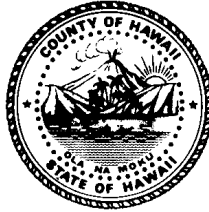


County of Hawai'i  
Council District 9 -  
North and South Kohala



Phone: (808) 961-8564  
(808) 887-2069  
Email: [tim.richards@hawaiiicounty.gov](mailto:tim.richards@hawaiiicounty.gov)

**Chair:** Committee on Regenerative  
Agriculture, Water, Energy, &  
Environmental Management

**HERBERT M. "TIM" RICHARDS, III**  
**HAWAI'I COUNTY COUNCIL**  
25 Aupuni Street, Ste. 1402, Hilo, Hawai'i 96720

October 3, 2021

Damaris Christensen  
Oceans, Wetlands and Communities Division  
Office of Water  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460  
Via email transmission to:  
[CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

Stacey Jensen  
Office of the Assistant Secretary of  
the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0104  
Via email transmission to:  
[usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@mail.mil)

**RE: Docket ID No. EPA-HQ-OW-2021-0328**

Dear Ms. Christensen and Ms. Jensen,

As the sitting Hawai'i County Council Member for the North and South Kohala districts of Hawai'i Island, Chair of the Committee on Regenerative Agriculture, Water, Energy, and Environmental Management, a 4<sup>th</sup> generation cattle rancher, livestock veterinarian with over 35 years' experience here in Hawai'i, as well as a member sitting on the Board of Directors of the U.S. Animal Health Association, an industry organization that is advisory to United States Department of Agriculture (USDA) policy, I appreciate the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers (Army Corps) proposed rule on the "Intention to Revise the Definition of Waters of the United States," which aims to clarify which water bodies are federally regulated under the Clean Water Act (CWA). Specifically, the purpose of the proposed rule is to repeal the Navigable Waters Protection Rule and replace it with the pre-2015 "waters of the United States" (WOTUS) regulations.

The health, well-being and safety of our citizens and community are top priorities for us. To that end, federal, state, and local governments must work together to craft reasonable and practicable rules and regulations. As partners in protecting America's water

resources, it is essential that local governments, such as the County of Hawai‘i, have a clear understanding of the vast impact that a change to the definition of WOTUS will have on all aspects of the CWA.

In our past efforts to implement new WOTUS guidance, we experienced an inconsistent understanding of what that actually means.

Clean water is essential for public health, and state and local governments prioritize protecting local water resources. It is essential counties are involved as a significant partner in the CWA rule development process. The CWA charges the federal government with regulating discharges of pollutants into the waters of the United States and quality standards for surface waters.

### **STATE & LOCAL AUTHORITY**

Under a federal agreement for CWA enforcement, the EPA and the Army Corps share clean water responsibilities. The Army Corps is the lead on the CWA Section 404 Dredge and Fill permit program, and the EPA is the lead on other CWA programs. States have undertaken authority for EPA’s Section 402 National Pollutant Discharge Elimination System (NPDES) permit program—EPA manages NPDES permits for Maryland, Massachusetts, New Hampshire, and New Mexico. Additionally, states are responsible for setting water quality standards to protect their water resources.

In the State of Hawai‘i, water is considered a public trust. Oversight of this comes under our State of Hawai‘i Department of Land and Natural Resources (DLNR). Thoughtful and unambiguous definitions are important for a sound water policy for our state, thus county to administer.

### **SUPREME COURT HISTORY**

Section 502 of the CWA states, “the term ‘navigable waters’ means the waters of the United States, including the territorial seas.” The phrase “navigable waters” was first used in 1899 in the Rivers and Harbors Act, which deals with interstate commerce—any ship involved in interstate commerce on a “navigable water” was required to have a license or permit for trading. At the time, navigable waters meant a lake, river, or ocean.

