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S. HRG. 115–909

HEARING ON A REVIEW OF THE TECHNICAL, SCIENTIFIC, AND LEGAL BASIS OF THE WOTUS RULE

HEARING

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH

FIRST SESSION

APRIL 26, 2017

Printed for the use of the Committee on Environment and Public Works



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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FIFTEENTH CONGRESS
FIRST SESSION

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HEARING ON A REVIEW OF THE TECHNICAL, SCIENTIFIC, AND LEGAL BASIS OF THE WOTUS RULE

WEDNESDAY, APRIL 26, 2017

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:19 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (chairman of the committee) presiding.

Present: Senators Barrasso, Carper, Inhofe, Fischer, Rounds, Ernst, Sullivan, Cardin, Whitehouse, Gillibrand, Booker, Duckworth, and Harris.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Good morning. I call this hearing to order.

On February 28th, President Trump signed an Executive Order directing EPA and the Army Corps of Engineers to review the Obama administration's Waters of the United States, or WOTUS Rule, and to publish a proposed rule that would rescind or revise that rule. While this action was both correct and important, the long saga of the WOTUS Rule is not yet over. This fundamentally flawed rule is still on the books and needs to be withdrawn.

The Supreme Court has decided to rule on whether or not circuit courts have the jurisdiction to hear challenges to the Rule. If the Supreme Court decides that these cases belong in district courts, then the nationwide stay that the Sixth Circuit Court of Appeals issued will go away.

If that happens, this Rule, that is terrible and unlawful, will go into effect and the EPA and the Corps will be able to regulate isolated ponds and dry streambeds that have no impact on navigable water and were never intended to be covered under the Clean Water Act.

As we will hear from our witnesses today, the justification for withdrawing the Rule is overwhelming. General Peabody is a decorated retired member of the military who was the Commanding General for the Civil and Emergency Operations at the Corps of Engineers until he retired in the fall of 2015. He will tell us that the definitions in the WOTUS Rule are not based on the Corps' expertise and experience. In fact, the Corps was shut out of the process of writing the final Rule and the support documents for the final Rule.

The Corps is the agency that performs the on-the-ground inspections that identify what water is federally regulated. If the Rule is not based on their experience, that means it has no technical basis; it is, instead, a blatant government power grab.

Dr. Josselyn is a Ph.D. and a professional wetlands scientist who was a member of the Science Advisory Board Panel that was put together by the EPA that reviewed EPA's "Science Report." This report is a scientific literature review on water connectivity.

The Obama EPA claimed that the WOTUS Rule is based on the conclusions of this report. Dr. Josselyn will tell us that, in fact, this report does not address the issue of where Federal regulators should establish jurisdiction.

EPA Science Report looks at connections to water, but fails to examine whether connections are significant, and most of the studies in the report do not address navigable water. Instead, this report concludes that all water is connected. Our children learn that in fourth grade when they learn about the water cycle. That has nothing to do with Federal jurisdiction, and it means that the EPA's Science Report can not be used to justify the WOTUS Rule.

Mr. Tseytlin is the Solicitor General for the State of Wisconsin and he works with the 31 States that are all challenging the WOTUS Rule. Mr. Tseytlin will tell us that the final rule included new definitions that were created without public input and even without public notice. This means that the WOTUS Rule is arbitrary and capricious, and violates the Administrative Procedure Act.

We also will hear from Mr. Kopocis. He was the Deputy Assistant Administrator for the Office of Water in the Obama administration. He will tell us that the Obama administration met with States and other stakeholders during the rulemaking process. That does not change the fact that between the proposed Rule and the final Rule the Corps was arbitrarily or deliberately shut out of the process. The end result is the Obama administration wrote a RULE that is not supported by agency expertise, by agency experience, or by the science or the law.

Finally, we will hear from Mr. O'Mara, who is President and Chief Executive Officer of the National Wildlife Federation. The National Wildlife Federation is very interested in protecting wildlife habitat. The right way to do this is to form partnerships with landowners, not to expand Federal control over private property. In fact, in 2014, the Fish and Wildlife Service issued a report that notes that the Service works with landowners to employ cooperative conservation measures to preserve isolated wetlands like prairie potholes, measures that let farming continue.

If the WOTUS Rule goes into effect, instead of working cooperatively, the Federal Government could simply take control of private land and shut down farming activity. We have already had attempts to do this in my home State of Wyoming, where Mr. Andy Johnson, who EPA threatened to fine $37,500 a day for simply building a stock pond on his property.

After looking at this record, the only course of action that makes sense is to withdraw the Rule and start over. I hope we can see quick action to lift this threat to farmers and other landowners that have been created as a result of the WOTUS Rule.

I now turn to Ranking Member Carper for his testimony.

OPENING STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator CARPER. Thanks, Mr. Chairman. Thanks for bringing us all together.

I spoke with the witnesses before we began and I said, this is an issue, as you are going to hear from the Chairman's opening remarks, that brings out strong feelings on several sides. One of the things that I hope might happen here today is that the panel this diverse and this smart could actually help provide some consistency and maybe some consensus before we walk out of the room, so thank you all for joining us.

This hearing also represents a valuable opportunity to consider the critical elements of any sound rulemaking to address the definition of water that receives Federal protection, including rulemaking that would be required to rescind the rule that we are considering today. Fortunately, we have a panel of experts to help us sort through the nuance of law and science. We welcome all of you very much, appreciate your contributions to our discussion. Before we dive into the details, though, I would like to step back just a little bit and recall how we got to this point with the definition of waters of the U.S.

You will recall that the passage of the Clean Water Act was a product of horrific water quality in many parts of the Country. I went to Ohio State University, and just north of us, in Cleveland, there is a river flowing through Cleveland that caught on fire. It was not just the Cuyahoga River that was contaminated, there were a lot of others as well. Frankly, there still are too many. There was broad, national concern over the State of our waters then, and there was consensus that we needed to do something comprehensive to fix the problem.

Congress was not confused or uncertain about what it was seeking to protect when it passed the Clean Water Act in 1972. The first sentence of that Act passed in 1972 says this: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." That is what it says. When Congress reported out that legislation, this Committee acknowledged that "it is essential that discharges of pollution be controlled at the source. At the source. The Act defined the term "navigable waters" broadly, as "all the waters of the United States." Congress clearly understood that cleaning up our waters involved controlling pollution discharges in a lot of places where ships do not go.

While broad, the coverage of the Act was clear. While demanding on cities and industries, farmers, ranchers, and developers, the benefits of the Act were dramatic. More than 60 percent of the lakes and 55 percent of the rivers were able to achieve the Act's water quality goals of being fishable and swimmable by the year 2003.

I believe that all of us understand that protecting wetlands and reducing pollution requires active participation from farmers and ranchers. They live closest to our land and to our waters, and they have every reason to be good stewards of these resources; and for

the most part they are, really good stewards in most cases. Indeed, that is one reason why farmers in my State of Delaware celebrate their investments in, and successes of, no-till farming and all other kinds of conservation measures that I will not get into today.

While those farmers love their land, traditional farming practices often ended up sending some of their best soils down a ditch or maybe away with the breezes on a windy day. Their land was eroding from under their feet. Then science showed them a better way. They were not blinded by science; they were guided by science. Their commitment to the land and their livelihoods allowed them to embrace new practices that preserve their future and a foundation of rural life and the economy. I think we need that sort of agreement for clean water, along with a commitment to make this collective effort as predictable, simple, and inexpensive as possible.

No one was pleased with the confusion, uncertainty, and burdensome bureaucratic processes resulting from the Supreme Court's decision in the 2001 SWANCC case and 2006 Rapanos case. Without the Clean Water Rule, though, EPA and the Corps of Engineers would have to undertake a burdensome, time-consuming, expensive, unpredictable, and confusing process to determine what is covered by the Clean Water Act and what is not. That is no way to do business, which is exactly why there was broad and diverse interest in having both the EPA and the Corps develop clear guidance, through regulation, to cut through the morass. That, I believe, is the motivation behind, and I think the result of, the Clean Water Rule.

If I were to take on that very important task, here are some things that I would want to focus on: I would analyze all the peer-reviewed science I could get my hands on; I would host hundreds of public meetings across our Country; I would ensure that all who wish could have their say; I would review a million comments, if I had to; and I would consult with the States, with affected industries, with farmers, with fishermen, and the best water minds around. That is exactly what went into developing the Clean Water Rule that we are discussing today.

To tell you the truth, I do not believe that I have ever met anyone who thinks the Rule is perfect. I do not, and I have not met anyone who thinks that it is. It is too hot for some, too cold for others, but it will protect the water we all need.

The Rule has been a long time coming, as you know. It is well informed by science and by experience, it treads a moderate line between the extreme desires of interests at both ends, and it is the product of a massive public engagement effort. I would ask this Administration and detractors of this approach to show us your work. Just show us your work. Give the rest of us the same rigor, the thoughtfulness, the engagement, the transparency, and science that underlies this effort, and show us, with the same degree of dedication to the task, to the law, and to our health and environment, that you have something better to offer. Otherwise, I am afraid that you risk, you being the Administration, risk failing all of our people and spending an awful lot of time and taxpayer money subsequently in court. This Rule has all the basis in law, has technical merit, and the science that it needs.

Thank you, Mr. Chairman. I would ask unanimous consent, if I could, to insert into this hearing record letters that I received from The Southern Environmental Law Center and Clean Water Action supporting the Clean Water Rule. Thanks so much.

Senator BARRASSO. Without objection, those are admitted to the record.

[The referenced information follows:]

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April 26, 2017

The Honorable John Barrasso
Chairman, Committee on Environment and Public Works
United States Senate
307 Dirksen Senate Office Building
Washington DC 20510

The Honorable Thomas Carper
Ranking Member, Committee on Environment and Public Works
United States Senate
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

Southern Environmental Law Center (SELC) thanks the U.S. Senate Committee on Environment and Public Works for the opportunity to provide written comments for the hearing "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule." Please accept these comments for the hearing's official record.

SELC is a regional non-profit organization, working in six states in the Southeast to champion the special resources of the South: clean water, healthy air, mountains, forests, rural countryside, and the coast. Our organization has a strong interest in the final rulemaking promulgated by the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) in 2015, which clarified those waters considered "waters of the U.S" under the Clean Water Act.

