Comments of the Waters Advocacy Coalition (WAC)
on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers'
Proposed Revised Definition of "Waters of the United States"

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

February 7, 2022

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I. Introduction

The Waters Advocacy Coalition ("WAC" or "Coalition") hereby offers the following comments on the U.S. Environmental Protection Agency's ("EPA") and the U.S. Army Corps of Engineers' ("Corps") (together, the "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, "Proposal" or "Proposed Rule").

The Coalition's members possess a wealth of expertise directly relevant to the Agencies' proposed revised definition of "waters of the United States" and are committed to protecting and restoring America's wetlands and waters. WAC members believe that a regulation that draws clear lines between federal and state waters will help further that goal. However, the Agencies seemingly have abandoned their long-lasting pursuit to provide more clarity, consistency, and predictability regarding the scope of "waters of the United States" protected under the Act. *E.g.*, 76 Fed. Reg. 24,479, 24,479-80 (May 2, 2011); 80 Fed. Reg. 37,054, 37,054 & 37,056-57 (June 29, 2015); 85 Fed. Reg. 22,250, 22,252 & 22,270 (Apr. 21, 2020). Throughout the Proposed Rule and its supporting documents, the Agencies state that they are codifying the pre-2015 regulatory regime that they are currently implementing. This is the very same regime that the Agencies criticized in 2015 for subjecting stakeholders to case-specific significant nexus analyses that are "time and resource intensive" and that "result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies." 80 Fed. Reg. at 37,056. Given those shortcomings, it was obvious why stakeholders on virtually all sides of this issue were pushing for more clarity, predictability, and consistency. *See id.* at 37,056-57.

Apart from the fact that jurisdiction under the pre-2015 regulatory regime often depends on case-specific, time-consuming, and inconsistent analyses, that regime is built on an erroneous foundation: that the Agencies can assert jurisdiction under *either* the plurality's relatively permanent standard *or* Justice Kennedy's significant nexus standard from *Rapanos v. United States*, 547 U.S. 715 (2006). And the Agencies have compounded that fundamental error by misapplying both of those standards to extend jurisdiction beyond the limits articulated in the plurality's and Justice Kennedy's opinions.

Were the Agencies truly just codifying the flawed pre-2015 regulatory regime that they are currently implementing, the Proposed Rule would be problematic enough. But in reality, the rule is far worse than advertised. The Agencies are poised to significantly broaden the reach of their authority under the CWA compared to the pre-2015 regime by using the same overbroad interpretation of "significant nexus" that underpinned the 2015 Rule. While the Agencies do not go so far as they did in the 2015 Rule when they categorically defined all tributaries and all adjacent waters as jurisdictional, the Proposed Rule is essentially a renewed quest to claim jurisdiction eventually over all tributaries, all floodplain riparian area wetlands and open waters, and as many remaining wetlands and open waters in non-floodplain landscapes as possible.

The Agencies state in the Proposed Rule that they are not reaching any conclusions, categorical or otherwise, about which waters and wetlands might meet the significant nexus standard. *See* 86 Fed. Reg. at 69,390. Yet at the same time, they are doubling down on the approach that they previously relied on in 2015 to justify categorical asserting jurisdiction over all tributaries, adjacent water features, and even dry land. By ignoring Congressional intent and

decades of judicial precedent and instead reaffirming their belief that the science "unequivocally demonstrates" that most features are clearly connected to downstream navigable waters in ways that profoundly influence downstream water integrity[1] and by seemingly reviving the 2015 Rule's watershed approach to aggregating features for purposes of determining whether they collectively have more than a speculative or insubstantial effect on a downstream navigable water, the Agencies have set the stage to rack up significant nexus determinations, one watershed at a time, until they replicate the overly expansive jurisdictional reach of the 2015 Rule—a rule that was enjoined by several courts.

Fortunately, the Supreme Court has stepped in and agreed to address whether Justice Kennedy's "significant nexus" inquiry is the proper test for asserting jurisdiction over wetlands that are adjacent to tributaries of "waters of the U.S." *See Sackett v. EPA*, __ S. Ct. __, 2022 WL 199378 (Mem), No. 21-454 (Jan. 24, 2022). Because the Proposed Rule's "either/or" approach to jurisdiction treats the "significant nexus" standard as a controlling test for determining what is a "water of the United States," the Agencies should halt rulemaking proceedings pending the outcome of that case. There is no sense in rushing through a rulemaking proceeding that codifies a standard that the Supreme Court could change or foreclose altogether.

If, however, the Agencies insist on moving forward with this rulemaking, they need to go back to the drawing board given the numerous important concerns that the Coalition sets forth in these comments. For the reasons discussed below, the Agencies should withdraw the Proposed Rule; reconsider the rule while addressing our concerns and reengaging stakeholders; and re-propose a rule that adheres to the CWA and relevant Supreme Court precedent.

A. The Coalition's Diverse Membership Is Vital to a Thriving National Economy.

WAC represents a large cross-section of the nation's construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed jobs. The Coalition's members remain committed to the protection and restoration of America's waters and wetlands. Businesses and landowners have interests in and are among our most effective stewards of the environment. Members of the Coalition include:

Agricultural Retailers Association
American Exploration & Mining Association
American Exploration & Production Council
American Farm Bureau Federation
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Iron & Steel Institute
American Petroleum Institute
Industrial Minerals Association North America
International Council of Shopping Centers
Leading Builders of America
National Association of Home Builders
National Association of Manufacturers
National Association of Realtors
National Association of State Departments of Agriculture
National Club Association

[1] *See* Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States' Rule," at 33 (Nov. 18, 2021) ("TSD").

American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
American Soybean Association
Associated Builders & Contractors
Associated General Contractors of America
Association of American Railroads
Association of Oil Pipe Lines
Club Management Association of America
Corn Refiners Association
Florida and Texas Sugar Cane Growers
Golf Course Builders Association of America
Golf Course Superintendents Association of America
Independent Petroleum Association of America
National Corn Growers Association
National Cotton Council of America
National Mining Association
National Multifamily Housing Council
National Oilseed Processors Association
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone Sand & Gravel Association
Responsible Industry for Sound Environment
Southeastern Lumber Manufacturers Association
Texas Wildlife Association
The Fertilizer Institute
Treated Wood Council
USA Rice Federation
US Chamber of Commerce

Many of the Coalition's members construct residential developments, multi-family housing units, commercial buildings, shopping centers, factories, warehouses, waterworks, roads, and other infrastructure. During 2021, total public and private investment in the construction of residential structures alone totaled nearly $800 billion.[2]

Many of the Coalition's members construct and maintain critical infrastructure: airports, bridges and highways, ports and waterways, railroads, tunnels, electric generation, transmission, and distribution facilities, and pipeline facilities. Research has shown that infrastructure investments increase economic growth, productivity, and land values. Coalition members support building smart, modern, and resilient infrastructure ahead of the next crises. Not only are investments in infrastructure critical to quality of life and environmental protection throughout the nation, but their effect on job creation is substantial.

WAC's agricultural members grow virtually every agricultural commodity produced commercially in the United States, including significant portions of the domestic wheat, soybean, cotton, milk, corn, poultry, egg, pork, and beef supply. Agriculture and livestock-related industries contributed over $1.109 trillion to the U.S. gross domestic product in 2019 and

[2] *See* U.S. Census Bureau, *Annual Value of Construction Put in Place 2012-2021*, *available at* https://www.census.gov/construction/c30/historical_data.html.

employed 20 million people in 2020.[3] Moreover, forest products—wood, paper, and furniture manufacturing—contribute nearly 6% of U.S. manufacturing GDP.[4]

Additionally, WAC represents producers of most of America's coal, metals, and industrial minerals, including critical minerals that support the supply chains of the low carbon energy transition. In 2017, U.S. mining activities directly and indirectly generated over 1.5 million U.S. jobs and $95 billion in U.S. labor income and contributed $217.5 billion to the U.S. GDP.[5] WAC also represents the energy industry that generates, transmits, transports, and distributes the nation's energy to residential, commercial, industrial, and institutional customers. Together, oil and natural gas supply more than 60 percent of our nation's energy.[6] Overall, as of 2017, the oil and natural gas industry supported 10.3 million U.S. jobs and contributed 8% of U.S. GDP.[7]

All of these sectors feed into the domestic manufacturing sector, which employs more than 12.5 million men and women, contributes $2.55 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation.[8] 98.6% of American manufacturing companies are small businesses, and 75.3% of those businesses have fewer than 20 employees.[9]

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[3] *See* U.S. Dep't of Agric., Econ. Rsch. Serv., *Ag and Food Sectors and the Economy* (Dec. 27, 2021), *available at* https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy; *see also* U.S. Dep't of Agric., Economic Research Serv., *Ag and Food Statistics: Charting the Essentials, February 2020* (Feb. 2020), *available at* https://www.ers.usda.gov/webdocs/publications/96957/ap-083.pdf.

[4] Forest2Market, *New Report Details the Economic Impact of US Forest Products Industry* (May 8, 2019), *available at* https://www.forest2market.com/blog/new-report-details-the-economic-impact-of-us-forest-products-industry.

[5] *See* Nat'l Mining Ass'n, *The Economic Contributions of U.S. Mining*, at E-1 (Sept. 2018), *available at* https://nma.org/wp-content/uploads/2016/09/Economic_Contributions_of_Mining_2017_Update.pdf.

[6] *See* U.S. Energy Info. Ass'n, *Annual Energy Outlook 2019*, *available at* https://www.eia.gov/outlooks/aeo/data/browser/#/?id=1-AEO2019&cases=ref2019&sourcekey=0.pdf.

[7] *See* Am. Petroleum Inst., *Oil & Natural Gas: Supporting the Economy, Creating Jobs, Driving America Forward* (2018), *available at* https://www.api.org/~/media/Files/Policy/Taxes/DM2018-086_API_Fair_Share_OnePager_FIN3.pdf.

[8] *See* Nat'l Ass'n of Mfrs., "Facts About Manufacturing: The Top 18 Facts You Need to Know," *available at* https://www.nam.org/facts-about-manufacturing/.

[9] *See* Bridget Weston, "How Small Manufacturing Businesses Drive the U.S. Economy (May 9, 2019), *available at* https://www.score.org/blog/how-small-manufacturing-businesses-drive-us-economy.

B. The Definition of WOTUS Is Exceptionally Important to WAC Members.

WAC members have substantial interests in ensuring that federal CWA jurisdiction is exercised lawfully and in promoting national uniformity and consistency in the definition of what features are WOTUS. Their members must comply with the CWA's prohibition against unauthorized "discharges" into any areas that are ultimately deemed jurisdictional. Their projects and operations are all subject to regulation (to differing extents) under CWA Sections 402, 404, 401, 311, other provisions of the Act, and the state and local laws that protect water quality.

In contrast with the Navigable Waters Protection Rule ("NWPR"), which provided WAC members long-overdue certainty in describing what features are or are not WOTUS, the Proposed Rule codifies a return to unpredictable case-by-case determinations of jurisdiction by agency staff, thereby subjecting WAC members and landowners nationwide to considerable confusion about what features on their lands may be jurisdictional. This confusion deprives WAC members of notice of what the CWA requires and makes it impossible for WAC members to make informed decisions about the operation, logistics, and finances of their businesses. Even worse, under the CWA, WAC members may be subjected to severe criminal and civil penalties and citizen suits.

The Proposed Rule marks the latest development in nearly two decades of administrative proceedings, not to mention considerable litigation. WAC has submitted detailed comments on every proposed rule or draft guidance document that the Agencies have issued on the definition of WOTUS dating back to 2007:

- 2019 Proposed Revised Definition of "Waters of the United States," 84 Fed. Reg. 4,154 (Feb. 14, 2019)[10]
- 2018 Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodify the Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018)[11]
- 2017 Proposed Rule to Repeal the 2015 Clean Water Rule and Recodify the Preexisting Rule, 82 Fed. Reg. 34,899 (July 27, 2017)[12]

[10] Waters Advocacy Coalition, Comments on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule, Revised Definition of "Waters of the United States," Doc. No. EPA-HQ-OW-2018-0149-6849 (Apr. 15, 2019) ("2019 WAC Comments"), attached as Ex. 1.

[11] Waters Advocacy Coalition, Comments on the Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodify the Pre-existing Rules, Doc. No. EPA-HQ-OW-2017-0203-15249 (Aug. 13, 2018) ("2018 WAC Comments"), attached as Ex. 2.

[12] Waters Advocacy Coalition, Comments on the Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules, Doc. No. EPA-HQ-OW-2017-0203-11027 (Sept. 27, 2017) ("2017 WAC Comments"), attached as Ex. 3.

- 2014 Proposed Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014)[13]

- 2011 Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24,479 (May 2, 2011)[14]

- 2007 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*, 72 Fed. Reg. 31,824 (June 8, 2007)[15]

Separately, many individual members of the Coalition have submitted comments on these rulemaking proposals and guidance documents, as well as other agency actions.[16] In all of these comments, WAC and its members have consistently urged the Agencies to define "waters of the United States" in a way that: gives appropriate weight to the explicit statutory policy to recognize, preserve, and protect the States' traditional and primary authority over land and water use; adheres to the full Supreme Court precedent on the definition of WOTUS under the CWA; gives effect to the term "navigable" in the statutory text; draws clear lines between federal and state or tribal jurisdiction so that regulators and regulated entities can easily identify what features are subject to federal CWA jurisdiction; and accounts for science, but recognizes that the statutory text ultimately dictates jurisdiction.

Through their experience, planning, and operations, WAC members have developed extensive experience under the CWA and, in particular, with the practical consequences of how the Agencies define WOTUS.

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[13] Waters Advocacy Coalition, Comments on the Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Doc. No. EPA-HQ-OW-2011-0880-17921 (Nov. 13, 2014, corrected Nov. 14, 2014) ("2014 WAC Comments"), attached as Ex. 4.

[14] Waters Advocacy Coalition, et al., Comments in Response to the Draft Guidance on Identifying Waters Protected by the Clean Water Act, Doc. No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011) ("2011 WAC Comments"), attached as Ex. 5.

[15] American Farm Bureau Federation, et al., Comments in Response to the Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, Doc. No. EPA-HQ-OW-2007-0282-0204 (Jan. 22, 2008), attached as Ex. 6.

[16] For example, prior to WAC's formation, several members collectively commented on the Agencies' 2002 Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1,991 (Jan. 15, 2003). *See* Foundation for Environmental and Economic Progress, et al., Comments in Response to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," (Apr. 16, 2003), Doc. Nos. EPA-HQ-OW-2002-0050-1816 (comments), -1829 to -30 & -1832 to -35 (Exhibits and Appendices), attached together as Ex. 7.

C. Summary of Coalition Comments and Recommendations.

When Congress enacted the CWA, it did not intend "to exert anything more than its commerce power over navigation." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 168 n.3 (2001). To be sure, the CWA is broader than its predecessor statutes by extending federal regulatory authority beyond those interstate waters that are navigable-in-fact, or readily susceptible of being rendered so, *and* part of a continued highway over which interstate or foreign commerce is or may be carried by water. *See Rapanos*, 547 U.S. at 723. But Congress's use of the term "navigable" in the CWA "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. Equally important, the CWA reflects Congress's express policy to recognize, preserve, and protect the states' traditional and primary authority over land and water use. *See* 33 U.S.C. § 1251(b).

Over several decades, the Agencies have sought to steadily expand the definition of "waters of the United States" through regulations and guidance documents. The Supreme Court has had to intervene twice to curb the Agencies' overreach and reinforce the limits that Congress placed on their regulatory authority under the CWA. Nonetheless, with this latest Proposal, the Agencies are back to their old ways of testing the outer limits of their authority by, among other things, articulating as broad a view of the "significant nexus" standard from Justice Kennedy's concurring opinion in *Rapanos* as the Agencies have ever taken.

As explained in these comments, the Proposed Rule suffers from numerous flaws in its attempts to expand the Agencies' authority beyond the limits set by Congress in the CWA and recognized by the Supreme Court. WAC members are especially concerned about the following aspects of the Proposal:

- The Agencies have reverted to disregarding the limits that Congress and the Supreme Court placed on their CWA authority and giving short shrift to the Congressional policy to recognize, preserve, and protect the primary responsibilities and rights of states to plan the use and development of land and water resources. In particular, the Proposed Rule effectively revives the 2015 Rule's overbroad approach to significant nexus that appears to reach further than the approaches to jurisdiction that the Supreme Court rejected in *SWANCC* and *Rapanos*.

- The Agencies badly misinterpret *Rapanos* in the Proposed Rule by: (1) allowing for the assertion of jurisdiction under either the plurality's relatively permanent standard or Justice Kennedy's significant nexus standard; and (2) misreading both of those opinions to expand jurisdiction to far more water features than the plurality or Justice Kennedy had in mind in writing their respective opinions.

- The significant nexus standard in the Proposed Rule is unconstitutionally vague. The Agencies leave certain key terms such as "similarly situated" and "in the region" undefined. To make things worse, the rule gives individual regulators too much discretion to assert jurisdiction based on subjective determinations and nebulous

inquiries. This standard does not give property owners fair notice of when the CWA actually applies to their lands.

- Because the so-called "foundational waters" in the Proposed Rule are defined too broadly, the other categories of waters that are jurisdictional because of their relationship to foundational waters are likewise overbroad. The Agencies' view of what constitutes traditional navigable waters is inconsistent with Supreme Court precedents. Moreover, the standalone interstate waters/wetlands category impermissibly reads the term "navigable" out of the CWA.

- The tributaries, adjacent wetlands, and other waters categories impermissibly expand the scope of federal regulatory authority based on misinterpretations of the *Rapanos* plurality and concurring opinions. The newly expanded "other waters" is especially flawed and would effectively allow the Agencies to claim jurisdiction over a wide array of isolated water features that have not previously been regulated as "waters of the United States." This expansion is incompatible with *SWANCC*.

- None of the reasons that the Agencies provide for repealing the NWPR withstand scrutiny. The Agencies' claims that the NWPR does not advance the Section 101(a) objective and is inconsistent with the science are based on a deeply flawed interpretation of the Act and mischaracterizations of the record supporting the NWPR. Moreover, the record for this rule does not support the Agencies' claims that the NWPR was causing environmental harm.

- The Proposed Rule's expanded definition of "waters of the United States" will substantially affect all CWA programs. The Agencies have not adequately considered the implications of that expansion.

- The Agencies' claim that the Proposed Rule will have zero impact on regulators or the regulated community because it codifies essentially the same definition as the pre-2015 regime they are currently implementing is implausible. The Agencies must actually assess the economic impact of broadening jurisdiction beyond the current regime. Furthermore, they must correct the many errors in their secondary baseline analysis comparing the Proposed Rule to the NWPR.

- In rushing to issue the Proposed Rule, the Agencies have failed to meaningfully comply with several requirements applicable to this rulemaking proceeding.

These and other concerns are discussed in detail below. We hope the Agencies carefully consider the Coalition's comments and recommendations.

II. The Proposed Rule Disregards Important Constitutional, Statutory, and Judicial Limitations on Federal Authority.

The Agencies' Proposed Rule professes constraint, using such phrases as "limiting jurisdiction only to those waters that significantly affect the integrity of waters where the federal interest is indisputable." 86 Fed. Reg. at 69,402. The Agencies claim to be taking a more limited

view of their jurisdiction than they did in the 2015 Rule, largely by adhering to a case-by-case approach to significant nexus. Yet the clear aim of the Proposed Rule is to expand federal regulatory authority incrementally, through aggregation analyses that are even broader than the pre-2015 regulatory regime that the Agencies are currently implementing. The Agencies continue to push constitutional limits on their authority, proffering theories of jurisdiction that are even broader than either of the theories the Supreme Court rejected in *SWANCC* and *Rapanos*. The Proposed Rule encompasses various non-navigable features, such as isolated wetlands, ephemeral drainages, and isolated ponds, that have previously been non-jurisdictional. Like the features at issue in *SWANCC* and *Rapanos*, these features are a far cry from the "navigable waters" over which Congress sought to exercise its commerce power. The Proposed Rule wholly ignores the limits recognized by the Supreme Court, and once again the agencies' expansive jurisdictional interpretations run afoul of the limits of Congress's commerce power over navigation.

A. The Proposed Rule Exceeds the Limits of Congress's Commerce Power Over Navigation and Results in a Significant Impingement on State and Local Authority.

The Proposed Rule purports to "advance[] the objective of the Act in section 101(a) and respect[] the role of states and tribes in 101(b)." 86 Fed. Reg. at 69,399. In actuality, the Proposed Rule departs from key CWA principles in several respects, most notably by disregarding the significant Commerce Clause and federalism restraints on the Agencies' assertions of jurisdiction that courts have recognized.[17] "Where an administrative interpretation of a statute invokes the outer limits of Congress's power," the Supreme Court has reminded, "we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. Similarly, the Supreme Court more recently stated: "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022). "There can be little doubt that [the CWA's] mandate qualifies as an exercise of such authority." *Id.* In this proposal, the Agencies again test the "outer limits" of these Commerce Clause and federalism constraints, and in both cases lack a clear statement from Congress to allow them to do so.

1. In Enacting the Clean Water Act, Congress Exercised Its Traditional Commerce Power Over *Navigation*.

Congress can only exert and delegate authority to the extent empowered by the Constitution. *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *Atl. City Elec. Co.* v. *FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony.") (internal quotes omitted). The Constitution, in turn,

[17] In this respect, the Proposed Rule is nothing new, and WAC has repeatedly submitted comments explaining the constitutional and statutory interpretation errors the Agencies have engaged in over the past several decades in their quest to expand federal jurisdiction over the nation's waters. *See, e.g.*, 2018 WAC Comments at 6-12 & 17-18 (attached as Ex. 2); 2017 WAC Comments at 4-9 (attached as Ex. 3); 2014 WAC Comments at 5-7, 12-14 & 46-47 (attached as Ex. 4); 2011 WAC Comments at 59-61 & 76-78 (attached as Ex. 5).

has authorized Congress, through the Commerce Clause, to regulate interstate and foreign commerce. For over 100 years, Congress has employed its Commerce Clause power to protect the country's waterways with navigability as the touchstone for the exercise of federal regulatory power. *See* Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 (prohibiting the unpermitted discharge of "refuse matter" "into any navigable water of the United States" or any tributary thereof).

In the CWA, Congress similarly couched its delegation of jurisdiction to the Agencies in terms of "navigable waters." 33 U.S.C. § 1362(7) (defining "navigable waters" to mean "the waters of the United States, including the territorial seas"). While it has come to be understood that Congress did not intend to limit the scope of federal jurisdiction *only* to waters that are navigable in the traditional sense, *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring in the judgment), navigability remains the touchstone for federal jurisdiction *vel non*. Indeed, the Supreme Court has explained that the word "navigable" "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 159 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)). In other words, in passing the CWA, Congress intended to exercise its traditional "commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3.

Recognizing these limits on federal regulatory authority under the CWA, the Supreme Court has several times curtailed the Agencies' overbroad interpretations of the Act. In *SWANCC*, for example, the Court characterized the Corps' assertion of jurisdiction over ponds at an abandoned sand and gravel pit based on their use by migratory birds as "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." 531 U.S. at 173. Indeed, the Corps' attempt raised "significant constitutional questions." *Id.* at 174. Not only did *SWANCC* emphasize the importance of the term "navigable" in holding that the text of the statute does not allow the Court "to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water," *id.* at 168, the Court explicitly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows. *See id.* at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).

After finding the CWA clearly foreclosed the government's interpretation, the Court rejected the government's argument that its jurisdictional claims could be upheld based on "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce." *SWANCC,* 531 U.S. at 173. In so doing, the Court stressed that allowing the government to "claim federal jurisdiction over ponds and mudflats [covered by the Migratory Bird Rule at issue] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 174. Such an interpretation, pushing the limits of Congressional authority, could only be upheld if there were "a clear statement from Congress that it intended" such a result. *Id*. The Court found no such statement. Quite the opposite: "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources[.]'" *Id.* (quoting 33 U.S.C. § 1251(b)).

SWANCC, therefore, precludes the argument that the CWA authorizes regulation based on the "substantial effects" test, 531 U.S. at 173, as the Agencies appear to acknowledge in this

Proposed Rule. *See* 86 Fed. Reg. at 69,419. Rather, authority to regulate navigable waters derives from the authority to regulate channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2001) (including "navigable rivers, lakes, and canals" among the channels of commerce). The authority to regulate the channels of interstate commerce, in turn, cannot be stretched so far as to read the term "navigable" out of the statute.[18] Moreover, regulation to the fullest extent of Commerce Clause powers risks running afoul of other constitutional constraints on Congress, such as the balance of power between federal and state governments. As the Supreme Court cautioned in *United States v. Lopez*, the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." 514 U.S. 549, 566 (1995). There, the Court ruled that to uphold a federal ban on firearms near schools would require the Court to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. So too here would upholding jurisdiction over any water with virtually any sort of connection to navigable waters, based on the ability to aggregate the cumulative effects across entire watersheds over time, amount to recognizing a "general [federal] police power" that does not exist. *Id.*

The Supreme Court continued to impose checks on the Agencies' regulatory overreach in *Rapanos*. There, the Supreme Court found that asserting jurisdiction under an "any connection" theory over wetlands that were *not* adjacent to traditional navigable waters "stretch[ed] the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738 (plurality). Asserting jurisdiction over an area based on any connection, no matter how tenuous, to a non-navigable water risks violating the Agencies' constitutional remit.[19]

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[18] The Agencies quote from *Appalachian Elec. Power Co.*, 311 U.S. 377 and *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 525–526 (1941) to argue for an expansive interpretation of the channels power under the Commerce Clause. *See* 86 Fed. Reg. at 69,397. But the Agencies fail to parse whether the quotes from those cases discussed Congress's power to regulate the channels of interstate commerce as opposed to its power to regulate intrastate activities that substantially affect interstate commerce. Again, the latter power is off limits following *SWANCC*. The Agencies point to no authority that stands for the proposition that the commerce power over navigation encompasses the regulation of *all* water features that affect the integrity (but not necessarily navigability) of a downstream channel of interstate commerce. Moreover, as the plurality pointed out in *Rapanos*, "what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?" 547 U.S. at 755 (plurality).

[19] In *United States v. Riverside Bayview Homes*, the Court concluded that the Agencies could assert jurisdiction over "wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. 121, 135 (1985). The Court reasoned that, under the facts presented and the statute as interpreted in 1985, "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.* at 134. However, in that case, the Court was only evaluating the Agencies' assertion of jurisdiction over a wetland adjacent to a navigable-in-fact water, not, importantly, a wetland several degrees removed from a navigable-in-fact water. And since then, as explained further herein, the Court has expressed increasingly

The through line of these cases is clear: "navigable waters" does not mean the same thing as "any waters" or even the "Nation's waters." The Court in *SWANCC* cautioned that although "navigable waters" may be interpreted to encompass some non-navigable features, "navigable" must retain "independent significance" and cannot be read out of the statute. *SWANCC*, 531 U.S. at 172. Furthermore, *SWANCC* was not limited to the particular isolated intrastate water features or the Migratory Bird Rule that were before the Court. Rather, it applies with equal force to any interpretation of CWA jurisdiction. Therefore, re-asserting jurisdiction over the very ponds at issue in *SWANCC* under some alternative theory, such as a novel interpretation of what constitutes a "significant nexus," is legally infirm, both as a matter of statutory interpretation and considering constitutional limits on Congress's and the Agencies' authority. *See Rapanos*, (Kennedy, J. concurring) (reaffirming the continued viability of *SWANCC*); *cf.* 2008 *Rapanos* Guidance at 9 n. 32 ("Justice Kennedy cites *SWANCC* with approval and asserts that the significant nexus standard, rather than being articulated for the first time in *Rapanos*, was established in *SWANCC*. . . . It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in *SWANCC*. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*.").

2. The Proposed Rule Espouses an Impermissibly Constrained Role for the States in the CWA.

Under the Proposed Rule, only that which is left over from the Agencies' dramatic expansion of federal jurisdiction falls within the States' exclusive authority. But the Agencies misconstrue Section 101(b) in the Proposal. They assert the provision is best read as merely a recognition of States' authority to address water pollution and to support EPA's exercise of authority to advance the Act's objective, *not* as a general policy of deference to state regulation to the exclusion of federal regulation. 86 Fed. Reg. at 69,400-01. But the Agencies' interpretation does not give sufficient weight to the policy's explicit reference to preserving and protecting States' primary responsibilities and rights to *plan the development and use of land and water resources*, which the Supreme Court emphasized in rejecting the Government's broad interpretation in *SWANCC*. *See* 531 U.S. at 172-74.

At the outset, basic canons of statutory interpretation require that Sections 101(a) and 101(b) be read together. *See United States v. Mills*, 850 F.3d 693, 698 (4th Cir. 2017) ("adjacent statutory subsections that refer to the same subject should be read harmoniously") (internal quotation marks omitted). In Section 101(a), Congress expressed the CWA's "objective" as "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," and enumerated seven national goals or policies to achieve that objective. 33 U.S.C. § 1251(a). Congress did not specify how to realize those goals or policies in that provision. But Congress did articulate in the very next section its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the

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skeptical views of the Agencies' exertion of authority to continue expanding federal authority to match the Agencies' evolving "ecological judgment." *Rapanos*, 547 U.S. at 740 & 749 (plurality).

development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of EPA] in the exercise of his authority under this chapter." *Id*. § 1251(b).

Read together, Section 101(b)'s policy of preserving and protecting states' rights and responsibilities must inform Section 101(a)'s objective of maintaining the integrity of waters. As the NWPR correctly noted, this conclusion is evident when examining the distinction between an "objective" and a "policy." An "objective" is a "goal," something to be aspired to. *See, e.g.*, 84 Fed. Reg. 56,626, 56,634 & n.20 (Oct. 22, 2019); 85 Fed. Reg. at 22,269. A *policy*, by contrast, is a means to achieve the goal; a "'plan or course of action.'" 84 Fed. Reg. at 56,634 (quoting *Webster's II, New Riverside Univ. Dictionary*); *see also* 85 Fed. Reg. at 22,252 (explaining that "Congress also established several key policies that direct the work of the agencies to effectuate th[e] goals"). Courts presume that Congress chooses language purposefully. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Here, particularly given that Congress chose to set forth an "objective" and a "policy" in sequential subsections, this distinction must be given effect. But the Agencies give short shrift to the role of Congress's policy in Section 101(b) in achieving the objectives set forth in Section 101(a).

The Agencies read Section 101(b) as relegating states to be mere enforcers of federal policy. *See, e.g.*, 86 Fed. Reg. at 69,400-01. The language the Agencies use is slightly less harsh—reading Section 101(b) "as a recognition of states' authority to '*prevent, reduce, and eliminate* pollution' and **provide support for the Administrator's exercise of his authority** to advance the objective of the Act." *Id.* at 69,400 (bolded emphasis added). The Agencies claim to have "considered" the important language in Section 101(b) that commands respect for States' rights "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* at 69,401. Yet they effectively discard the significance of that language altogether, as though it has nothing to say regarding the permissible level of federal encroachment on traditional state powers.

In fact, the CWA preserves a significant and primary role for states in implementing the Act. For example, Congress declared as a national policy that *states* manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. 33 U.S.C. § 1251(b). States also establish water quality standards and enforce those standards through permitting, enforcement, and their Section 401 water quality certification authority, among other means. And almost all states administer portions of the NPDES permit program. Beyond the regulatory powers entrusted to states, the CWA also provides a non-regulatory statutory framework to provide technical and financial assistance to states, municipal groups, and cooperation with other federal agencies to improve the quality of the nation's waters. It is important to note that these programs and assistance are *not* limited to protecting "navigable waters" that the Agencies interpret to be "waters of the United States." Rather, the CWA's broad array of protections of the nation's waters also include, for example:

- Grants to research improved methods of "preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants" (§ 1255(a)(1)) (emphasis added);

- Grants for projects to improve waste treatment and water purification methods (§ 1255(a)(2));

- Grants to research treatment and pollution control from point and nonpoint sources in river basins (§ 1255(b));

- Grants for research and demonstration projects for prevention of "*pollution of any waters* by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants," which is in turn defined more narrowly as the "addition of any pollutant to *navigable waters* from any point source" (§ 1255(c) and § 1362(12)) (emphases added);

- Waste-management, waste-treatment, and pollutant-effects research and development (§ 1255(d));

- Grants for research in preventing and reducing agricultural and sewage pollution in rural areas, in consultation with the Secretary of Agriculture (§ 1255(e)); and

- Programs for management of the Great Lakes (§ 1268), Chesapeake Bay (§ 1267), Long Island Sound (§ 1269), and Lake Champlain (§ 1270).

