STATE OF WASHINGTON

Detailed Comments on the Updated Definition

of Waters of the United States

Docket Number EPA-HQ-OW-2025-322

Washington submits the following detailed comments on questions posed in the proposed rule. The definition of Waters of the United States (WOTUS) in the proposed Rule will introduce additional regulatory confusion, cause delays in the regulatory process and will not meet the goals of the Clean Water Act. We provide these comments to support our recommendation that the current definition and practices be maintained, and to assist the Environmental Protection Agency and the Army Corps of Engineers, collectively the Agencies, in the preservation of a durable, easy to implement, and environmentally protective definition of WOTUS.

Scope of WOTUS

The Agencies solicit comment on an alternative approach to the proposed Rule, whereby "waters of the United States" would encompass only traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters. All other waters would be excluded. The Agencies also seek comment on whether the statute and the relevant history of Federal authority over navigable waters support this approach, or whether they support the Agencies' proposal to include a broader category of tributaries and adjacent wetlands within the scope of "navigable waters," based on the plain meaning of the term "waters" (informed by the qualifier "navigable") and the continuous surface connection between such waters and wetlands. Ecology does not support an approach that would remove all but traditional navigable waters and their direct tributaries and wetlands. We support the definition of WOTUS as it is currently defined and suggest that this updated definition is not necessary. We also note that the Agencies have protected non-navigable tributaries and wetlands adjacent to those tributaries for over 50 years.

Interstate waters

The Agencies should retain the category of Interstate Waters. In the west, many streams cross state lines and can have significant effects on downstream waters. A key premise of the interstate waters category is to protect downstream states from polluted water entering their borders. Increased pollution in interstate waters means that downstream states will

be forced to invest in more facilities to treat the impaired waters. Such costs can be significant, including those for infrastructure, operations, treatment upgrades, maintenance, research, and total maximum daily load (TMDL) plan development.

Relatively Permanent Waters

Wet Season

The Agencies introduce a new term and concept in their push to limit CWA protections: the "wet season." The Rule preamble describes the wet season as months where precipitation is greater than evapotranspiration at specific locations. The Agencies seek to limit jurisdiction to those streams, lakes, ponds and wetlands that have flows or standing water for the entire duration of the wet season. The Agencies are proposing to define wet season based on metrics reported from the Web-based Water-Budget Interactive Modeling Program (WebWIMP) using the Corps Antecedent Precipitation Tool (APT) to define 'wet season.' Using this tool, streams in the Seattle area would need to have continuous flows for 7 months, October – April, and wetlands would need to have standing water for that duration. Streams in central and eastern Washington would need continuous flows for 4 or 5 months, respectively.

The Agencies' proposed definition does not reflect scientific and practical realities. The majority of wetland systems connected to jurisdictional tributaries lack surface ponding for the entire wet season. They fill when precipitation and stream levels are high and have less water between storms when their surface waters drain off. These are some of our most important wetlands, as they provide valuable water storage functions that help to attenuate peak flows, prevent downstream flooding, and infiltrate surface water that recharges aquifers. These aquifers are already over-allocated in many of our watersheds and reducing recharge of those aquifers will put the drinking water supply at risk.

The proposed definition of "relatively permanent" waters, which require standing or flowing water throughout the entire wet season, also fails to consider the lag time between precipitation events and when waters manifest on the surface as ponding or flows.

Further, in some parts of Washington, such as Eastern Washington, the "wet season" occurs from November to February and coincides with long periods of freezing temperatures where falling precipitation is snow and would not be reflected as surface waters in wetlands or tributary flows until spring. The wet season similarly does not coincide with the growing season in Eastern Washington. For this reason, it does not make sense to base the definition of relatively permanent water solely on WebWIMP data.

Instead, the Agencies' definition of "wet season" should account for climatic considerations like lag time and snow melt.

Flow Duration

Washington does not recommend setting a flow duration that must occur at a certain time of the year (wet season). Rather, the Agencies should consider flows that occur regularly but not continuously for extended periods of the year as satisfying the "relatively permanent" test. If the Agencies must set a flow duration, we recommend 90 days during and/or after the wet season -- not 270 days as proposed in one alternative. We recommend using the alternative that surface hydrology just needs to occur for at least some months in response to the wet season, but not for the entire duration of the wet season.

To take into account the different climatic cycles in Washington and other areas of the nation, We also recommend that the flows may occur in separate events and not continuously.