The final Clean Water Rule published in the Federal Register on June 29, 2015, is long overdue. It is consistent with the law and is based on science. The rule provides greater clarity and restores longstanding protections for critical upstream waters across the country that contribute to the drinking water supplies for one in three Americans, filter out pollutants, and protect our communities from flooding.

This rulemaking is critical because it is imperative that the wetlands regulatory program be administered in a clear and definitive manner. The meaning of the words "navigable waters" and "waters of the United States" have been debated since Congress passed the Clean Water Act in 1972. Although the agencies have developed regulatory definitions for these terms in the past, we now have the benefit of a well-developed body of case law, as well as a well-developed body of scientific knowledge to shape the definition. With this rule, the agencies have revised the 1986 regulatory definition and put in place a definition that takes into account the legal and scientific developments that have transpired over the last three decades.

The final rule promulgated by the EPA and Corps is consistent with the law. Congress intended the regulatory agencies to interpret the term "waters of the United States" broadly. The legislative history of the Act demonstrates that in passing the Act, Congress meant to protect all the nation's waters. And the U.S. Supreme Court has ruled on the scope of these protections; each time the Court has upheld a broad interpretation of the Act. The final rulemaking honors these decisions as well as the original intent of Congress.

Since the Clean Water Act was enacted in 1972,[1] great progress has been made in cleaning up our nation's waters. Congress intended the term "waters of the United States" to be interpreted broadly. In defining the scope of the Act, Congress said the Act would apply to all "navigable waters," which it defined as the "waters of the United States." The legislative history is clear on how the terms should be interpreted. For example, as the House Committee Report for the Act provides:

> One term the committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that the interpretation would be read narrowly. However, this is not the committee's intent. The committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[2]

Later, when EPA promulgated its regulations in 1973 to implement Section 402 of the Act, it defined waters of the United States broadly and listed almost every connection possible between water and commerce.[3]

In 1977, when the Clean Water Act was amended the Section 404 program was scrutinized. Ultimately, instead of challenging the jurisdictional scope of the Section 404 program, Congress carved out exemptions for certain activities involved in normal farming, ranching, silviculture, and mining.[4]

Despite this long history of broadly interpreting "waters of the United States," Supreme Court rulings in 2001 and 2006 (*SWANCC* and *Rapanos*), and subsequent agency guidance, resulted in more than a decade of uncertainty and lost protections for countless streams, lakes, and wetlands. These decisions and their implementation, left 60 percent of the nation's stream miles at risk for pollution and destruction, and threatened the drinking water for 117 million Americans.

In developing the final rule, it was appropriate for the regulatory agencies to rely on Justice Kennedy's test as the basis for identifying waters protected by the Clean Water Act, and it is therefore, consistent with the Supreme Court's instructions in the *Rapanos* decision. There is no requirement that the agencies apply both the Kennedy and the Scalia tests. Also, it is the Kennedy test that is more firmly grounded in science.

---

[1] In 1972 the "Clean Water Act" was still labeled the "Federal Water Pollution Control Act Amendments of 1972." It was not until the Act was amended in 1977 and the Act was renamed the Clean Water Act.
[2] *Additional Views of Representative Edgar and Representative Myers*, H.R. Reo. No. 95-139, at 54 (1977); 123 Cong. Rec. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich)); 123 Cong. Rec. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)).
[3] *See* 38 Fed. Reg. 13529 (May 22, 1973).
[4] *See also* 40 Fed. Reg. 31319, 31320 (July 25, 1975); 33 C.F.R. § 209.120(d)(2) and €(2) (1976).

The EPA and the Corps embarked upon a multi-year effort to engage stakeholders and evaluate the science on the connectivity of wetlands and headwater streams. More than one million public comments were submitted and taken into account when EPA and the Corps developed their final Clean Water Rule. A vast majority of these comments were supportive of the rulemaking.

The final Clean Water Rule is based on more than 1,200 peer-reviewed scientific studies that have undergone an intense level of scrutiny. The rulemaking is underpinned by an EPA science report entitled, *Connectivity of Small Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, which confirms the well-established scientific principle that the network of small interconnected wetlands and headwater streams that pervade our watersheds are critically important to the health of our larger downstream waters. It is clear that pollutants entering headwaters can end up in downstream waters. Further, wetlands and small streams can help protect downstream waters from flooding, as well as capture waterborne pollutants. In addition to the scientific studies EPA included in its report, Masters students at the University of Georgia were able to amass an impressive list of additional scientific studies that were not contained in the original *Connectivity Report*. The science is out there to support the final Clean Water Rule.

Southern Environmental Law Center supports the final Clean Water Rule. After more than a decade of uncertainty, the rule provides much needed clarity for the regulated community about which waters are – and are not – "waters of the United States" under the 1972 Clean Water Act.

Thank you for the opportunity to comment on this important topic. If you have any questions or need additional information, please contact me at nbermudez@selcdc.org or 202.828.8382.

Sincerely,

Navis A. Bermudez

Navis A. Bermudez
Deputy Legislative Director
Southern Environmental Law Center

CLEAN WATER ACTION

April 26, 2017

Dear Chairman Barrasso, Ranking Member Carper, and members of the Senate Environment and Public Works Committee:

Clean Water Action, on behalf of our nearly one million members, appreciates the opportunity to provide written comments on the April 26, 2017 hearing, "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule." We respectfully request that this statement, along with our white paper, *Putting Drinking Water First: Restoring Clean Water Act Protections to Streams and Wetlands*, be submitted into the official record for this hearing.

Clean Water Action and our members have been engaged in the effort to restore critical Clean Water Act protections to small streams and wetlands for over a decade. We believe that the Clean Water Rule, finalized by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) in May 2015, is technically, scientifically and legally sound. The Agencies crafted a rule that is based on a robust review of over 1200 peer-reviewed journal articles on water science and connectivity of water resources. The final Clean Water Rule is also consistent with Justice Kennedy's "significant nexus" test that has been widely accepted by the U.S. Courts of Appeals following the 2006 *Rapanos* Supreme Court decision.

In addition to being scientifically and legally sound, the Clean Water Rule will better protect the drinking water sources for at least one in three people across the United States. Small streams are not just idyllic water features in a landscape; they provide most of the flow to our nation's major rivers and recharge critical drinking water supplies. If these streams are not fully protected from pollution or destruction, water quality in downstream rivers will suffer, and that has real economic consequences for the communities that rely on those rivers for fishing, recreation, or drinking water.

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Clean Water Action believes that the most efficient way to improve water quality is to prevent pollution at its source. Preventing pollution at its source also lessens the burden on downstream water users that may have to pay more to treat water so that it is suitable for drinking. Clean Water Action strongly supports the Clean Water Rule and believes the Agencies finalized a commonsense regulation that balanced the urgent need to better protect critical water resources, including drinking water sources, while addressing concerns raised by regulated industries. We urge this Committee to work with EPA and the Corps to maximize pollution prevention policies under the Clean Water Act to ensure that drinking water and public health are protected.

Sincerely,



Jennifer Peters
National Water Programs Director
Clean Water Action

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April 25, 2017

The Honorable John Barrasso
Chairman, Committee on Environment and Public Works
United States Senate
Washington, DC 20510

The Honorable Thomas Carper
Ranking Member, Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of the National Parks Conservation Association and our 1.3 million members and supporters, thank you for the opportunity to provide this testimony for the hearing entitled "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule" regarding the Environmental Protection Agency and the Army Corps of Engineers' rule to clarify the scope of the Clean Water Act (CWA). I ask this letter be submitted for the hearing record.

NPCA believes that the final Clean Water Rule is the important next step to better protect and restore our nation's park waters. We understand that the agencies have undertaken the authority granted to them by Congress under the Clean Water Act to legally clarify the statute's jurisdiction. NPCA strongly supported this rulemaking, which we requested, and supports the final rule.

NPCA is committed to the protection of our national parks and the waters that surround and flow through them. From Acadia to the Grand Canyon, Everglades to Glacier, water is central to the health of our national parks' natural systems, features, wildlife, recreation, aesthetics, and visitor experience. National parks are inseparable from their watersheds, and waterways transcend park boundaries – boundaries that usually include only a portion of watershed lands that are critical to park waters.

Because of this, the most serious threats to park waters mostly arise from activities on lands that lie upstream and outside of park boundaries. These threats include pollution from landfills, toxic dumps, mining practices, inadequate septic and wastewater disposal systems, and contaminated runoff from agriculture and urban development. Because EPA and the Army Corps have primary responsibility for implementing and enforcing the CWA, the National Park Service and park visitors rely on these agencies to help prevent impairment of park waters from activities that take place beyond park boundaries. It is imperative that the CWA protect all waters that feed into national park units and wetlands as they provide flood protection, safe drinking water, and wildlife habitat, among other things, that directly affect park ecosystems and the health of park visitors.

Until the final rule many of the wetlands, streams, lakes, and headwaters, which are critical to the protection of park waters, were threatened because of the regulatory confusion and legal uncertainty created by both the Supreme Court and agency guidance. This confluence of legal and policy decisions had potentially removed protection for at least 20 million acres of wetlands, including prairie potholes and seasonal wetlands, and jeopardized tens of thousands of miles of intermittent and headwater streams that comprise 60 percent of stream miles in the United States. According to the U.S. Environmental Protection Agency, over 117 million Americans depend on drinking water from public water systems that are fed in whole or in part by intermittent, headwater or ephemeral streams that were left unprotected due to the uncertainty about which waters are jurisdictional under our nation's laws.

The uncertainty of which waters are protected under the CWA as "waters of the United States" left vulnerable waters that provide numerous services to national park units. For example, a 2009 National Park Service report found that northern prairie wetlands, which provide essential habitat for many wildlife populations, were at risk of being lost due to changes in land use and climate. Previous CWA guidance exacerbated this threat leaving this region more vulnerable to wildfires, wildlife habitat loss, and vegetation shifts in grassland communities. With 31 park units located in this region of the country, the impact on the natural and cultural resources is significant.

The national park units located in southern regions have also been altered and affected by water quality problems, which threaten the viability of protected areas and jeopardize the economic benefits that these natural systems provide. In South Florida, urban development and nutrient and pesticide pollution currently impact waters that flow into Everglades National Park. According to EPA data, 30 percent of streams in Florida were at risk of losing protection under the CWA because they are headwater streams. Seasonal wetlands, which provide flood protection and critical wildlife habitat, were also at risk of being lost to development and land use changes under the former interpretation of the CWA. Without adequate protection of waterways upstream, polluted water will further degrade the water quality of Lake Okeechobee, subsequently flowing downstream and polluting Everglades and Biscayne National Parks and Big Cypress National Preserve. This would be directly adverse to the goals of the Comprehensive Everglades Restoration Plan (CERP), the Aquatic Ecosystem Restoration Program and the Presidential "no net loss" policy pertaining to Florida's wetlands.