States and federal agencies must therefore work *cooperatively* to manage the nation's water resources under the framework established by the CWA, and not at cross-purposes due to incessant jurisdictional tug-of-war. But the Agencies' assertions in the Proposed Rule make it difficult to see how states are treated as co-equal partners in the federal government when implementing the CWA.

The Agencies profess fidelity to Supreme Court precedent in their diminution of the states' role, *see* 86 Fed. Reg. at 69,401, but their cramped reading of Section 101(b) disregards the *SWANCC* Court's cautions against overreach. Indeed, when the Court "read the statute as written to avoid the significant constitutional and federalism questions raised by [the government']s interpretation" it zeroed in on the very language in Section 101(b) that the Agencies try to downplay. *See id.* at 174 ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources[.]' 33 U. S. C. § 1251(b)."). The Agencies try to assure stakeholders that the Proposed Rule is carefully tailored to avoid these concerns by limiting jurisdiction "only to those waters that significantly affect the integrity of waters where the federal interest is indisputable[.]" *See* 86 Fed. Reg. at 69,402. But as explained throughout these comments, the Agencies' broadened definition of what it means to "significantly affect" a navigable water, coupled with the Agencies' expansive interpretation of ambiguous terms in Justice Kennedy's concurring opinion in *Rapanos* (*e.g.*, "similarly situated" and "in the region"), provides no such assurance.

3. The Proposed Rule's Approach to Jurisdiction Is Every Bit as Broad as the Theories of Jurisdiction the Supreme Court Rejected in *SWANCC* and *Rapanos*.

As detailed above, *SWANCC* rejected the government's assertion of jurisdiction based on the migratory bird theory. Five years later, in *Rapanos*, a majority of the Court rejected the Agencies' attempts to assert jurisdiction over any non-navigable waters that have a "mere hydrologic connection" to navigable waters. *See Rapanos*, 547 U.S. at 739-40 (plurality). The plurality in particular emphasized that this approach would bring "virtually all planning of the development and use of land and water resources by the States under federal control," and therefore could not be a lawful interpretation of "waters of the United States." *See id.* at 737 (internal quotation marks omitted).

Despite these rebukes, the Proposed Rule effectively revives the impermissibly expansive "significant nexus" standard from the 2015 Rule, thus opening the door to limitless assertions of jurisdiction that are as broad as, if not broader than, the approaches the Supreme Court previously rejected. While the Proposed Rule does not go quite as far as the 2015 Rule in terms of categorically asserting jurisdiction over all tributaries and all adjacent waters, the Agencies have all but preordained the outcomes of significant nexus determinations, which under the Proposed Rule can involve consideration of the cumulative effects of streams, wetlands, and open waters across entire watersheds (or equally broad interpretations of "in the region"). *See* 86 Fed. Reg. at 69,439-40. If the Agencies determine that such features, in the aggregate, have a "more than speculative or insubstantial" effect on a downstream traditional navigable water ("TNW"), interstate water, or territorial sea, they can claim jurisdiction over all of them.

In an apparent attempt to ensure such a result, the Agencies point to the 2015 Connectivity Report, as supplemented by literature that has been published since then. *See generally* Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States'" Rule, Doc. No. EPA-HQ-OW-2021-0602-0081 (Nov. 18, 2021) ("TSD"). Just a few years ago, the Agencies leaned on this report to justify the *categorical* assertion of federal jurisdiction over: (i) *all* tributaries (rivers, streams, canals, ditches) that contribute direct or indirect flow to a TNW, interstate water, or territorial sea that is characterized by the presence of physical indicators of a bed, bank, and an ordinary high water mark; (ii) *all* water features within 100 feet of the ordinary high water mark of a TNW, interstate water, territorial sea, or tributary; (iii) *all* water features if any portion is within the 100-year floodplain of a TNW, interstate water, territorial sea, or tributary and within 1,500 feet of the ordinary high water mark of such a water; (iv) *all* water features if any portion is within 1,500 of the high tide line of a TNW, interstate water, or territorial sea; and (v) *all* water features if any portion is within 1,500 feet of the ordinary high water mark of the Great Lakes. Just as they did in 2015, the Agencies once again conclude that:

- "The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributaries, regardless of size of flow duration, are physically, chemically, and biologically connected to downstream waters and strongly influence their function." TSD at 64.

- "Wetlands and open waters in riparian areas and floodplains are physically, chemically, and biologically integrated with rivers via functions that improve downstream water quality. These systems buffer downstream waters from pollution and are essential components of river food webs." *Id.*

- "Wetlands and open waters located outside of riparian areas and floodplains, even when lacking surface water connections, provide numerous functions that could affect the integrity of downstream waters. Some benefits of these wetlands are due to their relative isolation than their connections." *Id.*

Similar statements appear throughout the TSD and the Proposed Rule. Accordingly, the Agencies have not merely placed their thumb on the scale in favor of finding a significant nexus; they are standing on the scale. It is hard to imagine an instance where a regulator could possibly find that features, when aggregated across large regions, will not have more than speculative or insubstantial effects on either chemical, physical, *or* biological integrity of some downstream water.[20] Like the 2015 Rule, the Proposed Rule's approach to jurisdiction is nearly limitless. Compared to the 2015 Rule, the Agencies are really only constrained by the time it takes to document their significant nexus findings. Over time, the Agencies' assertions of jurisdiction under the Proposed Rule will almost assuredly encompass remote features like those that troubled Justice Kennedy in *Rapanos* that are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). Indeed, the Proposed Rule would extend the definition of "waters of the United States" to a whole host of features that are remote from TNWs and carry minor volumes, including ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, man-made drainage ditches, and arroyos, all of which a majority of the Court in *Rapanos* found are beyond the scope of federal jurisdiction. *Id.* at 734 (plurality); *id.* at 781 (Kennedy, J., concurring). Once again, the term "waters of the United States" "cannot bear the expansive meaning" the agencies would give it. *Id.* at 731 (plurality).

In attempting to justify a reduced role for the States, the Agencies once again express the unfounded concern that States will engage in a race-to-the-bottom deregulatory spree, leaving vast numbers of waterbodies unprotected should the federal government not intervene. *E.g.*, 86 Fed. Reg. at 69,415-16. The evidence the Agencies cite in support is that, in the approximately *one year* that the NWPR was in effect, *two* States removed "expansive" protections. *Id.* But the Agencies correctly explained in 2019 that legal changes at the State level in response to federal rulemaking exist along a continuum, and that more appropriate methodologies developed to assess costs and benefits undermined the Agencies' prior concerns in this regard. 84 Fed. Reg. at 56,663-64.

[20] The limited examples of waters and wetlands that the Agencies deemed non-jurisdictional under the pre-2015 regulatory regime provide little comfort on this point. *See* 86 Fed. Reg. at 69,432. In all events, those examples beg the question of whether the Agencies could find some or all of those features to be jurisdictional under the expanded approach to "significant nexus" standard in the Proposed Rule.

In the end, in adopting a WOTUS definition, it is only by giving full effect to the term "navigable" that the Agencies can respect—as they must—both the limits of federal authority that flow from the Commerce Clause *and* from Congress's explicit choice to preserve and protect the states' traditional and primary authority over land and water use. In addition to exceeding the limits of Congress's authority under the Commerce Clause, the Proposed Rule also runs afoul of the Constitution by encroaching on the traditional power of states to regulate land and water.

B. The Agencies Once Again Misinterpret *Rapanos*.

The Agencies describe the Proposed Rule as a mere codification of the pre-2015 regulatory regime they are currently implementing. *E.g.*, 86 Fed. Reg. at 69,406.[21] That description provides no certainty, predictability, or assurance that the Agencies will adhere to the limits Congress placed on their authority. Moreover, the Proposed Rule is a thinly-veiled attempt to expand the Agencies' jurisdictional reach by appealing to deference to the Agencies' evolving ecological judgment. In essence, the Agencies are converting a limiting principle on the Agencies' overreach that Justice Kennedy articulated in *Rapanos* into a justification for what amounts to a "strictly ecological" approach to jurisdiction that "would swiftly overwhelm *SWANCC* altogether." *Rapanos*, 547 U.S. at 749 (plurality).

But before detailing the ways in which the Agencies misconstrue Justice Kennedy's opinion (and the plurality's, for that matter), it is important to first explain why the Proposed Rule's "either/or" approach to *Rapanos* is improper. To identify a workable, legally sound rule, the Agencies must reconcile the *Rapanos* plurality opinion with the concurrence, not conclude that jurisdiction may be found under the principles elucidated in one or the other. But even if this were an acceptable approach, the Agencies must revisit their interpretation of both opinions, because their current reading is insupportable.

1. The Either/Or Approach Is Legally Flawed.

The Agencies propose to assert jurisdiction over any water that meets "either the relatively permanent standard or the significant nexus standard," 86 Fed. Reg. at 69,373. This approach errs in two fundamental ways: (i) it impermissibly treats the concurring opinion of a single justice as a controlling opinion; and (ii) it unlawfully adopts the dissent's view that the Agencies can assert jurisdiction under either approach. To establish a rule that has any chance of surviving judicial scrutiny, the Agencies must instead assert jurisdiction only over either: (i) those waters that would be jurisdictional under the common holdings of the two opinions; or (ii) those waters that meet *both* tests the opinions set forth.

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[21] The Proposed Rule describes this regime as "the agencies' pre-2015 definition of 'waters of the United States,' implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience." 86 Fed. Reg. at 69,373 n.4. The Economic Analysis more precisely states that "the pre-2015 regulatory regime, [] consists of the 1986 'waters of the United States' regulation (33 CFR § 328.3), as informed by the 2003 *SWANCC* and 2008 *Rapanos* Guidance documents." *See* Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States'" Rule, Doc. No. EPA-HQ-OW-2021-0602-0083, at 19 (Nov. 17, 2021).

a. There Is No Single Controlling Opinion from *Rapanos*.

In *Rapanos*, no opinion united five Justices. Although there was majority agreement as to the *judgment*—with Justice Kennedy concurring with the result—there was no controlling majority *opinion* for lower courts (or the Agencies) to follow. In such a situation, the Supreme Court instructs that "'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). "[T]he *Marks* rule produces a determinative holding 'only when one opinion is a logical subset of other, broader opinions.'" *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1141 (10th Cir 2012); *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) ("Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down."); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("[O]ne opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.").

Properly understood, under *Marks*, which the Proposed Rule barely mentions, there is no single controlling opinion from *Rapanos*. Here, neither the plurality nor concurring opinions can be interpreted as a logical subset of the other. The plurality devised a two-part test to determine whether a wetland was within the CWA's jurisdictional reach. First, there must be "waters" that contain a "relatively permanent flow" that are connected to a "traditional interstate navigable water." *Rapanos*, 547 U.S. at 742. Second, the "wetland [must] ha[ve] a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* By contrast, Justice Kennedy's significant nexus test provided that wetlands "possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (Kennedy, J. concurring).

The plurality did not accept Justice Kennedy's significant nexus test because it "leaves the [CWA]'s 'text' and 'structure' virtually unaddressed." *Id*. at 753 (plurality). The plurality underscored that the "case-by-case determination of ecological effect" of a wetland on a navigable water under the significant nexus test "*was not the test*" and had been "*specifically rejected*" by the Court's prior cases. *Id*. at 754. Correspondingly, Justice Kennedy did not accept the plurality's test, finding it to be "inconsistent with the Act's text, structure, and purpose." *Id*. at 776 (Kennedy, J.). He concluded that the plurality's reliance on the permanence of water flow "makes little practical sense" and was precluded by the common understanding of "waters." *Id*. at 769. Justice Kennedy further stated that the requirement of a continuous surface connection found no support in precedent. *Id*. at 774. The plurality's test, but not the significant nexus test, would exclude wetlands that abut navigable-in-fact waters but lack a continuous surface connection, and it would include wetlands with a surface-water connection with a small but continuously flowing stream that may be excluded by the significant nexus test. *Id*. at 776-77.

Because neither opinion is a logical subset of the other, the *Marks* analysis breaks down. In those circumstances, the answer is *not* adopting an "either/or" approach that treats both as

controlling opinions. Importantly, the Eleventh Circuit has already rejected this approach: "It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). As explained in more detail below, the Agencies must either look for whatever common ground exists between the plurality and concurring opinions or require the definition of "waters of the United States" to satisfy *both* opinions.

One final point bears emphasis: The Supreme Court itself looks to the plurality opinion, *not* Justice Kennedy's concurring opinion when it seeks guidance from *Rapanos* on the reach of the CWA. For example, in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court issued a fragmented decision addressing the meaning of language in the CWA regarding discharge of pollutants "from any point source." Four Justices wrote opinions and all of them cited the *Rapanos* plurality's discussion of point sources under the CWA. *Id*. at 1468-78; *id*. at 1478-79 (Kavanaugh, J., concurring); *id*. at 1479-82 (Thomas, J., dissenting); *id*. at 1482-92 (Alito, J., dissenting). While each opinion applied the plurality's reasoning differently, there can be no question that the Court believes the plurality—even though not a holding under *Marks*—is the source from which to draw guidance about the meaning of the statute.

b. The Agencies Cannot Rely on the Dissent to Justify the Proposal.

To support both their either/or approach and their interpretation of the plurality and concurring opinions, the Agencies seem to believe that they can rely on reasoning employed by *any five* Justices, even if the reasoning comes from a dissenting opinion that did *not* concur in the judgment. *E.g.*, 86 Fed. Reg. at 69,422. But the Agencies have no more interpretive leeway than the courts (in fact, they have less), and even courts must "ignore dissents" when determining the holding of a divided Supreme Court decision. *Cundiff*, 555 F.3d at 208 (citing *Marks*, 430 U.S. at 193); *Robison*, 505 F.3d at 1221 ("*Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented."); *King*, 950 F.2d at 783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

Marks instructs lower courts to apply a ruling enjoying the support of those who "*concurred in the judgment[]*." 430 U.S. at 193 (emphasis added). Notably, in determining the precedential effect of its fragmented decisions, the Supreme Court looks to the opinions of "the Justices whose votes were necessary to the judgment." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997). The first step in the analysis is to ascertain which opinions are "necessary to our judgment." *United States v. Santos*, 553 U.S. 507, 523 (2008). To achieve a legally supportable rule, then, the Agencies must ignore the dissent in *Rapanos*. And yet, the Agencies continue to rely on that opinion to understand the outer bounds of the Agencies' interpretive authority and justify the Proposed Rule's "either/or" approach. *E.g.*, 86 Fed. Reg. at 69,380, 69,386, 69,434.

The Agencies also should be mindful that Courts "do not defer to [an agency] with respect to the interpretation of judicial precedent." *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001); *see also, e.g., Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (there is "no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the [Supreme] Court's opinions"), *vacated on unrelated grounds*, 524

U.S. 11 (1998). *See* 18 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2006) ("Stare decisis does not apply to dissenting opinions."); 20 Am. Jur. 2d *Courts* § 134 ("A minority opinion has no binding, precedential value").

c. The Agencies Must Seek to Reconcile the Plurality and the Concurring Opinions.

In light of the foregoing, there are only two options for interpreting *Rapanos*: (i) the definition of WOTUS must be based on common ground between the plurality and concurring opinions, *see Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) (court may look for common ground in plurality and concurring opinions); or (ii) the definition of WOTUS must satisfy *both* opinions, as that would be the narrowest "position" taken by the majority opinions, read together. *Marks*, 430 U.S. at 193.

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, drains, ditches, and streams remote from navigable-in-fact water and carrying only minor volumes of water towards it would not be WOTUS, nor would the wetlands that lie alongside such a ditch, drain, or stream.

The aforementioned common ground can be found in the two *Rapanos* opinions. The plurality and concurring opinions share a common understanding of traditional navigable waters: the waters that were subject to regulation under the Rivers and Harbors Act prior to the passage of the CWA. *See Rapanos*, 547 U.S. at 723 (plurality, citing *The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)); *id.* at 760-61 (Kennedy, J., concurring, and citing same). This conception of traditional navigable waters is limited to waters that (1) are navigable-in-fact (or are susceptible to being made so, within reason), and (2) form a continued highway for the transport of goods in interstate commerce, together with other waters.

From that premise, both opinions also agree that the word "navigable" in the CWA must be given some effect. *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality). In this respect, while WOTUS necessarily includes some waters and wetlands not navigable-in-fact, those non-navigable waters and wetlands must bear a substantial connection to navigable waters. *Id*. at 739, 742 (plurality); *id*. at 784-85 (Kennedy, J.). With respect to non-navigable tributaries, for example, both opinions view tributaries as jurisdictional, or not, depending upon intrinsic characteristics such as volume and flow. *Id.* at 733-34 (plurality); *id.* at 778-81 (Kennedy, J.). As for wetlands, both opinions agree that wetlands abutting traditional navigable waters may be jurisdictional so long as they possess the requisite relationship, *i.e.*, *both* a regular, strong physical *and* functional connection. *Id.* at 739, 742 (plurality); *id.* at 778-81 (Kennedy, J.). However, irrespective of the science, equally important in the opinions' views is that environmental concerns not override statutory text. *Id*. at 745-46 (plurality); *id*. at 778 (Kennedy, J.). Finally, both opinions agree that WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, or waters or wetlands that are alongside a drain or ditch. *Id*. at 733-34, 742 (plurality); *id*. at 778, 778-91 (Kennedy, J.). These waters simply lack the requisite

characteristics to pass constitutional muster. *Id.* at 781 (Kennedy, J., concurring); *see id.* at 778-781 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative" effect on navigable waters) (Kennedy, J.); *id.* at 733-34 (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient) (plurality); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus") (plurality).

Alternatively, a definition of "waters of the United States" would have to satisfy both opinions, which would mean that jurisdictional waters must have a relatively permanent flow that reaches traditional navigable water; that wetlands have a continuous surface connection to navigable waters; and that the flow or connection is sufficient in frequency, duration, and proximity to significantly affect the chemical, physical, and biological integrity of covered waters.

Either of these approaches would be compatible with *Marks*. Incompatible, however, is the Agencies' view that "waters of the United States" are those waters that satisfy either the plurality's opinion or Justice Kennedy's opinion.

2. The Agencies Misinterpret the Plurality Opinion.

Separately, the Proposed Rule is fundamentally flawed because it fails to adhere to either opinion the Agencies purport to follow. The Proposed Rule strays from the plurality's test for asserting jurisdiction over wetlands and "relatively permanent" waters.[22] Even if the "either/or" approach were permissible, the Agencies must revise their interpretation to conform to the actual conclusions in the plurality's opinion.

First, in the plurality's view, assertion of jurisdiction over a non-navigable water (other than a wetland) requires that the water be "relatively permanent, standing or continuously flowing" and connected to a "traditional interstate navigable water[]." *Rapanos*, 547 U.S. at 739, 742. A jurisdictional wetland, by extension, "requires two findings: first, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water *connected to traditional interstate navigable waters*); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742 (emphasis added). By using the term "traditional interstate navigable waters," the plurality was referring to waters that are navigable-in-fact (or readily susceptible of being rendered so) that form part of a continued waterborne highway of interstate commerce. But the Agencies violate these requirements, wrongly removing the

[22] Indeed, the lack of respect the Agencies have for the plurality opinion is evident in their characterization of it as "administratively useful, but insufficient to meet the objective of the Clean Water Act." 86 Fed. Reg. at 69,397. Particularly hubristic is their description of it as "inconsistent with the Act's text and objective and runs counter to the science." *Id.* But the Supreme Court says what the law is, not the Agencies.

requirement that a relatively permanent water be connected to a "traditional interstate navigable water."

For instance, under the Proposed Rule's "(a)(5)" category, the Agencies claim jurisdiction over any relatively permanent non-navigable tributaries of waters *other* than traditional interstate navigable waters, such as tributaries of non-navigable interstate wetlands. 86 Fed. Reg. at 69,450. This cannot possibly be what the plurality opinion allows. Rather, asserting jurisdiction over non-navigable relatively permanent waters that are not connected to any traditional interstate navigable water is precisely the "essentially boundless view of the scope of [the Agencies'] power" that Chief Justice Roberts so roundly rejected in his *Rapanos* concurrence. 547 U.S. at 758.

The Agencies further misapply the plurality's holding by using a vague "flow at least seasonally" approach, where by "seasonally" they mean generally three months, or possibly even less time depending upon what part of the country the water feature is located. *E.g.*, 86 Fed. Reg. at 69,434; *see also id.* at 69,441 (citing an AJD in Oregon in noting that two months can also satisfy the relatively permanent standard). To be sure, the plurality indicated it would not necessarily *exclude* a 290-day, continuously flowing stream. *Rapanos*, 547 U.S. at 732 n.5. But that does not mean tributaries that flow for just one season can automatically be *included*—290 days is 200 days more than three months. If by 290 days, Justice Scalia really meant 90 days, surely he would have said so. But the plurality's acknowledgement of the possibility of federal jurisdiction over "relatively permanent waters" whose flow may be interrupted during a seasonal drought does not translate into the assertion of jurisdiction over any water with only one season of flow. At most, the footnote acknowledges the *possibility* of jurisdiction over seasonal rivers, streams, and tributaries, but only if those seasonal waters satisfy Scalia's overarching jurisdictional test. Thus, any definition of "relatively permanent" water based on the plurality opinion should be in the neighborhood of 290 days, *not* three months. In sum, the seasonal flow concept runs headlong into the plurality's jurisdictional test and its clear direction that ephemeral streams, wet meadows, and dry arroyos fail this jurisdictional test. *See Rapanos*, 547 U.S. at 732.[23]

Finally, the Agencies continue to interpret the plurality's use of the term "continuous surface connection" as not requiring surface water to be continuously present between the wetland and the tributary. *See* 86 Fed. Reg. at 69,435 ("A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary."). In support of this conclusion, the Agencies imply that the *Rapanos* plurality opinion diminished the force of the continuous surface connection requirement by "indicat[ing] that 'continuous surface connection' is a [mere] 'physical-connection requirement.'" *Id.* at 69,435 (citing *Rapanos*, 574 U.S. at 751 n.13). This conclusion is puzzling, given that the plurality describes the requisite connection as "making it difficult to determine where the *'water'* ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742 (emphasis added).

[23] In this regard, the Agencies appear to be relying on the 2008 *Rapanos* Guidance as though it has come under no scrutiny and as though it, in and of itself, were an authority on which it could rely. *E.g.*, 86 Fed. Reg. at 69.435.

In all events, it plainly is not enough for wetlands to have "only an intermittent, physically remote hydrologic connection to 'waters of the United States'" because such wetlands "do not implicate the boundary-drawing problem of *Riverside Bayview*." *Rapanos*, 547 U.S. at 742. Instead, they are fully *out* of bounds. Because the Agencies' standard does not require a "continuous surface water connection" and that surface connection can be to a feature that flows for only two months, the rule comes perilously close (or worse) to asserting jurisdiction over wetlands with the types of remote hydrological connections to traditional navigable waters that the Supreme Court in *SWANCC* and the *Rapanos* plurality rejected.

3. The Agencies' Interpretation of Justice Kennedy's "Significant Nexus" Standard Is Impermissibly Broad.

The Agencies claim to be mindful of Supreme Court decisions rejecting their past attempts at asserting jurisdiction over waters outside the bounds imposed by Congress and the Constitution. *See, e.g.*, 86 Fed. Reg. at 69,397-98. Nevertheless, they posit that Justice Kennedy's "significant nexus" standard—which was intended to prevent unreasonable applications of the CWA, in some ways perhaps more than Justice Scalia's—allows the Agencies to extend federal jurisdiction to virtually any wet spot, as long as the Agencies can combine that wet spot with other features in a watershed or "region," evaluate the cumulative effects of all of those features over time, and find a "more than speculative or insubstantial" connection to a traditional navigable water, interstate water, or the territorial seas. This disregards the limits on regulatory overreach the Supreme Court has articulated. Even if it were permissible for the Agencies to establish jurisdiction based solely on Justice Kennedy's opinion—it is not—the Agencies' interpretation of vague terms in that opinion stretch the significant nexus standard far beyond what Justice Kennedy envisioned. The Agencies seem content to ignore Justice Kennedy's warning in *U.S. Army Corps of Engineers v. Hawkes Co.*, that, based on the government's interpretations, "the reach and systemic consequences of the Clean Water Act remain a cause for concern" and that the Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." 578 U.S. 590, 602-03 (2016).

a. Significant Nexus Under the Agencies' Proposal

As noted above, the Agencies define "significantly affect" to mean "more than speculative or insubstantial effects on the chemical, physical, or biological integrity of" a traditional navigable water, interstate water, or the territorial seas. 86 Fed. Reg. at 69,449. To determine whether tributaries, wetlands, or "other waters" meet that test, the Agencies would evaluate them "either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform." 86 Fed. Reg. at 69,430. The proposed regulatory text does not define key terms such as "similarly situated" or "in the region," though the Agencies suggest that waters can be aggregated on a watershed basis. *See id.* at 69,439.[24] The

[24] Remarkably, the Agencies seem to suggest they could interpret "in the region" to mean far broader areas of land, such as one of the twelve Level I ecoregions, one of twenty USGS-developed hydrological landscape regions, or one of eight physiographic regions that span the country. *See* 86 Fed. Reg. at 69,440. In a gross understatement, the Agencies note that such considerations of similarly situated waters at such large scales "could potentially obscure the

regulatory text also does not specify what sorts of functions the Agencies will evaluate when considering whether a water significantly affects a downstream water, but the preamble rattles off a list of functions, any one of which could be enough to trigger a significant nexus finding, though the Agencies do solicit comment on whether to codify specific functions (*e.g.*, nutrient recycling; provision of habitat for aquatic species that also live in foundational waters; pollutant trapping; retention and attenuation of floodwaters and runoff) that are tied to integrity of downstream waters. *See id.* at 69,437-38, 69,431. When assessing functions, the Agencies explain that they will consider factors such as: (i) distance from a WOTUS; (ii) distance from a traditional navigable water, territorial sea, or interstate water; (iii) hydrologic factors, including shallow subsurface flow; (iv) the size, density, and/or number of waters that have been determined to be similarly situated; and (v) climatological variables such as temperature, rainfall, and snowpack. *Id.* at 69,449.

The Proposed Rule and its supporting analysis state that the Agencies currently assess the significant nexus standard under the 2008 *Rapanos* Guidance, *i.e.*, establishing the relevant tributary reach, followed by an analysis of flow and functions of the tributary together with all adjacent wetlands. *See, e.g.*, 86 Fed. Reg. at 69,433, 69,435, 69,437. The Agencies also assert that "[t]he entire reach of a stream is a reasonably identifiable hydrographic feature." *Id.* at 69,435. But as noted above, the Agencies seek comment on alternative, even broader approaches to assessing significant nexus that are strikingly similar to the 2015 Rule. *See id.* at 69,438-69,440. And the proposed "other waters" category necessarily envisions an expansion beyond the regulatory regime that the Agencies are currently implementing, to the extent the starting point for analyzing significant nexus for such waters is not a tributary reach. *Id.* at 69,440.

b. The Agencies Must Clearly Define the Scope of a "Significant Nexus" Inquiry.

On its face, the proposed regulatory text does not provide sufficient clarity to the regulated community about how regulators will conduct a significant nexus analysis. The text does not explain what it means for water features to be "similarly situated." Nor does the text define what "in the region" means. *See* 86 Fed. Reg. at 69,449-50. As a result, regulated entities are left to guess whether, for instance, an intermittent stream and a playa lake could be considered "similarly situated" or whether regulators can aggregate features across large areas of land in assessing whether they in combination significantly affect the integrity of a downstream navigable water. The preamble does not clear up this confusion. The Agencies begin by explaining that they are currently assessing significant nexus using the approach described in the 2008 *Rapanos* Guidance.[25] But rather than committing to maintaining that approach, they solicit

measurable effects of a single aquatic resource on a downstream traditional navigable water, interstate water, or territorial sea." *Id.*

[25] That approach begins with determining the relevant reach of the tributary. *See id.* at 69,437. After establishing the relevant reach, the Agencies will either (1) consider the flow and functions of just that reach if there are no wetlands; or (2) consider the flow and functions of the tributary reach along with the functions performed by adjacent wetlands. *See id.*

comment on whether they should adopt alternative—and substantially broader—approaches for determining whether a significant nexus exists. *See id.* at 69,438-40.

It is unclear whether the Agencies deliberately intend to give individual regulators the flexibility to adopt whatever approach they see fit or whether the Agencies would have to finalize different regulatory text than what they have proposed if they want to allow regulators to use approaches that are even broader than the 2008 *Rapanos* Guidance's approach to significant nexus, such as aggregating all similar features at the watershed scale. Either way, the Proposed Rule is unsound. If the former, the proposed significant nexus standard is unconstitutionally vague (*see* Part II.C below) and leaves far too much discretion to the Agencies to choose how they will determine whether any given water feature(s) significantly affects downstream navigable waters. This will almost certainly lead to confusion in the field, inconsistent determinations, and arbitrary enforcement. If the latter, the Agencies would stretch the significant nexus test from Justice Kennedy's *Rapanos* opinion beyond recognition and exceed the limits that Congress placed on their CWA authority (*see* Parts II.B.3.c & d below).

c. The Agencies Should Limit Application of the "Significant Nexus" Standard to Wetlands.

Another reason why the Agencies' application of the significant nexus test fails from the start is that they attempt to apply it beyond wetlands. 86 Fed. Reg. at 69,373. Justice Kennedy explained that "*wetlands* possess the requisite nexus . . . if the *wetlands*, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters." *Rapanos* 547 U.S. at 780 (emphasis added). *Rapanos* was a case focusing on wetlands, not other waters, and subsequent case law reinforces that Justice Kennedy's concurrence must apply to wetlands only.

Justice Kennedy's significant nexus standard has its origins in *Riverside Bayview*, where the Court upheld the Corps' jurisdiction over wetlands abutting navigable-in-fact waterways. 474 U.S. at 121-22. As the *SWANCC* Court later explained, "[i]t was the significant nexus between the *wetlands* and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *SWANCC*, 531 U.S. at 167 (emphasis added). In his concurring opinion in *Rapanos,* Justice Kennedy adopted this language as the standard for determining whether *wetlands* adjacent to non-navigable tributaries are jurisdictional. It is clear from his language that wetlands were the focus of his inquiry. Justice Kennedy instructed the Agencies to apply a case-by-case significant nexus analysis when they "seek[] to regulate *wetlands* based on adjacency to nonnavigable tributaries." *Id.* at 782 (emphasis added). The U.S. Court of Appeals for the Ninth Circuit concurred in this reading and rejected application of the significant nexus test to non-wetland waters, explaining that "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent *wetlands* . . . . No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act." *S. F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (rejecting Baykeeper's argument that the Supreme Court has held that the CWA protects all waterbodies with a significant nexus to navigable waters).

Beyond the plain text of the opinion, Justice Kennedy's limitation of the significant nexus standard to wetlands abutting traditional navigable waters reflects his recognition that "wetlands

adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Rapanos*, 547 U.S. at 779. Justice Kennedy further explained that "wetlands' status as 'integral parts of the aquatic environment'—that is, their significant nexus with navigable waters"—is what makes their inclusion in waters of the United States reasonable. *Id.* The Agencies do not explain why tributaries and non-wetland "other waters" that may not be serving the same integral ecologic functions for traditional navigable waters as wetlands can nevertheless be evaluated under the same standard. The Agencies therefore have no basis in existing precedent to extend Justice Kennedy's significant nexus test to tributaries, adjacent non-wetlands, and other waters.

d. Even the 2008 *Rapanos* Guidance's "Reach Plus Aggregation" Approach to Evaluating Significant Nexus Is Impermissibly Broad.

The Agencies' current approach of analyzing the flow and functions of a particular tributary along with all adjacent wetlands, while relatively modest in comparison to the alternatives that the Agencies are contemplating, lacks support in Justice Kennedy's concurring opinion. Even if the Agencies ultimately limit themselves to evaluating significant nexus under that approach, such an approach nevertheless exceeds their authority.