We do not support limiting the definition to perennial waters. This discounts the term "relatively" and would be difficult to implement, as proving perennial flow, would require a full year of monitoring. If monitoring coincided with drought years, which are becoming more common, additional years of monitoring could be required to determine if perennial flow would normally be present. Limiting the definition to perennial waters would also fail to acknowledge the critical role that intermittent and ephemeral streams play in maintaining the chemical, physical and biological integrity of our nation's waters.

Tools for Determining Jurisdiction

To define flow regimes, we recommend that regionally specific tools be used to inform regulatory decisions and define ephemeral, intermittent and perennial waters. These tools would provide a clearer line to define these waters and allow classification without the use of direct flow measurements to determine flow regime, which would be time consuming and expensive for applicants. The Agencies also solicit comments on leveraging data and tools to increase predictability in jurisdictional determinations. We address this below.

Streamflow Duration Methods (SDAM)

The Agencies suggest the use of the Streamflow Duration Assessment Methods[1] (SDAM) developed by the EPA. SDAMs use physical and biological indicators to determine the

[1] *Oregon Streamflow Duration Assessment Method,* Publication Number EPA 910-R-11-002, November 2011, https://www.oregon.gov/dsl/WW/Documents/sdam_final_manual.pdf.

relative flow duration of water bodies. The method identifies whether the streamflow is perennial, intermittent, or ephemeral and accounts for regional, climate, and geological conditions. While these tools were not developed for regulatory purposes, they can provide information on a stream and its flow duration, to be used with other data to inform regulatory decisions. SDAMs also classify streams with fish use as either perennial or intermittent. At a minimum, protecting streams with fish use is a high priority in Washington State, and SDAM would provide this capability.

FLOwPER

Another potential tool already used in Washington State is the FLOwPER[2] Field App, developed by the U.S. Forest Service and the U.S. Geological Service. This tool provides standardized data that can be used to identify stream flow permanence across the landscape. A benefit of FLOwPER is that it is a collaborative tool that contributes to a database of stream observations. This database is publicly accessible and already contains more than 9,000 unique observations of stream flow status in multiple Pacific Northwest states.

We support the use of this tool, and others like it, to help inform regulatory decisions. While a landowner may be aware of stream flow regime on their own land, as advocated by the Agencies, this alone is insufficient to support repeatable, defensible, and consistent determinations by regulatory agencies. Use of a tool like FLOwPER would provide clarity and prevent legal challenges to the stream flow duration determinations that may be necessary to identify relatively permanent waters.

National Wetland Inventory Hydrology Modifiers

In the Regulatory Impact Analysis (RIA), the Agencies used National Wetland Inventory (NWI) hydrologic modifiers to determine which waters and wetlands would be jurisdictional.

We do not recommend using the NWI long duration ponding modifiers as a jurisdictional threshold. Instead, any determination of jurisdiction, and the extent of jurisdiction, should be based on site-specific data. Using the listed modifiers will result in an under-representation of waters that would otherwise meet the criteria for relatively permanent flow. This is because the NWI hydrology modifiers are based on a snapshot in time

[2] FLOwPER User's Guide—For Collection of FLOw PERmanence Field Observations — OFR 20201075)

delineated from aerial imagery. The NWI maps were never intended to represent a regulatory definition for CWA; they are intended for wildlife habitat identification.

Further, the proposed Rule references NWI maps as a resource in several sections. It should be noted that these maps were created decades ago, are out of date, miss many wetlands, and are not fully ground-truthed. For example, forested wetlands are not easily identified on aerial photographs and are thus often missed on NWI maps. Likewise, many smaller wetlands are not mapped because they fall below map unit thresholds. Jurisdictional determinations should instead be made after in-person site evaluations. For screening purposes, desktop tools that reflect updated, modern available technology – including remote sensing for wetland mapping -- should also be utilized.

Continuous Surface Connection

The Agencies add the concept of **surface water** connection as an additional requirement for adjacent wetlands. Sackett does not require that only flooded portions of adjacent wetlands should be jurisdictional. Sackett simply says the adjacent wetland must abut the jurisdictional water with a continuous **surface** connection. The Court did not find that the connection needed to be surface ponding. Wetlands can be inexorably linked to WOTUS through surface connections of other kinds, like hydric soils that are saturated and not ponded.