Aquatic habitats that are signature features of the national parks in the Midwest are also better protected under the rule. Indiana Dunes National Lakeshore contains many streams and wetlands, including dunal ponds, marshes, lagoons, seasonally-flooded pannes, and bogs. These sensitive aquatic habitats are readily impacted by activities occurring on waterways outside park boundaries. Without CWA protections, these adjacent and directly connected water bodies are subject to degradation that will negatively impact park resources. According to a 2006 NPCA technical report, Indiana Dunes' water resources – including Lake Michigan, the source of drinking water for 10 million people – has been severely impacted by outside factors including contamination from urban and agricultural runoff, industrial pollution, and sewage systems. Maintaining the resource conditions and quality of the waters within the park is dependent on protecting outside waters that transcend park boundaries.

NPS studies show that nonpoint source pollution and sedimentation are responsible for more than 70 percent of the known threats to park water quality and wetland loss. At Big Hole National Battlefield in southwestern Montana, the North Fork of the Big Hole River flows through the park and is impaired from flow alterations and nonpoint source pollution from upstream creeks and tributaries. At Colonial National Historical Park, upstream rural and urban land disturbances on watersheds are polluting creeks and streams. Ultimately, these waterways flow into the James

River and subsequently in the Chesapeake Bay. As a result, the marshes and wetlands of Colonial National Historical Park are being harmed by increased streambank soil erosion and sediment deposition. At Acadia National Park and St. Croix National Scenic Riverway, nutrient runoff from expanded residential development on watershed lands adjacent to these parks are polluting park waters. Similarly, the unique mineralized and freshwater springs of Chickasaw National Recreation Area, which lures in visitors as the park's main attraction, are being degraded from leaky sewer pipes from municipalities.

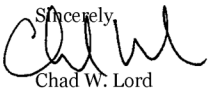
Now, the U.S. EPA and the U.S. Army Corps of Engineers have finished a rule that should restore former protections to America's waters. NPCA believes that the rule provides clearer and more predictable guidelines and a science-based and legal framework for determining which waters are protected by the CWA. In particular, the rule clarifies how smaller and seasonal streams and wetlands – waters that are particularly important to the visitors and wildlife in national parks – are connected physically, chemically, and biologically to larger water bodies downstream and will now be covered under federal law similar to coverage prior to 2001. The rule also provides clear and predictable protections for many streams, wetlands, and other waters while giving greater certainty to the regulated community by providing better guidance to federal and state regulators, which helps streamline the permitting process. It covers only water bodies that the Clean Water Act has traditionally covered. It also relies on the best scientific understanding of stream and wetland science to clarify the scope of the Clean Water Act, and enhance protection for streams, wetlands, and other waters nationwide.

The rule also sets clear lines for what is not covered. For example, it does not cover any new types of waters that haven't been historically covered under the Clean Water Act, like groundwater. The rule does not add any new requirement for agriculture or regulate most ditches. It does not cover any artificial lakes, ponds, and artificial ornamental waters or water-filled depressions incidental to construction activity.

In conclusion, NPCA supports this rule. The National Park Service cannot protect national park waters alone. They need the help from the Clean Water Act to ensure all the rivers, streams, and wetlands within and surrounding parks can provide clean drinking water for visitors, habitat for wildlife, and safe opportunities for fishing, paddling and swimming. The rule's clarifications will provide just that support.

Please do not hesitate to contact me at (202) 454-3385 or clord@npca.org with questions.

Sincerely,



Chad W. Lord
Senior Director, Water Policy

Senator BARRASSO. Thank you very much, Senator Carper.

We will now hear from our witnesses. I would like to remind the witnesses that your full written testimony will be made part of the official record today. I please ask that you keep your statements to 5 minutes so that we may have some time for questioning. I look forward to hearing the testimony of each and every one of you, and I would ask Major General John Peabody to begin.

Thank you so much for being here.

STATEMENT OF MAJOR GENERAL JOHN PEABODY (RET.)

General PEABODY. Thank you, Mr. Chairman, Mr. Ranking Member. I appreciate the invitation to appear here today.

I am testifying based on my personal knowledge related to the Waters of the United States, or Clean Water rulemaking, while serving as the Deputy Commanding General for Civil and Emergency Operations in the Army Corps of Engineers from October 2013 through August 2015. I retired 20 months ago, so I am testifying as a private citizen who does not speak today for the Corps in any way. However, my testimony reflects my best recollection of this rulemaking process and the professional advice I received from Corps experts during that period.

The Corps is the primary agency responsible for administering Section 404 of the Clean Water Act through more than 1,200 Corps regulators who process over 99 percent of all Section 404 actions in this Country, consisting of tens of thousands of regulatory actions each year. Contrary to common belief, the vast majority of all applications, about 80 percent, receive a decision within 60 days from receipt of a policy-compliant application.

Corps professionals are the face to the public regarding this program across many different circumstances involving a complex array of multiple environmental and administrative laws, policies, and procedures. In my opinion, the Corps' 40-plus years of experience involving over 2 million actions—that is my estimate—make it the best organization to advise policymakers on what should constitute waters of the United States.

Beginning in November 2014 and continuing through the Rule's finalization in May 2015, Corps involvement in the rulemaking was limited to a few engagements primarily regarding discreet aspects of draft Rule language. In that period, the Corps did not regularly or substantially participate in draft final Rule changes as they occurred, was excluded from routine Rule text development and policy discussions, had little direct engagement with EPA counterparts, and was only engaged by those developing the Rule on a periodic and constrained basis.

I do not consider the Corps to have been a member of a collaborative and substantive joint process that included serious consideration of Corps concerns and recommendations. On the contrary, in my opinion, Corps involvement was superficial during that period.

Despite this, Corps staff made every effort to propose options that would address policy considerations and ways that met central characteristics: that it be one, scientifically based, two, technically implementable, and three, legally defensible. These three criteria, and the duty to ensure policymakers clearly understood the impli-

cations of the Rule language, were the only motivation behind my personal actions.

The Corps' key concerns centered on new definitions, terms, and approaches in the draft final Rule that would cause changes to jurisdictional scope, as compared to the 2013 proposed Rule and then currently operating procedures. These key concerns addressed the subjects of tributaries, other waters, adjacency, neighboring isolated water bodies, the 4,000-foot jurisdictional limit, and ditches, among others. These concerns went largely unaddressed.

Further, it was the Corps judgment that key policy decisions, especially the 4,000-foot jurisdictional limit, but also decisions related to the definition of tributaries and the treatment of isolated water bodies, were not based on scientific analysis contained in the Connectivity Report, nor part of the proposed Rule that was available for public comment.

When the final draft Rule and Preamble were provided for interagency coordination in early April 2015, Corps staff discovered that the final Rule still did not address these key concerns. The Preamble also mischaracterized the Corps as jointly developing the Rule and as supporting its key judgments. This is inaccurate.

A few weeks later, the technical support document and economic analysis were published, and had analyzed Corps technical data without Corps involvement. In broad terms, they both misapplied Corps data out of context to generalize broad nationwide conclusions unsupported by the underlying data.

Corps experts believed the draft final Rule and supporting documents were so untenable, I asked Corps staff to provide a thorough, but rapid, analysis of only those issues in the Rule documentations which they identified as potential fatal flaws. Given limited Corps involvement during the rulemaking and the Corps judgment that the Rule was fatally flawed, I became unsure whether we had adequately conveyed Corps concerns to the policymakers. The internal deliberative memoranda I forwarded to the Secretary were intended to fulfill my duty to be certain to communicate the Corps' serious concerns clearly and unambiguously before an irreversible final decision.

In my professional opinion, this Country and Federal regulators like the Corps need clear, objective, bipartisan policy direction that is well founded on facts, science, appropriate expertise, and clearly articulated laws, regulations, and policies.

It remains my sincere hope that this Nation's policymakers, including this Committee, can find common ground based on science and objective analysis to develop a bipartisan solution on this important and, in my judgment, much needed matter. I hope that my testimony has provided some value for the Committee and I thank you for your time.

[The prepared statement of Mr. Peabody follows:]

STATEMENT OF JOHN PEABODY (MAJOR GENERAL, U.S. ARMY RETIRED) BEFORE THE SENATE COMMITTEE ON ENERGY AND PUBLIC WORKS REGARDING THE SCIENTIFIC, LEGAL AND TECHNICAL BASIS FOR THE WATERS OF THE UNITED STATES RULE-MAKING

Mr. Chairman and Mr. Ranking Member, thank you for the opportunity to testify on the recent rule-making effort regarding the Waters of the United States. It is always a privilege to appear before Congress and assist in advancing the public interest.

BACKGROUND

My name is John Peabody, and I am testifying today because of my personal knowledge of, and work with my former Corps of Engineers colleagues related to, the Waters of the United States (WOTUS) Rule-making undertaken by the Environmental Protection Agency (EPA) and the Office of the Assistant Secretary of the Army (OASA/CW, also "Army" or "Army Secretariat"). I was assigned to the U.S. Army Corps of Engineers (Corps) Headquarters as the Deputy Commanding General for Civil and Emergency Operations (DCG-CEO) from October of 2013 through August, 2015. In that position, I was responsible for directing the execution of the Corps Civil Works program, including the Corps' Regulatory program. I was also responsible for policy recommendations to the Assistant Secretary of the Army for Civil Works (ASA/CW) based on Corps expertise and experience, as well as coordination of policy issues with a broad array of partner federal agencies through a number of interagency mechanisms.

Although my testimony is based primarily on my knowledge and experience while serving as the DCG-CEO in the Corps, because I left that position and retired from active duty 20 months ago, I am testifying today as a private citizen who does not currently speak for the Army or the Corps of Engineers in any way. So, I find myself in the unusual position of testifying about an agency, its actions and its positions in which I was a senior leader and about which I have extensive knowledge, but for which I no longer represent.