Justice Kennedy was concerned that the Corps' pre-*Rapanos* interpretation allowed for the assertion of jurisdiction over water features with remote proximity and tenuous connections to downstream navigable waters, without any specific analysis of the connections with the impacted waterbody itself. *See* 547 U.S. at 781 (Kennedy, J., concurring). Yet the reach and aggregation policies from the 2008 *Rapanos* Guidance allow the Agencies to assert jurisdiction over minor waterbodies that are far removed from a traditional navigable water and may or may not be dry for most of the year in contravention of Justice Kennedy's opinion.

Specifically, the Agencies propose to assert jurisdiction reach-by-reach—*i.e.*, extending jurisdiction farther and farther upstream *not* because waters independently contain the requisite nexus, but rather because they are part of a reach whose downstream confluence is determined to have a "significant nexus" to a traditional navigable water or to exhibit the characteristics of a relatively permanent water. 86 Fed. Reg. at 69,439. The Agencies' jurisdictional reach could thus extend hundreds of feet or many miles upstream from traditional navigable waters, as in the case of *Rapanos*, regardless of how much (or how little) the tributary actually satisfies the jurisdictional tests in *Rapanos*. Again, Justice Kennedy repeatedly expressed concern about federal jurisdiction over remote, insubstantial, or minor flows. *See* 547 U.S. at 778-79. He further emphasized distance, quantity, and regularity of flow are important to establish jurisdiction for a *particular* wetland. *See id.* at 784-87. Indeed, that every impacted water body must be judged *in its own right* to determine whether it (and it alone) has a significant nexus to traditional navigable waters is the central feature of Kennedy's jurisdictional test.

Nor does Justice Kennedy's opinion support the Agencies' ability to claim jurisdiction over wetlands and tributaries based on their collective effect on a downstream TNW. Under the Agencies' interpretation, they could exercise jurisdiction over wetlands whose connections to traditional navigable waters are tenuous and insubstantial—the exact opposite of "significant," and directly contrary to the Agencies' professed policy. The combined effect of the reach and

aggregation policies in the 2008 *Rapanos* Guidance all but negates consideration of distance and hydrologic factors for "the wetlands in question" as Justice Kennedy intended. *Rapanos*, 547 U.S. at 779. That Justice Kennedy intended to require this more narrow consideration is reinforced by the instructions he would have given to the lower court on remand: to "consider[] whether the *specific wetlands at issue* possess a significant nexus with navigable waters." *Id.* at 787 (emphasis added). Justice Kennedy's acknowledgement that "it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region," *id.* at 782—at least until the Agencies engaged in rulemaking—is not a roving license to gather up as many wetlands as possible surrounding a particular tributary to find, in the aggregate, a significant nexus. Rather, Justice Kennedy merely acknowledged that, after conducting a case-specific significant nexus analysis for one wetland, it *might* be reasonable to consider other, individual wetlands in that region with comparable characteristics also to possess a significant nexus.

WAC's concerns about the overly expansive nature of this approach are not hypothetical. For instance, the Agencies attempted to assert jurisdiction over 165 wetlands in Illinois based on the theory that those wetlands were "adjacent" to Midlothian Creek within the meaning of the 2008 *Rapanos* Guidance and that the wetlands collectively and significantly impacted a downstream navigable water eleven miles from the developer's property. *See Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1022-23 (7th Cir. 2018). After the developer spent *twelve years* challenging the Corps' overreach, a court of appeals ultimately intervened and rejected the Corps' assertion of authority. *See id.* at 1019. The Court emphasized that the "so-called Midlothian Creek watershed is 12,626 acres—almost 20 square miles—and that considerable size belies any assumption that lands within the watershed are necessarily, or even likely, adjacent to the Creek." *Id.* at 1026. The Court pointedly rejected the Corps' argument that it "need not show or explain how each of the 165 wetlands is adjacent to the Midlothian Creek," because such a view "would invite jurisdictional overreach." *Id.*

e. The Agencies Cannot Aggregate Water Features Across Entire Watersheds (or Similarly Broad Regions) to Find a Significant Nexus.

Although the Proposed Rule does not specify a particular approach to implementing the significant nexus standard, the Agencies seem poised to revive the watershed aggregation approach from the 2015 Rule. *See* 80 Fed. Reg. at 37,106 (defining "significant nexus" and stating that "in the region" means the watershed that drains to the nearest TNW, interstate water, or territorial sea and that waters are "similarly situated" when they function alike and are sufficiently close to function together in affecting downstream waters). The Agencies include these exact approaches to "similarly situated" and "in the region" among the range of alternatives they may implement under the Proposed Rule. *See id.* at 69,439-40. The Agencies further direct individual regulators to consider the "size of the watershed or subwatershed" when assessing hydrologic factors during a significant nexus analysis. *Id.* at 69,430. And the Agencies note that "the significant nexus standard in the proposed rule reflects the type of analysis in the Science Report by describing the components of a river system and watershed; the types of physical, chemical, and biological connections that link those components; the factors that influence connectivity at various temporal and spatial scales; and methods for quantifying connectivity."

Id. at 69,396. The watershed aggregation approach finds no support in Justice Kennedy's opinion.

The Agencies first suggest they can consider all "waters that are providing common, or similar, functions for downstream waters" to be "similarly situated." *Id.* at 69,439. This may include considering waterbodies of the same general type, *i.e.*, tributaries, adjacent wetlands, and other waters, to be similarly situated. *Id.* In an attempt to bolster this approach, the Agencies argue that "the best available science supports evaluating the connectivity and effects of streams, wetlands, and open waters to downstream waters in a cumulative manner in context with other streams, wetlands and open waters." *Id.* This is not what Justice Kennedy intended to allow. Justice Kennedy's foundation for the "significant nexus" analysis is the relationship between a traditional navigable water and an upstream wetland, based on the role the wetland plays in the physical, chemical, and biological integrity of the traditional navigable water. *See Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). As such, the notion that all wetlands within a watershed could be "similarly situated" regardless of where they are physically located just because they perform similar functions in a vacuum is at odds with Justice Kennedy's opinion. Justice Kennedy's use of the phrase "similarly situated" does not allow aggregation many miles or thousands of acres away based on performance of common or similar functions; rather, Justice Kennedy emphasized *proximity* to navigable waters, and *quantity and regularity* of flow. *See id.* at 778-79 (warning that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a significant nexus and criticizing the dissent for "permit[ting] federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters"). It is not the mere *fact* of a function that allows a water to be similarly situated to another, but rather its *intensity*, *i.e.*, its quantity, duration, etc., that matters.

Next, the Agencies err in conflating "in the region" with terms like "watershed," "subwatershed," "ecoregion," "hydrologic landscape regions," or "physiographic divisions." *See* 86 Fed. Reg. at 69,439-40. Similar to the 2015 Rule, the Proposal states that "the region could be sub-watersheds or the watershed defined by where a tributary and its upstream tributaries drain into a traditional navigable water, interstate water, or the territorial seas. If the watershed draining to the traditional navigable water, interstate water, or territorial sea is too large, the watershed could be evaluated at a subwatershed scale (*e.g.,* at the hydrologic unit code (HUC) 8, 10, or 12 watershed scale)." Under this interpretation, the Agencies could aggregate water features across vast areas of land, considering that the more "restrained" approach would still allow for aggregation at the HUC 8 scale (on average, 700 square miles), HUC 10 scale (on average, 227 square miles), or HUC 12 scale (on average, 40 square miles). These concepts would allow for the assertion of jurisdiction over isolated waters that bear no meaningful connection with downstream navigable waters. Expanding "region" in this manner is far afield of anything Justice Kennedy might have intended in his concurrence, as the Agencies correctly recognized when they repealed the 2015 Rule. *See* 84 Fed. Reg. at 56,644-45.

Waters in the State of Arizona illustrate the point. Only three rivers in Arizona (or sections of them) are traditional navigable waters, according to the Corps. *See* U.S. Army Corps

of Eng'rs, "TNWs & Navigable Waters in Los Angeles District."[26] Applying a watershed-wide jurisdictional analysis to one of these waters, the Colorado River, would allow for a wetland adjacent to one tributary to be aggregated with a wetland 270 river miles away, with a difference in elevation of over 4,000 feet. *See* 2011 WAC Comments at Ex. 8 (Map of Little Colorado River Watershed, attached hereto as part of Ex. 5). While both are wetlands, they cannot be said to be in the same "region," nor do they have similar relationships with the Colorado River—indeed, they exist in different landscapes entirely. Many other areas in the West are covered with features such as dry washes, arroyos, seasonal waterbodies, and ephemeral streams that have historically not been within federal CWA jurisdiction. Here, the Agencies' approach would allow them to aggregate numbers of these features together and find a significant nexus where there is none. The Science Advisory Board ("SAB") Panel recognized that the watershed of a navigable water could drain "significant portions of a single State"—undoubtedly, such a large area would, in the aggregate, have an effect on the downstream water. *See* 2014 WAC Comments at Ex. 7, p. 44 (Rodewald Memo transmitting SAB Panel Member Comments on Proposed Rule; attached hereto as part of Ex. 4). If the Agencies' job was merely to establish scientific connectivity, a watershed-scale inquiry might be permissible; but that is decidedly *not* the Agencies' job. Rather, the Agencies are supposed to use science, policy, and legal considerations to devise a workable rule that respects the boundaries Congress and the Constitution impose.

The Agencies should take a step back and evaluate whether this approach can be legally supported—it cannot. The Agencies got it right when they repealed the 2015 Rule following numerous losses in courts nationwide (both in the preliminary injunction context and on the merits), and the Agencies should revisit and readopt that reasoning. *See* 84 Fed. Reg. at 56,644-45. For example, the Agencies correctly recognized that the aggregation approach ignored the intent of Justice Kennedy's concurrence both to be articulating a *limiting* principle on the assertion of federal jurisdiction and to be rejecting an approach that would sweep in features like those disallowed in *SWANCC* under different auspices. *Id. at* 56,645. And the Agencies have been warned before about sweeping too broadly—not just by regulated entities, but also by scientists. The GEI Report that WAC commissioned in 2014, for example, concluded that "the Ecoregion and hydrologic landscape unit approaches both suffer from being too broad, and are not placed within a consistent framework of determining significance." *See* 2014 WAC Comments at Ex. 6, p. 7 (2014 GEI Report; attached hereto as part of Ex. 4). The ecoregion approach could render an entire watershed jurisdictional, thereby greatly increasing the need for Corps permits. The 2014 GEI Report estimated that "the extent of area proposed to be covered using the Ecoregion concept covers nearly a quarter of the country." *Id.* To be sure, in this Proposal, the Agencies acknowledge that such a broad analysis would "obscure the measurable effects of a single aquatic resource on a downstream traditional navigable water, interstate water, or territorial sea." 86 Fed. Reg. at 69,440. The Agencies should thus expressly disclaim the authority to conduct a significant nexus analysis on that, or any comparably broad, scale.

Finally, aggregation raises significant due process and fair notice concerns, as discussed in more detail below. And the discretion inherent in the Agencies' approach leaves the Agencies and permittees vulnerable to third parties who would be eager to seize on these vague concepts

[26] *Available at* https://www.spl.usace.army.mil/Missions/Regulatory/Jurisdictional-Determination/Navigable-Waterways/.

and erroneously allege non-compliance. For all of these reasons, the Agencies must reconsider this approach.

f. The Agencies' Amorphous Definition of "Significantly Affect" Sets the Bar Too Low for Determining Jurisdiction.

Once the relevant waterbodies are identified, the Agencies will then determine whether the waterbodies (in the aggregate, not individually) "significantly affect" a traditional navigable water such that a particular feature that is part of the aggregate can be deemed jurisdictional. Again, this is erroneous because waterbodies must *individually* exhibit the required characteristics to be jurisdictional; the Agencies should not be looking at the cumulative effects to grab all aggregated features. Furthermore, the Agencies ignore Justice Kennedy's requirement for some significance of connection between the individual waterbody and a traditional navigable water. Instead of attempting to determine a threshold level or quantification of significance, the Agencies nebulously define "significantly affect" as "more than speculative or insubstantial." 86 Fed. Reg. at 69,430. Surely, the Agencies would not consider this Proposal's chance of success in the courts to be "significant" if it is merely "more than speculative" or "insubstantial." But that is how the Agencies purport to determine jurisdiction for the vast majority of water features in the United States.

One way to view "significance" as a scientific matter is "statistical" significance, which means only that the result of an experiment is unlikely to be due to chance or error. *See* Amy Gallo, "A Refresher on Statistical Significance," *Harv. Bus. Rev.* (Feb. 16, 2016).[27] In statistics, a single percentage point could be "statistically significant." A nexus that is "unlikely to be erroneous" or that could be quantified in the single-digit percentages is decidedly *not* what Justice Kennedy had in mind when he used the term "significant" in the context of jurisdictional waters. Rather, using the everyday, plain-language meaning of "significant," Justice Kennedy meant the nexus had to be "full of import," "important," or "weighty." *See Webster's Third New International Dictionary of the English Language Unabridged* 2116 (1993); *see also Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (stating the "commonly understood" meaning of significant is "important"); *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that a "significant risk" of HIV transmission does not mean "any risk" and "must be rooted in sound medical opinion and not be speculative or fanciful"); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1189 (D.C. Cir. 1983) (television channels watched "occasionally" are not "significantly viewed" channels).

The Agencies' use of the "more than speculative or insubstantial" approach improperly amounts to allowing statistical significance to lead to a finding of actual significance, because it inverts the significant nexus test. Justice Kennedy made clear in his opinion that waters with a "speculative or insubstantial" connection to traditional navigable waters *fall far short* of his test. He specifically contrasted wetlands that displayed the requisite significant nexus by virtue of their demonstrable chemical, physical, and biological impact on traditional navigable waters to waters with only speculative or insubstantial impacts. *Rapanos*, 547 U.S. at 780 ("When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"). Justice Kennedy thus drew

[27] *Available at* https://hbr.org/2016/02/a-refresher-on-statistical-significance.

a sharp distinction between significant and speculative/insubstantial as though they were two opposite ends of a continuum. It cannot be the case, then, that speculative plus one, or insubstantial plus one, equals "significant."

Further, by defining "significantly affect" as "more than speculative or insubstantial effects," the Agencies ignore that Justice Kennedy's test was a limiting principle, setting a *higher* bar for jurisdiction than the Agencies had previously articulated. In this Proposal, the Agencies' conception of more than speculative or insubstantial does not reflect any attempt to ascertain whether effects are *actually* substantial or even important. And the Agencies' illustrative examples of waters that do not meet the significant nexus test seem only to confirm that the Agencies intend to continue asserting jurisdiction so long as there is *some* hydrologic or ecological connection, in plain disregard of *Rapanos*. *See* 86 Fed. Reg. at 69,432-33; *see also* Memorandum for the Record on Examples of Waters that Were Non-Jurisdictional Under the Pre-2015 Regulatory Regime, Doc. No. EPA-HQ-OW-2021-0602-0086 (Dec. 2, 2021).

The Agencies' attempts to lower the bar using a "more than speculative or insubstantial" standard have not been well received. As the Agencies previously acknowledged when they repealed the 2015 Rule, "several federal courts have now questioned the 2015 Rule's interpretation of Justice Kennedy's significant nexus standard in *Rapanos*." 84 Fed. Reg. at 56,645-46 (discussing *North Dakota v. EPA,* 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015) and *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 & n.3 (6t Cir. 2015)). More recently, the Seventh Circuit rejected the Corps' attempts to assert jurisdiction over wetlands based on the assertion that the wetlands in question "have the 'ability' to pass pollutants along" due to their "discrete and confined intermittent flow" to a tributary of a TNW. *See Orchard Hill*, 893 F.3d at 1021 & 1025. The Court explained that the wetlands in question made up "2.7 percent of the 462.9 total acres of the wetlands in the [] watershed" and thus, loss of those wetlands "would result in a floodwater rise of a fraction of a percent," which the Court deemed to be a "trivial number." *Id.* at 1025. The Court similarly rejected the Corps' arguments concerning the "potential increase on downstream nitrogen" from the wetlands in question; the Court noted that even if nitrogen were present, that "would presumably account for a small fraction of that increase to the Midlothian Creek (to say nothing of the increase to the navigable-in-fact River)" and that "[s]uch a bit impact seems 'insubstantial.'" *Id.*

Not only are the Agencies ignoring the prior *legal* warnings they have been given, they are also ignoring the *scientific* advice of their own advisors. Indeed, the SAB Panel expressed concern with the Agencies' vague conception of "significant" when commenting on the Connectivity Report years ago. *See* SAB, Panel for the Review of the EPA Water Body Connectivity Report, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) ("SAB Panel Review of Connectivity Report").[28] Unfortunately, the Agencies appear to have failed to meaningfully respond to the Panel's numerous suggestions of ways to improve the Connectivity Report. *Id.* While the Agencies do acknowledge that the

[28] WAC previously submitted this report as Exhibit 5 to its 2014 comments. The report is attached hereto in Part 1 of Exhibit 4.

"concept of a 'connectivity gradient' is useful," 86 Fed. Reg. at 69,395, it is difficult to discern how they put that concept into practice in the Proposal.

If anything, as GEI Consultants explain in their comments on the current Proposed Rule and the TSD, the lack of clarity around how to determine the significance of the various factors and functions "suggests that there is no gradient of hydrologic connection that would in fact be determined to be 'insubstantial and speculative.'" Lucy Harrington, Robert Gensemer, Jeniffer Lynch, GEI Consultants, "Technical Comments on Proposed Revised Definition of Waters of the United States" (Feb. 2, 2022) ("2022 GEI Report"), attached as Ex. 8; *id.* at 7 (explaining how the Agencies have muddied the gradient concept by "emphasizing that connections with low values . . . does not necessarily indicate low connectivity" and thus, "the concept of 'gradient of connectivity' does not appear to be a factor in determining what waters are jurisdictional, as even the lack of connection is linked to functions significantly affecting downstream jurisdictional waters.").

The Agencies' proposal even misstates Justice Kennedy's articulation of the standard. Justice Kennedy's "significant nexus" standard requires significant chemical, physical, *and* biological effects. The Agencies again improperly change "and" to "or." Not only does this misquote Justice Kennedy, it misquotes the *Act*, which also connects "chemical, physical, *and* biological" with an "and." 33 U.S.C. § 1251(a) (emphasis added). By substituting *or* for *and*, the proposed rule improperly lowers the standard and would find a significant effect where only one of the three qualities is present.

Yet another shortcoming of the Proposal is the lack of metrics for defining whether connections are significant. As such, the Agencies provide no scientific basis to conclude which connections are significant and which are non-significant. The Agencies speak generally about the importance of upstream waters to downstream waters and how evidence of even one factor or function can be enough to establish a significant nexus, but their explanation of this standard remains too vague. This was another key criticism that the SAB Panel identified when reviewing the draft Connectivity Report. *See* 2014 WAC Comments at Ex. 5, p. 11 (SAB Panel Review of Draft Connectivity Report; attached hereto as part of Ex. 4).[29] Indeed, members of the Panel requested that EPA "discuss approaches to measuring or otherwise quantifying connectivity." *Id.* at 14. As Dr. Allison Aldous noted, "[s]pecific scientifically grounded, objective methods must be put in place to draw the line between those waters having or not having a significant nexus to other jurisdictional waters . . . [E]valuating the technical accuracy of the definition is difficult in the absence of clear criteria." *Id.* at 2. Dr. Siobhan Fennessy also raised this concern, stating that the proposed rule "require[s] the development of methods to determine when a nexus is significant, including metrics based on hydrologic, chemical, and biological connectivity." *Id.* at 31 ("A key question is where, along the gradient of connectivity, do the effects of other waters

[29] The panel noted that "[i]t would be useful to provide examples of the various dimensions of connectivity that are most appropriately quantified, ways to construct connectivity metrics (e.g., retrospective or prospective analyses, model simulations, spatial analyses), and the scientific methodological, and technical advances most needed to understand and estimate connectivity."

become significant."). Other panel members had similar concerns.[30] In sharp contrast to other regulatory programs in the same statute, for example water quality criteria that are based on measurements of effects on aquatic species, the Agencies' nebulous "we know it when we see it" agglomeration of factors to be applied with virtually unlimited discretion deprives the regulated community of any objective methods to use in undertaking their own evaluations.

Despite these pointed criticisms, the Agencies still do not provide meaningful metrics on how significant nexus is to be measured and thus, regulated entities and regulators alike are no better off than they were in late 2014. As explained in a new analysis prepared by GEI Consultants, the TSD not only fails to provide sufficient clarity, it makes the significant nexus factors *even more* confusing by providing "examples that justify the evaluation of the factors in differing ways." 2022 GEI Report at 4 (attached as Ex. 8). For example, the TSD "acknowledges that an increased frequency, volume, or duration of a hydrological connection to ephemeral features would have more potential impacts on the integrity of downstream waters but then states that a lack of hydrologic connection completely can also contribute to the influence of these features to TNWs." *Id.* That the Agencies believe a *lack* of a connection can contribute to a finding of a significant nexus is extremely troubling and indicates that the term is truly amorphous. Furthermore, this view is difficult to reconcile with *SWANCC*, in which the lack of a hydrologic connection was central to the holding that isolated ponds are not "waters of the United States."[31] Under the Agencies' interpretation, a variety of isolated features that provide floodwater retention and pollutant sink functions could be jurisdictional and thus, undermine the holding in *SWANCC*.

GEI's new analysis also raises several important questions the Agencies should answer when attempting to justify their identification of tools to aid in a significant nexus analysis, including the following:

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[30] *See, e.g., id.* at 47 (comments of Dr. Michael Josselyn) ("A section may need to be added to the Final Science Report that addresses what type of connections should be evaluated and the methods by which these connections can be measured . . . . I concur with an approach that is more quantitative."); *id*. at 90-91 (comments of Dr. Mark Murphy) ("[I]f [the proposed rule] is to have any defensible basis in science," "[t]he significance of the connection must be defined by the likelihood of a measurable effect[.]"); *id.* at 101 (comments of Dr. Duncan Patten) ("[T]here is little or no explanation (science or legal) of what 'significant effect' means.").

[31] Perhaps the Agencies' assertions about how the *lack* of a hydrologic connection and relative isolation can contribute to the importance of "other waters" to downstream waters, *e.g.*, TSD at 204, 207-08, are an attempt to latch onto Justice Kennedy's statement that "it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme." *See Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring). Justice Kennedy's statement, however, was about *adjacent* wetlands and cannot be used out of context to nullify the holding in *SWANCC* that the "text of the statute will not allow" the Court to hold that the Agencies' jurisdiction "extends to ponds that are *not* adjacent to open water." 531 U.S. at 168.

- "How are precipitation and snowfall data to be utilized in determining presence/absence of a significant nexus?"

- "If natural history museum collections databases document that macroinvertebrates were collected from a location on an ephemeral tributary, is that sufficient to say that a significant nexus exists even if the collection were made in the distant past?"

- "For the modeling and simulation approaches described in [the TSD], what quantitative level of effects on downstream waters would need to be identified to be more than speculative and insubstantial?"

- "[W]ith a long list of possible tools referenced, if the initial utilized resources do not highlight a connection between the water evaluated and the downstream jurisdictional water, is it necessary to continue using the remaining tools and resources listed until one of them indicates an effect on integrity is occurring downstream?"

- "Do all tools need to be utilized and assessed to make a no [significant] effect determination?"

Id. at 7-8. This last question is particularly important, for without identifying a point at which a significant nexus analysis may end, jurisdictional determinations could end up being so time- and resource-consuming that applicants will simply give up. Ultimately, with so many questions left unanswered, and without a precise explanation of how they are to be used, this list of tools may do more harm than good. *See id.* at 5 ("[T]here is little to no discussion of how these tools would be utilized to provide metrics and associated thresholds to differentiate between significant and non-significant effects, likely resulting in little consistency in significant nexus determinations.").

Stating the obvious, the mere presence of *any* nexus alone does not provide a basis for assessing to what extent such connections may or may not significantly affect downstream navigable waters, and therefore does little to inform the analysis required by Justice Kennedy's concurrence. Nonetheless, the Agencies seem to believe that, as long as they can look at some "function" that an isolated water performs and articulate why that demonstrates a "more than speculative or insubstantial" connection between the isolated water and a traditional navigable water, that is enough to meet the significant nexus standard. *See* TSD at 206-08 (discussing how "other waters" can provide functions that restore and maintain the chemical, physical, and biological integrity of downstream navigable waters, including allowing seeds, pollen, and invertebrates to "hitchhike" on birds and mammals between isolated waters and downstream traditional navigable waters even hundreds of kilometers apart). As the Agencies cogently explained in repealing this type of boundless interpretation of significant nexus (in the 2015 Rule), such a strictly ecological approach "would swiftly overwhelm *SWANCC* altogether." 84 Fed. Reg. at 56,645 (quoting *Rapanos*, 547 U.S. at 749). Asserting jurisdiction based on these sorts of functions is at least as broad as the "any hydrological connection" standard that was rejected by five Justices in *Rapanos*.

Finally, when Justice Kennedy articulated his significant nexus standard, he was concerned with the potential overbreadth of the Agencies' regulatory interpretations and the need

to "avoid unreasonable applications of the statute." 547 U.S. at 782 (Kennedy, J., concurring). The Agencies once again ignore those words of caution and tout that the "evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity." TSD at 33. That statement closely resembles the view articulated by the dissenting justices in *SWANCC*. Relying on an *amicus* brief filed by a group of scientists, the dissent in that case stressed that the meaningful hydrological and ecological connections between the wetlands and nearby navigable waters at issue in *Riverside Bayview* "are also present in many, and possibly most, 'isolated' waters" and that "ecologically speaking—the waters at issue in [*SWANCC*] are anything but isolated." 531 U.S. at 176 n.2. Justice Kennedy obviously rejected that view by helping to form the majority in *SWANCC*. Years later, in *Rapanos*, he again reminded us that "environmental concerns provide no reason to disregard limits in the statutory text" and that a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." 547 U.S. at 778 (Kennedy, J., concurring). The Agencies need to abandon their familiar attempts to transform Justice Kennedy's opinion into an invitation to strip the term "navigable" of any independent significance.

4. The Agencies' Discussions About Considering Climate Change When Evaluating Significant Nexus Raise Legal and Technical Concerns.

The Agencies note that their significant nexus standard allows for the consideration of the effects of climate change on water resources. *See* 86 Fed. Reg. at 69,394. To their credit, the Agencies correctly recognize they cannot rely on "climate benefits" such as "carbon sequestration" functions to expand their authority under the CWA. *See id.* The Agencies likewise correctly recognize that it is appropriate to account for changed conditions when assessing whether a water is still jurisdictional, such as declining to assert jurisdiction over a "lake that dries up from warming temperatures due to climate change and no longer has a surface hydrologic connection to downstream waters." *Id.* Other aspects of the Agencies' discussions about climate change, however, raise significant concerns for WAC members.

The Agencies appear to take the position that they can assert jurisdiction *now* over water features (or perhaps even dry land) based on how such features *may* exist in the future due to climate change. For instance, the TSD talks about the need to evaluate changes to wetlands "in the context of past *and predicted changes (e.g., from climate change)* to other wetlands within the same watershed. TSD at 37 (emphasis added); *see also id.* at 51 ("[E]ven if a stream and wetland do not currently serve a function, it has the potential to provide that function under appropriate conditions (*e.g.*, when material imports or environmental conditions change). These functions can be instrumental in protecting those waters from future impacts."). This sort of predictive approach to asserting jurisdiction lacks legal and technical support.

The Agencies have long recognized that the CWA regulates waters as they exist now, *not* as they formerly existed. For instance, EPA has stated that "[w]hen a portion of the [w]aters of the United States has been legally converted to fast land . . . it does not remain waters of the United States." 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980). Similarly, the Corps has stated that "Section 404 . . . regulate[s] discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time" and thus, the agency does not

"assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37,122, 37,128 (July 19, 1977); *accord* Corps RGL 86-9, at ¶ 5 (Aug. 27, 1986) ("[I]f a former wetland has been converted to another use (other than by recent un-permitted action not subject to 404(f) or 404(r) exemptions) and that use alters its wetland characteristics to such an extent that it is no longer a 'water of the United States,' that area will no longer come under the Corps regulatory jurisdiction for purposes of Section 404.").

By the same logic, the Agencies cannot *now* assert jurisdiction based on how waters *might* exist someday as a result of a changing climate. Allowing agency staff to claim jurisdiction today based on predicted changes adds too much uncertainty and inconsistency to the regulatory process. Additionally, Justice Kennedy's opinion in *Rapanos* plainly forecloses the assertion of jurisdiction over wetlands where such wetlands' "effects on water quality are speculative or insubstantial." 547 U.S. at 780 (Kennedy, J., concurring). Yet that is precisely what the Agencies would do by basing significant nexus determinations on potential changes.

Even if the Agencies stood on firm legal ground to incorporate predictions about climate change into significant nexus determinations, the Agencies have not explained how this can be done in a scientifically defensible manner. The Agencies' emphasis on evaluating predicted changes to water features to determine whether they satisfy the significant nexus standard amounts to asserting jurisdiction based on little more than speculation. While it is possible that tools may exist to make predictions, albeit fairly uncertain, about the effects of climate change at large enough scales, the Agencies have not demonstrated that such tools exist to make reliable predictions at a site-specific scale. *See* 2022 GEI Report at 14 (attached as Ex. 8) ("While climate models have continuously improved over the past three decades, it is our understanding that accurate site-specific assessments of climate change impacts are still unavailable. This seems to be acknowledged by the Agencies as well by the TSD's evocation of global, national, and broad regional climate change trends.").

Further, the Proposed rule's definition of "significantly affect" states that the Agencies will consider, among other factors, "climatological variables" including temperature, rainfall, and snowpack when determining whether waters meet the significant nexus standard, yet the Agencies do not explain, even generally, how these factors will be considered in the determination. For instance, which temperature measurements are to be applied—water or air temperatures—and how do they relate to the nexus of a water either considered alone or in combination with similarly situated waters in the region? How are rainfall thresholds to be considered (average or episodic?) and over what periods of time (long enough to accurately represent climate, not meteorology)? Because certain ephemeral waters may be considered jurisdictional, how would decreases in rainfall, rather than increases, affect significant nexus determinations? Without specifics, these factors are susceptible to inconsistent, unpredictable, and arbitrary application.

5. Before Proceeding Further, the Agencies Must Correct the Myriad Legal Errors in the Proposed Rule.

For all of the foregoing reasons, the Proposed Rule is based on a framework that suffers from numerous legal flaws and fails to adhere to the limits that Congress and the Supreme Court

have placed on the Agencies' authority. WAC urges the Agencies to withdraw the Proposed Rule and resume implementation of the NWPR in states other than Arizona and New Mexico. Should the Agencies insist on continuing to revise the definition of "waters of the United States" in yet another round (or two) of rulemaking, they must stay within applicable constitutional, statutory, and judicial limits on their authority.

C. The Proposed Rule Is Unconstitutionally Vague.

"[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The first is to ensure fair notice so that regulated individuals and entities "know what is required of them so they may act accordingly." *Id.* The second is to provide precise standards and guidance for enforcement "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.*

The importance of shielding the public against vague civil laws, not just against vague criminal laws, has garnered increasing attention in recent years. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (noting that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes"). Laws with vague standards "enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives," in defiance of our most basic constitutional principle of separation of powers. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring). Of particular relevance to the Proposal, a growing number of justices have expressed concerns since *Rapanos* about the "reach and systemic consequences" of the CWA. Justice Kennedy, joined by Justices Thomas and Alito, protested that "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 578 U.S. at 602-03 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 566 U.S. 120, 132 (2012)). This lack of clarity "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes*, 578 U.S. at 603; *see also Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring) (advising the agencies to stop asserting "essentially limitless" jurisdiction under the CWA and to instead issue a definitional rule that ordinary landowners can understand and that abides by the "clearly limiting terms Congress employed in the [CWA]").

The Proposed Rule, however, does not even acknowledge, much less assuage, these important concerns. Instead, the Agencies once again propose to codify as vague and expansive an interpretation of Justice Kennedy's significant nexus standard as they did in 2015. This standard can be used to assert jurisdiction over tributaries, adjacent wetlands, and a whole host of "other waters" because the rule uses opaque and confusing terms that leave regulated entities guessing about what features on their properties may be deemed jurisdictional, such as "similarly situated," "in the region," and "more than speculative or insubstantial." *See* 86 Fed. Reg. at 69,449-50. To further complicate matters, the Agencies discuss various alternatives or options for how they could implement some of these terms. *See id*. at 69,439-40. This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that regulated entities may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties. *See* 2022 GEI Report at 1 (attached as Ex. 8) ("At

various points, the documents consider a variety of scales for time (related to hydrology cycles) and geography (including broad regions of the U.S., ecoregions, watersheds, and individual wetlands) when considering the interconnectivity of wetlands, aggregate wetlands impacts, inundation periods, and climate change. The uncertainty of scale will likely result in confusion within the regulated public and within the Agencies themselves as anything may be determined to be significant if viewed from a person's desired scale.").