The Agencies ask what should be jurisdictional in adjacent wetlands. They ask if the entire wetland should be considered jurisdictional. We respond yes, where any portion of the wetland abuts and has a continuous surface connection to the jurisdictional water, the Agencies should include the entirety of the delineated wetland. We recommend including the entire wetland due to the biological, hydrologic and physical connections within the wetland. This approach would also provide cost effective implementation by utilizing a well-known and tested wetland delineation method. If wetland jurisdiction is determined as proposed in the draft Rule, project proponents would be faced with implementation challenges and increased time and cost.

Implementation Challenges

The proposed standard for adjacent wetlands would be difficult to implement due to the need to delineate the ponded area of the wetland separately from the delineated wetland boundary. The delineation method and regional supplements do not provide a delineation method for parsing out relatively permanent flooded areas from saturated areas in the wetland. Multiple site visits would be required to document the duration of flows/surface

ponding to ensure that the wetlands meet the required flow duration. This would increase time and cost to applicants and result in additional uncertainty in determining the regulated areas.

Further, according to the methodology of the 1987 Army Corps of Engineers (ACOE) Wetland Delineation Manual and applicable regional supplements, wetlands are required to have inundation or saturated soils *during the growing season*. Many states, including Washington, regulate wetlands based on the existing ACOE methodology. Because the wet season often will not coincide, or only partially coincide with the growing season, additional site visits will likely be necessary to determine the portion of a wetland that is regulated, and applicants will need to provide two delineations: one to show the entire extent of the wetland for state requirements, and another to determine the portion with relatively permanent water during the wet season for federal requirements. Although the Agencies state that the proposed rule is intended to simplify the process for proponents, this proposal will have the opposite effect.

Definition of Tributary

The Agencies seek comment on the proposed treatment of natural and man-made features that connect tributaries and regulated waters. We support the Agencies' proposal that jurisdiction should not be severed by certain features, both natural (e.g., debris piles, boulder fields, beaver dams) and artificial (e.g., culverts, ditches, pipes, tunnels, pumps, tide gates, dams) if they convey relatively permanent flow. However, we also believe that jurisdiction should not be severed even in situations where the natural or artificial feature does not convey relatively permanent flow. These discrete features maintain a hydrologic connection to a relatively permanent water. In other words, we support the approach adopted in the Navigable Waters Protection Rule, on which the Agencies also solicit comment.

Regardless of flow duration, these discrete features maintain a hydrologic connection to a relatively permanent waters. Thus, excluding these features would strip upstream wetlands and stream reaches of water quality protections and result in the degradation of downstream waters of the United States. Allowing these features to sever jurisdiction could incentivize the construction of these features to remove protections from waters otherwise covered by the Clean Water Act.

Ephemeral and Intermittent Waters are Essential to Water Quality and Health

The definition of WOTUS in the proposed Rule specifically excludes "ephemeral" streams and proposes to limit the protection of intermittent waters to those that are "relatively permanent." We do not agree that these waters should be categorically excluded from jurisdiction and support a definition of "relatively permanent" that would include at least some of them. In Washington and particularly the arid portions of the state, ephemeral and intermittent streams play an important role in the hydrologic, chemical and biologic conditions of downstream waters.

According to EPA's own synthesis of ephemeral stream science,[3] riparian ecosystems "exert substantial influence on hydrologic, geomorphic, and ecological processes, and typically support the great majority of biodiversity" in arid and semi-arid regions. The active channel of streams in arid lands include zones that are not surface waters but that interact with surface waters and are inherent to the stream functions, including the hyporheic and parafluvial zones. These zones occur where surface water may not be visible yet they maintain important influence on the water quality of downstream waters. In particular, ephemeral and intermittent streams are "important sources of sediment, water, nutrients, seeds, and organic matter for downstream systems." They help to regulate the flow of water and provide much of the connectivity in arid landscapes, which in turn controls movement of chemicals downstream, and serves as an important factor in water quality.

These waters are common. Based on the National Hydrography Dataset (NHD), approximately 18 percent of the nation's waters are classified as ephemeral, although this is based on old field data and photo interpretation from 1990s and is likely underestimated. For the arid west, NHD estimates approximately 35 percent of all streams and 39 percent of all stream miles are categorized as ephemeral and 47 percent of all streams are intermittent. In Washington state, NHD estimates approximately 54% of Washington's streams are intermittent, less than 25% of the stream miles are perennial, and 1% are ephemeral (in the arid eastern side of the state the percentage of intermittent and ephemeral waters is much larger). More than 13% of the stream miles are not attributed with a hydrologic class, and the remaining 7% are classified as ditches, canals, connectors, or artificial paths.