My testimony reflects my best recollection of discussions with and advice from numerous senior Corps experts with whom I was privileged to associate during my tenure at the Corps headquarters, and the Corps' staff recommendations related to the Waters of the United States (WOTUS) Rule-making as I remember it at that time. My testimony is based on limited access to contemporary records (emails I sent or received), and information from on the record documents that have since become available in the public record, primarily from Congressional investigations and hearings. This testimony is intended to reflect what I knew at the time of the draft final rule-making, primarily from September 2013 through July of 2015, but includes background knowledge I had acquired throughout my tenure in various positions in the Corps of Engineers.

I spent the last ten of my 35 years in the Army assigned to the Corps. This included command of three divisions, in sequence the Pacific Ocean Division (2005-2008), Great Lakes and Ohio River Division (2008-2011), Mississippi Valley Division

and President of the Mississippi River Commission (2011-2013), then finally as the Deputy Commanding General for Civil and Emergency Operations (2013-2015). During those ten years I was involved with a number of high profile programs, projects, disaster response efforts, environmental challenges and regulatory issues, during which I acquired a deep respect for the vast responsibilities of the Corps, especially regarding the Corps' history of delivering water resource solutions to the nation's most challenging problems.

US ARMY CORPS OF ENGINEERS CONTEXT

The US. Army Corps of Engineers is the largest and most sophisticated public engineering agency in the world. The opinions and expertise of its amazingly talented experts, are sought throughout the world, and its techniques are modeled globally. From the early 1800's through to the present day, this nation has continuously turned to and relied upon the Army Corps of Engineers to solve its water resource development and management challenges. These include to clear, snag and improve river channels with structures like locks and dams to enable navigation; reduce flood risks with levees, river matting and channel structures, as well as hundreds of flood risk reduction dams; establish, deepen and maintain coastal and inland ports; manage coastal erosion; conduct cutting edge research and design to develop engineering approaches for myriad challenges, from taming the Mississippi River to preventing Asian carp from invading the Great Lakes; and developing policies and expertise to administer Section 10 permits under the 1899 Rivers and Harbors Act, and later Section 404 of the 1972 Clean Water Act, to permit construction and other activities involving work in Waters of the United States.

During my time in the Corps, I gained a keen appreciation for the decisive importance of water resource infrastructure to America's economic vitality, international competitiveness, and environmental health. In the nineteenth and early twentieth centuries, our nation required a robust infrastructure to enable commerce and blunt the devastating ravages of nature's force, especially from floods. The infrastructure dreamed of to manifest the positivist vision of taming nature was largely constructed in the middle portion of the 20th century. Now that much of it is complete – having accrued massive but essentially unappreciated benefits which are rarely understood by the public because cheap and reliable transportation is enabled, and flood catastrophes prevented – this infrastructure's incredible benefits are mostly taken for granted except by those pockets of communities and stakeholders that lack and therefore clearly understand the need for such projects.

While the Corps is the subject of both high praise and periodic condemnation, my experience with the vast majority of Corps professionals is that they are exceptionally hard working, selflessly committed, and professionally apolitical. One of the attributes I most admire about the Corps is this apolitical professionalism. The Corps will always implement laws, regulations, and policy decisions to the best of its ability in an objective manner. But before a decision is made, Corps leaders feel duty bound to ensure that policy makers benefit from a clear and complete understanding of the implications and outcomes prospective policy decisions will cause. As the nation's premier engineering organization, the Corps works hard to ensure it clearly communicates its best expertise

and judgment, so that policy makers fully understand potential impacts, and that the final decision will be factually and scientifically based, legally viable, and can be implemented consistently and effectively across the nation.

As our nation developed and steadily advanced in making modern life less dangerous, more reliable, and more convenient, the laws, policies and regulations which have enabled federal activities to advance these purposes have also developed. Increasingly complex laws, regulations and policies have become confusing and challenging to navigate by the average citizen. Modern American laws and regulations are navigated most effectively by professional civil servants, or professional advocates and trade associations.

A key aspect of this more complex legal and bureaucratic development arose from the environmental laws passed to correct the disregard, neglect and even abuse of the environment all too common until the late 20th Century. With this change the Corps added environmental missions to its portfolio of major purposes. In its civil works and regulatory programs, the Corps operates at the juncture of water, the natural environment, and land, both public and private, much of which is developed. This reality often brings into focus conflicting viewpoints between the public and disparate federal agencies over the proper application of federal statutes, regulations and policies. Part of this juncture includes the complex array of laws, regulations and policies implemented by several different federal and state agencies.

CORPS REGULATORY PROGRAM AND THE MODERN BUREAUCRATIC STATE

The public most frequently interacts with the Corps through its recreation program (an outgrowth from the lakes impounded behind Corps dams) and to obtain a regulatory permit. The more than 1200 Corps' regulators process well over 99% of all Section 404 Clean Water Actions actions in this country, consisting of tens of thousands of regulatory actions each year. This makes the Corps' regulatory staff and legal professionals supporting them uniquely positioned as the nation's premier experts on the application and nuances of Section 404 of the Clean Water Act within varying conditions across the country.

The Corps' permitting rules and process are extremely complex, and can cause great frustration for those unacquainted with the nuances of the requirements. This frustration can translate into a general mischaracterization of Corps permits as burdensome, cumbersome, and unnecessarily bureaucratic. While this characterization is the case in some instances, and some permit requests have lingered for many years due to exceptional circumstances, Corps data proves that this is the exception. In reality over 85% of all applications are processed within 60 days from receipt of a final policy-compliant application to a decision.

According to the Corps' Fiscal Year 2016 data, approximately 79,000 permitting actions were processed, of which only 87 were denied. Most of these permitting actions were covered under the general permit program, which enables streamlined decisions for the majority of applicants, whose requests meets certain common parameters for frequently applied purposes. Of particular note, nearly 7,000 requests resulted in a determination that no permit was required. On top of these permitting actions, the

Corps also processed about 4,000 jurisdictional determinations. Corps regulators work very hard with permit applicants to achieve the applicant's objective while avoiding and minimizing impacts to regulated water bodies, then identifying mitigation solutions to unavoidable impacts. The regulatory professionals' goal is to find a solution to every applicant's request in a way that corresponds to law, regulation, and policy.

Environmental health and the biodiversity our nation treasures depend on clean and healthy waterways, especially wetlands. Because human development naturally occurs near and along water bodies, which it is the duty of the Corps to regulate through its Section 10 and 404 permitting programs, the Corps is at the intersection of human and environmental needs, corresponding also with the intersection of multiple competing interests, and the divergent views of various federal, state and local agencies. I have tremendous respect for the amazingly talented and incredibly dedicated professionals of the Corps who expertly navigate the wide array of laws, policies and regulations that both enable and constrain their work, yet somehow manage to deliver positive results despite innumerable funding and policy challenges, and frequent interagency disagreements which often significantly lengthen decision-making.

To this complex mix of laws, regulations, policies, and agencies with different authorities and disparate purposes and views, is added a Clean Water Act whose most basic definition – "Waters of the United States" – regarding what constitutes the jurisdictional scope of the Act, has been the subject of decades of intense disagreement. This disagreement has manifested in legal disputes, dozens of landmark judicial decisions making a rich body of case law, and a pivotal Supreme Court case where the justices themselves could not arrive at a majority opinion on how to define, or clearly and unambiguously assess, what constitutes jurisdictional waters of the United States. On top of this, scientific understanding related to natural water bodies has also developed and advanced, and the result is a Clean Water Act history characterized by a dynamically changing legal and policy environment whose only constant is conflict and uncertainty. It is little wonder, then, that the agencies charged with implementing this law have been challenged to do so in a way that is broadly accepted by the public, and are sometimes accused with inconsistent application of the law.

The energy and fervor a wide variety of interests have expressed both for and against the WOTUS rule, speaks volumes about the challenges of applying Section 404 of the Clean Water Act. The inherent complexity of waterways in the natural and human-altered environment has generated an entire industry of experts who study and publish technical and legal papers, and others who alternately advocate for expanding or limiting the jurisdictional reach of Section 404. The passionately held disagreements on this issue play out most often through interactions with Corps regulators across the country, who stoically engage and absorb the regulated public's frustrations, from both sides of this debate.

Caught in the middle of this debate, what the Corps needs more than anything is clear and objective policy direction that is well founded on facts, science, and clearly articulated laws, regulations and policies. For it is almost exclusively the Corps which

must explain and support the rule to a generally skeptical (and sometimes hostile) public. It is Corps regulators who must assess permit applications and make regulatory decisions, and whose decisions will be legally challenged in the courts.

No agency is more motivated to have a WOTUS rule update that is soundly based on the most current science and the proper application of technical and economic data. The Corps and public would both benefit from a WOTUS rule that is as easy as possible to explain and to apply to widely divergent realities across the nation, given the complexity of water bodies in the natural environment, and numerous relevant statutes and case law. These qualities in a rule would enable responsible and responsive Corps regulatory decisions for applicants.

WOTUS RULE BACKGROUND

Although I was well aware of the *SWANCC* and *Rapanos* decisions and subsequent policy guidance as a division commander in the Corps from 2005 through 2013, my personal involvement with the Waters of the United States rule-making began when I arrived at the Corps Headquarters in October of 2013, just after the draft rule was promulgated for public review in September 2013. This was near the end of a long process that began with the Supreme Court's *SWANCC* and *Rapanos* decisions in 2001 and 2006, continued through the 2008 joint EPA-Army *Rapanos* Guidance, followed by the 2011 draft *Rapanos* Updated Guidance, which later evolved into the 2013 draft rule. My direct knowledge of the rule-making process is limited to the rule-making for the final draft rule from 2013 through 2015, with most of my personal involvement occurring from the fall of 2014 through to the end of my tenure in August of 2015.

After I arrived at the Corps headquarters, I asked Corps senior staff to brief me on a wide array of national policy issues, including the WOTUS Rule-making, to sharpen my understanding of key issues, and optimize my effectiveness in executing my duties. To ensure I understood the context for the rule-making as completely as possible, I engaged Corps leaders, legal and regulatory staff, on a periodic basis to brief me on the background that led to the on-going rule-making, especially various aspects of the 2013 proposed rule, including the Connectivity Report, as well as Corps staff involvement with Army, EPA, OMB, and CEQ staff. By understanding the context of the rule-making, I intended to be position myself to guide and support Corps staff as this process progressed, and to engage and advise the Chief of Engineers, the Assistant Secretary of the Army for Civil Works, and other members of the interagency team, on the rule-making.