For example, imagine a landowner is trying to figure out whether a federal permit is needed to discharge fill material into a small, isolated pond on her property, *e.g.*, to build a swimming pier. This requires her to try to determine whether the pond, "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of any traditional navigable water, interstate water, or territorial sea. *See* 86 Fed. Reg. at 69,449-50 (proposed 33 C.F.R. § 328.3(a)(3)(ii) & proposed 40 C.F.R. § 120.2(a)(3)(ii)). This is no small task, as she must try to understand how regulators will apply each of the following concepts:

***In the region*:** the landowner must first sort out what regulators will consider to be the relevant "region." Because the "other waters" category was not addressed in the 2008 *Rapanos* Guidance and because the pond in question is not a tributary, the 2008 *Rapanos* Guidance's approach to "in the region" (*i.e.*, an approach focused on the relevant tributary "reach") is a poor fit. *See* 86 Fed. Reg. at 69,439. Consequently, the landowner must guess whether regulators will use one of the following approaches or some other approach:

- Regulators might look to a subwatershed or watershed "defined by where a tributary and its upstream tributaries drain into a traditional navigable water, interstate water, or the territorial seas." *See id.* But how close does the relevant tributary or any of the upstream tributaries have to be to the landowner's pond? Is one mile too far? What about 10 miles? Similarly, how close does the nearest traditional navigable water, interstate water, or territorial sea have to be to the landowner's pond?

- Another possibility is regulators might try to identify a contiguous area of land that has "relatively homogenous soils, vegetation, and landform . . . providing similar functions such as habitat, water storage, sediment retention, and pollution sequestration." *Id.* The Agencies state that this approach must "rely on the use of resources such as soil surveys and possibly watershed assessment reports," but they leave key questions unanswered. For instance, how small or large can this contiguous area be? Is this list of "similar functions" referenced in the preamble exclusive or merely illustrative? Is it enough that the area of land functions similarly as to only one of these functions? How is the average landowner expected to assess what it means for an area of land to provide similar functions?

***Similarly situated*:** Upon figuring out what regulators consider to be the relevant "region," the landowner must then try to determine which "other waters" regulators plan to evaluate in combination with her pond. The Agencies suggest they can look at any "waters that are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effect together." 86 Fed. Reg. at 69,439. But how does the landowner know whether her pond provides "common, or similar, functions" compared to other waters in relation

to downstream waters? Moreover, how is the landowner realistically supposed to identify all "similarly situated" waters within whatever area the regulators determine to be the "region," particularly if the "region" is as large as an entire watershed, a Level I ecoregion, or a hydrologic landscape region?

***Significantly affect*:** Even assuming the landowner somehow manages to accurately identify all "similarly situated" waters within whatever "region" the regulators decide to use, she must then try to ascertain whether the regulators will conclude that her pond, in combination with those similarly situated waters, has "more than speculative or insubstantial effects on the chemical, physical, or biological integrity" or a traditional navigable water, interstate water, or territorial sea, taking into account a hodgepodge of "factors" (such as shallow subsurface connections or the *lack* of hydrologic connections) and "functions" (such as nutrient recycling, provision and export of food resources for aquatic species located in foundational waters). *See* 86 Fed. Reg. at 69,430-31. The Agencies claim the factors enumerated in the regulatory text are "readily understood criteria" and that the functions referenced in the preamble "can include [but do not necessarily include] measurable indicators." *Id.* at 69,430. But the preamble's discussion of these factors and functions only serve to confirm that there is no meaningful guidance on how regulators will assess the strength of effects or what it means for an effect to be "more than speculative or insubstantial." *See id.* at 69,430, 69,438. Nor is there any clarity as to how exactly regulators will measure functions or how they will analyze and draw conclusions about functions that are *not* measurable.

***Hydrologic factors, including shallow subsurface flow*:** Under the proposed definition of "significantly affect," this is one factor that regulators must consider. But neither the rule nor the preamble sheds light on what "shallow subsurface" means. For example, how many inches or feet below the surface is too deep to constitute "shallow subsurface" flow? Are there limitations on the distance between such shallow subsurface flow and a downstream traditional navigable water? Elsewhere in the preamble, the Agencies note that regulators must evaluate all available hydrologic information "and physical indicators of flow including the presence and characteristics of a reliable [ordinary high water mark]" ("OHWM") when assessing significant nexus. 86 Fed. Reg. at 69,437. Regulators are to apply regulations, guidance, and manuals, such as RGL 05-05, "to ensure that the OHWM identification factors are applied consistently nationwide." *Id.* But this statement is cold comfort to regulated entities given the historic "difficulty and ambiguity associated with identifying" the OHWM. *See* U.S. Gov't Accountability Off., GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, at 20-22 (2004); *see also Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). Indeed, as RGL 05-05 candidly states, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-05, at 3 (Dec. 7, 2005). This all but guarantees that regulators can reach whatever outcome they wish and that regulators' assessments are bound to vary from field-office to field-office and case to case.

These are just a few examples of the so-called standards that fail to put ordinary landowners on notice of when the CWA actually applies to their lands or conduct. The Proposed Rule is far too imprecise to provide any assurance against arbitrary or discriminatory enforcement. Accordingly, it is unconstitutionally vague.

Importantly, the Proposed Rule is not insulated from the void for vagueness doctrine merely because the Agencies are purportedly codifying longstanding practice. Indeed, "an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error." *Summit Petroleum Corp. v. EPA*, 690 F.3d 733,746 (6th Cir. 2012). Even if we assume that the Agencies are merely codifying the *status quo* (they are not), the definition of WOTUS has been a moving and inconsistent target for many years, as the Agencies themselves acknowledged. Tellingly, when the Agencies finalized the 2015 Rule, they criticized the 2003 *SWANCC* Guidance and the 2008 *Rapanos* Guidance documents, because they "did not provide the public or agency staff with the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations. Many waters are currently subject to case-specific jurisdictional analysis to determine whether a 'significant nexus' exists, and this time and resource intensive process can result in inconsistent interpretation of CWA jurisdiction and perpetuate ambiguity over where the CWA applies." 80 Fed. Reg. at 37,056; *see also id.* at 37,057 (recognizing a "compelling need for clearer, more consistent, and easily implementable standards to govern administration of the Act"). And even before the additional uncertainty that *Rapanos* introduced, the Agencies' approach to jurisdiction suffered from inconsistent, varied interpretations by regulatory offices both within a single state and even between staff sitting in the same office. *See, e.g.,* U.S. Gov't Accountability Off., GAO-04-297, at 26.

Against this backdrop, it is unsurprising that "[m]embers of Congress, developers, farmers, state and local governments, energy companies, and many others requested new regulations to make the process of identifying waters protected under the CWA clearer, simpler, and faster." *See* 80 Fed. Reg. at 37,056. The pre-2015 regulatory regime was, by all accounts, fundamentally flawed. And arguably the most critical flaw—one the NWPR wisely put an end to—was allowing for subjective, case-by-case determinations of whether waters satisfied the Agencies' nebulous nexus standard. Rather than codifying that unconstitutionally vague standard, the Agencies should withdraw the Proposed Rule.

Finally, the Agencies' reliance on *Maui* to defend the vague and imprecise significant nexus standard is misplaced. *E.g.*, 86 Fed. Reg. at 69,399 & 69,432. While *Maui* established a multi-factor test for determining whether a discharge is the "functional equivalent" of a direct discharge, that test does not involve the sort of roving and imprecise inquiry that the Proposal calls for. In scope, the functional equivalent test from *Maui* focuses on the movement of pollutants from a specific point source to a specific jurisdictional water and does not allow regulators to aggregate a large number of water features across a vast area of land for purposes of assessing various factors and functions like the Proposed Rule's significant nexus standard. Moreover, *Maui* requires consideration of concrete factors that can be quantified or measured—*e.g.*, distance traveled, transit time, and the nature of the material through which the pollutant travels—and the Supreme Court has instructed that "[t]ime and distance [which are both readily measurable] will be the most important factors in most cases." 140 S. Ct. at 1467. By contrast, the standard-less significant nexus factors discussed in the Proposed Rule, which may or may not be measurable, *see* 86 Fed. Reg. at 69,430, are too vague and ambiguous, which opens the door to arbitrary enforcement.

In sum, the Proposed Rule's significant nexus standard offends both of the important due process concerns underpinning the void for vagueness doctrine and thus, it is unconstitutional.

III. Proposed Definitions and Jurisdictional Categories

As discussed above, the Proposed Rule is built around the flawed "either/or" approach and on that basis alone, it is invalid. But even if that approach were legally sound, the Proposal compounds that error by misinterpreting both the *Rapanos* plurality and concurring opinions and thus, it improperly opens the door to the assertion of jurisdiction over too many streams, wetlands, and "other" features on the landscape that are remote from and bear little or no connection to any traditional navigable water or territorial sea. To make matters worse, the Proposed Rule suffers from additional fundamental errors: *first*, the starting point for the Agencies' determinations of jurisdiction over tributaries, adjacent wetlands, and "other waters"—the so-called foundational waters that are categorically jurisdictional—lacks support in the statutory text, legislative history, and Supreme Court decisions that purportedly underpin the Agencies' interpretation. From there, the Agencies can sweep far too many water features into the definition of "waters of the United States" because the relatively permanent and significant nexus standards (as broadened by the Agencies' reinterpretations) each tie back to the overly broad categories of "foundational waters." *Second*, the Agencies also improperly elevate the (a)(4) impoundments category because relatively permanent tributaries and adjacent wetlands can be jurisdictional merely based on their connection to impoundments. The following sections discuss these errors in further detail.

A. The Proposed Rule's Traditional Navigable Waters Category Is Inconsistent with Supreme Court Precedent.

The Proposed Rule continues to define the (a)(1) category, commonly referred to as traditional navigable waters or "TNWs," as those waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 86 Fed. Reg. at 69,449-50. It is imperative that the Agencies define this category in accordance with the CWA and applicable Supreme Court case law given that both the plurality and concurring opinions in *Rapanos* tie jurisdiction over non-navigable waters to the relationship between such waters and downstream TNWs. The plurality opinion referred to "traditional interstate navigable waters" in concluding that jurisdiction over wetlands requires a showing that "the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable *waters*)." *Rapanos*, 547 U.S. at 742 (plurality). Similarly, Justice Kennedy concluded that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring).

While the plurality and concurring opinions use slightly different terminology in referring to TNWs, they cite the same cases to describe what their understanding of what the terms "traditional interstate navigable waters" or "navigable waters in the traditional sense" meant: *The Daniel Ball*, 77 U.S. at 563 and *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 406-09. *See Rapanos*, 547 U.S. at 723, 734 (plurality); *id.* at 760-61 (Kennedy, J., concurring). Under these cases and their progeny, TNWs are waters that: (i) are navigable-in-fact or capable of being rendered so; and (ii) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce. *See The Daniel Ball*, 77 U.S. at 563. This is the definition of "navigable waters of the United States" that Congress adopted in the Rivers and

Harbors Act ("RHA"), as numerous courts have recognized. *E.g.*, *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1168 (10th Cir. 1974); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921) (relying on the two-part test in *The Daniel Ball* in interpreting the RHA).

When the plurality and concurring opinions in *Rapanos* cited *The Daniel Ball* to support their use of the terms "traditional interstate navigable waters" and "navigable waters in the traditional sense" in the context of formulating the relatively permanent and significant nexus standards, they were referring only to those waters that were considered navigable waters under the historical two-part test set forth in *The Daniel Ball*. In total disregard of this important historical context, the Proposed Rule improperly adds the following waters into the TNW category:

- Waters determined by a federal court to be navigable-in-fact under *any* federal law;
- Waters currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments);
- Waters that have historically been used for commercial navigation, including commercial waterborne recreation; or
- Waters that are susceptible to being used in the future for commercial navigation, including commercial waterborne recreation.

See 86 Fed. Reg. at 69,417. This interpretation reaches too far and cannot be reconciled with the cases that the plurality and concurring opinions in *Rapanos* rely on in describing the "traditional interstate navigable waters" and "navigable waters in the traditional sense" that are central to the relatively permanent and significant nexus standards. Under the cases cited by the plurality and Justice Kennedy, the only waters that can be TNWs are the waters referenced in the first bullet, *i.e.*, the RHA waters. The Agencies have not provided any support for expanding the terms "traditional interstate navigable waters" and "navigable waters in the traditional sense" to create a broader (a)(1) category.[32]

The critical flaw in the Agencies' definition of the TNW category is it wrongly removes the second prong of the two-part test in *The Daniel Ball*: that the water in question, together with other water bodies, forms "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is

[32] The CWA undoubtedly reaches more waters than the RHA. Thus, a water that does not meet the two-part test in *The Daniel Ball* can still be a "navigable water" within the meaning of the CWA, such as a landlocked lake that is navigable-in-fact, but is not part of a continued highway of waterborne commerce. Such a water can be a "navigable water" under the CWA even if it is not an RHA water (*i.e.*, a "traditional interstate navigable water" or a "navigable water in the traditional sense"). *See, e.g.*, *Minnehaha Creek Watershed Dist.*, 597 F.2d at 627 (affirming district court order that Lake Minnetonka and a nearby creek are *not* subject to federal regulatory authority under the RHA, but *are* subject to federal regulatory authority under the CWA).

conducted by water." 77 U.S. at 563. While the text of the (a)(1) category in the Proposed Rule uses some similar terminology, it is indisputably broader as it encompasses waters that are, were, or are susceptible to *any use* in interstate commerce, not just those waters that are, were, or are susceptible to forming part of a continued highway of waterborne commerce.

By ignoring the second part of the test from *The Daniel Ball*, the Agencies claim that a water can be a TNW if a federal court finds it to be navigable-in-fact under any federal law. This is not what the plurality and Justice Kennedy had in mind in *Rapanos* when they referenced the "traditional interstate navigable waters" and "navigable waters in the traditional sense." As the Supreme Court has explained over the decades, "any reliance upon judicial precedent" on the issue of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); *accord PPL Montana LLC v. Montana*, 565 U.S. 576, 592 (2012) (cautioning that "the test for navigability is not applied in the same way in [] distinct types of cases" interpreting specific federal statutes or applying specific doctrines). Thus, just because a water is found to be navigable-in-fact by a federal court for purposes of title, admiralty, or a particular statute does not mean it meets the two-part test for traditional navigable waters articulated in *The Daniel Ball*. Neither the preamble nor Appendix D to the Corps' Jurisdictional Determination Form Instructional Guidebook addresses whether, in light of these cases, it is appropriate for the Agencies to define all waters deemed navigable under any federal law as TNWs.[33]

The Agencies also impermissibly expand the TNW category to encompass waters that are used, were used, or are susceptible to use for commercial waterborne recreation, which includes, among other things, waters that could be used by out-of-state visitors or that have the potential to float a canoe or kayak. *See* 2014 WAC Comments at 29-30 (discussing TNW determinations in CA and AZ) (attached as Ex. 4). But the Agencies provide no support for equating use for commercial waterborne recreation with forming part of a continued highway for interstate commerce. If anything, to the extent cases beyond the CWA context are relevant, they undercut assertions of jurisdiction based on experimental canoe or kayak outings. *E.g.*, *See, e.g.*, *United States v. Oregon*, 295 U.S. 1, 23-24 (1935) (holding that several bodies of water were not "navigable" for purposes of title action despite use by fur trappers, canoes, row boats and limited use by motor boats); *North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992) (evidence of modern canoe use was insufficient to show that the Little Missouri River was a "navigable water" at the time of North Dakota's statehood under the "equal footing doctrine"). As the Fourth Circuit convincingly explained, while recreational boat use "might amount to commercial activity, which even may affect interstate commerce, the [water body] does not thereby become a waterway for commerce between the states." *See Alford v. Appalachian Power Co.*, 951 F.2d 30,

[33] The Agencies' reliance on non-CWA cases in "Appendix D" is therefore misplaced. *E.g.*, Appendix D at 4 (citing *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) and *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989)). As WAC previously explained in detail, neither of these cases arose under the CWA and thus, they do not involve the traditional test for navigability that the *Rapanos* plurality and concurring opinions had in mind when describing the relatively permanent and significant nexus standards. *See* 2011 WAC Comments at 30-33 (attached as Ex. 5).

33 (4th Cir. 1991) (holding that Smith Mountain Lake was not a "navigable water" for purposes of admiralty jurisdiction despite use of the lake for dinner and sightseeing cruises and recreational boat use). These cases confirm that recreational use of a water body is not enough to support a determination of navigability and that the Agencies' interpretation of what constitutes a TNW is unacceptably broad.

Again, waters that do not meet the two-part test could still be subject to federal regulation under the CWA—for instance, if they are relatively permanent bodies of water connected to a traditional interstate navigable water within the meaning of *The Daniel Ball*. But such waters are *not* themselves TNWs. To be consistent with either the plurality's or Justice Kennedy's opinions in *Rapanos*, both of which condition jurisdiction over non-TNWs on their relationship to TNWs, the Agencies must define TNWs to include only those waters that meet the traditional test for navigability under *The Daniel Ball* and its progeny.

B. The Interstate Waters Category Impermissibly Reads the Term "Navigable" Out of the CWA.

Under the Proposed Rule, interstate waters and interstate wetlands[34] are jurisdictional regardless of navigability. The Proposal does not require that interstate waters have a significant nexus or any type of connection to TNWs, or meet any flow or permanence requirements; rather, waters such as isolated ponds or streams with an intermittent trickle are deemed jurisdictional as long as they cross a state line. This overbroad approach to interstate waters is further compounded by the Proposal's treatment of interstate waters as equivalent to TNWs and territorial seas because a non-navigable interstate water is the starting point for asserting jurisdiction over its adjacent wetlands or tributaries. Categorically asserting jurisdiction over all interstate waters and wetlands is problematic for several reasons.[35]

First, the Proposal's exercise of jurisdiction over all interstate waters ignores and misinterprets the CWA's text and legislative history. When Congress passed the 1972 amendments to the Water Pollution Control Act of 1948, it selected "navigable waters" as the operative term for the newly established regulatory programs under the Act and deleted the definition of "interstate waters" from the statute. *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) (the pollution of "interstate waters" is a public nuisance subject to abatement), *and* Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) (the pollution of "interstate or navigable waters" is subject to abatement), *with* 33 U.S.C. § 1362(7) (defining "navigable waters" as waters of the United States). Basic canons of statutory interpretation require the

[34] For ease of reference, WAC refers to both of these waters collectively as "interstate waters."

[35] The NWPR covered these (and many other) points in detail in its carefully reasoned reevaluation of prior legal and policy rationales supporting the inclusion of interstate waters and wetlands as a standalone category of "waters of the United States" on equal footing as TNWs. *See* 85 Fed. Reg. at 22,283-86. That reevaluation considered and explained why every one of the assertions that the Agencies have reverted to relying on—which are indistinguishable from the justifications advanced in the Technical Support Document for the 2015 Rule (at Part IV)—lack textual support in the CWA and are based on a misreading of the Act's history and relevant case law.

presumption that Congress's removal of the term "interstate waters" was intentional. *See, e.g.*, *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Indeed, the courts have repeatedly held that navigability is a "central requirement" to jurisdiction. *Rapanos*, 547 U.S. at 778; *see also Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1359 (S.D. Ga. 2019) (finding that the Agencies' exercise of jurisdiction over all interstate waters, regardless of their relationship to navigable waters, exceeds the Agencies' authority under the Act).

As additional support for their decision to treat interstate waters as an independent category of jurisdictional waters, the Agencies point to Section 303(a), which requires that any water quality standard for "interstate waters" adopted prior to 1972 remain in effect. 86 Fed. Reg. at 69,417-18. The Agencies state that the language in that section is a clear indication that Congress intended the Agencies to continue protecting the water quality of interstate waters as an independent category without regard to their navigability.

The lone reference to "interstate waters" in Section 303(a) cannot bear the weight the Agencies place on it. Indeed, the legislative history of the 1972 amendments demonstrates that Congress did *not* consider interstate waters and navigable waters to be distinct categories in the pre-1972 regulatory regime. To the contrary, Congress referred to the categories conjunctively as "interstate navigable waters." S. Rep. No. 92-414, at 2 (1971) (The 1965 version of the Act required each State "to develop standards for all '*interstate navigable waters*' within its boundaries.") (emphasis added); *id.* at 4 ("The setting of water quality standards for *interstate navigable waters* . . . is the keystone of the present program for control of water pollution.") (emphasis added). And the legislative history of the 1972 amendments demonstrates that Congress modified the text of the Act in 1972 in part because States had interpreted "interstate" waters to apply only to interstate *navigable* waters. *See, e.g.*, 118 Cong. Rec. 10240 (1972) (the amendment "expands the coverage of the law to intrastate, as well as interstate navigable waterways"). Importantly, the Supreme Court interpreted the pre-1972 laws in the same manner: "Before it was amended in 1972, the Federal Water Pollution Control Act employed ambient water quality standards specifying the acceptable levels of pollution in a State's *interstate navigable waters* as the primary mechanism in its program for the control of water pollution." *EPA* v. *California,* 426 U.S. 200, 202 (1976) (emphasis added) (footnote omitted). Based on the foregoing, Section 303(a) does *not* show that Congress extended federal regulatory authority to all "interstate waters" regardless of navigability.

The Agencies also attempt to justify reinstating the interstate waters and wetlands category by invoking the doctrine of congressional acquiescence. *See* TSD at 23-24. In their view, when Congress amended the CWA in 1977, it was aware of the Agencies' definition of navigable waters, which included interstate waters, and "the agencies' assertion of Clean Water Act jurisdiction over interstate waters was uncontroversial." *Id.* at 24. But if Congress had truly acquiesced to the Agencies' view on the precise issue of whether interstate waters are "foundational waters" alongside TNWs, then why did Congress plainly *omit* those waters and wetlands from the text of Section 404(g)? If non-navigable interstate waters and wetlands were indeed foundational as the Agencies claim, then surely Congress would have included them among those waters that are *not* "assumable" under Section 404(g). But Congress did not do that. Rather, the only waters that Congress withheld from possible state assumption are "those waters which are presently used, or are susceptible to use in their natural condition or by reasonable

improvement *as a means to transport interstate or foreign commerce* shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide . . . , including wetlands adjacent thereto." 33 U.S.C. § 1344(g) (emphasis added). This provision is further textual support that "foundational waters" under the CWA must be *navigable*.

The Agencies' reliance on certain Supreme Court cases to support their approach to interstate waters is likewise misplaced. In particular, the Proposal cites *City of Milwaukee v. Illinois* ("*Milwaukee* II"), asserting that the Supreme Court interpreted 1972 amendments to the Clean Water Act to cover all interstate waters as jurisdictional. 86 Fed. Reg. at 69,418 (citing 451 U.S. 304, 317 (1981)). However, *Milwaukee II* is inapposite not only because it involved Lake Michigan—an interstate *navigable* water—but also because the Court's decision addressed interstate water pollution generally and did not opine on whether "interstate waters" and "navigable waters" are separate and distinct categories of jurisdictional waters under the Act. The Agencies' reference to *Arkansas v. Oklahoma* is similarly unhelpful because that case also involved an interstate *navigable* water—the Illinois River—and did not address the question of whether "interstate waters" provide an independent basis for jurisdiction under the CWA. *See* 503 U.S. 91, 95 (1992).

Finally, *Rapanos* undermines the Agencies' theory that interstate waters are "foundational waters" of the CWA alongside traditional navigable waters and territorial seas. As explained above in Part III.A, the plurality and Justice Kennedy formulated their relatively permanent and significant nexus standards around *navigable* waters. The plurality emphasized that for a non-navigable water to be jurisdictional, it had to be relatively permanent and connected to a "traditional interstate *navigable* water" (and if that requirement was satisfied, wetlands with a continuous surface connection would also be jurisdictional). *See Rapanos*, 547 U.S. at 742 (plurality) (emphasis added). Similarly, Justice Kennedy's opinion emphasized that the focal point of his test for jurisdiction is whether there is a "'significant nexus' to waters that *are or were navigable in fact or that could reasonably be so made*." 547 U.S. at 759 (Kennedy, J., concurring) (emphasis added). Neither of these opinions envisions applying the standard to determine connections or a nexus to *non-navigable* waters and wetlands, merely because they cross state lines.

For these reasons, the Agencies should not reinstate the standalone interstate waters and interstate wetlands category.

C. The Proposed Rule Codifies a New and Impermissibly Broad "Other Waters" Category.

The Proposed Rule would codify the list of "other waters" from the 1986 regulations as a standalone category, but rather than asserting jurisdiction based on whether the use, degradation, or destruction of such waters "could affect interstate or foreign commerce," the Proposal allows for case-specific assertions of jurisdiction over "other waters" if they satisfy either the relatively permanent or significant nexus standards. *See* 86 Fed. Reg. at 69,418. This new category of "waters of the United States" is overly broad and would encompass too many intrastate, non-navigable water features that were previously considered to be "isolated" and thus beyond the CWA's reach following *SWANCC*.

1. The Proposed "Other Waters" Category Lacks Legal Support.

Under the Proposed Rule, an "other water" can be jurisdictional if it satisfies the Agencies' interpretations of either the relatively permanent standard or the significant nexus standard. As explained above in Part II.B.2, the Proposed Rule misapplies the relatively permanent standard articulated in the *Rapanos* plurality opinion. For instance, the "other waters" category allows for the assertion of jurisdiction over, among other things, relatively permanent "other waters" solely by virtue of their connection to a non-navigable interstate water or wetland. *See* 86 Fed. Reg. at 69,449-50 (proposed 33 C.F.R. § 328.3(a)(3)(i) & 40 C.F.R. § 120.2(a)(3)(i)). That is assuredly *not* what the plurality had in mind in requiring that "a relatively permanent body of water [be] connected to traditional interstate *navigable* waters." *Rapanos*, 547 U.S. at 742 (plurality) (emphasis added). As proposed, the "other waters" category impermissibly encompasses waters that are not connected to any traditional interstate navigable water.

The Agencies' application of the significant nexus standard to "other waters" is on even shakier legal ground. As a threshold matter, neither Supreme Court precedent nor subsequent case law support applying that standard to waters other than wetlands. *See infra* Part II.B.3.b. Moreover, application of the significant nexus standard to "other waters" would be inconsistent with *SWANCC*, where the Court "read the statute as written" to hold that isolated, intrastate, non-navigable ponds that did not abut a navigable water were not jurisdictional. *See* 531 U.S. at 168 & 174. To hold otherwise would effectively read the term "navigable" out of the CWA and strip it of any independent significance. *See id.* at 171-72. Apart from emphasizing the importance of the term "navigable" in the Act's text, *SWANCC* also underscored the lack of a clear statement from Congress that it intended to allow the federal government to significantly impinge the states' traditional and primary power over land and water use. *Id.* at 174. Notably, in *SWANCC*, there was no need to perform an elaborate analysis of ecological functions because the lack of proximity alone was enough to conclude there was no meaningful connection to traditional navigable waters. And Justice Kennedy effectively acknowledged as much in reaffirming *SWANCC*'s holding in his concurring opinion in *Rapanos*. *See* 547 U.S. at 766-67 ("Because [] a [significant] nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action.").

The holding in *SWANCC* is *not* limited to the particular isolated, intrastate, non-navigable features at issue in *SWANCC*. Nor is it reasonable for the Agencies to construe that holding narrowly as being limited to the Migratory Bird Rule. Instead, the *SWANCC* holding applies with equal force to any interpretation of CWA jurisdiction that threatens to read the term "navigable" out of the statute and that would significantly readjust the federal-state balance. Nonetheless, that is exactly what the proposed "other waters" category would do by allowing the Agencies to aggregate all similarly situated "other waters" across an entire watershed and asserting jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water.

Consider again the Technical Support Document's discussion of how "other waters" can restore and maintain the biological integrity of downstream "foundational waters" through the movement of seeds, pollen and macroinvertebrates that disperse "over a variety of distances" (*e.g.*, "hundreds of kilometers") by "hitchhiking" on or inside birds and mammals or via wind

dispersion. *See* TSD at 206-08. Similar to the Migratory Bird Rule, relying on these sorts of biological connections to make a significant nexus finding for "other waters" located hundreds of kilometers from the nearest traditional navigable water would deprive the term "navigable" of all meaning and raise the very same "significant constitutional [and federalism] questions" that the Supreme Court warned about in *SWANCC*. *See* 531 U.S. at 172 & 174.

Equally troubling, under the Proposed Rule, the Agencies could base a significant nexus determination for "other waters" on "shallow subsurface connections" or "deeper groundwater connections." *See* 86 Fed. Reg. at 69,393; *see also* TSD at 206-08. This is true even though the Proposed Rule reaffirms the Agencies' "longstanding interpretation" that groundwater is not a WOTUS. *See* 86 Fed. Reg. at 69,424 n.47. Asserting jurisdiction based on shallow subsurface or groundwater connections raises substantial concerns:

- ***No clarity or consistency*:** How will regulators assess characteristics and significance of subsurface and groundwater connections, particularly in instances where groundwater hydrologic connections are "visibly absent" (TSD at 208)? Consideration of shallow subsurface and groundwater connections could lead to lengthy and costly disputes between landowners and regulators.

- ***Improper reliance on subsurface connections*:** The Agencies appropriately reaffirm their longstanding interpretation that the Act categorically excludes groundwater from the term "navigable waters." Accordingly, the Agencies should *not* rely on groundwater connections, or any subsurface connections, to establish jurisdiction. Establishing jurisdiction based on groundwater connections in particular could give rise to liability and permitting obligations never before contemplated.

Put simply, the "other waters" category exemplifies the sort of "[strictly ecological] reasoning [that] would swiftly overwhelm *SWANCC* altogether." *Rapanos*, 547 U.S. at 749 (plurality).

2. The Proposed "Other Waters" Category Is Likely to Cause Confusion and Lead to Inconsistent Results.

The Proposed Rule does not provide sufficient guidance as to how regulators will apply the significant nexus standard to the "other waters" category. The predictable result will be considerable confusion on the part of landowners and inconsistent and unpredictable implementation by regulators.

The preamble and TSD list various waters that could fall within the "other waters" category such as sloughs, prairie potholes, streams, wetlands, playa lakes, or ponds. But because existing guidance does not discuss whether or how the significant nexus standard applies to the "other waters" category, the Agencies seek comment on possible approaches. *See* 86 Fed. Reg. at 69,440. For instance, the Agencies may consider "other waters" to be "similarly situated" if they perform "similar functions" and have similar "geographic position[s] on the landscape." *Id.* at 69,439. The Agencies likewise float several possibilities for interpreting "in the region," including watersheds or subwatersheds, ecoregions, hydrologic landscape regions, or physiographic groupings. *See id.* at 69,439-40.

As a procedural matter, the Proposed Rule does not provide enough information on or scientific support for the various "alternatives" for implementing the significant nexus standard with respect to the "other waters" category. As such, the public does not have a meaningful ability to evaluate and comment on the various alternative approaches.

In all events, the Agencies do not sufficiently explain what it means for "other waters" to be "similarly situated" with respect to their effects on downstream navigable waters. For example, even though features like prairie potholes, lakes, and sloughs all differ in physical and ecological characteristics, including quantity and regularity of flow, when (and on what basis) will the Agencies determine that they serve similar functions relative to downstream navigable waters? Alternatively, will the Agencies aggregate only the same features (*e.g.*, playa lakes only with other playa lakes)? How many functions must "other waters" have in common to be deemed "similarly situated"? Is it enough, for example, if they both contribute baseflow to a nearby stream that ultimately flows into a traditional navigable water located miles away? All of these questions are left to individual regulators' judgment, which all but assures there will be inconsistent and unpredictable decisions in the field.

