjacent” by this definition, but do not contribute physically, chemically or biologically to the watershed or primary WOTUS. Determining function, designing/implementing costly mitigation measures, etc. will have significant and unnecessary impacts to business operations. All will pose challenges for golf industry professionals when determining whether a water feature is a wetland.



3. The “all other waters” category is so vague as it can include many features on a golf course. Under Sec. 328.3 (3), other waters include “intrastate lakes, rivers, streams (*including intermittent streams – emphasis added*), mudflat, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds”. Water features on golf courses include both natural (intended by design and managed/protected by design and best management practices) as well as man-made features. These must clearly be exempted or defined for jurisdictional determinations and not lumped into a “catch-all” definition.
4. The “significant nexus standard” adds additional uncertainty for determining tributaries, wetlands, and other waters. Beyond the concerns mentioned above, the Proposed Rule also establishes two different standards for determining a WOTUS: the “relatively permanent standard” and the “significant nexus standard”. In doing so, it relies on Justice Kennedy’s significant nexus test from *Rapanos v. United States*. As a result, a water can be a tributary, wetland, or other water if it “either alone or in combination with similarly situated waters in the region, significantly affect[s] the chemical, physical or biological integrity of waters in interstate commerce, interstate wetlands, impoundments, the territorial seas”. We note that this opinion was not adopted by the majority of the Supreme Court and therefore does not control. Further it is impractical for golf course professionals to apply and will further lead to uneven decisions being made by regulatory staff across the country and uncertainty faced by golf course superintendents when they are using inputs on their courses or developing or managing features that inconsistent decisions would determine as impacts to WOTUS.

Should the Agencies decide to proceed with the Proposed Rule as well as step two of the rulemaking process, we urge you to consider the comments of the Waters Advocacy Coalition (“WAC”), which many of the allied golf groups including GCSAA belong:

*“First, the common ground approach requires, in sum, that “navigable” be given importance, that a substantial connection to traditional navigable waters exist to extend jurisdiction to waters and wetlands that are not themselves navigable-in-fact, and that environmental concerns not override statutory text. Further, categorically excluded from WOTUS would be drains, ditches, and streams remote from navigable-in-fact water and carrying only minor volumes of water towards it, and accordingly, the waters or wetlands that lie alongside such a ditch or drain.” (Page 20)*

### **III. Final Golf Industry Comments**



The golf industry supports the proper implementation of the CWA and supports the goals of the CWA itself. However, the golf industry does not support the Agencies' expansion of the jurisdiction over WOTUS as written in the Proposed Rule.

This is not a zero-sum situation. There can be clear rules that also recognize the important role golf plays as stewards of the environment. Golf course professionals utilize agronomic and environmental best management practices to protect the environment, including focusing on protecting water quality by reducing the movement of sediment, nutrients, and pesticides to water. Buffer strips are used extensively on golf courses to reduce the amounts of sediments, nutrients and pesticides reaching surface water. Pesticides are applied following integrated pest management (IPM) principals and golf course superintendents use multiple tactics to determine if a pesticide application is needed. In addition, the GCSAA with support from the rest of the golf industry launched the Best Management Practices 50 x 2020 initiative. At the end of 2020, all 50 states now have a comprehensive golf course centric environmental and agronomic BMP program in place. Facility specific BMP programs are now underway. So, it is very important that the Agencies clearly articulate the extent – and limits - of federal CWA authority. Too much is at stake: 94% of a golf course is valuable greenspace and includes turf grass, native and naturalized landscapes, and wildlife habitat. Golf's turf, native landscapes, and waterways provide valuable wildlife habitat. They also provide a vital environmental backstop in areas of the country facing the pressures of increasing development. Residential, commercial, and industrial facilities create impervious surfaces where rain runs off. Golf courses collect, and filter, that water. If they go out of business, we lose that vital environmental ecosystem.

In light of the Proposed Rule's numerous ambiguities and inconsistencies, the golf industry recommends the Agencies withdraw the Proposed Rule. The golf industry invites the Agencies to engage in discussions with stakeholders to develop a revised proposed rule that is more consistent with the available science and with the limits established by Congress and recognized by the Supreme Court.

The golf industry looks forward to working with the Agencies to pursue what we believe are common goals. Please forward any questions or comments to Chava McKeel, GCSAA Director of Government Relations, by phone at 800.472.7878, ext. 3619, or by e-mail at [cmmckeel@gcsaa.org](mailto:cmmckeel@gcsaa.org), or direct mail at GCSAA, 1421 Research Park Drive, Lawrence, KS, 66049.

Thank you for considering these comments and recommendations.



Sincerely,

Rhett Evans, Chief Executive Officer, Golf Course Superintendents Association of America

Seth Waugh, Chief Executive Officer, Professional Golfers Association of America

Jeffrey Morgan, FASAE, CAE, President & Chief Executive Officer, Club Management Association of America

Jay Karen, Chief Executive Officer, National Golf Course Owners Association

Henry Wallmeyer, Chief Executive Officer, National Club Association

Chad Ritterbusch, Executive Director, American Society of Golf Course Architects

Justin Apel, Executive Director, Golf Course Builders Association of America