WOTUS FINAL DRAFT RULE MAKING PROCESS

According to the Corps senior staff with whom I discussed this issue, prior to the draft final rule effort which began in late September 2014, senior Corps staff, principally regulatory and legal staff, had been substantively involved in drafting the rule with EPA colleagues throughout the post-*Rapanos* decision period. In mid-September of 2014, the ASA/CW informed me at one of our weekly meetings that the Administration intended to finalize the CWA WOTUS Rule quickly, with a goal of early January 2015. To that end, a small group called the "Interagency Strategic Team" (IST) consisting of

eight or nine people from EPA, the Army Secretariat staff, and including two or three leaders from the Corps of Engineers, would meet frequently – at least weekly or more often – to establish principles and framework for finalizing the rule, and to craft the final draft rule language based on guidance from policy makers, especially EPA Administrator McCarthy, since EPA was the lead agency for the rule-making. The ASA/CW, Ms. Darcy, said that her representative at these meetings would be the Army General Counsel (AGC) representative, Mr. Schmauder, and that the Corps was to work with him or her on all concerns. This was in line with previous guidance form the ASA/CW that all communication on this matter was to be coordinated through her office. At that time the major issues I was aware of that needed to be worked included addressing and incorporating public comments, addressing updates to the draft Connectivity report, and applying rule language changes based on policy guidance from the Administration.

Senior Corps staff were concerned with the ability to develop a quality report in the short time specified given the record number of public comments approaching one million (of which approximately 20,000 were ultimately characterized as unique), the reality that the Connectivity report was still undergoing Science Advisory Board review, and the fact that the Corps had no visibility on the status of the Economic Analysis or Technical Support documents which would be required to support the rule. To meet this aggressive schedule, the Corps brought in to the headquarters several regulatory experts from the field to review and assess the public comments.

Beginning in November 2014, the Corps was marginalized from substantive participation in the rule-making process. In general, Corps involvement was limited to providing analysis of various proposed changes or alterations to the final draft rule that was under consideration. Specifically, in late November or early December 2014 Corps staff made me aware that we were no longer being invited to the rule-making meetings, and therefore our involvement in developing the rule language had ceased. When I advised Ms. Darcy that Corps personnel were no longer being invited to rule meetings that were still being held, she re-confirmed that this was contrary to her specific direction, and she emphasized that she wanted Corps experts at the meetings. Although I assumed this would resolve the issue, notwithstanding her direction nothing changed. I brought this up two or three more times in early 2015, but with no effect.

My review of the limited contemporary record that I was able to access, reinforces my memory about the marginal and insubstantial Corps involvement with the final rule-making process. The Corps attended a few IST meetings with EPA and Army Secretariat staff in late September to early November 2014, but Corps experts were excluded from routine meetings after November 6th, 2014, with the exception of one conference call on January 7, 2015. After November, most of our information related to the rule-making came from periodic, often imprecise, but nearly always narrowly specific snippets of information from Mr. Schmauder, the AGC representative, almost exclusively passed via phone discussions held with the Corps Chief Counsel. I was told in late 2014 that Mr. Schmauder said he was working options directly with EPA Water staff, but we were generally unaware of the substance of those discussions. The Corps was provided periodic updates of the draft rule text on two or three occasions, and at least once was provided the preamble for review and comment.

Periodically Mr. Schmauder would convey narrowly specific decisions, or ask for feedback on discrete and narrow proposed language, which was usually difficult to assess out of context with the status of the entire rule's language at any stage of the drafting process. On occasion the Corps would be sent information for review and comment, or in a few instances a third party provided updates, from which we would discover some change in the draft final rule that we assessed to be factually, technically, or legally challenging. Whenever that occurred, Corps staff raised their concerns with Mr. Schmauder. For example, in at least one instance the Corps headquarters received information on the draft final rule from Corps districts, who had been engaged by their EPA Field counterparts. EPA staff in the field had received the draft from EPA Headquarters for their review and comment, and had shared that draft with their Corps district counterparts in the field. Regardless of how information was conveyed, the Corps' concerns with the factual, scientific, and legal basis for the rule text went unaddressed.

In particular, the Corps was excluded from several interagency meetings from December 2014 through April 2015 involving Army, CEQ, EPA and OMB senior staff, which we discovered through various indirect means after the fact. I can recall only three meetings with the ASA/CW related to the rule between November 2014 and June 2015. In late November 2014 Corps staff briefed her on Corps legal and technical concerns with the draft rule at that time, in preparation for a meeting she was having with the EPA Administrator. In the March 2015 time frame, Corps staff and leaders briefed the ASA/CW regarding concerns with the draft final rule, especially the impact to jurisdiction that the 4,000 foot "bright line" jurisdictional limit would have. The last meeting occurred in June after the rule had been posted to the federal register, and was requested by the Chief of Engineers to gather senior Army Secretariat and Corps staff to discuss the concerns I had expressed in the memoranda I had sent to the ASA/CW.

The Corps did get updates to the draft final rule text twice that I can discern from my review of the record, once in late January 2015 when EPA staff passed along an updated copy directly to the Corps Regulatory Chief, and once in early March 2015 from the AGC. The first time that the Corps was provided a copy of the revised preamble was in early March, 2015. The next time we saw the final draft preamble was after it was sent to OMB in early April 2015, which contained some statements we had not previously seen that were factually inaccurate, especially regarding the Corps. At the very end of the process, a week before the rule was submitted to OMB, the EPA Wetlands Chief met with the Corps Regulatory Chief to discuss Corps concerns with the 4,000 "bright line", but nothing changed.

What was of greatest concern to me personally, and to the Corps senior leaders and staff with whom I discussed this issue at that time, was not that the Corps was excluded from most of the process of developing the rule. The more concerning issue was that the marginalization of the Corps had caused Corps expertise, concerns and related recommendations – founded on serious and significant concerns with the viability of the rule from a factual, scientific, technical and legal basis – to be so completely disregarded. Whenever we received periodic access to see updated versions of the draft final rule text or preamble, the serious concerns the Corps had repeatedly communicated were left largely unaddressed. Most importantly from an

outcome perspective, Corps concerns and recommendations remained unaddressed in the rule or preamble language throughout the process.

JOINT RULE-MAKING

Based on my review of the record and my recollections of what transpired, I did not then and do not now consider the Corps to have been a substantive contributor to the final rule, beginning in the fall of 2014. Starting in November of 2104 the Corps did not regularly or substantially participate in draft rule changes as they were occurring. The preamble to the final rule states that the rulemaking was a joint endeavor of the EPA and the Corps, that both agencies jointly reached significant findings, and that the agencies came to important conclusions based on their experience and expertise. These statements and characterizations are untrue. Several important aspects of the final rule do not reflect the technical and legal analyses provided by the Corps to the drafters of the final rule, which was intended to ensure that the rule would be both legally and technically supportable.

The Corps was not involved in analyzing the data it shared with EPA, which was then misapplied in the Economic Analysis and the Technical Support Document to develop conclusions which are unsupportable by the underlying data. In fact, the Corps was not consulted regarding, and had no role in the drafting of those two documents. Additionally, many of the statements in the rule preamble that attempt to explain the rule's rationale indicate that decisions in the rule-making relied explicitly on "Corps experience and expertise." This is misleading because Corps experience and expertise was either not accepted in the rule-making, or information from the Corps was used by EPA without consulting the Corps on its proper application, resulting in its use out of context. The Corps had no involvement in the actual analysis or documentation.

For these reasons I do not consider the final WOTUS rule-making effort to have involved the Corps as a joint rule-making partner. Rather, all of the evidence with which I was then aware, and which I recently reviewed in preparation for this testimony, led me then and now to conclude that this was a joint rule-making between EPA and the Army Secretariat, but not the Corps. In fact, the record shows that the Corps was marginalized from the final draft rule-making process from November of 2014 through to its publication in the federal register.

Starting in November of 2014, in general the Corps' involvement in the rule-making was marginal, episodic, and limited to a few discrete engagements primarily regarding specific rule language over which the Corps expressed concern. The Corps was excluded from the IST meetings and other routine discussions, had little direct engagement with EPA counterparts, and was able to engage only on a periodic and significantly constrained basis with those involved in developing the final draft rule language. On those occasions when the Corps was engaged, or when the Corps advanced concerns, its recommendations were either not accepted, or resulted in changes which were unresponsive to the basic concerns. However, because the Corps was not involved in routine or substantive discussions, it is difficult to assess to what extent various changes EPA made in the draft final rule were intended to be responsive to Corps concerns, or were made based on other factors. Most of the Corps' concerns

were expressed either to Mr. Schmauder of the Army Secretariat staff involved in the rule-making, or to the ASA/CW herself.

DRAFT FINAL WOTUS RULE INTERAGENCY REVIEW

On or about 6 April 2015, the Corps was provided a copy of the draft final rule and preamble that had just been submitted to OMB for final interagency review. After quickly reviewing the documents, Corps staff discovered several issues of serious concern with the rule, including a number of inaccurate characterizations about the Corps' involvement in developing the rule. Based on lengthy internal Corps discussions and the adamant concerns conveyed by Corps staff, I concluded that the basis for the rule as documented in the preamble and other supporting documents, was insufficient scientifically, technically and legally to justify the rule text that had been submitted to OMB. In short, it was the unanimous conclusion of Corps staff, which I fully supported, that the rule as written was fatally flawed.

Because of EPA and Army Secretariat staff's unresponsiveness to Corps staff recommendations regarding the rule, I had an additional concern that I as a leader had failed to ensure the Corps had expressed our concerns with sufficient clarity to the senior Army policy maker, the ASA/CW. This had been hard to do because we had been excluded from the EPA-Army Secretariat discussions that had resulted in various final draft rule and preamble text changes, were not invited to or involved in key meetings, and had no visibility on the economic analysis or technical support documents until they were published at OMB. Notwithstanding these constraints, I felt a professional obligation to ensure that policy makers received the benefit of the Corps' technical expertise, especially our experts' clear and unambiguous recommendations, before policy makers finalized a decision which we believed to be so fundamentally untenable.

I therefore began to consider the potential need to document Corps concerns in writing so that we could be confident that we had communicated our concerns and recommendations "in a manner that is impossible to misunderstand," as the then Chief of Engineers, Lieutenant General Bostick, would often say. With this possible need in mind, I directed Corps regulatory and legal staff to conduct a detailed review of the preamble and rule, and to document their most serious concerns in separate legal and regulatory memoranda for my review. Given the Administration's desire to complete the rule quickly, I asked for their analysis as soon as possible.