To further complicate matters, the Agencies specify several approaches to "in the region" of varying scales, while recognizing that some "regions" may be too large (*e.g.*, if watersheds are too large, then a subwatershed approach might be more appropriate). What criteria will regulators use to determine whether the watershed scale is inappropriate? Is that likely to happen only in some parts of the country, but not others? Similarly, for the ecoregion, hydrologic landscape region, or physiographic region approaches, what is the scientific support for being able to aggregate "other waters" within such large areas for purposes of determining whether those waters significantly affect a downstream traditional navigable water? Notably, members of the SAB Panel expressed concerns about the lack of scientific support for these alternative approaches. *See* 2014 WAC Comments at Ex. 7, at 12 & 96 (SAB Panel Member Comments on 2014 Proposed Rule, attached hereto as part of Ex. 4). Likewise, WAC previously submitted technical comments explaining why "the Ecoregion and hydrologic-landscape unit approaches both suffer from being too broad, and are not placed within a consistent framework of determining significance." *See* 2014 WAC Comments at Ex. 6, at 8 (2014 GEI Report, attached hereto as part of Ex. 4). Given these criticisms, why do the Agencies continue to believe that they are acceptable approaches to "in the region"?

For these reasons, the "other waters" category not only exceeds the Agencies' authority under the CWA, it is also too vague and imprecise to allow for clear and predictable implementation.

3. The Agencies Should Not Finalize the "Other Waters" Category.

Waters and wetlands that do not otherwise fall within the other categories of jurisdiction—most of which are defined too broadly—should not be federally regulated under the CWA. Instead, those waters should be regulated, if at all, by states or tribal governments.

D. The Proposed Impoundments Category Is Confusing and Lacks Legal Support.

The Agencies propose to define WOTUS to include "[a]ll impoundments of waters otherwise defined as waters of the United States under the definition, other than impoundments of" jurisdictional "other waters." 86 Fed. Reg. at 69,450. This means that impoundments of most other "waters of the United States" are categorically jurisdictional, from impoundments of TNWs to impoundments of "significant nexus" tributaries. *Id*. The Agencies also articulate that an impoundment could create a TNW (even if the water pre-impoundment could not be so characterized), as well as a relatively permanent water. *Id.* at 69,420. But it is also true that a CWA Section 404 permit may authorize a change to the jurisdictional status of a water, such as where an impoundment is constructed to create a waste treatment system. *Id.* at 69,420-21. The Agencies also seek comment as to whether certain types of impoundments that completely sever surface or subsurface hydrologic connections should instead be evaluated under the "other waters" provision. *Id.* at 69,421.

1. The Agencies Must Define "Impoundment."

The term "impoundment" is inherently broad and amorphous. In the proposal, the Agencies explain *when* impoundments will qualify as "waters of the United States," but they do not explain, in the first instance, *what* they consider impoundments to be. A necessary predicate to exerting jurisdiction is knowing to what, exactly, such jurisdiction will apply. As such, WAC strongly recommends that the Agencies define the term, particularly if they insist on regulating impoundments as a standalone category without any further required showing. *See* 2019 WAC Comments at 20-21 (attached as Ex. 1); 2014 WAC Comments at 32-33 (attached as Ex. 4).

Failing to define "impoundment" is problematic because there are effectively no limits on the Agencies' ability to declare a feature to be an "impoundment" and therefore exert jurisdiction over it. In prior outreach, such as during meetings for the 2015 Rule, EPA officials referred to impoundments as "lakes made by damming a water of the U.S." If this is what the Agencies intend, they should define impoundment accordingly in the rule. Furthermore, because the proposal would assert jurisdiction over other tributaries and wetlands based upon their relationship to an impoundment,[36] it is even more important that the Agencies clearly define what an impoundment is so that the jurisdictional status of related features can be readily determined.

2. The Agencies' Categorical Assertion of Jurisdiction Over Impoundments Lacks Support in Either Law or Science.

The Agencies wisely declined to delineate impoundments as a standalone jurisdictional category in the NWPR. The Agencies observed that "[a]n impoundment may lose its surface

[36] Indeed, the Proposal states that "the Agencies interpret the term "[WOTUS]" to include: . . . *tributaries to* traditional navigable waters, interstate waters, the territorial seas, and *impoundments* that meet either the relatively permanent standard or the significant nexus standard; *wetlands adjacent to impoundments* and tributaries, that meet either the relatively permanent standard or the significant nexus standard." 86 Fed. Reg. at 69,373 (emphasis added).

water connection to a downstream jurisdictional water due to any number of reasons," and in such cases, the impoundment is not a jurisdictional water. 85 Fed. Reg. at 22,303. The Agencies inexplicably backtrack in the proposal without providing a supportable rationale grounded in the science or in the law.

This proposal largely resurrects the impoundment category from the 1986 regulations. *Id.* at 69,420. The age of that regulation, however, does not mean that it is legally defensible. Rather, the Supreme Court simply has not had occasion to evaluate whether "waters of the United States" includes impoundments of other WOTUS. In this regard, the Agencies' reliance on case law to support their interpretation that they retain jurisdiction, categorically, over a WOTUS that has been dammed or impounded[37] is misplaced. The Agencies correctly note that one case on which they rely, *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), does not address the definition of "waters of the United States" at all. 86 Fed. Reg. at 69,420. And yet, they argue that it nevertheless "confirmed" the Agencies' position regarding damming and impounding. *Id.* (citing 547 U.S. at 379 n.5).

S.D. Warren concerned the applicability of CWA Section 401 state water quality certifications to the operation of hydroelectric dams. *See* 547 U.S. at 373. There, the Supreme Court considered the meaning of "discharge" and whether the absence of the phrase "of a pollutant" meant that "discharge" could apply to river water that was being artificially moved from upstream of the dam to downstream. *Id.* at 373-76. The Court concluded, without difficulty, that "discharge" was broader than "discharge of a pollutant" and so could apply to river water being routed through a dam and back to the river. *Id.* at 377-78. But the Court nowhere addressed the jurisdictional status of impoundments or the legal effect of damming or impounding a water of the United States. In a footnote, the Court explained that it was affirming the lower court on different reasoning, disagreeing with the Supreme Judicial Court of Maine's conclusion that the river water was an "addition" to waters of the United States because it lost its federal character once removed from the natural course of the river. The Court explained, "we can [not] agree that one can denationalize national waters by exerting private control over them." 547 U.S. at 379 n.5. But dicta in a footnote about the *privatization* of WOTUS says nothing about whether a WOTUS must categorically remain a WOTUS when impounded or dammed, whether the entity doing the impounding or damming is private or public. The Agencies' elevation of a footnote to a holding is thus in error. As the Agencies correctly recognized in promulgating the NWPR, *S.D. Warren* "did not address what happens when a water of the United States is so altered as to significantly modify its connection to traditional navigable waters, nor did the cases cited in that opinion." 85 Fed. Reg at 22,303.

The Agencies' reliance on *United States v. Moses*, *see* 86 Fed. Reg. at 69,420, is no more persuasive. There, the Ninth Circuit upheld the criminal conviction of an individual who illegally discharged fill material into a jurisdictional creek without a permit. 496 F.3d 984, 985-86 (9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). The individual challenged the jurisdictional status of the creek at issue, and the court remarked on its way to upholding jurisdiction under the

[37] That is, of course, unless the Agencies decide otherwise. 86 Fed. Reg. at 69,420 (explaining that the Agencies may authorize an activity that would remove federal jurisdiction over a previously jurisdictional water).

specific facts of that case that "it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else." 496 F.3d at 988. The court did not speak in categorical terms. As such, the most that can be gleaned from these cases is that jurisdiction over impoundments must be analyzed on a case-by-case basis. Neither case informs whether impoundments categorically should be jurisdictional without any further analysis.

The Proposed Rule's approach to impoundments is also without scientific support. The Proposal generally states that the scientific literature and findings confirm that "impoundments have chemical, physical, and biological effects on downstream waters through surface or subsurface hydrologic connections," 86 Fed. Reg. at 69,421, which the TSD reiterates without much elaboration (at 196). But this assertion is not a sufficient ground to claim jurisdiction over *all* impoundments. Likewise, explaining that features used to create impoundments do not typically block all flow, *see* 86 Fed. Reg. at 69,421, proves virtually nothing about what sorts of chemical, physical, and biological effects impoundments may have, much less about their *significance*. As such, the proposal fails to assure the existence of a connection or nexus significant enough to warrant categorical jurisdiction. At most, then, the Agencies' scientific reasoning supports a case-by-case assertion of jurisdiction, as with their legal reasoning.

WAC supports the exclusion of impounded "other waters" from this category. As the Agencies note, there is no lawful basis to assert jurisdiction over tributaries or adjacent wetlands by virtue of their connections to "other waters" and thus, there is no basis to deem an impoundment of an "other water" *per se* jurisdictional, either. *See* 86 Fed. Reg. at 69,420. But the Agencies' reasoning for excluding those impoundments may apply equally to other impoundments that the Agencies would categorically include, such an impoundment of a tributary to an impounded wetland.

In this regard, by granting categorical jurisdiction over impoundments, the proposal inexplicably puts impoundments on the same footing as TNWs and territorial seas vis-à-vis establishing jurisdiction over tributaries. This means that a relatively permanent tributary of an impoundment—in other words, an (a)(5)(i) tributary of an (a)(4) water—can be jurisdictional regardless of whether the impoundment is a TNW or has any connection to a TNW. An impoundment of that tributary would then be categorically jurisdictional, and so on, *ad infinitum*, without *ever* evaluating whether there is in fact a connection to a TNW. Similarly, the proposal allows for the assertion of jurisdiction over wetlands adjacent to relatively permanent impoundments (*i.e.*, an (a)(7)(ii) wetland) regardless of whether the impoundment is a TNW or has any connection to a TNW. This interpretation strays far afield from the plurality opinion of *Rapanos*, which requires connection with a traditional navigable water as the *sine qua non* of jurisdiction. *See* 547 U.S. at 742 (ruling that to establish that wetlands are covered by the CWA, two findings are required: "first, that the adjacent channel contains a [WOTUS] (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "'water' ends and the 'wetland' begins"); *see also* discussions of *Rapanos*, *supra* Part II.B.2.

In sum, the Agencies have failed in their attempt to establish the legal and scientific authority to exert categorical jurisdiction over impoundments, which themselves are inadequately defined. While it may be reasonable, with appropriate justification, to presume

jurisdiction over impoundments of traditional navigable waters (if the impoundments are clearly defined), the Agencies have not justified the blanket assertion of authority here.

E. The Proposal's Treatment of Tributaries Is Confusing to Implement, Overbroad, and Inconsistent with *Rapanos*.

Under the Proposed Rule, tributaries of TNWs, interstate waters, impoundments, and territorial seas are jurisdictional if they either meet the relatively permanent standard or the significant nexus standard. As discussed above, this "either/or" approach is legally indefensible and, in all events, the Agencies' misinterpretations of both the plurality's and Justice Kennedy's opinions in *Rapanos* lead to incurable defects in the tributary provision. But apart from those fundamental legal errors, the tributary category in the Proposed Rule suffers from numerous other deficiencies.

1. The Lack of a Tributary Definition Is Unacceptable.

The tortured history of the Agencies' assertions of jurisdiction over "tributaries" is well documented. In *Rapanos*, both the plurality and Justice Kennedy expressed concern that the Corps' approach to tributaries allowed for the extension of federal regulatory authority to waters with remote proximity and tenuous connections to TNWs. *See Rapanos*, 547 U.S. at 726-28 (plurality; cleaned up) (detailing the Corps' "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries,'" including roadside ditches, irrigation ditches and drains that intermittently connect to covered waters, and "(most implausibly of all) the 'washes and arroyos' of an 'arid development site,' located in the middle of the desert, through which 'water courses . . . during periods of heavy rain'"); *id.* at 781-82 (Kennedy, J., concurring) (stating that the Corps' regulations left "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it"). As the Chief Justice explained, the Corps' "view that its authority was essentially limitless" prompted the Supreme Court to twice "explain[] that such a boundless view was inconsistent with the limiting terms Congress had used in the Act," and he lamented "how readily the situation could have been avoided" if the Agencies had "provid[ed] guidance meriting deference" rather than default to their "essentially boundless view" of the scope of federal regulatory authority under the CWA. *Id.* at 757-58.

Over fifteen years later, the Agencies are proposing an essentially boundless definition. Rather than define "tributary" in the Proposed Rule, the Agencies instead try to assure stakeholders that they have "decades of experience implementing the 1986 regulations." 86 Fed. Reg. at 69,422. And the Agencies explain that tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into a TNW, interstate water, or the territorial seas. *See id.*

Given the history of the Agencies' assertions of jurisdiction over tributaries, as the plurality catalogued in *Rapanos*, the Agencies' assurances ring hollow. Failing to define tributary once again triggers significant vagueness and fairness concerns, given the importance of the term in determining the extent of the CWA's reach and potential penalties. Stakeholders still lack meaningful criteria and guidance for determining what constitutes a tributary, while the Agencies continue to retain too much discretion to expand jurisdiction to historically unregulated features.

Because tributaries are a central part of the Agencies' jurisdiction, it is crucial that the Agencies propose an objective, measurable definition with specific flow characteristics.

2. The Agencies' Inconsistent "Reach" Concept Results in Overly Expansive Assertions of Jurisdiction and Poses Substantial Implementation Concerns.

The uncertainty resulting from the lack of a tributary definition is compounded by the tributary "reach" analysis used to determine which tributaries are jurisdictional. According to the Agencies, a tributary includes "the entire reach of the stream that is of the same order (*i.e.,* from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." 86 Fed. Reg. at 69,435 (relatively permanent) & 69,437 (significant nexus). The Agencies apply this tributary reach analysis to both the relatively permanent and significant nexus standards.

Under this approach, the Agencies can extend jurisdiction far upstream to waterways merely because they are part of a reach whose downstream confluence is determined to have a "significant nexus" to a TNW, interstate water, or territorial sea, but *not* because the upstream portions independently have the required nexus. The Agencies thus improperly assume that entire reaches are jurisdictional based only on an analysis of one portion of the tributary—the very portion that is most likely to result in a significant nexus finding because it is the point of maximum flow.

The Agencies' reach analysis in the context of the relatively permanent standard is no more reasonable. The Agencies state that if the downstream point of confluence is not representative of the entire reach, the "flow regime that best characterizes the entire tributary [will be] used." 86 Fed. Reg. at 69,435. But the Proposed Rule fails to explain how the most characteristic flow regime will be determined except to say that "[a] primary factor" in making the determination will depend on the relative lengths of segments with differing flow regimes. *Id.* Again, the Agencies' failure to provide objective, measurable criteria for determining the best flow regime results in vagueness concerns that leave landowners and project applicants with uncertainty and confusion about which waters are subject to regulation under the Act. And even this alternative reach assessment is likely to result in an inaccurate and overbroad assertions of jurisdiction without consideration of water bodies' varying flow characteristics. Entire reaches can still be deemed jurisdictional, no matter their length, even if evidence of hydrological, chemical, or biological conditions derived from an analysis of certain portions of those reaches are unrepresentative of other portions of the same reach.

To assume, as the Agencies do, that the entire reach of a stream is a hydrographic feature sufficient to establish jurisdiction under either the relatively permanent or significant nexus standard, regardless of whether that reach extends hundreds of feet or several miles, lacks support in either the plurality's or Justice Kennedy's opinions in *Rapanos*. Neither opinion supports the exercise of jurisdiction over broad expanses of waters simply because of their proximity to, or hydrological connection with a *single point* of water found to satisfy either standard. Indeed, Justice Kennedy's hallmark case-by-case jurisdictional determination under the significant nexus test precludes the Agencies' categorical and expansive approach under the reach analysis. In addition, the reach analysis raises the very same concern that Justice Kennedy expressed when he rejected the Corps' definition of tributary in *Rapanos* because it would

include as jurisdictional waters that are "remote from any navigable-in-fact water and carr[y] only minor volumes." 547 U.S. at 781.

The reach analysis also conflicts with Justice Scalia's relatively permanent test, which focuses on the connection between a wetland or stream and a TNW. *See id.* at 742. By contrast, the reach analysis shifts the focus from the impacted wetlands or stream crossing to the point of confluence downstream. Under the reach analysis, jurisdiction could extend to remote upstream waters, even if the stream travels for several miles. Such exercise of jurisdiction would be based on little more than a mere hydrological connection—the very standard that both Justice Scalia and Kennedy expressly rejected as insufficient to establish jurisdiction. *Rapanos,* 547 U.S. at 784-85 (Kennedy, J., concurring) (a hydrologic connection alone is "too uncertain" as a standard for jurisdiction); *see also id.* at 716 (plurality) (wetlands may not be deemed jurisdictional merely because they have a hydrologic connection to jurisdictional waters).

The problems with the tributary reach approach do not end there. Under the Proposal, project applicants must try to conduct a reach analysis to determine whether a tributary is subject to regulation under the CWA, and in many cases, a reach-wide analysis will extend well beyond the limits of a project area. This will create insurmountable hurdles for project applicants because the reach analysis does not make any distinction between lands that a project applicant owns or has access to and lands that the applicant does not. Consequently, conducting a reach analysis will require an applicant to obtain and document detailed information about an entire stream reach, which may stretch for many miles and include waters downstream and upstream from the project, as well as all adjacent wetlands—which may not be owned by or accessible to the applicant.

The tributary reach analysis will be especially problematic for linear infrastructure projects such as electric utilities, roads, and pipelines, which can extend hundreds of miles and traverse numerous stream reaches. Generally, these projects involve non-landowner applicants who may not even have access to lands within the project footprint. To illustrate the potential burden for linear project applicants, a several-hundred-mile-transmission project might involve as many as 1,000 water body crossings and hundreds if not thousands of land owners. It is unreasonable to impose such enormous costs and unnecessary burdens on project applicants, especially where the reach analysis may not be representative of the portion of the stream affected by a project.

3. The Agencies' Suggested "Alternatives" for Implementing the Relatively Permanent and Significant Nexus Standards Cannot Be Reconciled with the Plurality and Concurring Opinions in *Rapanos*.

The Agencies seek comment on alternatives to the tributary reach analysis for assessing relative permanence and significant nexus. As explained below, those alternatives stray even further from the *Rapanos* opinions in which they are purportedly grounded.

***Relatively permanent*:** The Agencies solicit comment on whether they should interpret "relatively permanent" to include *all* perennial and intermittent tributaries and use the NWPR's approach to the terms "perennial" and "intermittent" or modified definitions of those terms. *See* 86 Fed. Reg. at 69,436. Such an approach would directly contradict the *Rapanos* plurality's

"relatively permanent" standard. In lambasting the Corps for "stretch[ing] the term 'waters of the United States' beyond parody," 547 U.S. at 734, the plurality repeatedly indicated that it did *not* consider intermittent flow to meet the relatively permanent standard:

- Terms included in the dictionary definition of "waters" all "connote continuously present, fixed bodies of water, *as opposed to ordinarily dry channels through which water occasionally or intermittently flows*." *Id*. at 732-33 (emphasis added).

- "It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams…—that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,'…, or 'existing only, or no longer than, a day; diurnal . . . short-lived,'…—are not." *Id.* at 732 n.5 (citation omitted).

- "The restriction of 'the waters of the United States' to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term." *Id.* at 733-34.

- "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source'. . . . The separate classification of 'ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'" *Id.* at 735-36 (emphasis in original; cleaned up).

- "The phrase ["waters of the United States"] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739.

It is true that the plurality acknowledged that unusual conditions, such as a seasonal drought that would interrupt year-round flow, would not necessarily mean a water is excluded from the meaning of "relatively permanent." *Id.* at 732 n.5. But not necessarily excluding a "290-day, continuously flowing stream" very different from proclaiming that all streams with intermittent flow meet the relatively permanent standard. *Id.*

Notably, in developing the NWPR's categorical approach to tributaries, the Agencies sought to "incorporate important aspects of Justice Kennedy's opinion, together with those of the plurality." 85 Fed. Reg. at 22,291. In other words, it was not an attempt to implement only the plurality's relatively permanent standard in a vacuum. WAC supports the NWPR's approach to tributaries, which was based on common ground between the plurality's and Justice Kennedy's opinions, but only if that approach is the *sole* standard for determining the jurisdictional status of tributaries. Such a common ground approach satisfies *Marks*. However, WAC strongly opposes the Agencies' current attempt to blend the NWPR's approach to tributaries into the Proposal's interpretation of the plurality's relatively permanent standard in isolation from Justice Kennedy's opinion. The Agencies' Proposal would result in an interpretation of "relatively permanent" that bears no resemblance to the sorts of waters the plurality had in mind. *See supra* at Part II.B.2

(explaining why the Proposed Rule's approach to seasonal flow is inconsistent with the plurality opinion).

***Significant nexus*:** The Agencies suggest that instead of continuing to apply a tributary reach plus adjacent wetlands analysis, they can broaden their approach to significant nexus by aggregating all similarly situated tributaries within large regions. *See* 86 Fed. Reg. at 69,439-40. As explained above, such an approach stretches Justice Kennedy's opinion too far. *See supra* at Part II.B.3.c. (discussing expanded significant nexus approaches). "[C]onsider[ing] tributaries to be similarly situated with other tributaries" or "consider[ing] similarly situated waters to be tributaries of the same flow regime" within entire watersheds (or similarly broad geographic regions) covering dozens or even hundreds of square miles flouts Justice Kennedy's warning that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a "significant nexus." 86 Fed. Reg. at 69,439-40; *see also Rapanos*, 547 U.S. at 778-79 ("[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."). By downplaying the significance of distance from a navigable water and the volume, duration, and frequency of flow, the Proposal's alternatives defy Justice Kennedy's rejection of the "any hydrological connection" standard.

As a practical matter, the combined effect of the Proposed Rule's watershed-wide interpretation of "significant nexus" and the statements in the record about the significance of connections between tributaries and downstream navigable waters will result in an unlimited jurisdictional reach. Take for example the following:

- "The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters." TSD at 29.

- "The evidence unequivocally demonstrates that the stream channels and riparian/floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity." *Id.* at 31.

- "Streams: *The scientific literature unequivocally demonstrates that streams, individually or cumulatively, exert a strong influence on the integrity of downstream waters. All tributaries, regardless of size or flow duration, are physically, chemically, and biologically connected to downstream waters and strongly influence their function*." *Id.* at 64 (emphasis in original).

- "The Science Report, as well as the peer-reviewed updated synthesis of the scientific literature by Fritz *et al.* (2018), Schofield *et al.* (2018), and Goodrich *et al.* (2018), conclude that the scientific evidence unequivocally demonstrates that streams, including ephemeral, intermittent, and perennial streams and rivers are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits. The scientific evidence in the Science Report (and Fritz *et al*. 2018, Schofield *et al.* 2018, Goodrich *et al*. 2018) notes that streams,

individually or cumulatively, exert a strong influence on the integrity of downstream waters, and that all tributaries, regardless of size or flow duration, are connected to and strongly influence the functioning of downstream waters." *Id.* at 71.

The Agencies believed the science back in 2015 justified the categorical assertion of jurisdiction over *all* tributaries, regardless of size, flow duration, or distance from a TNW. And the above-quoted passages (and other statements throughout the record) reflect that the Agencies believe that the science has only grown stronger in support of asserting jurisdiction over *all* tributaries. There is hardly any doubt about whether individual regulators will find that tributaries satisfy the significant nexus standard. The question is not *whether* the Agencies will again assert that all tributaries meet their interpretation of significant nexus, it is *how long* it will take for the Agencies to aggregate large numbers of tributaries and make significant nexus findings on a watershed-by-watershed basis. This is very much the sort of "boundless view" that the Supreme Court has twice found to be "inconsistent with the limiting terms Congress had used in the Act." *Rapanos*, 547 U.S. at 757 (Roberts, J., concurring).

In conclusion, the Agencies should abandon their proposed "alternative" approaches to implementing the relatively permanent and significant nexus standards. These approaches are inconsistent with the plurality's and Justice Kennedy's opinions.

4. <u>There Is No Reasonable Legal or Scientific Basis to Exercise Jurisdiction Over Ephemeral Streams that Serve as "Transitional Areas" or Provide Certain Ecological Functions.</u>

The Agencies assert that certain ephemeral waters in the arid West may be jurisdictional under the significant nexus standard where they have a significant effect on the physical, chemical, and biological integrity of downstream TNWs. *See* 86 Fed. Reg. at 69,437. The Agencies attempt to distinguish such ephemeral waters from geographic features such as non-jurisdictional swales and erosional features by noting that ephemeral tributaries may serve as a transitional area between the upland environment and TNWs, provide habitats for wildlife, and assist in physical processes such as nutrient cycling, sediment retention, and pollutant trapping, which may in turn affect the integrity of downstream TNWs. *See id*. This paragraph made little sense when the Agencies originally included it in the 2008 *Rapanos* Guidance, and it still makes no sense.

Perhaps the biggest flaw in the Agencies' approach to ephemeral waters in the arid West is it ignores the importance of volume, duration, and frequency of flow, which both the plurality and concurring opinions in *Rapanos* found to be critically important. Accordingly, the Agencies open the door to the very sorts of unlawful assertions of jurisdiction over ephemeral drainages that they attempted to get away with under the former "any hydrologic connection" theory, which was resoundingly rejected in the *Rapanos* decision. *See Rapanos*, 547 U.S. at 784 ("Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain . . . mere hydrologic connection should not suffice . . .") (Kennedy J., concurring); *see also id.* at 732 n.5 (plurality) ("Common sense and common usage distinguish between a wash and seasonal river."). The opinions forming the majority in *Rapanos* thus instruct that all streams, whether ephemeral or otherwise, must have more than insubstantial flows.

Moreover, the Agencies' discussion of how ephemeral tributaries serve as transitional areas and provide certain ecological functions is equally vulnerable. Such attributes are not unique to ephemeral streams and are thus not distinguishing features of jurisdictional waters. To the contrary, any channel or upland riparian area may serve as a "transitional area" or provide ecological functions that could affect the integrity of downstream waters. For example, non-jurisdictional upland vegetated areas bordering waters often provide the same ecological and water quality functions as jurisdictional wetlands. Therefore, there is no basis to extend jurisdiction over ephemeral streams simply because they serve as transitional areas or provide ecological and/or water quality benefits. At bottom, the Proposal's failure to identify volume, duration, and frequency of flow criteria for ephemeral tributaries would allow the Agencies to assert jurisdiction over countless bodies of water without any meaningful limit.

F. The Proposed Rule's Approach to Adjacent Wetlands Fails to Respect the Limits that Congress and the Supreme Court Placed on Federal Regulatory Authority.

The Agencies' constitutional errors reach their apogee with adjacent wetlands. As discussed above, the Agencies have seriously misinterpreted *Rapanos*, and as such are mangling the application of the relatively permanent and significant nexus tests. The result is the Agencies have virtually ensured that they will be able to find a jurisdictional hook for any wetland on which they set their sights.

1. The Agencies' Proposal

The Agencies propose to assert jurisdiction over wetlands adjacent to: (i) traditional navigable waters, interstate waters, or territorial seas; (ii) relatively permanent, standing, or continuously flowing impoundments or tributaries with a continuous surface connection to such waters; or (iii) impoundments or tributaries if the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of so-called "foundational waters," *i.e.*, traditional navigable waters, interstate waters (which includes interstate wetlands), or the territorial seas. 86 Fed. Reg. at 69,450. The Proposed Rule also restores the 1986 regulations' definition of "adjacent": "[a]djacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands." *Id.* Under the Proposal, wetlands adjacent to "other waters" would need to be assessed as "other waters" to determine if they meet the relatively permanent or significant nexus standards, instead of as adjacent wetlands under (a)(7). *Id.* at 69,423.

Under the relatively permanent approach, wetlands are "adjacent" if they have a "continuous surface connection with a relatively permanent, non-navigable tributary." *Id.* at 69,435. A continuous *hydrologic* connection is not required for a wetland to be considered "adjacent." Rather, the continuous surface connection requirement for adjacency can be satisfied by "a physical connection such as a non-jurisdictional ditch that connects the adjacent wetland to the relatively permanent tributary." *Id.* The Agencies further seek comment on whether other features such as "culverts, pipes, or swales" can also satisfy the continuous surface connection requirement. *See id.* at 69,436. Finally, the Proposed Rule states that a wetland must not be

separated from the relatively permanent tributary "by uplands, a berm, dike, or other similar feature[s]" to meet the continuous surface connection requirement. *Id.* at 69,435.

Under the significant nexus approach, the Agencies will first establish the relevant reach of a tributary as noted in the "tributaries" discussion (for purposes of assessing whether adjacent wetlands meet the significant nexus test). *Id.* at 69,437. They will then consider the flow and functions of the tributary together with the functions performed by ***all the wetlands*** adjacent to the tributary reach in evaluating whether a significant nexus is present. *Id.* (emphasis added). A wetland is "adjacent" if one of three criteria is satisfied: (i) there is an unbroken surface or shallow subsurface connection to jurisdictional waters and at least an intermittent hydrologic connection; (ii) wetlands are physically separated by man-made dikes or barriers or natural breaks; or (iii) proximity to a WOTUS is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters. *Id.* at 69,435. The Agencies will assess various functions performed by tributaries and their adjacent wetlands that are relevant to the significant nexus determination (*e.g.*, pollutant trapping, floodwater retention). *Id.* at 69,437-38. Although the Agencies confirm that this is the approach to adjacent wetlands that they are currently implementing under the 2008 *Rapanos* Guidance, they discuss how they might adopt an alternative approach for implementing the significant nexus standard in the future that would involve aggregating even more wetlands across even broader areas. *See id.* at 69,439-40.

2. The Proposed Rule's Adjacent Wetland Provision Is Inconsistent with the Plurality's Relatively Permanent Standard.

Beyond conflicting with the *Rapanos* plurality's relatively permanent standard, *see* Part II.B.2, the Proposed Rule's approach to adjacent wetlands suffers from additional errors.

The Proposal gives too little weight to the plurality's "continuous surface connection" requirement for adjacent wetlands, thereby allowing for a much broader assertion of CWA jurisdiction than the plurality opinion would have endorsed. In describing the continuous surface connection requirement, the *Rapanos* plurality emphasized that the connection must "mak[e] it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742. It further stated that wetlands "with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." 547 U.S. at 742 (plurality). The Agencies ignore these important limitations by allowing the continuous surface connection requirement to be satisfied by physical connections such as non-jurisdictional ditches with irregular flow. *See* 86 Fed. Reg. at 69,435.

The Agencies' interpretation of the "continuous surface connection" requirement makes no sense and flouts the plurality's requirement that the connection must be one that "mak[es] it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742. Moreover, by suggesting that features such as ditches or pipes can satisfy the continuous surface connection requirement—without any mention of the distance between the wetland and a relatively permanent tributary or how often water must be present in those sorts of connections,

see 86 Fed. Reg. at 69,435-36[38]—the Agencies open the door to asserting jurisdiction over "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' [that] do not implicate the boundary-drawing problem of *Riverside Bayview*." *Rapanos*, 547 U.S. at 742 (plurality). Such a broad interpretation of "continuous surface connection" finds no support in the plurality's opinion. The Agencies should limit the "continuous surface connection" requirement to those wetlands that "*directly abut* the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature." *See* 2008 *Rapanos* Guidance at 7 & n.29 (emphasis added).

3. The Agencies' Approach to Aggregating Adjacent Wetlands for Purposes of Assessing Significant Nexus Is Too Broad.

The Coalition previously discussed why the Agencies' misapplication of Justice Kennedy's significant nexus standard renders the Proposed Rule indefensible and unconstitutionally vague. *See supra* Parts II.B & II.C. Among other things, the Agencies' approach of aggregating impacts of all wetlands in a particular region is inconsistent with Justice Kennedy's opinion in *Rapanos*. Justice Kennedy neither aggregated the wetlands at issue, nor did he instruct lower courts to determine jurisdiction over the wetlands at issue by aggregating impacts of all wetlands surrounding those at issue. Instead, he emphasized the need to look at distance, quantity, and regularity of flow for ***each wetland***. *Rapanos*, 547 U.S. at 784-87 (emphasis added).