After linking navigable waters with waters of the United States, Congress limited the scope of the CWA to all pollutants discharged into a navigable water. In the realm of the CWA’s Section 404 permit program, the courts have generally said that “navigable waters” go beyond traditionally navigable-in-fact waters but have also acknowledged there is a limit to the CWA’s jurisdiction.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, the Army Corps used the “Migratory Bird Rule”—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. In SWANCC, the Court ruled that the Army Corps exceeded its authority and infringed on states’ water and land rights.

In 2006, in *Rapanos v. United States*, the Army Corps was challenged over its intent to regulate isolated wetlands under the CWA Section 404 permit program. The Court ruled that the Army Corps exceeded its authority to regulate these isolated wetlands in a split decision. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a “significant nexus” with a navigable water, either alone or with other similarly situated sites. Since neither opinion was a majority opinion, it causes confusion over which waters are federally regulated under CWA.

In Hawai‘i, many of our streams and rivers are ephemeral. All flow almost directly into the ocean. Any vagueness or ambiguity opens up its own “nexus of confusion” as to definition of waters of the United States.

## **ECONOMIC IMPACTS**

In Hawai‘i County, we fear that navigating the regulatory changes will create an environment where it will take time to understand the process and how implementation will be practiced fully. County engineers, staff, and consultants will simultaneously learn the changes, even when it is simply reversing to past guidelines and regulations. By the time we fully understand and grasp these changes, the second rulemaking on defining WOTUS will come out, and we will have to start this process again. Without clear guidance that includes reliable and accurate maps indicating federal jurisdiction claims that are vetted with state and local input, we fear the debate over the definition of WOTUS will continue and put water quality and public health at risk.

Additionally, Hawai‘i County is interested in learning more about the economic impacts of returning to the pre-2015 regulations. With more projects being subject to the permitting process, this will significantly slow down the construction of projects and increase costs. As Congress works to pass much-needed federal funding for infrastructure in the Infrastructure Investments and Jobs Act, by expanding the definition of WOTUS to the pre-2015 definition, we believe it will slow down the implementation of these much-needed investments.

## **COUNTY-OWNED INFRASTRUCTURE**

Under the pre-2015 rules, ditches were regulated under CWA Section 404, both for construction and maintenance activities. Should these rules be reimplemented, several challenges within the 404 program will significantly impact counties. Historically, an exemption existed for ditch maintenance; however, the Army Corps districts inconsistently applied it across the country.

Local governments are responsible for public safety; they own and manage a wide variety of public safety ditches—road, drainage, stormwater conveyances and others—to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses. Ultimately, a local government is responsible for maintaining the integrity of these ditches, even if the federal agencies do not approve federal permits promptly.

Hawai‘i County has responsibility and jurisdiction of cleaning ditches that are ephemeral and flow almost immediately into the ocean. Our concern is the red tape permitting process that ultimately causes more harm to our ability to maintain these areas.

Counties urge the EPA and Army Corps to include local government, public works general maintenance and repair projects, in CWA Section 404 permitting exclusions.

## **BENEFITS OF 2020 RULE**

As the rulemaking process is initiated, we wanted to provide the following recommendations that Hawai‘i County proposes for inclusion, based on elements of the Navigable Waters Protection Rule that considered the unique role of counties in its implementation. Certain aspects of the 2020 Navigable Waters Protection Rule simplified our counties function as it pertained to maintaining ditches, stormwater features, ephemeral streams and helping somewhat simplify areas for a definition of wetlands.

In closing, Hawai‘i County appreciates the opportunity to comment on the proposed revision of the regulations defining “waters of the United States.” As partners in protecting America’s water resources, counties must clearly understand the vast impact WOTUS will have on our local communities. We look forward to working with the EPA and the Army Corps as the regulatory process moves forward.

Should you desire to discuss my knowledge and understanding of this matter further, please do not hesitate to contact me directly.

Sincerely,



HERBERT M. “TIM” RICHARDS, III  
Hawai‘i County Council