Upon reviewing the legal and regulatory concerns prepared at my request about two weeks later, and after carefully questioning the Corps' staffs' conclusions, I consulted with the Corps Chief Counsel, Director of Civil Works, and Operations Chief, after which my confidence was strengthened in my prior conclusion that the rule and preamble, as written, were fatally flawed. I determined that my professional responsibility to the ASA/CW required me to ensure that she clearly understood the Corps' positions and serious concerns. I discussed this approach with the Chief of Engineers before I finalized my decision and conveyed the Corps analysis and concerns to the ASA/CW in writing.

The Corps concerns are summarized in two memoranda that I wrote, with which I forwarded more detailed documented concerns by the Corps Legal expert, Mr. Wood, and Regulatory Chief, Ms. Moyer. Although these documents were intended for internal Administration consumption, most of them have since become part of the public record, and are contained on this committee's web site at https://www.epw.senate.gov/public/_cache/files/94d5f9d0-2a56-47ee-aa44-4dcf7c9f6a94/07.17.15-army-corps-darcy-with-7-attachments-responses-to-07.16.15.pdf.

KEY CORPS RULE CONCERNS

Fundamentally, the key concerns with the final draft rule published for interagency review in early April 2015, emanated from IST discussions in the fall of 2014 in which the Corps initially participated. Corps staff proposed a variety of options to address policy desires in ways that would be scientifically founded, technically accurate, and legally defensible. Although the Corps' proposed options were never applied, the key issues at that time included the following:

(1) Tributary. A changed definition of "tributary" which would exclude from jurisdiction headwaters currently jurisdictional waters contributing flows to tributaries, such as lakes, ponds and wetlands which contributed flow to a tributary. The Corps believed this change to be without scientific foundation, and therefore Corps legal staff advised me this was susceptible to legal challenge as arbitrary and capricious;

(2) Adjacency. The definition of the terms "adjacent", "neighboring" and other similar terms had generated substantial public feedback;

(3) "Other Waters". EPA staff had discussed the desire to incorporate truly isolated water bodies, such as prairie potholes, vernal pools, playa lakes, and so forth, as jurisdictional. Corps staff believed establishing the jurisdiction over such water bodies required identifying a scientific basis for a connection to traditionally jurisdictional waters, by applying the Kennedy "significant nexus" standard from the Rapanos decision.

(4) Definition of "Waters". The rule would be strengthened by adding a definition for three terms ("water", "waters", and "water body") used synonymously in the 2013 proposed rule

(5) Ditches. Options were discussed regarding ditches, which were initially unclear as to the policy desire in the fall of 2014.

The Corps concerns identified in the fall of 2014 only intensified as the rule-making process progressed. After the final draft rule was provided to OMB for interagency review in early April 2015, as discussed above, Corps regulatory and legal staff analyzed the rule, preamble, and supporting documents as quickly as possible. The volume of information requiring review was challenging, amounted to several hundred pages of highly technical documentation, and only days in which to review the material. As such I asked Corps staff to focus only on issues which they identified as potential "fatal flaws", or issues which by themselves would cause key aspects of the rule, or perhaps the entirety of the rule, to be technically unimplementable,

environmentally unacceptable, legally unsupportable, or an unwarranted assertion of jurisdiction.

That analysis resulted in a series of memoranda from Corps staff to me summarizing their most significant concerns. Their memoranda (written in late April to mid May 2015) outlining their concerns, and in some cases advancing recommendations to address them, can be found at the committee web site referenced at page 10 above. I forwarded their memoranda with some supporting documentation, in two separate packets with cover memoranda from me to summarize their contents.

The total documentation provided to the ASA/CW includes several dozen pages, but the most critical concerns of the Corps regarding the draft final rule and associated supporting documents, includes the following issues:

(1) The 4,000 feet jurisdictional limit has no scientific basis, no administrative record supporting it, is arbitrary and capricious, and would result in the loss of potentially significant aquatic resources currently jurisdictional and therefore required an Environmental Impact Statement (EIS);

(2) Isolated Water Bodies should require a case specific significant nexus determination if a policy decision is made to pursue them as jurisdictional;

(3) Changed Definition of Adjacency excludes from jurisdiction by rule large areas of wetlands used or formerly used for farming, forestry, and ranching – this is unsupportable under the Kennedy significant nexus test, as there was no public comment, as well as likely requiring an EIS;

(4) Neighboring - All water bodies within 1500 feet of an ordinary high water mark or high tide line would be jurisdictional by rule, although the Connectivity Report indicates that 300 feet would be the scientifically supportable distance;

(5) Changed definition of Tributary would exclude certain lakes, ponds and wetlands that were previously included under the prior rule and the 2008 *Rapanos* Joint Guidance;

(6) Altered Jurisdictional Scope could occur without the benefit of national detailed analysis that an EIS would enable;

(7) EPA Analysis Flawed – By using Corps data without the involvement of Corps personnel, EPA misapplied Corps data to draw unsupportable conclusions. In general, EPA took specific data sets and applied them more broadly than the data could justify; made assumptions without an analytical basis,; overestimated compensatory mitigation required under Section 404; failed to address potential decreases in jurisdiction; incorrectly concluded the rule has no tribal implications; among many other errors in both the Economic Analysis and the Technical Support Document.

SUMMARY

In summary, at the time the final draft rule and preamble were provided for interagency review and subsequently finalized, the Corps did not believe that either of these documents were viable from a factual, scientific, analytical, or legal basis. It was also the Corps judgment that it would be incredibly difficult for Corps leaders, regulatory and legal staff to advance and defend this rule with the regulated public, and that its technical implementation would be exceptionally challenging.

The memoranda forwarded to the ASA/CW along with the memoranda prepared by Corps legal and regulatory staff for my review, were intended to fulfill my duty to provide the best possible professional advice and judgment on this matter. Although the Corps is the agency with the most in depth expertise on the field application and legal defense of the Section 404 program, it was marginalized from the rule-making process, and its recommendations ignored or not accepted. Further, it was the Corps' judgment that key policy decisions, most particularly the 4,000 feet jurisdictional limit, but also decisions related to isolated water bodies, were not founded on scientific analysis contained in the Connectivity report or elsewhere in the scientific literature, and therefore would be susceptible to legal attack as arbitrary and capricious. That the rule was published without accounting for the key concerns and recommendations of the Corps was less concerning to me than the fact that the final documentation misrepresented Corps data and falsely characterized and portrayed the Corps' involvement and position. The Technical Support Document misapplied specific Corps technical data out of context to generalize broad national conclusions unsupportable by the underlying data, the 4,000 feet jurisdictional limit was based on no scientific or legal foundation of which the Corps was aware, and the rule-making process did not include the Corps as a joint member.

Notwithstanding Corps disagreement with the content of the final rule, throughout the WOTUS rulemaking process I, and I believe all Corps staff, fully understood and supported the Assistant Secretary's decision making authority in seeing the process to fruition. We fully appreciated the importance of this rulemaking to the Administration, and supported the need for this rule, which I believe all Corps professionals involved felt was a rule that is long overdue and needed. The Corps expended great effort in providing its technical and legal expertise, and decades of experience in implementing Section 404 of the Clean Water Act, to ensure that the final rule rested on sound technical and legal foundations. However, despite our best efforts, the final rule contained inaccuracies and misrepresentations which caused me grave concern, and which I felt compelled me to convey clearly and unambiguously to the ASA/CW.

CONCLUSION

In the staunchly apolitical civil-military tradition of this country, I take no personal position on what specific outcome or form a WOTUS rule should take. But based on my experience with the rule-making that occurred while I served in the Corps of Engineers, it was then and is now my firm belief that an updated rule is needed to address the major changes affecting the basis for a WOTUS rule since the 1986 rule was

promulgated. In the over thirty years since that time, significant case law (most notably *SWANCC* and *Rapanos*) has changed the way the federal government regulates waters of the United States. In addition, significant advancements in scientific understanding of the functionality of water bodies and wetlands, and their impacts on both the natural and human-made environment have also transpired, and continue to develop. Similarly, Corps regulators and EPA experts have developed a vast body of experience in applying all aspects of the Clean Water Act.

Given the energy and interests that feel threatened by a potential WOTUS rule change, it might be easy to conclude that no rule satisfactory to all, or at least most, sides of this debate can be developed. Whether or not that is the case is a matter for politicians such as yourselves to determine. But as a former Army Corps of Engineers official, I was charged with serving the citizens of this country who are affected by federal regulations such as this rule; with leading the professionals whose careers are deeply affected by how this issue is decided; with supporting the environmental responsibilities of the position that I held; and with following through on my professional duty to advise policy makers on the viability and consequences of their decisions. For all of these reasons it remains my fervent hope that our political leaders, such as yourselves, can find a way to bridge political differences and address valid concerns from advocates on all sides of this issue, then help develop a rule that is objectively based and acceptable to most constituents.

The key characteristics of a WOTUS rule for which I advocated in uniform are that it be factually and scientifically based; technically supportable by data and objective analysis; based on the experience and expertise of both federal experts who implement it and the regulated public and stakeholders who must abide by it; and that it be legally supportable and defensible. As a private citizen, I would add to this list that it also should be comprehensible by those among the regulated public who are willing to dedicate reasonable time to understand the complexities of the rule's application.

I am only too aware that concluding with a plea such as this likely will sound naive and unrealistic to most readers familiar with this issue and with our national political environment. Nonetheless it remains my sincere hope that this nation's political leaders, such as this committee, can dedicate yourselves to lead our country to a bipartisan solution on this issue, which you have taken so much time to deliberate over for many years, and now once more in this hearing today.

Thank you for your time and for the honor of being asked to testify. It is my sincere hope that my testimony will provide value for the Committee's deliberations.

ORIGINAL SIGNED
John W. Peabody
Major General, U.S.
Army (Retired)

Senator BARRASSO. Thank you very much, General Peabody. We appreciate your comments and your testimony. Appreciate it.

Next I will turn to Michael Josselyn, who is a Principal at Wetlands Research Associates, San Rafael, California.

Thanks so much for being with us today. We appreciate you coming and we look forward to your testimony.