As explained above, Justice Kennedy's jurisdictional test is predicated on every subject water body being judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. *See supra* Part II.B.3.c. The focus of Justice Kennedy's significant nexus test was plainly on the wetland at issue, not that wetland's impact when aggregated with many other wetlands (much less other non-wetland waters): "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus *between the wetlands in question* and navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 779 (emphasis added); *see also id.* at 782 ("the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands"). Plainly, the Agencies' proposed approaches to adjacent wetlands—either aggregating the "functions performed by all the wetlands adjacent to the tributary" (86 Fed. Reg. at 69,437) or aggregating all similarly situated wetlands across entire watersheds, ecoregions, hydrological landscape regions, or physiographic regions (*id.* at 69,439-

[38] The Agencies' reliance on *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009), to support allowing ditches to satisfy the continuous surface connection is misplaced. *See* 86 Fed. Reg. at 69,435. There, the Court pointed to a channel that "provides a largely uninterrupted permanent surface water flow between the wetlands and traditional waterways," as well as "additional (and substantial) surface connections between the wetlands and permanent water bodies 'during storm events, bank full periods, and/or ordinary high flows" as satisfying the continuous surface connection requirement. *See* 555 F.3d at 212. Only then did the Court further observe that the property owner "went a long way towards creating a continuous surface connection when he dug or excavated ditches to enhance the acid mine drainage into the creeks and away from his wetlands." *Id.* at 212-13. Going a "long way towards creating a continuous surface connection" does not mean those ditches alone would satisfy the plurality's requirement.

40)—to evaluate whether they significantly affect a TNW, interstate water, or territorial sea expands the significant nexus standard far beyond what Justice Kennedy intended and would lead to the sorts of claims to jurisdiction that Justice Kennedy rejected in *Rapanos*. *See* 547 U.S. at 784-87 (Kennedy, J., concurring).

Moreover, the Proposed Rule's approach to adjacency, which allows for the assertion of jurisdiction over wetlands with only intermittent shallow subsurface connections or wetlands that the Agencies deem to be "reasonably close" in proximity to a jurisdictional water such that they can infer an ecological interconnection, raises implementation concerns because of the use of vague terminology. *See* 86 Fed. Reg. at 69,435. To illustrate:

- The Agencies do not define what it means to be an "unbroken . . . shallow subsurface connection" or how to distinguish such connections from groundwater. Underground hydrological connections are numerous and complicated; because it is unclear what the Agencies are attempting to include with this standard, the Agencies should clarify the meaning of "sub-surface hydrological connections." For example, does this standard include man-made surface connections? Are there any limitations on the distance of the sub-surface connection between the "adjacent" wetland and the non-navigable water? How deep can such connections be and still be considered "shallow"? If groundwater flow paths are in the shallow subsurface, does this mean the Agencies are effectively regulating groundwater?[39]

- Establishing jurisdiction over adjacent wetlands with "maybe intermittent" hydrologic connections comes dangerously close to the "any hydrological connection" test rejected in *Rapanos*.

- How will the Agencies determine what constitutes "reasonably close" "proximity" such that they can infer an "ecological interconnection"? These terms are opaque and potentially allow for even more expansive assertions of jurisdiction than the "any hydrological connection" test.

The Agencies' failure to explain these concepts more precisely all but guarantees that individual regulators will apply the rule inconsistently or rely heavily on guidance documents that are not subject to notice-and-comment. Such reliance will mean that key aspects of the Proposed Rule could evade review. The Agencies must clarify how they will apply these vague concepts.

[39] WAC previously explained in detail why asserting jurisdiction over waters based on "shallow subsurface hydrologic connections" is so problematic. *See* 2014 WAC Comments at 53-55 (attached as Ex. 4). Although the Proposed Rule does not go so far as to categorically assert jurisdiction over all "waters" with "shallow subsurface hydrologic connections," the Agencies' current claim that they can establish jurisdiction over adjacent wetlands based on intermittent, shallow subsurface hydrologic connections raises all of the same concerns, and WAC hereby incorporates those prior comments.

IV. Proposed Exclusions

WAC supports the Agencies' proposal to maintain the decades-old exclusions for waste treatment systems and prior converted croplands, but we are disappointed to see that the Agencies are not proposing to carry forward the NWPR's definitions of those exclusions, which were designed to improve clarity and consistency regarding the implementation of those exclusions. WAC is also disappointed that the Agencies have proposed to remove all of the other exclusions that the NWPR codified, many of which were similar to exclusions in the 2015 Rule. Although the preamble to the Proposed Rule suggests that the Agencies will continue to regard certain features as non-jurisdictional consistent with longstanding agency practice, the codification of clear and precise exclusions, such as those in the NWPR, is a superior approach than merely discussing additional exclusions in preamble language.

A. Prior Converted Cropland

WAC supports the Agencies' proposal to maintain an exclusion for prior converted cropland ("PCC") in the regulatory text. This exclusion has been in the regulatory text since 1993, when the Agencies first codified "existing policy" that PCC are not "waters of the United States." 58 Fed. Reg. 45,008, 45,033 (Aug. 25, 1993). Although prior to the NWPR, the term was not defined in the regulatory text, the preamble to the 1993 Rule explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]" *Id.* at 45,031. This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal circumstances for such lands. *See id.* at 45,032. The 1993 Rule specifically clarified that PCC do not lose their status merely because the owner changes use. *See id.* at 45,033-34. Thus, even if the PCC are used for a non-agricultural use, they remain excluded from the definition of "waters of the United States." That interpretation was upheld in *United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998). The change in use issue was litigated again in *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010), and the court there found that change in land use does *not* cause a property to lose PCC status. Relatedly, another important clarification in the 1993 rule is that even if PCC are "abandoned," meaning not used for agricultural production at least once in five years, they do not automatically become subject to CWA regulation. Rather, the PCC merely become eligible for CWA regulation. The critical inquiry is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area. If not, the land remains PCC and excluded from the definition of "waters of the United States."

Although the 1993 Rule strived to ensure consistency between determinations made by the U.S. Department of Agriculture ("USDA") under the Food Security Act of 1985 and those made by the Agencies under the CWA, it makes clear that "[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." *See* 33 C.F.R. § 328.3(a)(8) (2014). Thus, even though Congress made changes in the 1996 Farm Bill to how USDA makes PCC eligibility determinations for purposes of the conservation compliance programs it administers, that bill did not affect how EPA and the Corps

make PCC determinations for CWA purposes. *See* H.R. Conf. Rep. No. 104-494, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 745 (clarifying "the amendments to abandonment provisions under swampbuster should not supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA).[40]

WAC opposes implementation of the PCC exclusion for CWA purposes in a manner consistent with the USDA's "change in use" principle. The 1996 Farm Bill adopted that concept relevant to USDA *wetlands* certifications (not PCC certifications), but as noted above, those changes did not affect the Agencies' determination of what constitutes "waters of the United States" for CWA purposes. This issue was litigated in the *New Hope* case—the "issue paper" overturned by that court asserted that USDA "change in use" principles applied to jurisdictional determinations under the CWA—and the court rejected the assertion that a change in land use, without abandonment and return of wetland conditions, makes prior converted cropland part of "the waters of the United States." *New Hope*, 746 F. Supp. 2d at 1279, 1282; *see also* Pls' Mot. For Prelim. Inj., or in the Alternative, for Summ. J., at 14, 27-28, *New Hope*, No. 10-cv-22777-KMM, (S.D. Fla. filed July 2, 2010), ECF No. 18 (discussing USDA-related provisions in the "issue paper"). Far from merely codifying the pre-2015 regulatory regime that the Agencies claim to be implementing, incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule.

WAC recommends that the Agencies retain the following clarifications from the NWPR, which will help reduce confusion over how the PCC exclusion is implemented: (i) formal withdrawal of the 2005 Joint Guidance and any other guidance that is inconsistent with the 1993 regulations; (ii) recognition that a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs; and (iii) recognition that PCC designations are retained so long as land has been used for a broad range of agricultural purposes at least once in the preceding five years.

B. The Proposed Exclusion for Waste Treatment Systems Needs Additional Refinement.

The Agencies propose to retain the waste treatment system exclusion and "return to the longstanding version of the exclusion that the agencies have implemented for decades." 86 Fed. Reg. at 69,426. Although WAC supports the retention of the exclusion, we recommend that the Agencies finalize the version of the exclusion from the NWPR, including the first ever definition of the term "waste treatment systems." That definition was consistent with longstanding practice and interpretation by the Agencies.

[40] Likewise, when USDA amended its regulations following the 1996 Farm Bill, it specified that they "do[] not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction." *See* 61 Fed. Reg. 47,019, 47,022 (Sept. 6, 1996).

The Proposed Rule's approach to the waste treatment system exclusion is also consistent with how the Agencies have applied the exclusion for years. For example, the Proposal recognizes that the Agencies have *not* limited application of the exclusion to man-made bodies of water *and* that waste treatment systems can include systems constructed in WOTUS pursuant to a CWA Section 404 permit. *See* 86 Fed. Reg. at 69,427 (citing *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). For that reason, the Proposed Rule appropriately deletes the suspended sentence formerly contained in EPA's NPDES regulations that limited application of the exclusion to man-made bodies of water. The Proposed Rule also correctly removes the cross-reference to a definition of "cooling ponds" that no longer exists in the Code of Federal Regulations. *See* 86 Fed. Reg. at 69,426. Moreover, the Proposal appropriately clarifies that discharges from waste treatment systems to WOTUS would continue to be subject to regulation by the CWA Section 402 permitting system and that if a waste treatment system is abandoned or otherwise ceases to serve the treatment function, it no longer qualifies for the exclusion. *See* 86 Fed. Reg. at 69,427-28.

The Proposed Rule's exclusion, however, falls short in two ways. *First*, the Agencies propose to add a comma that would change the reach of the qualifying language "designed to meet the requirements of the Clean Water Act" by applying it to all systems, not just "treatment ponds and lagoons." *See* 86 Fed. Reg. at 69,426-27. The addition of this comma is problematic, as it could be misinterpreted to mean that systems that were constructed prior to 1972—and thus, could not possibly have been designed to meet the requirements of a statute that Congress had not yet enacted—do not qualify for the exclusion. This is not merely a "ministerial" change, and it could have significant consequences for WAC's members that operate decades-old waste treatment systems constructed prior to 1972. We note that even if the "designed to meet" language were applied to all waste treatment systems, it need not be read as preventing application of the exclusion to systems that predate the CWA. Reading the exclusion to encompass features that predate the CWA is clearly consistent with the way in which the exclusion has been applied in most cases. Rather than finalize this change, the Agencies should follow the approach in the NWPR, when they made it clear that the exclusion applies "to all waste treatment systems constructed prior to the 1972 CWA amendments." 85 Fed. Reg. at 22,325.

Second, the Proposed Rule's exclusion eliminates the additional clarity that the NWPR provided by expressly stating that: an excluded system includes "all components" of a system; the exclusion applies to both active and passive treatment prior to a wastewater discharge (or the elimination of such a discharge); *and* cooling ponds are waste treatment system features. *See* 85 Fed. Reg. at 22,341. These helpful clarifications, which the NWPR codified, are consistent with longstanding agency practice and did not expand the exclusion in any way.

To sum up, WAC strongly supports retaining the waste treatment systems exclusion. WAC recommends that the Agencies remove the problematic limitation that could be implied by the addition of the comma and that the Agencies make it clear, either in the regulatory text or, at a minimum, in preamble text, that the exclusion encompasses all components of a system, a variety of active and passive treatment systems fall within the exclusion, and cooling ponds are waste treatment system features.

C. The Agencies Should Restore the NWPR's Ditch Exclusions or Otherwise Make Clear that Most Ditches Are *Not* WOTUS.

The jurisdictional status of ditches is one of the most important issues for WAC members in the seemingly endless cycle of changes to the definition of "waters of the United States" by rulemaking or guidance. Ditches long pre-date the CWA's enactment and they are prevalent in every type of landscape across the country. Every day, Coalition members build, maintain, and depend on hundreds of thousands of miles of ditches every day as part of the construction, operation, and maintenance of homes, electric generation, transmission, and distribution facilities, railroads and highways, agricultural irrigation and drainage, mines, and pipelines, as well as to support other activities nationwide.

Historically, most ditches were not subject to federal regulation as "waters of the United States" under the CWA. Though the Agencies gradually expanded their claims of jurisdiction over ditches beginning in the 1980s, they remarkably broadened those claims following *Rapanos*. The NWPR brought an end to that overreach and appropriately limited jurisdiction over ditches to those ditches that are traditional navigable waters and ditches that relocate a tributary or are constructed in a tributary or a jurisdictional wetland that satisfy the flow conditions of the NWPR's "tributary" definition. WAC recommends that the Agencies either maintain the NWPR's approach to ditches or otherwise clarify that most ditches are not "waters of the United States." The Proposed Rule's approach to ditches, however, is both overbroad and too vague to allow for consistent application.

1. Ditches Are Ubiquitous and Serve a Variety of Important Functions.

The importance of drainage ditches to WAC members' activities cannot be overstated. They ensure that stormwater is properly diverted away from facilities, land, and activities where it would otherwise collect and interfere with the intended use of property. Ditches are also critically important to preventing flooding, which can be a major cause of damage to and disruption of rural and urban communities alike. Moreover, subsurface drainage systems in both rural and urban settings allow for the collection and conveyance of excess water while reducing or avoiding the erosion and pollutant transport associated with surface runoff.

WAC members depend heavily on ditches to support their agricultural activities. Too much water can be a bad thing. Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately to feed the growing population.

Ditches also are essential to transportation-related infrastructure, including the thousands of public-use airports,[41] nearly 140,00 miles of railroads,[42] and several million miles of roads and highways[43] across the country. Not only do ditches help prevent flooding of such infrastructure, they also promote public health and safety by moving water from roads and highways, protecting the integrity of rail tracks, and promoting traffic safety via proper drainage. Federal safety requirements for roads and railways require stormwater management and drainage, *see* 40 C.F.R. Part 213, as do municipal and county codes. These requirements are not surprising given the potential for poor drainage to cause traffic accidents and railroad track failures, among other hazards.

Ditches are also important for managing runoff and conveying it from residential and commercial development sites, both during construction and post-development. WAC members' developments must comply various stormwater management controls, including best management practices to minimize the adverse effects of runoff from developments. *See generally*, 40 C.F.R. §§ 122.26, 122.34; *see also* U.S. EPA, "Summary of State Post Construction Stormwater Standards," (July 2016 Update).[44] WAC members rely on ditches to collect and convey overland runoff.

Finally, many industrial facilities rely on ditches for stormwater and process water management. Under the Proposed Rule, such manmade ditches could be considered "waters of the United States" unless a facility owner can establish that they were excavated in uplands, drain only uplands, and do not carry relatively permanent flow. This could prove difficult or impossible, especially for facilities constructed decades or even more than a century ago. Many process water systems, for example, flow year-round as the process is continual. Such conveyances inadvertently could be covered under the Proposed Rule as "waters of the United States" based on flow alone. In addition, it may be impossible to demonstrate that stormwater ditches were constructed in uplands and drain only uplands when originally constructed, especially in light of the fact that the term "uplands" is not defined.

In the event such ditches are considered "waters of the United States", the ditches will be subject to regulation under CWA Section 404 dredge and fill requirements. This applicability would impose unduly burdensome permitting requirements on an owner of property on which these ditches are located, whenever maintenance, reworking, relocation or other minimal activity will take place, even though such activity would have no impact on downstream waters.

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[41] *See* Federal Railroad Administration, U.S. Dep't of Transp., "The Freight Rail Network," *available at* https://railroads.dot.gov/rail-network-development/freight-rail-overview.

[42] *See* Federal Aviation Administration, U.S. Dep't of Transp., "Airport Categories," *available at* https://www.faa.gov/airports/planning_capacity/categories/.

[43] *See* Federal Highway Administration, U.S. Dep't of Transp., "Table HM-16 – Highway Statistics 2017," *available at* https://www.fhwa.dot.gov/policyinformation/statistics/2017/hm16.cfm.

[44] *Available at* https://www.epa.gov/sites/default/files/2016-08/documents/swstdsummary_7-13-16_508.pdf.

To state the obvious, an enormous number of ditches provide integral support for various activities around the country. Treating most or all of these features as "waters of the United States" would dramatically alter the reach and consequences of the CWA, including undermining the public health, safety, and economic benefits ditches provide.

2. The Proposed Rule Improperly Expands the Agencies' Prior Approach to Ditches and Fails to Provide Clarity.

Historically, the Agencies have excluded non-tidal ditches from the definition of "waters of the United States." For instance, the Corps' 1975 regulations broadly stated that "[d]rainage and irrigation ditches have been excluded" from the definition. *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). Two years later, the revised regulations more precisely stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition." 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). The preamble to the 1977 rule further clarified that "nontidal drainage and irrigation ditches *that feed into navigable waters* will not be considered 'waters of the United States' under this definition." *Id.* at 37,127 (emphasis added). To the extent ditches cause water quality problems, the Corps appropriately concluded they "will be handled under other programs of the [CWA], including Section 208 and 402." *Id.*

Although the Corps maintained in the following decade that man-made ditches excavated on dry land were not jurisdictional,[45] its statements began to soften in the mid-1980s. For instance, the preamble to the 1986 regulations stated that "we generally do not consider [drainage and irrigation ditches excavated on dry land] to be 'waters of the United States,'" though the Corps reserved authority to claim jurisdiction on a "case-by-case" basis. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Moreover, in 2000, the Corps indicated that "ditches constructed entirely in upland areas" are not considered "waters of the United States," but non-tidal ditches *would* be considered "waters of the United States if they extend the OHWM of an existing water of the United States." 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000). This decades-long regulatory creep occurred without any Congressional authorization, and the Proposed Rule is just the latest attempt to further expand the Agencies' regulatory authority.

Under the Proposed Rule, the Agencies intend to continue implementing the approach to ditches set forth in the 2008 *Rapanos* Guidance: "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States." 86 Fed. Reg. at 69,433. Yet this approach is as broad (if not broader) than the Corps' approach to ditches leading up to the Supreme Court's rejection of the Agencies' interpretation in *Rapanos*.

For starters, the application of the Agencies' interpretation of the term "relatively permanent"—presumably, "typically three months" of flow—to ditches ironically has resulted in the assertion of jurisdiction over ditches that were not previously jurisdictional before *Rapanos*. *See* Comments on Draft *Rapanos* Guidance at 62-63 (detailing how the Corps *increased* the number of ditches it determined to be "waters of the United States" on a 500-acre project site in

[45] *E.g.*, 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980); 48 Fed. Reg. 21,466, 21,474 (May 12, 1983).

North Carolina as a result of the position articulated in the 2007 *Rapanos* Guidance). This is *not* what the plurality opinion intended. Rather, the plurality emphasized that the term "waters of the United States" excludes "channels through which water flows *intermittently* or ephemerally, or channels that periodically provide drainage for rainfall." 547 U.S. at 739 (plurality) (emphasis added). An interpretation of "relatively permanent" that encompasses all upland ditches that flow for three months (or perhaps for even shorter amounts of time depending on what Corps districts consider to be seasonal flow) cannot be squared with the plurality opinion.

Moreover, a ditch carrying even minor relatively permanent flow that is far removed from a traditional navigable water would not seem to satisfy Justice Kennedy's significant nexus standard either. Justice Kennedy rejected the dissent's suggestion that federal regulation would be appropriate "whenever wetlands lie alongside a ditch or drain, *however remote and insubstantial*, that eventually may flow into traditional navigable waters." The deference owed to the Corps' interpretation of the statute does not extend so far." *Id.* at 778-79 (Kennedy, J., concurring) (emphasis added); *see also id.* at 780-82 (Kennedy, J., concurring) ("Yet the breadth of [the Corps'] standard [defining 'tributaries']—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system.").

The Proposed Rule's approach to ditches also incorporates ambiguous and vague terms that leave too much room for inconsistent and arbitrary implementation. For example, the phrase "excavated wholly in and draining only uplands" raises a number of questions. It does not appear that the Agencies have provided a definition of "uplands," and the Agencies have proposed to remove the NWPR's definition of "uplands" from the regulations. Would any feature that does not meet all three wetland factors count as "uplands"? If a ditch crosses a wetland, is it possible for the portion that is excavated in uplands to be excluded even if the portion downstream of the wetland crossing is jurisdictional, or is the entirety of the ditch jurisdictional? And what does it mean to drain only uplands? What if a ditch was constructed in a wetland before the CWA's enactment? It may be the case that such a ditch now drains only uplands because it long ago drained the wetland, so would the Agencies still consider that ditch to meet the "draining only uplands" requirement?

The phrase "do not carry a relatively permanent flow of water" is likewise ambiguous and open to interpretation. Presumably, the Agencies will interpret the term "relatively permanent" to mean that they flow year-round except in times of drought or have continuous flow at least seasonally (*e.g.*, typically three months), but the Proposed Rule suggests that the Agencies might interpret the term to encompass features that "may flow for shorter periods of time" such as features that flow for "two months" in certain parts of the country. *See* 86 Fed. Reg. at 69,436 & 69,441. This ill-defined standard does not provide sufficient clarity for stakeholders. Another important consideration is whether ditches with the presence of water, but not necessarily flow, will be considered to meet the "do not carry a relatively permanent flow of water" requirement. *Id.* at 69,432-33. To illustrate, in flat areas, drainage may be poor, resulting in the presence of water in low-lying portions of many roadside, railroad rights-of-way,[46] and

[46] For a detailed discussion of why rail ditches, which are typically very flat and wide, often contain standing water that may not flow, *see* 2014 WAC Comments at 45-46 (attached as Ex.

stormwater management ditches. If the mere presence (but not necessarily flow) of water for more than a few weeks disqualifies ditches from being excluded, then a massive number of ditches in both rural and urban settings could be deemed jurisdictional.

Finally, unlike the NWPR, the Proposed Rule would shift the burden of proof back to landowners to demonstrate that ditches on their lands were excavated wholly in and drain only uplands. But what exactly must a landowner show with respect to a ditch that was constructed several decades ago? Must the landowner demonstrate that conditions at the time do not satisfy the Agencies' *current* wetland delineation standards or is the area to be judged based on scientific understanding at the time?

Because of the very purpose of ditches (to collect and convey water from a saturated or ponded area) and because of modern drainage engineering criteria (which call for slowing drainage and runoff to reduce erosive force and potential collection in flood areas), there is a high likelihood that few ditches could meet the Proposed Rule's requirements for a ditch to be determined non-jurisdictional. And it appears that entire ditch systems, even if constructed almost entirely through uplands, but perhaps impacting a wetland along some small portion of its length, would be swept into federal regulatory jurisdiction. This broad assertion of jurisdiction will inevitably mean more regulatory burdens and delays for simple projects such as constructing or maintaining ditches and of course more litigation.

3. Regulating Most Ditches as "Waters of the United States" Would Result in a Significant Impingement of Traditional State and Local Authority.

As the Supreme Court has repeatedly recognized, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). Therefore, "where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," such as the assertion of jurisdiction under the Migratory Bird Rule, there must be "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172-73. In rejecting that assertion, the Supreme Court emphasized that "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *Id.* at 174 (quoting 33 U.S.C. § 1251(b)). Years later, in rejecting the "any hydrologic connection" theory in *Rapanos*, a plurality of the Court emphasized that the government's theory "would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." 547 U.S. at 738.

As explained above, the Proposed Rule, through its expanded approach to "significant nexus" and its overly restrictive view of what ditches are excluded, would result in too many ditches being deemed "waters of the United States." This would impermissibly alter the federal-state balance and intrude upon traditionally local functions such as the construction, operation,

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4). The Proposed Rule's approach to ditches would erroneously result in the assertion of jurisdiction over rail ditches as a whole or segments of such ditches.

maintenance, and management of ditches for various public purposes, such as transportation, flood control, and agriculture. Local authorities, such as water management districts, flood control entities, and drain and road commissions, remain best positioned to determine how best to regulate their local land and water resources, including ditches, given their knowledge of local conditions. Because state and local governments are already responsible for managing and controlling stormwater runoff, *e.g.*, under the NPDES program, there is no added benefit to defining the same drainage systems as "waters of the United States." In fact, such an approach risks diverting precious funding away from more environmentally sensitive resources.

4. The Agencies Should Exclude Most Ditches from "Waters of the United States."

The Agencies should retain the approach to ditches from the NWPR, which is protective of downstream navigable waters and avoids impinging upon state and local governments' traditional authority. Otherwise, the Agencies should clarify that non-tidal, man-made ditches, irrigation ditches, roadside ditches, county drains, and similar ditch features are excluded as they historically were from the definition of "waters of the United States." Defining more ditches as "waters of the United States" is unnecessary to ensure the protection of such features or connected waters against the discharge of pollutants. Indeed, there is an extensive framework of stormwater regulation that ensures that water from such conveyances does not impact downstream "waters of the United States." *E.g.*, 40 C.F.R. §§ 122.26, 122.34.

Instead of defining more ditches as "waters of the United States," the Agencies should rely on existing Section 402 authority to address discharges to navigable waters. In so doing, the Agencies should also clarify that point sources, such as ditches and conveyances that are components of permitted MS4s, protect downstream waters under other CWA regulatory authorities as point sources and are not "waters of the United States." This clarification is consistent with prior pronouncements that MS4s are not "waters of the United States." *See, e.g.*, 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) ("[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program."); *id.* at 47,997 (responding to one municipality's concern that EPA's stormwater regulations would create the "impression that [urban storm water] systems are navigable waters" by clarifying that EPA "always" addresses industrial releases into MS4 as "'discharges through municipal separate storm sewer systems' as opposed to 'discharges to waters of the United States'").

D. The Agencies Should Codify Additional Exclusions.

WAC generally supports the listing of waters that are categorically excluded from the definition of "waters of the United States" in the regulatory text, rather than merely in preamble language. Codifying exclusions, so long as they are not unduly limited in scope and application, helps provide clarity and regulatory certainty, even if the Agencies no longer deem those to be important goals.

The preamble to the Proposed Rule essentially repeats what the preamble to the 1986 regulations says about features that the Agencies generally have not asserted jurisdiction over, *e.g.*, artificially irrigated areas which would revert to upland if the irrigation ceased or artificial

reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons. *See* 86 Fed. Reg. at 69,434. The preamble further says that, in accordance with the 2008 *Rapanos* Guidance, the agencies generally do not assert jurisdiction over swales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow). *See id.* The preamble does not address other water features that the Agencies expressly excluded starting in 2015, such as groundwater, including groundwater drained through subsurface drainage systems or stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. *See, e.g.*, 80 Fed. Reg. at 37,105 (codified at 33 C.F.R. § 328.3(b)(5)-(6)).

Just as they did in both the 2015 Rule and the NWPR, the Agencies should codify additional exclusions in the regulatory text beyond the two exclusions (prior converted cropland and waste treatment systems) that have appeared in the regulatory text for decades. Because the Proposed Rule's discussion of non-jurisdictional features tracks the 1986 preamble, the list of excluded features is too narrow in the following ways:

- There is no mention of excluding groundwater, including groundwater drained through subsurface drainage systems. As the Proposed Rule notes, the Agencies have never considered groundwater to be a "water of the United States" and the Proposed Rule does not change that longstanding interpretation. *See* 86 Fed. Reg. at 69,424. Like the 2015 Rule and the NWPR, the Agencies should codify this explicit exclusion.

- There is no mention of either stormwater control features constructed to convey, treat, or store stormwater; or wastewater recycling, groundwater recharge, or water reuse structures. Both the 2015 Rule and the NWPR appropriately excluded such features in the regulatory text. Those exclusions provided much needed clarity for regulated entities, including MS4s in particular, and they were important to avoid discouraging or otherwise creating barriers to water reuse and conservation.

- The Proposed Rule and the 1986 preamble discussions of artificial lakes or ponds are too narrow because they require such features to be "used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." *See* 86 Fed. Reg. at 69,434. Starting in the 2015 Rule, the Agencies appropriately removed references to "use" and "exclusively" in describing what artificial lakes and ponds are excluded. That important change reflects the reality that excluded ponds are often used for more than one purpose without turning them into a jurisdictional water. *See* 80 Fed. Reg. at 37,099. The Agencies also clarified since 2015 that the list of excluded ponds has always been illustrative and not exhaustive. *See id.* The Proposed Rule's discussion of which artificial lakes and ponds are non-jurisdictional needs to be updated accordingly.

As the Agencies know, there was considerable overlap between the exclusions set forth in the 2015 Rule and the NWPR. WAC prefers the NWPR's formulation of exclusions over those in the 2015 Rule, because some of the exclusions in the latter rule were confusing and too restrictive in certain ways for reasons we previously explained. *See* 2014 WAC Comments at 60-64 (attached as Ex. 4). To use just one example, many of the 2015 Rule's exclusions were

conditioned on creation in dry land. The NWPR more appropriately excluded the same sorts of features so long as they were constructed or excavated in either upland or in non-jurisdictional waters. As the preamble to the NWPR explains, using stock watering ponds as an example, the Agencies' longstanding position has been that artificial lakes and ponds are excluded even if they are developed in non-jurisdictional waters. *See* 85 Fed. Reg. at 22,322.

In conclusion, WAC recommends that the Agencies codify additional exclusions in the regulatory text alongside the longstanding exclusions for prior converted cropland and waste treatment systems. In so doing, the Agencies should clarify, as the Proposed Rule appropriately does for non-jurisdictional ditches, that wetlands that develop entirely within the confines of *any* non-jurisdictional water feature would be considered part of the excluded feature and would not be considered "waters of the United States." *See* 86 Fed. Reg. at 69,433-34. This clarification is important to ensure the utility of the exclusions and will help avoid creating disincentives for green infrastructure and other types of environmentally beneficial treatment features that mimic natural hydrological processes to manage stormwater.

V. The Agencies Have Not Articulated a Reasoned Justification for Repealing the Navigable Waters Protection Rule.

The Agencies assert that they are acting pursuant to their inherent authority to reconsider the NWPR and to issue the Proposed Rule in its place in accordance with the new administration's policy priorities. 86 Fed. Reg. at 69,386. While it is well settled that a new administration may reconsider, revise, or replace the policies and regulations issued by previous administrations, the Supreme Court has made clear that the decision to repeal and replace an existing regulation must at a minimum be supported by a reasoned explanation and be within an agency's legal authority. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In some cases, an agency must also provide a more detailed justification, such as when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Id*.

The Agencies' rationale in support of the Proposed Rule falls short of this standard. First, the Agencies make broad claims that the implementation of the NWPR is causing significant environmental harm, but they do not provide the necessary detailed data to support their assertions. Second, the Agencies argue that the NWPR does not advance the CWA's objective, but this criticism rests on a flawed interpretation of the Act and, as detailed throughout these comments, the Agencies have not adequately explained how the Proposed Rule fits within the Agencies' statutory authority and Supreme Court precedent. Third, the Agencies argue that the NWPR is too difficult and confusing to implement, but the record presented by the Agencies support the opposite conclusion.

A. The Agencies' Assertions of Environmental Harm Lack Record Support.

On January 20, 2021, President Biden issued Executive Order No. 13,990, 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 had decided to initiate a new rulemaking to revise the WOTUS definition.

The Department of Justice, acting on behalf of the Agencies, began submitting motions in the various district court cases involving challenges to the NWPR seeking voluntary remand of the NWPR. In each case, the motion was supported by declarations from Ms. Fox and Mr. Pinkham alleging that keeping the NWPR in place was resulting in significant harm.[47] Ms. Fox's declaration, for example, stated that the preamble to the NWPR called into question how the Agencies had considered science and water quality impacts when developing the 2020 rule and that the Agencies "now believe" that consideration of the effects of a revised definition "on the integrity of the nation's waters is a critical element in assuring consistency with the statutory objective of the CWA." *See* Declaration of Radhika Fox, at ¶¶ 12-13, *Conservation Law Found. v. EPA*, No. 20-cv-10820-DPW (D. Mass. filed June 9, 2021), ECF No. 113-1.