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[3] Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, 116 pp.

The United States Geologic Service[4] (USGS) reports that dry segments account for 52 to 92 percent of the stream network in arid basins of the Pacific Northwest, and "streamflow permanence decreased during climatically drier years". This implies that large parts of stream networks could be considered ephemeral depending on climatic conditions in any one year. When waters flow in ephemeral channels, they can carry significant amounts of sediment and pollutants into perennial and traditionally navigable waters.

In addition, the National Wetland Inventory (NWI) classifies 25% of the wetlands in Washington, not identified as streambeds or associated with lakes or marine waters, as types analogous to ephemeral (temporarily flooded and seasonally saturated). Also, EPA estimates from NWI data that approximately 51% of wetlands do not intersect a stream feature and therefore would not be covered under the proposed rule. This body of scientific information regarding the importance and magnitude of ephemeral and intermittent waters and wetlands is evidence that only protecting perennial waters is insufficient to protect the physical, chemical, and biological integrity of traditionally navigable waters.

Omission of these critical intermittent and ephemeral flows would disrupt hydrologic cycles. Losing protection for such waters –which often include headwater wetlands -- would reduce water storage and availability for groundwater recharge, which would in turn contribute to downstream flooding. Extreme fluctuations in flows caused by the loss of intermittent and headwater wetlands will also further imperil Washington's Endangered salmon, which are essential to its economy and to the tribal nations whose treaty rights must be honored.

Finally, the Agencies also ask whether the definition of tributary should be limited to perennial waters only. For the reasons outlined above, we respond no, the rule should include intermittent waters, wetlands, and to the extent permitted by law, ephemeral waters that are relatively permanent over the course of longer timescales than a single wet season. For example, while certain streams may be ephemeral over the course of a short time span, they recur frequently, leave recognizable physical features, and are therefore relatively permanent as hydrological features. Further, intermittent waters are often continuously flowing during the times of the season that they experience flow. This fits the definition of "relatively permanent" outlined in both *Sackett* and *Rapanos*.

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[4] K.L. Jaeger, R. Sando, R.R. McShane, J.B. Dunham, D.P. Hockman-Wert, K.E. Kaiser, K. Hafen, J.C. Risley, K.W. Blasch. 2018. *Probability of Streamflow Permanence Model (PROSPER): A spatially continuous model of annual streamflow permanence throughout the Pacific Northwest.*

Wetland Mosaics

The Agencies seek to limit the regulated portion of mosaic wetlands to those portions that have a continuous surface water connection that abuts a jurisdictional water. The Regional Supplement for the Army Corps of Engineers' Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region includes specific guidance for the delineation of wetland mosaics. The Supplement describes wetland/non-wetland mosaics as "landscape[s] where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately." Using the Army Corps of Engineers' definition, delineating a specific portion of a wetland mosaic would be a difficult and cost-prohibitive endeavor for the regulated community. We do not recommend that only parts of mosaic wetlands be regulated.

One alternative presented by the proposed Rule is to utilize aerial photos for the delineation of mosaic wetlands. This is not a viable option in mosaic wetlands, as many of these wetland types in Washington are forested. Further, there is a significant potential for inaccuracy in delineations that do not include a site evaluation. Wetlands are defined not just by water but also by hydric soils and hydrophytic vegetation, which cannot be accurately determined from an aerial photograph. Aerial photographs would also only reflect a moment in time and it would be difficult to infer from an aerial photograph whether a wetland area has a "relatively permanent" hydrologic regime.

We also do not support the alternative approach where a continuous surface connection would require the presence of perennial water. Neither *Sackett* nor *Rapanos* requires a continuous surface water connection, and other forms of surface connection — for example, vegetation and saturated soil — may be present.

Ditches

Under the proposed Rule, only ditches excavated or constructed in dry land are considered excluded. This removes the existing requirement that, to be excluded, a ditch cannot also drain aquatic resources. We believe that an excluded ditch must be constructed in dry land and drain only dry land.

We support the Agencies' proposal that tributaries that have been relocated into ditches are WOTUS if they contribute relatively permanent flows to a regulated water. Excluded ditches should not include natural waterbodies that have been channelized and would exist in their location regardless of the constructed channel. Some watercourses include areas that are heavily modified that would meet the definition of ditch but are actually part

of a larger upgradient river or stream. These should remain under WOTUS. Additionally, tributaries should not be excluded simply because they flow through a non-jurisdictional ditch or have non-relatively permanent flows in certain reaches.