STATEMENT OF MICHAEL JOSSELYN, PH.D., PWS, PRINCIPAL, WETLANDS RESEARCH ASSOCIATES

Mr. JOSSELYN. Thank you, Mr. Chairman, Mr. Ranking Member, and members of the Committee. I am Michael Josselyn, Founder and Principal with the environmental consulting firm Wetlands Research Associates, with offices throughout California and in Colorado. I am primarily responsible for assisting our Federal and State private clients in compliance with Section 404 of the Clean Water Act, and I have 38 years of experience and am a Certified Professional Wetlands Scientist.

I served on the Environmental Protection Agency's Science Advisory Board Expert Panel to review the EPA's Connectivity Report which was prepared during the rulemaking process for the 2015 WOTUS Rule. I want to make three points in my introductory remarks.

First, the Panel's focus was on the Connectivity Report and whether the Report reflected the current status of the science on rivers, streams, and wetlands. We were charged with making recommendations to improve and clarify the Report. The draft Report confirmed the basic hydrologic principle that all parts of a watershed are connected to some degree.

The Panel was not tasked, nor did it consider, the policy and legal questions on which waters should be federally regulated. The Panel made numerous recommendations on the content and interpretation of the literature. The Panel asked the EPA to evaluate the strength of the literature in various topic areas and the uncertainty associated with it.

As you can see from the table here on my right that was published in the final Report, the scientific literature is strongest for those drainages that have perennial and intermittent flows as being connected, as shown by the larger dots on the chart. The effect to downstream waters is less known for intermittent streams.

We also know a great deal about riparian wetlands, that is, wetlands that are directly connected to rivers. When it comes to ephemeral streams and non-floodplain waters, the literature is very limited, as shown at the bottom of the graph in the small dots.

The final Report is an encyclopedia of what we know about the science, but is also limited by what we do not know.

Second, the Panel found that "the review of the scientific literature strongly supports the conclusion that streams and bidirectional floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient." The presence of a gradient that defines the effects on downstream waters became a foundational element in the discussions by the Panel. The Panel stated that connectivity should "recognize variation in frequency, duration, magnitude, predictability,

and consequences of these connections" and developed a figure as to what that meant. This is the figure that I am showing right now that was published in the science report.

In the upper portion of the figure, the Panel concluded that there was a high probability, as shown by the width of the blue bar, that perennial streams and intermittent streams will have a high degree of connectivity to downstream waters given their high frequency and duration of flow, and the amount of material that could be transported to those waters.

Similarly, for biological factors, the scientific evidence shows that perennial and intermittent streams transported materials downstream are also high, but had considerably less probability associated with ephemeral streams. Importantly, as the frequency, duration, and magnitude of flows decrease, ephemeral streams, as shown as you move to the side where the smaller arrow, that the probability for an effect on the downstream waters is much lower, as the chart states, and may not have a discernible effect.

The Panel repeatedly recommended that the EPA develop more quantitative measures and criteria to assess this connectivity gradient. The Panel concluded that although connectivity is known to be ecologically important, the frequency, duration, predictability, and magnitude of connectivity will ultimately determine any consequences to downstream waters.

Third, there are a number of concepts and issues included in the WOTUS Rule that were not elements of the Panel's review. For instance, distances set by the WOTUS Rule were not considered by the Panel and, in fact, the Panel stated distance should not be used as a metric for determining connectivity. Furthermore, the approach set forth in the WOTUS Rule for determining significant nexus is based on the selection of any one function and does not consider the connectivity gradient discussed in the Panel's report and shown on this graph. Finally, the Panel did not review, nor did the Connectivity Report discuss, the aggregation methods in which similarly situated tributaries would be combined in order to reach a significant nexus finding.

In my experience in making jurisdictional determinations, these elements of the WOTUS Rule have the effect of expanding the scope of jurisdiction compared to past guidance by the Corps and the EPA.

Thank you.

[The prepared statement of Mr. Josselyn follows:]

TESTIMONY SUBMITTED FOR THE RECORD

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

HEARING ON THE TECHNICAL, SCIENTIFIC, AND LEGAL BASIS FOR THE, CLEAN WATER RULE: DEFINITION OF 'WATERS OF THE UNITED STATES'

April 26, 2017

Dr. Michael Josselyn
Certified Professional Wetland Scientist
Principal
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Introduction

Good morning, Mr. Chairman and members of the Committee. I am Michael Josselyn, Principal with the environmental consulting firm, WRA, Inc., with offices in California and Colorado. I am primarily responsible for assisting our federal, state, and private clients in compliance with Section 404 of the Clean Water Act. I have 38 years of experience in the field and am a Certified Professional Wetland Scientist. I served on the Environmental Protection Agency's Science Advisory Board Expert Panel (Panel) to review the EPA's *Connectivity Report*[1] which was prepared during the rulemaking process for the 2015 "Waters of the United States" (WOTUS) rule. My testimony today focuses on the Connectivity Report and the review process.

The draft Connectivity Report focused entirely on the scientific literature that was reviewed on the connection between headwaters, wetlands, and streams. The draft Report confirmed the basic hydrologic principle that all parts of a watershed are connected to some degree. Of course, the draft Report did not address the policy and legal questions on which waters should be federally regulated based on how that connectivity affects water quality in the Nation's navigable waters. The Report's conclusion that all water (and the material contained in it) flows downhill did not address the issue of where regulators should establish regulatory lines within the broad geographic landscape in the US.

The Panel recognized that concept of connectivity was a gradient, not a binary property (connected or not connected), and that connectivity should "recognize variation in the frequency,

[1] Environmental Protection Agency. 2015. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. EPA/600/R-14/475F

duration, magnitude, predictability, and consequences of those connections".[2,3] This is most important in those drainages with very infrequent flows—of a few days to weeks such as the intermittent and ephemeral streams referenced in Justice Kennedy's concurring *Rapanos* opinion. The Panel concluded that there was strong evidence on connectivity within tributary systems overall, however, it recommended that the "EPA should recognize that there is a gradient of connectivity"[4]. In addition, the draft Report did not provide metrics for how to quantify connectivity or consider methodological and technical advances that would support the EPA's and Corps' determinations regarding which waters are subject to federal jurisdiction.

The EPA adopted a WOTUS rule that redefined all tributaries as "waters of the US", no matter how small in volume or in frequency of flow. The definition also adopted distances for the inclusion of wetlands as adjacent to such tributaries. The Expert Panel specifically stated " that adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters"[5],[6]. In addition, the WOTUS rule set a low threshold for the inclusion of wetlands under the rule's significant nexus test procedure. It provided a list of nine general functions performed by wetlands and stated that if any one of them could be demonstrated to occur, either within the subject wetland or in combination with other wetlands within a very large watershed, it would have a significant nexus and be considered a "water of the US". Under this standard, there would be few situations where a wetland would not meet the significant nexus test. This is not consistent with the Panel's recommendation to consider connectivity on a gradient from high to no probability of an effect on downstream waters.

The Panel was initially convened to review the Connectivity Report, but was later asked to review the proposed rule. The proposed rule was issued before our review of the draft report was completed and the revised Connectivity Report issued. The Panel members did not reach a consensus on the proposed rule and the Panel letter was a compilation of comments from the Panel members.

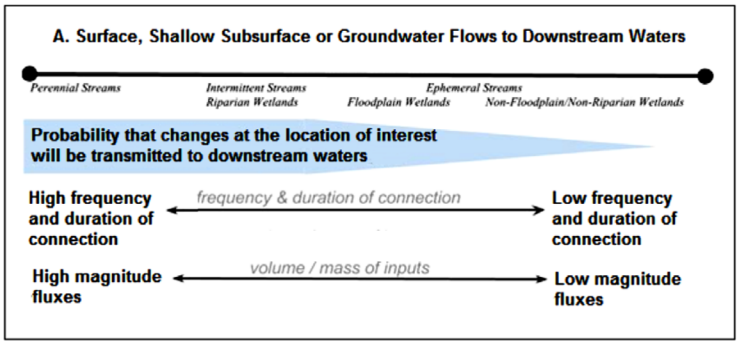
I am a strong supporter of the use of evidence-based science in assisting agencies and legislators in developing regulatory policy. The Connectivity Report is a compilation of our knowledge about rivers and wetlands. The Panel recommendations were focused on the interpretation of the science. No new data analysis or scientific findings were established as a result of this effort. Most importantly, the Panel was told by the EPA that its job was not to establish criteria for regulatory decisions nor to evaluate legal interpretations of Supreme Court decisions.

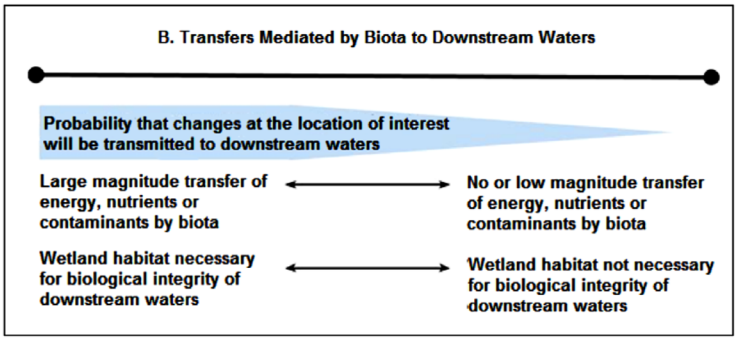
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[2] Letter to Gina McCarthy. October 17, 2014 SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence
[3] Page 2, Line 6
[4] Page 3, Line 5
[5] Letter to Gina McCarthy. September 30, 2014. Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"
[6] Page 3, Line 5

Connectivity occurs on a Gradient

The Panel found that "the review of the scientific literature strongly supports the conclusion that streams and 'bidirectional' floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient"[7]. The presence of a gradient that defines the effects on downstream waters was not discussed in the draft version of the Connectivity Report; however, it became an important element in the discussions by the Panel. The Panel developed a figure to explain what was meant by its recommendation:





In the upper figure, the Panel concluded that there was a high probability (as shown by the width of the blue bar) that perennial streams and intermittent streams will have a high degree of connectivity to downstream waters given the frequency and duration of flow and the amount of

[7] Page 1, Line 5 of October 17, 2014 Letter

material that could be transported to those downstream waters. Similarly, for biological factors (shown in the lower portion of the figure), the scientific evidence that perennial and intermittent streams transported materials downstream was also high, with less probability associated with ephemeral streams. Riparian wetlands with direct connection to streams have a high probability of affecting downstream waters; whereas connectivity with floodplain and non-floodplain wetlands is much lower. The Panel repeatedly recommended that the EPA develop more quantitative measures and criteria to assess connectivity on this gradient.