Regarding the potential for environmental harm, the declaration also expressed concern that 333 projects that would previously have required permits under Section 404 would no longer be considered jurisdictional under the NWPR. *Id.* ¶ 15. The Fox Declaration further noted that there were fewer preliminary jurisdictional determinations ("PJDs") being sought and that the majority of approved jurisdictional determinations ("AJDs") being issued were for non-jurisdictional water features. *Id.* The Fox Declaration singled out Arizona and New Mexico, which are arid, as areas that are disproportionately impacted by the NWPR. *Id.* ¶ 16. Finally, the declaration broadly references "concerns from a broad array of stakeholders, including states, tribes, scientists, and non-governmental organizations, that the reduction in the jurisdictional scope of the CWA is resulting in significant, actual environmental harms," and alludes to an unspecified number of projects and discharges. *Id.* ¶ 17. About a week after these declarations were filed, the Agencies publicly released details about the 333 projects that would not have been jurisdictional under the NWPR and their analysis of the NWPR's impacts on the number of PJDs and AJDs. *See* Memo for the Record on Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule (June 8, 2021).[48]

The Technical Support Document for the Proposed Rule and the rule itself include largely the same information and make similar assertions about alleged environmental harm, though the list of projects increased from 333 to 368. *See generally* TSD at 93-118; 86 Fed. Reg. at 69,413-16. Upon close review, the data provided by the Agencies to justify the Proposed Rule do not hold water. For example, the Agencies fail to recognize that several of the projects on the list of 333 (now 368) projects are themselves environmentally beneficial, such as replacement of an existing wastewater treatment facility or the installation of erosion control features. https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf. Similarly, the list includes multiple public infrastructure projects including bridge/culvert

[47] Both declarations are available on EPA's website at https://www.epa.gov/wotus/request-remand-and-supporting-documentation.

[48] The memorandum and its supporting documentation are also available on EPA's website at https://www.epa.gov/wotus/request-remand-and-supporting-documentation.

replacement, roadway signal improvements, and solar developments that are intended to provide a public benefit. *See id.*

This list is also misleading because the Agencies do not explain why such projects would have required a permit prior to the NWPR, but no longer did under the NWPR. To begin with, the public still does not have access to some of the data necessary to review this list of projects, because the Corps' website[49] has stated "The ORM2 PUBLIC DATABASE IS UNAVAILABLE" since the Agencies' announcement on June 9, 2021. More importantly, for those JDs that are available online through Corps district web pages, most of them indicate that there are no prior JDs by stating "N/A" in the portions of the AJD form corresponding to "Associated JDs" or "Previous Jurisdictional Determinations (AJDs or PJDs)." If that is accurate, then what is the Agencies' basis for claiming that those projects used to require a permit but no longer do so under the NWPR?[50]

Yet another shortcoming in this list is that it fails to account for the status of individual projects, including whether projects that would have been jurisdictional under a pre-2015 rule would actually have been subject to any mitigation or permit restrictions. In short, the list of non-jurisdictional projects does not prove that any activities moved forward that otherwise would not have in the roughly one year that the NWPR was in effect, much less that any concrete environmental harms or impacts on water quality resulted. The Agencies' reliance on this data to support a new rulemaking falls short of the Supreme Court's requirement in *Fox Television* to provide a more detailed justification when a change in policy rests upon factual findings that contradict those which underlay its prior policy.

The Agencies' Technical Support Document also provides multiple figures and tables, spread out over dozens of pages, to show that the number of PJDs being issued dropped after the NWPR was issued, and that the number of AJDs finding a water resource was non-jurisdictional increased since the NWPR. *See* TSD at 99-106. The Agencies imply that a change in jurisdiction following the NWPR, especially for ephemeral features, had a direct and negative effect on water quality. However, the Technical Support Document does not actually identify any water body that has suffered environmental degradation or quantify the environmental impact on any water resource as a result of the NWPR.

Finally, the Agencies' Technical Support Document also focuses on whether the NWPR is having geographically unequal impacts in Arizona and New Mexico, suggesting that, based on the number of AJDs issued in those states, the number of non-jurisdictional stream reaches in those areas has increased more significantly under the NWPR compared to similar water resources elsewhere in the nation. *See* TSD at 107-14. The Agencies imply the Proposed Rule is necessary because the NWPR may result in some states having fewer water resources covered

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[49] *See* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/server_down/.

[50] If the Agencies are basing their conclusion on their view that the water features in question would likely have been categorically jurisdictional as tributaries or adjacent waters under the 2015 Rule, that conclusion is misplaced because it fails to consider that the rule was never really in effect in over half of the country and that two district courts invalidated the rule on the merits.

under the CWA than other states based on their unique features. It stands to reason that different states may be impacted by the NWPR—and any replacement rule—differently based on their unique geography.

Regardless, the Agencies mischaracterize the impact that the NWPR is having on arid states like New Mexico. For example, the Technical Support Document states "commenters on the NWPR indicated that closed basins in New Mexico that straddle the state's borders with Texas or Mexico serve as essential sources of water for drinking and irrigation for tribes and other communities, but waters within these basins were no longer jurisdictional under the NWPR." TSD at 26. However, the State of New Mexico provided a detailed overview of that state's unique geography and water resources as part of its comments on the 2015 WOTUS rulemaking, explaining that five major rivers located in the state had historically been treated as jurisdictional under the CWA, that nine basins were closed and considered intrastate waters, and that the majority of the state's other water resources were intermittent or ephemeral features. *See* Comments of New Mexico Environment Department, at 2-4, Docket No. EPA-HQ-OW-2011-0880-16552 (Nov. 14, 2014). The Agencies are now suggesting that the NWPR eliminated jurisdictional coverage for water features, despite New Mexico's previous comment that the nine closed basins had historically been treated as non-jurisdictional state waters and that a more expansive definition of WOTUS would result in almost of all of the state's surface water features being subject to federal jurisdiction—something it did not think Congress would have intended when it enacted the CWA. *See id.* 5-6, 9-10 ("As applied in New Mexico, such an expansive definition of 'tributary' to include non-seasonal intermittent and ephemeral streams will greatly enlarge federal jurisdiction and authority over almost all State waters.") (footnote omitted).

As the TSD confirms, the overwhelming majority of water resources in Arizona and New Mexico were determined to be non-jurisdictional in AJDs under the pre-2015 regulatory regime. *See* TSD at 109-11. The Agencies acknowledge in the preamble that "the Corps found high percentages of streams in Arizona to be non-jurisdictional between 2016 and 2020," but they nevertheless maintain that the NWPR was disproportionately affecting Arizona and New Mexico because of the "ten-fold increase in the total number of individual resources documented as non-jurisdictional in AJDs." 86 Fed. Reg. at 69,414. Given the high percentage of negative JDs under the pre-2015 regulatory regime (just below 94%), it begs the question what percentage of the 1,525 AJDs that were completed during the first year of the NWPR would have resulted in findings of non-jurisdictional resources under the pre-2015 regulatory regime.

That the sweep of the CWA may be different depending on the unique features of a state should be viewed as a feature and not a bug of the law. The Agencies simply have failed to provide a reasoned explanation—supported by facts, rather than specious conjecture and supposition—to justify the change in policy. The Agencies also mistakenly claim that changing policy and abandoning the NWPR will not implicate any reliance issues. As discussed in the Grandfathering section of these comments, there is considerable uncertainty about how the Agencies plan to approach AJDs and permits issued when the NWPR was in effect.

B. The Agencies' Claim that the NWPR Fails to Advance the CWA's Objective and Is Inconsistent with Science Rests on a Fundamentally Flawed Interpretation of the Act that Elevates Science Over the Law.

The Agencies claim the NWPR must be repealed because it failed to consider science and placed too much emphasis on the Section 101(b) policies supporting federalism at the expense of the Section 101(a) objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. *See* 86 Fed. Reg. at 69,407-08. As discussed elsewhere in these comments, the Agencies have misconstrued Section 101 of the CWA by once again giving short shrift to the Section 101(b) policies.

The Proposed Rule mistakenly assumes the only way to advance the Section 101(a) objective is through an expansive definition of "waters of the United States" that encompasses any water relevant to water quality in a downstream TNW, interstate water, or territorial sea. The NWPR cogently explained how Congress designed a statute that advances the objective of protecting water quality and integrity of all the Nation's waters through *both* regulatory and non-regulatory approaches, and the Agencies adhered to the statutory text and Congress' recognition of the federalism principles embedded in the Constitution. 85 Fed. Reg. at 22,252-54, 22,262 & 22,269-70. The Agencies now claim that the balance between CWA and non-CWA state, tribal and local governments established in the NWPR "does not reflect consideration of the [Section 101(a)] objective as intended by Congress," 86 Fed. Reg. at 69,408, but the Agencies' discussion cherry-picks statements from Supreme Court opinions and fails to parse important distinctions in the statutory text (*e.g.*, "pollution" vs. "discharge of a pollutant" or "any waters" vs. "navigable waters").

To be sure, the 1972 Act was an overhaul and a fundamental restructuring of water pollution control laws. But it was not an open invitation, much less a command, to pursue the Section 101(a) objective at all costs and without regard to: (i) the important distinction between federal and state authority; or (ii) important limits that Congress placed on federal authority by, among other things, confining the scope of federal regulatory programs to "*navigable* waters."

Again, the Agencies wrongly believe that the only way to advance the objective of the CWA is by defining as many upstream ephemeral tributaries and wetlands as WOTUS as possible. That completely ignores and diminishes the importance of the many non-regulatory programs that Congress stood up to help states protect those water features that *are not* "navigable waters." The notion that the agencies *must* assert jurisdiction over anything that has a significant effect on a downstream TNW is an untenable proposition as it both reads "navigable" out of the statute and impermissibly redraws the federal-state line. On this point, it bears emphasis that the Agencies admit (correctly) that "the Supreme Court's interpretations of the scope of 'waters of the United States' do not require adoption of a significant nexus test." *See* 86 Fed. Reg. at 69,407.

In *California v. Wheeler*, Judge Seeborg of the U.S. District Court for Northern District of California accurately summarized the legal landscape in rejecting multiple states' attempts to block the NWPR from taking effect in June 2020, finding the Agencies operate on essentially a blank slate in defining what *must* be jurisdictional as WOTUS. *See* 467 F. Supp. 3d 864, 873-75 (N.D. Cal. 2020). At the very least, the NWPR struck a perfectly acceptable balance between the

Section 101(a) objective, the Section 101(b) policy, and the need for clear categories, as opposed to subjecting landowners to nebulous case-specific tests. *See id.*

The NWPR was the most defensible and sensible reading of the Act. As Judge Seeborg also noted, claims that the NWPR ignored the science are ultimately policy disagreements. *See id.* at 875-76. That the science suggests some waters that the NWPR appropriately left to state authority may significantly affect downstream waters is not an adequate justification for repeal, as the Agencies were not required to define those waters as jurisdictional. The Agencies wisely chose not to test the boundaries of federal authority, not to trample on states' rights, and to exercise caution in light of the Supreme Court's prior rebukes of the Agencies' attempts to expand the regulatory reach of the CWA.

Nonetheless, the Agencies now claim the NWPR failed to adequately consider the effects of degradation of upstream waters on downstream waters, pointing to the exclusion of ephemerals and the narrowing of wetland category. *See* 86 Fed. Reg. at 69,408-09. These criticisms rest on at several faulty premises: First, the Proposal wrongly states the NWPR inadequately considered effects on downstream waters. As the final NWPR explained, the Agencies actually broadened the approach to jurisdiction between proposal and final, specifically with an eye toward protecting downstream waters. For instance:

- The Agencies declined to require that groundwater be the source for perennial and intermittent flow in tributaries because this would "too narrowly limit CWA jurisdiction over waters that provide continuous or intermittent and predictable flow to traditional navigable waters in a typical year" such as "headwater streams in mountainous regions [that] flow through channels incised in bedrock with no groundwater interface with the bed of the stream" and are "instead are fed by glacial or high elevation snowpack melt." 85 Fed. Reg. at 22,275. The Agencies were also mindful of the downstream effects of effluent-dependent streams and declined to define tributary in a way that would categorically exclude such streams from jurisdiction. *See id.*

- The Agencies changed their approach to breaks between the proposal and final to better incorporate common principles from the *Rapanos* plurality and Kennedy opinions "and to strike a better balance between the objective and policy in CWA sections 101(a) and 101(b), respectively." *See* 85 Fed. Reg. at 22,277-78 & 22,289-90. The proposal would have severed jurisdiction upstream of any ephemeral feature, but the Agencies reconsidered how certain waters upstream are "regularly 'connected to' traditional navigable waters via channelized surface water flow" during a typical year and thus, ought to be jurisdictional. *Id.* at 22,277. The Agencies further stated that breaks, whether natural or artificial, do not sever jurisdiction for tributaries, lakes, ponds, or impoundments if, in a typical year, the feature upstream of the break contributes surface water flow to a downstream jurisdictional water. *See id.* These key changes between the proposal and final NWPR reflected the Agencies' recognition that federal regulation of the upstream water was warranted in light of the close connection and the need to protect downstream waters.

- The final NWPR eliminated the proposal's requirement that a lake or pond contribute perennial or intermittent flow to a downstream TNW, because it would remove too many waters from jurisdiction "that are regularly 'connected to' traditional navigable waters via surface water flow." 85 Fed. Reg. at 22,302-03.

- The Agencies expanded the scope of the term "adjacent" between proposal and final, for instance, eliminating the requirement that a wetland maintain a perennial or intermittent connection to the jurisdictional water and instead determined that a direct hydrologic surface connection in a typical year, regardless of flow classification, is sufficient to demonstrate the wetland and jurisdictional water are inseparably bound up. 85 Fed. Reg. at 22,307-13.

That the NWPR did not stretch the outer limits of federal authority and instead gave proper weight to important considerations *in addition to* water quality in downstream waters—such as the Section 101(b) policy and the need for clarity—is not a sufficient justification for repealing the well-reasoned NWPR.

Nor is the Agencies' claim that the NWPR is inconsistent with the best available scientific information a sufficient ground for repealing the rule. This criticism is rooted in the mistaken belief that the science mandates outcomes to the legal and policy questions, which is something even the 2015 Rule acknowledged is *not* the case. *See* 80 Fed. Reg. at 37,060 ("[T]he agencies' interpretation of the CWA is informed by the Science Report and the review and comments of the SAB, but not dictated by them."). The Agencies now claim the NWPR is inconsistent with the scientific record, but that is misleading. Science does not establish where the constitutional or statutory line is between federal and state authority, so it cannot possibly show that the Agencies struck the wrong balance between environmental goals and the federalism, clarity, and due process concerns.

That the science demonstrates there is a strong connection or that a particular water can affect integrity of downstream waters does *not* require that the upstream water be defined as "waters of the United States." In fact, the Agencies could not legally assert jurisdiction over all such features "in the name of providing *all* of the benefits for water quality the science suggests might be achievable," even if they wanted to, for reasons explained throughout these comments. *See California v. Wheeler*, 467 F. Supp. 3d at 875. It goes without saying then that the Agencies are *not* required to assert federal jurisdiction over all such features.

Relatedly, the Agencies' reliance on the Science Advisory Board's criticisms of the proposed NWPR misses the mark. *See* 86 Fed. Reg. at 69,409. The SAB faulted the NWPR for not "fully incorporat[ing] the body of science on connectivity," but that was an invitation to flout the limits on the Agencies' authority. *See* SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act, at 2, Docket No. EPA-HQ-OW-2021-0602-0102 (Feb. 27, 2020). In the SAB's view, even "connected ground water" should be defined as "waters of the United States," *see id.* at 3, but no administration since the Act's inception has ever taken such a brazen view of federal authority. Indeed, the Agencies clarified in this very proposal that they are not changing that longstanding interpretation. *See* 86 Fed. Reg. at 69,424 n.47. The importance of groundwater (and protecting groundwater resources) is perhaps the clearest example of why the science cannot dictate the definition of

WOTUS. As Justice Kennedy acknowledged, the plurality correctly explained in *Rapanos* "that environmental concerns provide no reason to disregard limits in the statutory text." 547 U.S. at 778 (Kennedy, J., concurring).

C. The Agencies' Claim that the NWPR Poses Insurmountable Implementation Challenges Is Unconvincing, Especially Given Their Proposal to Codify the Nebulous Significant Nexus Standard.

The Agencies inexplicably claim that the NWPR must be replaced because "the agencies' experience implementing the NWPR for over a year made clear that foundational concepts underlying much of the NWPR are confusing and difficult to implement in the way the NWPR required." 86 Fed. Reg, at 69,409. The Agencies further claim that the NWPR does not provide "clarity and predictability," *id.* at 69,410, and that terms such as "typical year," "adjacency," and "ditches" are difficult for agency personnel to implement. *Id.* at 69,410-12.

To the contrary, the NWPR struck an appropriate balance between protecting waters and wetlands and providing clarity and predictability to stakeholders and regulators, while respecting the CWA's stated policy of preserving the states' primary authority over land and water use, as well as relevant Supreme Court precedent. Over the decades, the definition of WOTUS has at times expanded well beyond the limits of the Agencies' statutory authority under the CWA and the Constitution, at the expense of state and local authority. The Coalition believes the NWPR rightly brought an end to persistent, unlawful efforts to expand federal power by preserving the careful federal-state balance that Congress struck in the CWA and avoiding the sorts of difficult constitutional questions raised by the prior definitions of WOTUS.

Because of the NWPR's clear definitions, the rule is far easier to implement consistently on the ground compared to prior WOTUS rules and guidance. For example, because the NWPR largely bases jurisdictional determinations on observable surface connections, landowners can more easily ascertain whether they require CWA permits for their activities. The NWPR also excludes mostly dry ephemeral features, eliminates the nebulous "significant nexus" test, and precludes the extension of jurisdiction to non-navigable, intrastate water features that are distant from any navigable-in-fact waters. As a result of these changes, regulated entities are better able to protect waters and wetlands while avoiding unnecessary costs associated with the uncertainties under prior definitions of WOTUS. The exclusion of ephemerals, in particular, is critical to WAC members' ability to identify what features on their land may be jurisdictional and thus protect them, while avoiding significant permitting costs or losses in productivity that result from vague or more expansive definitions of WOTUS.

The Agencies nevertheless object to the NWPR because of "implementation challenges," but what they are really complaining about is that the NWPR readily implementable in the field by landowners and project proponents and that it is now too difficult for the Agencies to assert jurisdiction over specific water features that they believe previously could have been deemed jurisdictional. *See* TSD at 143-44. All features being jurisdictional is not the kind of "consistency" sanctioned by the CWA.

The Agencies' own data undermine their complaints about implementation. As discussed above, the TSD compares PJDs and AJDs under the NWPR to pre-2015 practice. According to

the TSD, the number of AJDs significantly increased and the number of PJDs decreased in the first year after the NWPR took effect, which the Agencies explain meant that project proponents were not first requesting a PJD as an initial measure or because they believed those water resources were in fact not jurisdictional. *See* TSD at 99. Such data support the conclusion that the NWPR was easier for the regulated community to implement—and more difficult for the Agencies to assert jurisdiction under improperly. That the number of non-jurisdictional findings increased under the NWPR does not support the Agencies' claim that the NWPR was difficult to implement.

The TSD also discusses an internal survey conducted by EPA of 27 regional staff concerning their experiences implementing the NWPR. *See id.* at 150-53. The TSD states that the EPA staff who responded objected to how they were expected to evaluate historical conditions and assess water flow during a typical year under the NWPR. However, the TSD does not include details about the survey questions or how the survey was administered. Nevertheless, the survey discussion suggests that EPA staff objected to the NWPR because it required a higher burden of proof to establish jurisdiction, which resulted in fewer water resources being considered jurisdictional, rather than uncertainty over what the NWPR meant.[51] Furthermore, the TSD does not discuss the training EPA staff received on implementation or explain why that was deficient. Specifically, in the summer of 2020, EPA released a series of videos and presentation slides to assist with implementation, including materials on "typical year;" tributaries, ditches, and flow regimes; and adjacency—the very topics the Agencies claim to have caused implementation challenges. This material remains on EPA's website.

Finally, it strains credulity to think that the Proposed Rule's case-by-case approach to jurisdiction would be easier to implement and provide greater regulatory certainty than the clear definitions contained in the NWPR. The case-by-case approach under the 2008 *Rapanos* Guidance has, by all accounts, been an implementation failure. The Agencies boast that "field staff located in 38 Corps District offices and 10 EPA regional offices . . . have over a decade of nationwide experience in making decisions regarding jurisdiction under the 1986 regulations consistent with the relatively permanent standard and the significant nexus standard as interpreted by the *Rapanos* Guidance," 86 Fed. Reg. 69,405, but this claim rings hollow for at least two reasons: *first*, as the Agencies acknowledged in promulgating the 2015 Rule, both the public and agency staff lacked "the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations" under the 2008 *Rapanos* Guidance, which is why (until this rulemaking, apparently), the Agencies found it imperative to provide more clarity and predictability than the pre-2015 regulatory regime. 80 Fed. Reg. at 37,056. *Second*, the Agencies' intent to shift to substantially expanded approaches to implementing the "significant nexus" standard undercuts their claims of familiarity and experience in implementing the 2008 *Rapanos* Guidance. At the end of the day, the Agencies fail to meaningfully recognize the difficulties of implementing a pre-2015 regime in the Proposed Rule.

[51] Curiously, the TSD contains no discussion about Corps staff's experience with implementing the NWPR.

VI. Implications for All CWA Programs

As discussed throughout these comments, the Agencies' characterization of the Proposed Rule's "regulatory scope" as being "approximately the same" as the pre-2015 regulatory regime that they are current implementing is misleading. *E.g.*, 86 Fed. Reg. at 69,446; *accord* Economic Analysis at x ("[T]he proposed rule restores very similar protections and would not change current implementation sufficiently to alter any costs to the regulated public or states and tribes."). In reality, the Proposed Rule represents a considerable expansion of federal jurisdiction compared to the pre-2015 regime because of, among other things, the broader interpretation of "significant nexus" and the new "other waters" category. Because this new definition of "waters of the United States" will apply to all CWA programs, the Agencies must do more to analyze and explain the implications across each of those programs. As it stands, the preamble is virtually silent on impacts to the Section 303 water quality standards and total maximum daily load ("TMDL") programs, Section 311 oil spill prevention program, Section 401 certifications, or Section 402 permit program. And although the proposal contains a cursory and inadequate discussion of estimated costs and benefits for the Section 404 program of the Proposed Rule in comparison to the "secondary NWPR baseline," there is no discussion of impacts to the 404 program from expanding beyond the pre-2015 regulatory regime.[52]

The Agencies have enough trouble as it is timely processing permit applications under the definition of "waters of the United States" that they are currently implementing. Those delays, and the related burdens on the regulated community and on federal and state regulators, will only get worse as a result of the Proposed Rule's expansion. The Agencies must consider the practical impacts of the Proposed Rule on each of the major CWA programs.

A. The Proposed Rule Will Require Additional Burdensome Actions to Implement Section 303.

In Section 303, Congress placed primary authority with each state to adopt water quality standards for its own water bodies. 33 U.S.C. § 1313(c)(2)(A). Each state must designate one or more uses for each of its water bodies (such as recreation, drinking water supply, aquatic life uses, and agricultural or industrial uses) and identify water quality criteria necessary to protect these uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 131.10 and 131.11. State-promulgated water quality standards are subject to EPA review and approval to ensure that they meet the CWA's requirements. 33 U.S.C. § 1313(c)(2)-(3). Each state must also, at least once every three years, review its water quality standards. *See id.* § 1313(c)(1).

CWA Section 303(d) requires each state to (i) identify those waters within its boundaries for which technology-based limitations on point source discharges are not stringent enough to implement the standards "applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). For each impaired water, the state must establish a TMDL for pollutants that EPA identifies as "suitable

[52] As discussed below in Part VII.A and in more detail in Exhibit 10, the Agencies' discussion of the potential effects of the Proposed Rule relative to the NWPR across the major CWA programs suffers from numerous critical flaws. The comments in this section, however, focus on the Agencies' failure to analyze the implications of broadening the definition of "waters of the United States" compared to the pre-2015 regulatory regime.

for such calculation." *Id.* § 1313(d)(1)(C). The Act directs that a TMDL be established "at a level necessary to implement the applicable water quality standards." *Id.*

As jurisdiction expands under the Proposed Rule—*e.g.*, because numerous "other waters" that are isolated will become jurisdictional for the first time or because additional ephemeral tributaries and adjacent wetlands become jurisdictional as a result of a much broader aggregation approach than the one set forth in the 2008 *Rapanos* Guidance—states will now have to determine whether existing water quality standards for general categories of waters will apply or, alternatively, whether they must develop new standards for newly jurisdictional waters. Either way, those will be expensive and time-consuming endeavors for states. One reason why the process for setting water quality standards is so burdensome is the relatively recent regulatory requirement that jurisdictional waters are presumed to be able to achieve "fishable" and "swimmable" uses unless states manage to rebut that presumption through onerous use attainability analyses. *See* 40 C.F.R. §§ 131.10(j)-(k). Take for example a state that does not believe that isolated, non-navigable "other waters" that could be newly jurisdictional under the Proposed Rule can reasonably meet the default fishable, swimmable designated uses in CWA Section 101(a)(2). Its choices are to either acquiesce in EPA's rebuttable presumption or incur substantial cost to demonstrate to EPA's satisfaction that the Section 101(a)(2) uses are not attainable.

Additionally, as the number of jurisdictional waters, and likely new water quality standards, expands, so too will the costs of monitoring and assessing whether such waters are attaining applicable standards. If the waters are not attaining standards, states must then undertake the costly process of establishing TMDLs. Going back to the example of a state that chooses to acquiesce in EPA's rebuttal presumption that the Section 101(a)(2) uses are attainable—even though the state reasonably believes such uses will never be attained—the state must go through the process of establishing a TMDL to try to achieve uses that are in all likelihood unattainable or only attainable at exorbitant costs, with little or no environmental benefit. These would not be appropriate uses of states' limited resources.

Finally, as EPA knows all too well, Section 303 requirements are popular targets for citizen suits seeking to compel EPA to establish federal water quality standards or federal TMDLs in the absence of state action or due to delays in state action. Thus, not only are states facing potential citizen suit exposure as a result of an expanded definition of "waters of the United States," EPA is potentially liable too.

The Agencies should not be permitted to sidestep all analysis and discussion of these important implications of the Proposed Rule. While they acknowledge that increases in the scope of federal CWA jurisdiction can increase regulatory burdens under Section 303, *see* Economic Analysis at 87, they do not meaningfully evaluate the implications of implementing a considerably broader approach to "significant nexus" (including the assertion of jurisdiction over "other waters" aggregated across entire watersheds or similarly large regions) than the already overbroad approach that they are currently implementing under the 2008 *Rapanos* Guidance.

B. The Proposed Rule Will Require More Section 311 Planning.

Under Section 311, any facility with oil storage capacity that, because of its location, could reasonably be expected to inadvertently discharge oil in quantities that may be harmful into or upon the navigable waters must develop a comprehensive Spill Prevention, Control, and Countermeasures ("SPCC") plan. 33 U.S.C. § 1321(b)(3); *see also* 40 C.F.R. Part 112. SPCC plans must include, among other things, discharge prevention measures; discharge or drainage controls; countermeasures for discharge recovery and response; and predictions of the direction, rate of flow, and total quantity of oil that could be discharged following major equipment failures. *See* 40 C.F.R. § 112.7. Plans must also provide for inspections, tests, and appropriate training for oil-handling personnel. *Id.* A licensed professional engineer must review and certify these provisions. *See id.* § 112.3(d). Given the complexity of SPCC plans, many facilities must hire outside consultants to help develop an appropriate plan.

Because of the Proposed Rule's expansive approach to aggregating waters across large regions for purposes of determining significant nexus, more waters will become jurisdictional compared to the pre-2015 regulatory regime. At the very least, various "other waters" will be deemed jurisdictional for the first time. Consequently, more facilities will be subject to Section 311's SPCC requirements based on proximity to formerly non-jurisdictional, non-navigable, intrastate water features. This expansion of jurisdiction will upend current SPCC plans, and it will greatly expand planning, compliance, and cleanup costs. It is thus unreasonable for the Agencies to claim that "impacts of the proposed rule on the CWA section 311 program would be small." Economic Analysis at xv.

C. The Proposed Rule Will Require More Section 401 Water Quality Certifications.

Section 401 requires any applicant for a federal license or permit to conduct an activity that will result in a discharge into "navigable waters" to obtain a water quality certification from the state in which the discharge will originate. *See* 33 U.S.C. § 1341. Section 404 permits are among the various federal licenses and permits that can trigger the Section 401 certification requirement. As the Agencies acknowledge, the Proposed Rule will lead to increased Section 404 permitting requirements because, among other things, "non-adjacent wetlands, ephemeral features, certain ditches, and certain lakes and ponds would become jurisdictional based on a significant nexus analysis." Economic Analysis at 88. As a result of that expansion, more projects will then also have to go through the Section 401 certification process and thus, more project proponents will have to comply with whatever effluent limitations, monitoring, and other requirements are imposed by the certifying states.

Relatedly, certifying states will have to expend additional resources processing and evaluating new or revised permit applications due to the Proposed Rule's expansion in CWA jurisdiction. Delays or backlogs in the certification process could impact important infrastructure projects and delay the provision of vital goods and services to the public. The resulting resource burdens could also undermine states' efforts to restore and maintain the quality of waters within their borders.

D. The Proposed Rule Will Increase Section 402 Permitting Requirements.

Under Section 402, an NPDES permit is required for a point source discharge into "navigable waters." 33 U.S.C. § 1342(a). Through a more expanded interpretation of "significant nexus," the Proposed Rule would allow the Agencies to assert jurisdiction over ditches and non-navigable, isolated "other waters" that are not currently regulated as WOTUS. Thus, an NPDES permit would be required for the discharge of a pollutant from a point source into any such newly jurisdictional water. And because some waters (*e.g.*, ditches and conveyances) could be regulated both as point sources and as "waters of the United States," this could result in additional permits, duplicative regulatory requirements, and increased risk of citizen suit litigation. Because most states administer their own NPDES programs, states will largely bear the burden of developing, issuing, monitoring, and enforcing new permits. These increased requirements could jeopardize or at a minimum slow down critical infrastructure development and other job-creating economic activities.

As a practical matter, virtually all WAC members that undertake industrial activities will need to revisit whether new or revised stormwater permits are required under the Proposed Rule. Because of the more inclusive aggregation approaches discussed in the rule, it is possible that just about any drainage ditch or isolated water feature near the activity's site could be determined to have a significant nexus to some remote downstream traditional navigable water. And if a permit is required, the permittees must then monitor discharges from every covered outfall and adopt costly stormwater control measures such as relocating activities, implementing erosion controls, adopting more spill prevention measures, and diverting or reusing runoff.

Likewise, construction activities, such as most homebuilding projects, are subject to stormwater permitting requirements whenever they disturb more than one acre of land or will disturb less than one acre but is part of a common plan of development or sale that will ultimately disturb at least one acre of land. Under the Proposed Rule, federal regulatory requirements would extend to all construction activities that discharge into newly jurisdictional ditches, non-relatively permanent tributaries, and "other waters." Accordingly, more water features will be subject to, among other things, the requirement to provide and maintain a 50-foot undisturbed natural buffer (or implement sediment and erosion controls that achieve the sediment load reduction equivalent to such a buffer) whenever there is a discharge to a "water of the United States" located within 50 feet of a construction site's earth disturbances. *See* U.S. EPA, 2017 Construction General Permit § 2.2.1. As more water features are deemed "waters of the United States" by virtue of the proposed implementation of "significant nexus" standard, operators will find it increasingly difficult and costly to design and construct projects.

To further complicate matters, the Proposed Rule no longer expressly excludes stormwater control features, unlike the NWPR and even the 2015 Rule. Regardless of whether the Agencies intend to assert jurisdiction over municipal separate storm sewer system ditches and other conveyances under the Proposed Rule, the lack of an express exclusion creates an ambiguity and could invite citizen suits.

E. The Proposed Rule Will Result in Increased Uncertainty in Section 404 Permitting Requirements.

Under Section 404, a permit is required to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344. As the Agencies acknowledge through the Economic Analysis, albeit inaccurately (*see infra* Part VII.A), the Proposed Rule will trigger additional Section 404 permitting requirements due to the expansion in jurisdiction relative to the NWPR. But the Agencies must also analyze and discuss the increased Section 404 permitting requirements that will result from the assertion of jurisdiction over "other waters" as well as additional tributaries and wetlands compared to the pre-2015 regulatory regime as a result of the Proposed Rule's broader interpretation of "significant nexus."