However, the proposed Rule excludes some ditches that have relatively permanent flow if they do not contain a relocated tributary and are not excavated in a wetland or other aquatic resource. We do not support this. Many drainage ditches provide habitat for salmonids and other aquatic wildlife species. The ditches are relatively permanently flooded and connected to jurisdictional tributaries and traditionally navigable waters. Discharges to these ditches degrade water quality in the ditch and the connected jurisdictional water. For this reason, we recommend that the Agencies consider all ditches with relatively permanent flow as jurisdictional. We understand the desire to minimize the burden on agricultural producers, but this can be accomplished through Section 404(f) exemptions for agricultural activities and general permits for work affecting water quality in connected ditches.

The proposed rule is also inconsistent in its treatment of ditches and tributaries. It is not clear what the difference is between a relocated tributary with relatively permanent flow versus a ditch with relatively permanent flow. Tributaries and ditches often function as stream segments, and it is not possible to protect water quality and the integrity of a stream when one part of the stream is protected and another section of a similar (but differently labeled) water body is allowed to be degraded or even filled. In Washington, excluding only ditches would still exclude from protection relatively permanent waters flowing through ditches that could contain fish.

We support the Agencies' intent to maintain jurisdiction over relocated tributaries. To further this end, we believe that a relatively permanently flowing ditch should be assumed to be a relocated tributary unless there is evidence showing otherwise. The burden of proof for demonstrating that a ditch is not a relocated tributary should be borne by the entity proposing to impact the aquatic resource.

Economics

The Regulatory Impact Analysis (RIA) does an inadequate job of evaluating the impacts from the proposed Rule. The Agencies' analysis does not account for wetland benefits, increased costs to state and local governments for spills responses, and increased costs to project proponents.

Wetland benefits

The RIA also falls short in the calculation for foregone benefits from wetland and stream losses under the proposed Rule. Rather than concluding that these benefits cannot be quantified, the Agencies should – at the very least-- use the existing science and studies on the economic values of wetlands for purifying water and storing floodwaters. Costs from the proposed Rule could include calculations of the costs to local governments and the state for polluted water. This would include building water purification plants and paying for flood recovery costs.

Studies exist on quantifying the benefits of wetlands and streams. For example, a search of Earth Economics' database, the Ecosystem Valuation Toolkit, revealed that at least four studies of wetland value have been published between 2005 and 2012.[5] These studies include:

- Whitehead, J. C., Groothuis, P. A., Southwick, R., Foster-Turley, P. 2005. The Economic Values of Saginaw Bay Coastal Marshes. Southwick Associates, Inc.

- Petrolia, D. R., Interis, M. G., Hwang, J., Hidrue, M. K., Moore, R. G., Kim, T. 2012. America's Wetland? A National Survey of Willingness to Pay for Restoration of Louisiana's Coastal Wetlands. Marine Resource Economics 29(1): 17-37.

- Awondo, S. N., Egan, K. J., Dwyer, D. F. 2011. Increasing Beach Recreation Benefits by Using Wetlands to Reduce Contamination. Marine Resource Economics 26(1): 1-15.

- Whitehead, J. C., Groothuis, P. A., Southwick, R., Foster-Turley, P. 2009. Measuring the economic benefits of Saginaw Bay coastal marsh with revealed and stated preference methods. Journal of Great Lakes Research 35(3): 430-437.

In addition, the Association of State Wetland Manager performed a brief search and found five willingness to pay (WTP) studies between the years 2009-2016, including:

- Loomis, J., Haefele, M. 2015. Economic Contribution, Impacts, and Economic Benefits of Deer, Waterfowl and Upland Game Bird Hunting in North and South Dakota: Relationship to CRP Lands.

[5] Earth Economics, 2017. Ecosystem Valuation Toolkit. Retrieved at: http://www.eartheconomics.org

- Murray, B., Jenkins, A., Kramer, R., Faulkner, S.F. 2009. Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley. Nicholas School of the Environment, Duke University.

- Newell, L.W., Swallow, S.K. 2013. Real-payment choice experiments: Valuing forested wetlands and spatial attributes within a landscape context. Ecological Economics, 92: 37-47.