As a result of the Proposed Rule's sweeping aggregation approach, more activities are likely to require individual permits because fewer activities will meet the requirements for general permits. Nationwide permits issued under CWA Section 404(e) have maximum acreage limits. Thus, if more water features and areas are deemed WOTUS, then many more activities are likely to exceed the NWP limits. The result will be longer individual permit processing times and much higher permitting costs. On the agency side, an increase in individual permit applications could overwhelm agency staff thus exacerbating the delays in permitting. The impact of these additional burdens comes at an unfortunate time given the vast number of long overdue infrastructure and manufacturing projects that need to move forward. For example, there are several reclaimed mine sites throughout the country that could be repurposed for renewable energy projects, such as solar farms, or other development projects. But because various water features on the land, *e.g.*, insignificant gullies and non-natural ditches that could be deemed ephemeral tributaries or small wetlands that have developed from settling of the land, are sometimes considered "waters of the United States," development of such projects could be thwarted, or at a minimum significantly delayed, due to Section 404 permitting requirements. Repurposing of these lands could reduce disturbance of traditional navigable waters and important agricultural lands.

Moreover, the vague terms in the Proposed Rule will lead to even greater uncertainty in Section 404 program implementation. For instance, the Proposed Rule will frustrate project design and engineering efforts designed to avoid jurisdictional impacts because of inherent uncertainties in how the Agencies will apply the nebulous "significant nexus" standard (*e.g.*, what waters will they determine to be "similarly situated" and across what "region"?) and just how many waters the Agencies will claim as jurisdictional under the capacious aggregation approaches that the Proposed Rule allows. The end result could well be more discharges to improperly designated "waters of the United States" without a permit and thus, additional enforcement actions and citizen suits.

For those permittees who manage to navigate the permitting process within a reasonable amount of time,[53] they will nevertheless face increased mitigation requirements to offset

[53] This is a tall order given that Section 404 permitting requirements trigger potentially lengthy and costly requirements under other laws, such as the National Environmental Policy Act (environmental assessments or environmental impact statements), the National Historic Preservation Act (consultation with state historic preservation offices), the Endangered Species

unavoidable impacts to newly jurisdictional "waters of the United States." The increase in jurisdiction and consequent need for additional mitigation threatens to put a strain on available mitigation banks.

Finally, the Proposed Rule could complicate the development of green infrastructure. Section 404 permits may be required for green infrastructure construction and maintenance, to the extent such infrastructure is developed in waters considered to be "waters of the United States" under the Proposed Rule. The consequent delays and regulatory requirements could thwart the development of environmentally beneficial green infrastructure.

VII. Supporting Analyses

A. The Agencies' Economic Analysis Suffers from Numerous Critical Flaws.

1. The Agencies' Dismissive Primary Baseline Analysis Is Meritless.

In the Economic Analysis accompanying the Proposed Rule, the Agencies state that "[t]he primary baseline for the economic analysis is the pre-2015 regulatory regime, which consists of the 1986 'waters of the United States' regulation (33 CFR 328.3), as informed by the 2003 *SWANCC* and 2008 *Rapanos* Guidance documents." Economic Analysis at 19. From there, the Agencies claim that "the world with the proposed rule is very similar to the world without this proposed rule." *Id.* at 20. Indeed, the only costs they identify are the "costs associated with regulated entities as well as states, tribes, and localities reviewing the proposed rule language and ensuring their activities going forward are in keeping with it," which the Agencies claim will be "de minimis." *Id.* The Agencies further conclude that "the benefits and the costs of the rule are trivially different from $0" and thus, Table I-1 lists the total national benefits, costs, and net benefits relative to the primary baseline as "$0.0." *Id.*

The preamble to the Proposed Rule similarly represents that the Proposed Rule "would not depart in material respects from current practice; as such, the agencies find that the proposed rule generally maintains the legal status quo such that there would be no appreciable costs or benefits in comparison to the primary baseline of the pre-2015 regulatory regime." 86 Fed. Reg. at 69,446; *see id.* ("Under the primary baseline, there are no costs or benefits as the regulatory scope between the presently implemented pre-2015 regulatory regime is approximately the same as the proposed rule."). This analysis does not reflect reality.

The proposed "other waters" category is perhaps the clearest illustration of why the Agencies' "zero impact" conclusion is incredible. The Agencies are retaining the "non-exclusive list of water types that could be jurisdictional" under the old (a)(3) category, but they are attempting to replace the Commerce Clause-based test with the relatively permanent and significant nexus standards. *See* 86 Fed. Reg. at 69,419. By the Agencies' own admission, the 2008 *Rapanos* Guidance is silent on whether, much less how, the significant nexus standard can be applied to the "other waters" category. *See* 86 Fed. Reg. at 69,440; *see also id.* at 69,436 ("The agencies do not address the 'other waters' category in the *Rapanos* Guidance with respect

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Act (section 7 consultation), and the Coastal Zone Management Act (certifications of consistency with state coastal zone management plans). *See* 33 C.F.R. § 325.2.

to either the relatively permanent standard or the significant nexus standard."). Equally important, the Agencies further acknowledge that they in practice have not asserted jurisdiction using the "other waters" category since 2003. *See id.* at 69,440. This acknowledgement echoes the Agencies' statement in 2015 that, "[f]ollowing the Supreme Court decisions in *SWANCC* (2001) and *Rapanos* (2006), the agencies no longer asserted CWA jurisdiction over isolated waters." U.S. EPA & U.S. Army Corps of Eng'rs, Economic Analysis of the EPA-Army Clean Water Rule, at 5 (May 20, 2015).[54]

Given these admissions, only one of two scenarios could explain the Agencies' finding that the regulatory scope of the Proposed Rule is "approximately the same" as the regulatory regime they are currently implementing: *either* the Agencies misled the public in 2015 (and in this Proposed Rule) about assertions of jurisdiction over "other waters" and they are somehow currently asserting jurisdiction over waters in this category using an off-the-books approach that contravenes the effects on commerce standard from the 1986 regulations; *or* the proposed "other waters" category is an empty or null set. Either way, the proposed "other waters" category would be superfluous, which begs the question of why the Agencies are proposing to create this new category.

In all likelihood, neither of these scenarios is true. The far more likely explanation is that the Agencies' "zero impact" finding involves deliberately obfuscating the expected impacts of the Proposed Rule. It is beyond dispute that the reformulated "other waters" category in the Proposed Rule changes the pre-2015 regulatory regime by applying the relatively permanent and significant nexus standards to a massive number of currently non-jurisdictional water features that are outside of any stream network (and thus, cannot be deemed jurisdictional as either tributaries or their adjacent wetlands under the current regulatory regime). And given how the Agencies heavily stack the deck in the Technical Support Document in favor of making significant nexus findings for "other waters," this change will greatly expand federal regulatory authority under the CWA.

The proposed expansion of the current regulatory regime is not limited to the "other waters" category. Indeed, the Agencies have teed up changes to their current method of conducting a significant nexus analysis, which is limited to tributaries and adjacent wetlands. Right now, the "unit of analysis of the significant nexus evaluation [is] the individual tributary (*i.e.*, the entire reach of the stream that is of the same order) and any wetlands that are adjacent to that reach of the tributary." Economic Analysis at 30. In sharp contrast, the implementation discussions in the preamble, including the Agencies' requests for comments on alternative approaches to evaluating a significant nexus, preview much broader interpretations of the terms "similarly situated" and "in the region" from Justice Kennedy's opinion. *See* 86 Fed. Reg. at 69,439-40. For instance, the Agencies suggest they can aggregate all streams of the same order within the watershed that drains to the nearest TNW. *See id.* at 69,439. To use another example, the Agencies could theoretically aggregate all lakes and ponds that perform similar functions and occupy a similar geographic position on the landscape (however similarity is to be judged) within a specific ecoregion of their choosing. *See id.* at 69,439-40 (discussing the varying number of ecoregions within Levels I, II, III, and IV).

[54] *Available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866.

Because the Proposed Rule signals that the Agencies will substantially alter how they are now implementing the significant nexus standard *and* extends that standard to new water types, the Agencies cannot credibly state that the impacts of the Proposed Rule are *de minimis* or trivially different from $0. The Agencies' primary baseline analysis is plainly deficient and of close to no value. The Agencies must redo their primary baseline analysis so that the governmental entities and the public can fully understand the actual economic impacts of the Proposed Rule's changes to the pre-2015 regulatory regime that the Agencies are currently implementing. In so doing, the Agencies must analyze the impacts of the Proposed Rule's expansion across all affected CWA programs.

2. The Agencies' Secondary Baseline Analysis Greatly Underestimates the Costs of the Proposed Rule While Improperly Inflating Estimated Benefits.

Although the Agencies improperly gave two district court orders nationwide precedential effect and halted implementation of the NWPR, the NWPR remains in the Code of Federal Regulations. Moreover, the Agencies correctly recognize that "court actions [could] result in the NWPR becoming the primary baseline prior to the final rule" and thus, they were obligated to analyze the impacts of moving from the NWPR to the Proposed Rule. *See* Economic Analysis at 17-18. As explained more fully below and in an analysis provided by Drs. David Sunding and Gina Waterfield, the Agencies' secondary baseline analysis, which focuses heavily on the costs and benefits that would accrue under CWA Section 404, "is unfortunately limited in its scope and relies on flawed methods and assumptions." *See* David Sunding, Ph.D., and Gina Waterfield, Ph.D., The Brattle Group, Review of the Environmental Protection Agency and Department of the Army 2021 Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States'" Rule, at iv (Feb. 7, 2022) (attached as Ex. 10). The Agencies' analyses of non-404 programs "are cursory at best" and rely on "assumptions and conjecture." *Id.* at iv. Given the shortcomings in the Agencies' Economic Analysis, the document does virtually nothing to inform policy-making.

As a general matter, the Agencies fail to explain significant discrepancies between the estimates of costs and benefits they prepared for the Proposed Rule and the estimates they prepared for the NWPR. *See id.* at 7. According to the Agencies' secondary baseline analysis, the total national annualized costs of the Proposed Rule range from $109 million to $276 million (assuming a 3 percent discount rate), and the annualized national benefits range from $376 million to $590 million (assuming a 3 percent discount rate). *See id.* at 6. These estimates contrast sharply with the supporting analysis for the NWPR, which estimated the foregone benefits of a narrower definition of "waters of the United States" at $55 million to $173 million and estimated avoided costs of $109 million to $513 million. *See id.* at 7. While the Agencies opaquely allude to methodological differences between the two sets of analyses, they "do not provide adequate justification for the changes to their approach, despite the fact that the two analyses address much the same question and were conducted less than two years apart." Nor do the Agencies "test the validity of their new approach by revisiting the case study geographies [from the NWPR] for which better data exists to conduct a more robust analysis." *See id.*

Drs. Sunding and Waterfield further explain how the Agencies also fail to reasonably estimate the increase in jurisdictional waters in moving from the NWPR to the pre-2015

regulatory regime and thus, significantly understate the impact of the Proposed Rule. The Agencies rely on Corps permit data for the period 2010 to 2019, excluding certain permits that were issued under the 2015 Clean Water Rule, and they use Cowardin codes included in the Corps' ORM2 database to identify permits that would have been required under the Proposed Rule, but not under the NWPR. *See id* at 7-8. Those codes, however, do not align with the NWPR's jurisdictional categories, nor do they capture the entire universe of jurisdictional areas under the current CWA framework. *See id.* at 8. As a result, the Economic Analysis "fails to account for large numbers of acres across the country that may be impacted by the regulations." *Id.* Although the Agencies acknowledge various layers of uncertainty and data limitations, they fail to "present sensitivity analyses or provide adequate characterization of the impact of these uncertainties on their estimates and conclusions." *Id.* at 8-9.

More specifically, the Agencies' analysis of costs associated with the Section 404 program is riddled with errors. Dr. Sunding and Dr. Waterfield detail the following shortcomings in their review:

- The Agencies' cost analysis focuses broadly on permit costs (application costs, permitting time costs, and impact avoidance and mitigation costs) and compensatory mitigation costs. Yet the agencies do not attempt to quantify costs associated with avoidance and minimization measures, even though those are likely to be significant and could dwarf the other permit costs *See id.* at 9-10.

- Although the Agencies acknowledge there are implicit costs, such as the cost of transferring projects from newly jurisdictional areas to non-jurisdictional areas, they do not estimate or scale these costs. Moreover, the Agencies ignore other categories of implicit costs altogether, such as those associated with project delays and uncertainty. *Id.* at 10.

- The Agencies ignore potential changes to the distribution of individual and general permits—namely that an increase in the scope of jurisdictional waters could mean that projects previously eligible for general permits must apply for individual permits, which could significantly increase costs. *See id.* at 11. The Agencies ignore "the heterogeneity in impacted acreage" within the two categories of permits and instead "calculate an average for each type of permit that provides a single estimate of project size." *Id.*

- Data on permitting costs are grossly outdated, and the Agencies effectively assume "no real change in permitting costs over a period of more than four decades." *Id.* at 12. Consequently, "assumed per-permit costs are likely to underestimate the present and future cost of the permitting process." *Id.* These same concerns apply to the Agencies' compensatory mitigation cost estimates, which suffer from an *additional* flaw in that the Agencies' "process for generating th[o]se estimates is not transparent or adequately supported." *Id.* at 12-13.

Apart from inadequately analyzing Section 404 costs, the Agencies commit several errors in estimating Section 404 benefits. For instance:

- All of the studies that the Agencies rely on to estimate benefits take a contingent valuation approach, which has a "tendency [for] survey respondents to provide inaccurate and inconsistent answers. The agencies do not discuss these important shortcomings of the studies that form the basis of their benefits estimate, or the likely bias as a result." *Id.* at 13.

- Most of the willingness to pay estimates come from studies that were conducted over a decade ago, with the oldest being conducted over 30 years ago. These studies "are largely irrelevant and do not provide accurate estimates of benefits for the types of wetlands likely to be preserved or restored by incremental compensatory mitigation requirements under the proposed rule but not the NWPR." *Id.* at 14. Among other shortcomings, there is wide variation in per-household per-acre willingness-to-pay estimates ranging from $25-$78 per acre (of coastal marsh) down to less than $1 per acre. *See id.*

- The Agencies assume, illogically and without support, that all households would benefit equally from incremental compensatory mitigation, no matter how far they are from the wetland. *See id.* at 15. While the Agencies' alternative "radius-based" approach is potentially an improvement, it is nevertheless "subject to arbitrary selection of radii." *Id.*

Finally, Drs. Sunding and Waterfield explain how the Agencies' analyses of impacts to non-404 programs, such as impacts to state water quality standards and total maximum daily load programs under Section 303, are largely unsupported. The Economic Analysis acknowledges substantial uncertainties, yet the Agencies ultimately conclude that impacts are likely to be minimal, with very little discussion or evidence to support those conclusions. *See id.* at 16-19.

B. The Agencies Have Failed to Comply with the Regulatory Flexibility Act.

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), requires EPA to convene a panel to seek the input of small entities (including small businesses and government jurisdictions with populations less than 50,000) that may be affected by a proposed action and to issue a report, referred to as a regulatory flexibility analysis, of potential impacts and alternatives before a proposed rule is issued. *See generally* 5 U.S.C. §§ 601-612. If EPA has supporting data that its action will not have a substantial impact on small businesses, it can issue a certification to that effect, thereby excusing the agency from preparing either an initial or a final regulatory flexibility analysis or holding a SBREFA panel.

The Agencies have certified that the Proposed Rule, if finalized, would not have a significant economic impact on a substantial number of small entities and thus, they did not prepare an initial regulatory flexibility analysis. The Agencies argue that the Proposed Rule would codify a regulatory regime that largely reflects what is currently in effect due to the judicial vacatur of the NWPR and that the action would define a key term of the CWA but would not subject any entities with any regulatory burdens. 86 Fed. Reg. at 69,447. The Agencies claim that they have already sought and received input from a range of small entities through a public

meeting held on August 25, 2021, which obviated the need to hold a formal SBREFA panel to consider alternatives to minimize burdens on small entities. Economic Analysis at 20-21.

The Agencies have not developed an adequate record to support their certification of no significant impact on a substantial number of small entities, and their minimal engagement with small entities is a poor substitute that fails to satisfy the robust engagement and alternatives requirements required by the law. Just because the Agencies assert the Proposed Rule will not impact small entities does not make it so.

Regarding the Agencies' familiar claim that the Proposed Rule is a purely definitional rule that does not directly regulate any small entities and involves consideration of factors not readily informed by the RFA, the Office of Advocacy of the U.S. Small Business Administration ("SBA") previously explained in its comments on the proposed 2015 Rule why rules defining "waters of the United States" under the CWA impose *direct* costs and burdens on small entities. *See* U.S. Small Business Administration, Office of Advocacy, Comments on Definition of "Waters of the United States" under the Clean Water Act, at 5-7 (Oct. 1, 2014). WAC members anticipate that the Proposed Rule's expanded definition of "waters of the United States," particularly if the Agencies once again swing for the fences in how broadly they implement the significant nexus standard, would have far-reaching impacts on small businesses and small governmental jurisdictions. Everyday activities undertaken by these small entities would immediately become subject to a wide range of regulations and permitting requirements, all of which would impose direct costs, delays, and uncertainty in planning future activities and projects. These impacts resulting from the replacement of the NWPR are felt acutely by small business entities, including many WAC members. For all of these reasons, the agencies' certification is invalid.

Recently, the Agencies participated in roundtable discussions on the Proposed Rule hosted by SBA's Office of Advocacy. The Agencies will no doubt claim this outreach is an acceptable substitute for RFA compliance, but these belated efforts fall short of the RFA's requirements. The RFA directs an agency to publish an initial regulatory flexibility analysis and convene a SBREFA panel *prior* to the publication of that analysis, so that the panel can collect advice and recommendations from small entity representatives on issues such as whether there are any significant alternatives to the proposed rule that minimize any significant economic impact of the proposed rule on small entities. *See* 5 U.S.C. §§ 609(b), 603(b)(3)-(5) & 603(c). These requirements are designed to give small entity representatives a chance to understand an upcoming proposed rule and provide meaningful input *before* publication of the proposed rule. Participation in meetings more than halfway through the comment period—meetings that small entity representatives were given very little advance notice of during the week between the Christmas and New Year's Day holidays—is not equivalent to complying with the RFA before proposing a rule.

C. The Agencies' Comment Period Does Not Allow for Meaningful Participation.

Despite the Agencies' stated commitment to robust and meaningful stakeholder engagement, the 60-day public comment period for this proposal does not provide a meaningful opportunity for interested stakeholders to review all of the supporting documents in the

docket—not all of which were even available when the comment period was opened—and comment on the Proposed Rule, the Economic Analysis, and the Technical Support Document. To make matters worse, the Agencies are hosting a series of regional roundtables focused on identifying regional similarities and differences that should be considered as part of a *separate* rulemaking. These competing invitations to participate in overlapping public engagement processes may frustrate the Agencies' ability to obtain meaningful input on this rulemaking proposal.

By comparison, the 60-day comment period for this 79-page proposal is far more abbreviated than those comment periods associated with recent WOTUS rulemaking proposals. For instance, when the Obama administration published its 88-page proposed definition in the *Federal Register* on April 21, 2014, it initially allowed the public 90 days to comment, until July 21, 2014. *See* 79 Fed. Reg. 22,187 (Apr. 21, 2014). That deadline was subsequently extended multiple times to November 14, 2014, and thus, the public had a total of 207 days to comment on the proposal. *See* 79 Fed. Reg. 61,590 (Oct. 14, 2014). And before that, the Obama administration even allowed the public 90 days to comment on the far shorter 2011 draft WOTUS guidance. *See* 76 Fed. Reg. 39,101 (July 5, 2011). While it is true that the comment period for the proposed Navigable Waters Protection Rule was also 60 days long, interested stakeholders had a chance to review the pre-publication version of the proposal for approximately 60 days before the proposal was published in the *Federal Register*. *See* 85 Fed. Reg. at 22,261 n.23 (noting lengthy delay between publication of the pre-proposal version on EPA's website and *Federal Register* publication).

Given the importance of this issue and the inadequately short comment period for the proposal, it is not surprising that the Agencies received numerous requests for an extension of the public comment period from residential developers, public clean water utilities and stormwater agencies, members of the agricultural community, cement manufacturers, members of Congress, miners, and aggregate producers. The Agencies have inexplicably ignored these requests from a diverse array of stakeholders and declined to extend the 60-day comment period.

D. The Proposed Rule Should Address Grandfathering Issues

The Proposed Rule does not address how the revised definition of WOTUS would affect valid JDs approved under the NWPR. EPA's website, however, currently states that: (i) AJDs completed prior to the District of Arizona's August 30, 2021, vacatur order "will not be reopened" and remain valid for their five-year term; and (ii) permit decisions made prior to the court's decision in reliance on a NWPR AJD will not be reconsidered. *See* U.S. EPA, "Current Implementation of Waters of the United States" (attached as Ex. 11).[55] WAC recommends that the Agencies provide these *and* other clarifications in the preamble.

It is well-established that "[r]etroactivity is not favored in the law" and thus, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). "Even where

[55] *Available at* https://www.epa.gov/wotus/current-implementation-waters-united-states.

some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen*, 488 U.S. at 208-09.

Not surprisingly, the Agencies have clarified in every recent WOTUS rulemaking that changes to the WOTUS definition do *not* apply retroactively and that existing AJDs and permits will *not* be reopened to reconsider jurisdiction under a newly revised definition. For instance, in the 2015 Rule, the Agencies assured regulated entities that they "will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant or, consistent with existing Corps' guidance,' unless new information warrants revision of the determination before the expiration period." 80 Fed. Reg. at 37,073. The Agencies further stated that "consistent with existing regulations and guidance, approved jurisdictional determinations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization." *Id.* at 37,073-074.

In the 2019 Repeal Rule, the Agencies again cited RGL No. 05-02 and proclaimed that "AJDs are valid for a period of five years from the date of issuance unless new information warrants revision before the expiration date or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis." 84 Fed. Reg. 56,626, 56,664 (Oct. 22, 2019). In so doing, the Agencies emphasized the Supreme Court's holding in *U.S. Army Corps of Engineers v. Hawkes* that an AJD is a final agency action pursuant to the Agencies' definition of WOTUS at the time of its issuance and therefore, the repeal of the 2015 Rule "does not invalidate an AJD that was issued under the 2015 Rule." *See id.* (citing 136 S. Ct. at 1814).

Finally, in the NWPR, the Agencies again confirmed that AJDs generally are valid for five years. Addressing the uncertainty caused by all of the recent regulatory changes and ensuing litigation, the Agencies explained that "[t]his final rule does not invalidate an AJD that was issued before the 2015 Rule or in States where the 2015 Rule was not in effect due to litigation, under the 2015 Rule, or under the 2019 Rule. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL 05–02, or the recipient of such an AJD requests that a new AJD be issued pursuant to [the NWPR]." 85 Fed. Reg. at 22,331-32. In other words, AJDs that were completed pursuant to whatever WOTUS rule was in effect at the time remain valid until their expiration dates even if the rule changes at a later date.

Consistent with these prior pronouncements, the Agencies should similarly clarify that any changes to the definition of "waters of the United States" will not apply retroactively and that AJDs and permits finalized before the District of Arizona's vacatur order will not be reopened and will remain valid until their expiration date.[56] Furthermore, WAC urges the Agencies to clarify further that neither the "pre-2015 regulatory regime" that the Agencies are currently implementing nor the Proposed Rule will apply to AJDs associated with either pending individual permit applications that were determined complete (per 33 C.F.R. § 325.1) on or before August 30, 2021 or complete Section 404 pre-construction notifications pending on or before August 30, 2021. This clarification would be consistent with the Agencies' position

[56] WAC members are aware of at least one instance where a Corps district has recently taken the position that it would have to "re-do" an AJD finalized under the NWPR, even though the applicant had not requested a new JD and no new information had come to light.

following issuance of the 2015 Rule. *See* U.S. EPA, "Technical Questions and Answers for Implementation of the Clean Water Rule" (Jan. 19, 2017 snapshot) (attached as Ex. 12).[57] It is also consistent with the Agencies' recognition, in the 2008 Mitigation Rule, that it could impose a "substantial hardship" if new requirements are applied to a permit applicant that has invested considerable time and effort (and thus has substantial reliance interests) under prior regulations. *See* 73 Fed. Reg. 19,594, 19,608 (Apr. 10, 2008).

Finally, the Agencies should clarify that neither issuance of the Proposed Rule nor the Agencies' decision to acquiesce nationwide to the District of Arizona's vacatur order constitute new site-specific information that warrants revision of an AJD under RGL No. 05-02. Such a clarification is consistent with prior agency practice.[58]

The foregoing clarifications are necessary to ensure that permit applicants (and regulators) who have invested a significant amount of effort into the permit process need not start over based on a change to the WOTUS definition, either as a result of the District of Arizona's vacatur order or the issuance of a final rule revising the definition.

E. The Agencies Have Failed to Comply with Other Requirements Applicable to Agency Rulemaking Proceedings.

1. The Proposed Rule Does Not Comply with Executive Order No. 13,132 (Federalism).

Executive Order No. 13,132 (entitled "Federalism"), issued on August 4, 1999, directs agencies to adhere to nine broad principles as well as four criteria prescribing the role of states and limitations of federal authority under the Constitution when formulating and implementing policies with federalism implications. The question of whether particular water resources are subject to federal regulation as a "water of the United States" or are instead subject to state control raises important federalism concerns.

In the Proposed Rule, the Agencies state "that a revised definition of 'waters of the United States' may be of significant interest to state and local governments" before concluding that they "believe that the requirements of the Executive Order will be satisfied." 86 Fed. Reg. at 69,447-48. For support, the Agencies cite the outreach they have undertaken to seek input from state and local governments and organizations such as the National Governors Association, the Environmental Council of States, and the National Association of Clean Water Agencies. *See* Summary Report of Federalism Consultation for the Proposed Rule: Revised Definition of "Waters of the United States," Doc No. EPA-HQ-OW-2021-0602-0105 (Dec. 2021). While the Federalism Summary Report provides an overview of the comments the Agencies received through letters, a meeting with intergovernmental associations on August 5, 2021, or at one of three regional "dialogue" meetings between September 29, 2021 and October 20, 2021, the report fails to describe how the Agencies incorporated the feedback into the Proposed Rule. In

[57] *Available at* https://19january2017snapshot.epa.gov/cleanwaterrule/technical-questions-and-answers-implementation-clean-water-rule_.html.

[58] *See id.*

fact, the Agencies submitted the draft Proposed Rule to the Office of Management and Budget for interagency review pursuant to Executive Order No. 12,866 on October 10, 2021—*more than a week before* the final regional "dialogue" meeting took place.[59] It defies logic to think that the outreach to states and local governments was meaningful and that the Agencies actually incorporated the feedback they received when the draft Proposal was submitted to OMB in the midst of the so-called outreach process. Instead, the outreach to states and local governments seems little more than a box-checking exercise, as opposed to the robust consultation process that advances the federalism principles established by the Framers that Congress incorporated into the CWA.

The superficial outreach to state and local governments does not overcome the fact that the Proposed Rule itself does not adhere to the federalism principles and criteria outlined in the Executive Order No. 13,132. For example, Section 2(f) of the Executive Order states:

> The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues. One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems.

The Agencies seem particularly frustrated that, under the NWPR, certain water features, including those located in parts of the arid west, may not be subject to federal jurisdiction. Thus, the Agencies seem intent on devising a new definition for "waters of the United States" that maximizes the reach of federal jurisdiction, instead of one that respects regional variability and recognizes that federal jurisdiction ought to be narrowly drawn. As noted elsewhere in these comments, this aggressive approach to federal jurisdiction—rather than maximizing the principles of cooperative federalism—explains why the Agencies downplay the importance of CWA Section 101(b). In light of Executive Order No. 13,132, the Agencies are mistaken that the federalism policies in Section 101(b) are secondary to the environmental policies in Section 101(a).

The Agencies should withdraw the Proposed Rule so that they may complete the state and local consultation process; include state and local entities in the development of the WOTUS definition; and consider ways to provide states additional flexibility consistent with the CWA Section 101(b) policies and Executive Order No. 13,132.

2. The Agencies' Environmental Justice Analysis Undercuts Their Claims of Environmental Harm.

In 1994, President Clinton issued Executive Order No. 12,898, directing that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental

[59] *See* https://www.reginfo.gov/public/do/eoDetails?rrid=200961.

effects of its programs, policies, and activities on minority populations and low-income populations."

The Agencies are proposing to return to a regulatory definition that purportedly reflects the regulations that were put in place in the 1980s, long before President Clinton's environmental justice executive order. In other words, there was no consideration of environmental justice when the Agencies adopted the definition of "waters of the United States" that they want to reinstate, albeit with some amendments to reflect advances in case law.

Upon taking office, President Biden issued Executive Order No. 13,990 ("Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis"), which states that the federal government must advance environmental justice and that it is the policy of the Biden administration "to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." Executive Order No. 13,990 § 1. One week later, the Biden Administration issued Executive Order No. 14,008 ("Tackling the Climate Crisis at Home and Abroad"), which admonished agencies to "deliver environmental justice in communities all across America," at Section 201, "make achieving environmental justice part of their missions," at Section 219, and "to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care," *Id.*

The Proposed Rule asserts that the NWPR may have had a negative impact on environmental justice communities and states "the agencies affirm their commitment to assessing the impacts of a revised definition of 'waters of the United States' on population groups of concern." 86 Fed. Reg. at 69,446. But neither this assertion—not the Agencies' broader claims about the environmental harms resulting from the NWPR—find support in the record. The Economic Analysis, for instance, examined the socioeconomic characteristic of communities within certain HUC12 watersheds that would experience impacts from the revised definition and determined that only 96 (or .2%) of affected HUC12 watersheds would experience a change in wetland areas greater than 50 acres, whereas 52,401 of the HUC12 watersheds would experience no change and 39,017 would experience a change of less than half an acre. TSD at 89-94. While the Agencies state further analysis may need to be done to understand the potential impacts on environmental justice communities at some of 96 watersheds with wetland changes of 50 acres or more, it is clear from the Agencies' economic analysis that the Proposed Rule's definition would not result in such dramatic benefits to the environment and environmental justice communities as they have otherwise claimed.

Executive Order No. 13,990 and Executive Order No. 14,008 link economic growth and job creation with advancing the cause of environmental justice. However, the environmental justice section of the preamble to the Proposed Rule, the TSD, and the Economic Analysis, all fail to address how job growth in rural areas, low-income and minority populations, and indigenous communities will be advanced by the Proposed Rule. Instead, the discussion of potential impacts suggests permitting costs and other regulatory burdens will increase as a result of replacing the NWPR, which would undermine the Biden Administration's infrastructure agenda as well as its commitment to environmental justice. To be clear, the only reference to the

word "jobs" in the preamble to the Proposed Rule and the TSD is in reference to Executive Order No. 13,990, while the Economic Analysis does not include a single reference to the word.

For these reasons, the Agencies should withdraw the Proposed and conduct a thorough analysis about how replacement of the NWPR with the proposed pre-2015 regulatory regime benefits both environmental justice and job creation, as directed by Executive Order No. 13,990.

VIII. Conclusion

The Coalition believes the Proposed Rule disregards the limits that Congress placed on the scope of federal regulatory authority under the CWA, codifies misinterpretations of relevant Supreme Court precedents, and impermissibly reads the term "navigable" out of the statute. The Proposed Rule also eliminates the clarity and predictability that the NWPR provided by codifying an overly expansive interpretation of Justice Kennedy's significant nexus standard that opens the door to arbitrary and inconsistent permitting and enforcement decisions. The Agencies also failed to adequately analyze the implications of the Proposed Rule's changes across CWA programs and its impacts on the public, including small entities in particular.

Accordingly, WAC recommends that the Agencies withdraw the Proposed Rule. If the Agencies are sincere about engaging all stakeholders, including small businesses and regulated entities, in crafting a durable and defensible definition of "waters of the United States," they should engage in more robust and meaningful dialogue that focuses on developing a rule that actually adheres to Congress's intent and respects the limits that Congress and the Supreme Court have placed on the CWA's reach. WAC continues to believe that the NWPR is an appropriate foundation for a durable and defensible rule. Rather than wiping out that rule in its entirety and replacing it with the flawed pre-2015 framework that prompted stakeholders to demand more clarity and certainty, the Agencies should focus their efforts on revisions to the NWPR or related implementation guidance.

At a minimum, if the Agencies do not withdraw the Proposed Rule, they should pause their current rulemaking efforts. The Proposed Rule is built around an "either/or" approach that improperly treats Justice Kennedy's concurring opinion in *Rapanos* as controlling. Because the Supreme Court recently decided to consider whether Justice Kennedy's "significant nexus" standard is the proper test for determining if wetlands are "waters of the United States" under the CWA, the Agencies should not rush through a rulemaking that tries to codify that standard.

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