- Patton, D., Bergstrom, J., Covich, A., Morre, R. 2012. National Wildlife Refuge Wetland Ecosystem Service Valuation Model, Phase 1 Report: An Assessment of Ecosystem Services Associated with National Wildlife Refuges. University of Georgia. Prepared for the Division of Refuges and Division of Economics, U.S. Fish and Wildlife Service, Washington, D.C.

- Young, N. 2016. The Economic Value of Riparian Buffers. American Rivers, Washington, D.C.

EPA itself has also recognized the economic benefits of wetlands. An EPA report[6] noted that wetlands in South Carolina remove pollutants equivalent to removal from a five million dollar wastewater treatment plant. These studies and reports demonstrate that wetlands and streams protected under the CWA provide significant economic benefits that can be estimated.

Importantly, the approaches to estimating value are not mutually exclusive but additive. Estimating the value of wetlands can be done but will almost always undervalue them because of the multiple benefits they provide. Focusing only on reduced permitting costs severely underestimates the costs that Americans will incur as a result of this proposal. This approach values short-term savings over long-term economic losses resulting from the loss of our nation's waters.

Oil Spill Response

The RIA fails to account for the loss of resources for spill response and recovery funding for oil spills into streams and wetlands. Currently, the federal government assists with funding and personnel when there is an oil spill. Reducing the scope of WOTUS reduces the resources available to state and local governments, in turn increasing the costs for those

[6] Economic Benefits of Wetlands EPA843-F-06-004 https://www.epa.gov/sites/production/files/2016-02/documents/economicbenefits.pdf

governments and their constituents. This cost should be included in the economic analysis.

To start, the US Coast Guard (USCG) and EPA play roles as Federal On-Scene Coordinators and subject matter experts in a unified command response to an oil spill. These roles are diminished or non-existent in incidents where the spill occurs outside WOTUS. The proposed reduction in the scope of WOTUS thus results in less expertise and resources for responding rapidly and effectively to a spill. This then increases the risk of greater environmental harm from oil spills.

A similar concern exists for resources intended to build capacity for spills response. For example, spill drills exercises help ensure that federal, state, tribal, local and industry partners have experience and practice working together to effectively coordinate efforts for a large oil spill event. Similarly, USCG and EPA lead Regional Planning efforts through Area Committees. The scope of this "big picture" planning could be diminished or eliminated for some areas of the State, which would result in diminished capacity to mount a rapid, aggressive well-coordinated response.

Access to National Pollution Fund Center funds to pay for cleanup and damages -- specifically the Oil Spill Liability Trust Fund -- will also be diminished. This will place a larger financial burden on state, tribal and local jurisdictions, many of whom may not have the financial resources to respond to a large oil spill, even with other governmental agency partners assisting and cooperating.

Finally, Natural Resource Damage Assessments (NRDAs) for oil spills events will also be impacted. Federal agency trustees are currently involved in NRDAs, and the National Pollution Fund Center assists with upfront payments to "initiate" NRDA funding and/or NRDA claims. Reducing the scope of WOTUS reduces the availability of funds for assessment and natural resource restoration. Federal agency trustees will also reduce their participation on the trustee councils which provide expertise, and serving as federal lead administrative trustee will be diminished, potentially making the process less effective. In totality, this will result in fewer public natural resource damages being restored by responsible parties.

Increased Violations and Regulatory Uncertainty

The proposed Rule will increase confusion for the regulated. This confusion will likely result in increased inadvertent and intentional impacts to wetlands and streams. Before 2020 when the Navigable Waters Protection Rule was promulgated, Ecology responded to

approximately 200 wetland violations annually. Since 2020 that number has steadily increased to nearly 300 violations annually. Responding to these violations increases state costs to address unauthorized impacts to wetlands. It also potentially results in more enforcement actions and penalties.

In particular, the proposed Rule introduces new concepts and metrics that will require new delineation methodologies. This will be confusing for consultants and landowners. The lack of a clear method for making these determinations is likely to result in additional violations and disputes over what parts of a wetland are regulated and where exactly the line is located. While the intent of these rules is to simplify, this is unlikely to be the result without clear, repeatable, and scientific methodology – something currently missing from the proposed definitions.

Summary

We hope that the Agencies consider these comments as you move forward. We would reiterate that we do not believe that this rulemaking is necessary. The Agencies should maintain the current definition of WOTUS -- which the regulatory community is familiar with -- instead of creating yet more confusion and risk to the environment.