The plurality opinion written by Justice Scalia in *Rapanos* stated that those perennial and intermittent streams including "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months" are "waters of the United States" and that wetlands, such as the riparian wetlands discussed by the Panel, which have a "continuous surface water connection" should also be regulated under the Clean Water Act. This is entirely consistent with the findings of the Panel that found a high probability that perennial and intermittent streams and the wetlands adjacent to them can affect water quality in downstream "navigable waters".

The degree of connectivity and the role of ephemeral streams and wetlands located far from tributaries is, of course, the subject of Justice Kennedy's concurring opinion that focused on a finding of a significant nexus to support the role of these features in affecting downstream water quality that is more than speculative or insubstantial. To that point, the scientific literature is less convincing and the Panel recommended more analysis and further study on those issues. The final Connectivity Report acknowledged the relatively small body of peer reviewed literature available on ephemeral streams and non-floodplain wetlands not connected with tributaries, particularly on their effect on downstream waters (see attached Table 6-2 in the Report). Nonetheless, the EPA concluded that all tributaries should be considered "waters" regardless of their flow regime whereas wetlands outside of floodplains required a significant nexus analysis.

The Panel was only provided a draft of the proposed Rule after it had completed the majority of its work reviewing the draft Connectivity Report. Thus, there was little opportunity to evaluate the context of how the science in the Connectivity Report would be used to inform the development of the WOTUS rule. The SAB requested panel members' view points on the proposed Rule; however, this was not accompanied by the usual robust discussion amongst Panel members. The resulting document prepared the Panel was a compendium of comments and, as noted in the September 2014 letter, did not represent a consensus opinion. It was my view[8], based on a review of the literature and my experience with arid western streams, that connectivity of <u>both</u> tributaries and wetlands occurs on a gradient. I provided the Panel with my analysis of references cited in the draft Connectivity Report showing only two studies (out of

[8] Shared with another Panel member, Dr. Mark Murphy, from Arizona, who also commented that the gradient approach to connectivity should also apply to tributaries as well as wetlands.

1000 cited in the draft report) actually reported on first order (headwater) streams and, in those studies, reduced ecological function was found in upstream reaches which supports the gradient theory. In addition, the lack of appropriate mapping scales for determining the distribution of headwater streams further limited the scientific literature on these features.

In my opinion, the scientific literature reviewed in the Connectivity Report supports the proposition that all parts of a watershed are connected to some degree and that connectivity occurs along a continuum. The Report leaves to policy makers to establish jurisdictional lines along the connectivity gradient based on many policy and legal considerations. These regulatory determinations would be better informed by a consideration of the technology and quantitative measures necessary to establish connectivity. There are likely ephemeral tributaries and wetlands that are close enough to traditional navigable waters (TNWs) and have sufficient volume and duration of flow to have an effect on those TNWs. What is lacking is the ability to establish a quantitative and objective method to separate them from those which do not have a significant effect.

Significant nexus determinations require more information

The Corps of Engineers which is responsible for implementing the *Rapanos* decision has also had problems in applying the significant nexus test. The EPA and the Corps issued guidance in 2007[9] to their staff and the public on how to make significant nexus determinations. This Guidance was published as a draft and the EPA and Corps received 66,000 comments. It was released as a final guidance document in 2008. It requires a multiple step process and establishment of specific analyses in order to determine that a significant nexus occurs. There are also multiple reviews required at both the Corps and EPA offices.

Jurisdictional determinations involving a significant nexus analysis are so complicated for Corps staff and so burdensome on landowners that, in 2008, the Corps began to offer a short cut by allowing landowners to opt for a "Preliminary Jurisdictional Determination" (PJD)[10]. The purpose of the PJD is to provide a "written indication that there may be waters of the United States, including wetlands, on a parcel" but does not exclude any wetlands or "waters" based on either the *SWANCC* or *Rapanos* Supreme Court decision. The reason given is that it allows landowners an opportunity to "expeditiously to obtain a Corps permit authorization" presumably due to the controversy and difficulty in obtaining an approved jurisdictional determination involving the significant nexus test. Many Corps District informed landowners that PJDs were the preferred method to assure rapid response to their permit applications.

[9] Environmental Protection Agency and Corps of Engineers. 2007. Jurisdictional Determination Form Instructional Guidebook.
[10] Corps of Engineers Regulatory Guidance Letter 08-02 Jurisdictional Determinations. June 26, 2008.

For those landowners that sought an Approved Jurisdictional Determination that included a significant nexus determination, the extended time for review and the undefined methodology to make that determination led to disputes over the findings. The Corps of Engineers does have an appeal process, but often those appeals result in remands to the District to provide more specific information on their significant nexus determination. Rarely have these significant nexus cases made it to Court, but the 4th Circuit Court of Appeals determined in the *Precon*[11] case, that the Corps must provide sufficient evidence in the record to show that there is a downstream effect on a navigable water from the upstream tributary or wetland. Mere citation of literature or general findings are insufficient. Some investigation is required to show a specific effect on downstream navigable waters. Other courts have reached similar decisions[12]. Since the Supreme Court decision in *Hawkes* allowing landowners to seek court review of jurisdictional determinations before the permitting process has been completed, we are likely to see more decisions related to the information necessary for a significant nexus determination to be upheld.

The point is that a finding a significant nexus must go beyond a list of citations or general assumptions on the functions of a tributary or wetland. It must include demonstrable evidence that specific actions in the subject "water" will affect downstream waters. The Courts have not gone so far as to require exhaustive site specific studies; however, they have required that information relevant to that particular water system be provided in order to meet Justice Kennedy's requirements that such evidence be more than speculative or insubstantial.

The Panel recommended that the EPA develop more detailed quantitative and methodology procedures in establishing a significant nexus. However, the WOTUS rule did not make such an effort but rather used a list of nine ecological functions and said that if any one of those functions could be demonstrated to occur with the wetland or in similarly situated wetlands within a watershed, then a significant nexus finding could be made. The functions listed included:

- Sediment trapping;
- Nutrient recycling;
- Pollutant trapping, transforming, and transport;
- Retention and attenuation of flood waters;
- Runoff storage;
- Contribution of flow;
- Export of organic matter;
- Export of food resources;
- Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species

These functions are extremely broad, sometimes contradictory, and provide little room for any true evaluation of the particular nature of the wetland being evaluated nor the significance of that wetland on downstream TNWs. There was no guidance as to the specificity of the information

[11] Precon Development Corp, Inc v US Army Corps of Engineers. January 25, 2011.
[12] Simsbury-Avon Preservation v. Metacon Gun Club. US District Court, Connecticut. January 31, 2007.

required, how to quantify any of these variables, and what measures would be used to assess how they influenced downstream TNWs. The Panel was never asked to opine on these matters and the final Connectivity Report stated that no scientific consensus on such measures had been reached in the peer-reviewed literature[13].

Current extent of federal interpretation of significant nexus

When issuing the WOTUS rule, the agencies stated that because all tributaries are jurisdictional "by rule", "the vast majority of the nation's water features were located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." The Rule's significant nexus test would apply to these features, either alone or in combination with similarly situated "waters". Justice Kennedy's concurring opinion stated that wetlands adjacent to tributaries can "come within the statutory phrase navigable waters, 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." Justice Kennedy only discusses wetlands in the context of significant nexus; however, the WOTUS rule expanded this concept to cover streams and tributaries.

The draft Connectivity Report did not discuss the "similarly situated" concept nor was the Panel requested in any of the Charge Questions to evaluate how the existing scientific literature could inform this process. No specific recommendations were provided nor did the Final Connectivity Report contain any specific analysis of how to address Justice Kennedy's test. The Panel's comments on the draft Rule were also very cryptic and noted that there can be an effect on downstream waters when "waters" were considered in aggregate; however, no agreement was reached on how that aggregation should be done.

The WOTUS rule defined an extraordinarily large area to be considered as subject to aggregation—stating that it would include all wetlands and waters within a region that drains into the nearest navigable water, intrastate water, or territorial sea. In California, this would include extraordinary large areas encompassing large portions of a single state (e.g. waters draining into the Sacramento River) with variously different wetland types. There is considerable geologic, vegetative, and topographic variation in such large areas that it goes beyond what would be considered as being similar based on scientific principles. The areas subject to aggregation under the 2015 Rule would be far larger than under the 2007 EPA/Corps guidance which uses the immediate watershed surrounding the specific stream reach subject to a significant nexus analysis. Because the WOTUS rule was in effect for such a short period, no significant nexus determinations were made using this expanded standard.

[13] See Section 2.4.6 of the final Connectivity Report

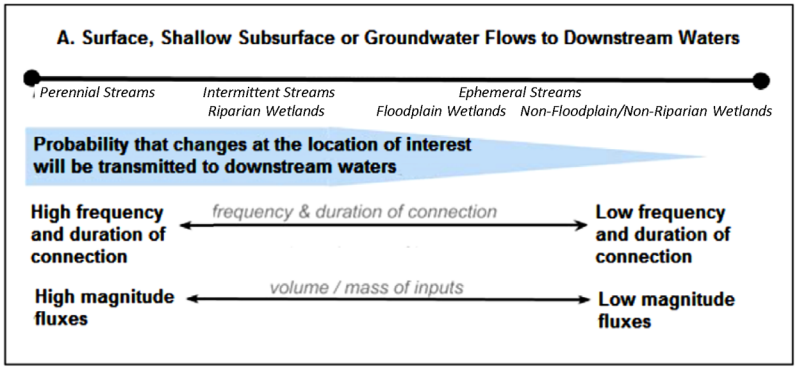
Nevertheless, the Department of Justice, for the Environmental Protection Agency, has brought enforcement actions based on use of a broad concept of "similarly situated" that was adopted in the WOTUS rule. An example of this expanded view is *US* v *HVI Cat Canyon* in the US District Court (California)[14]. In this matter, the discharges occurred within ephemeral drainages that flow, on average, for only a few days/year following rain events and when they do flow, contribute less than 1% of the flows from the entire watershed to the TNW. The drainages are located over 25 miles from the TNW. Under the 2007 EPA/Corps guidance, the "relevant reach" for the evaluation of the significant nexus is only that portion associated with the first order stream and any wetlands associated with that reach. In the *Cat Canyon* case, the relevant reach and its watershed comprises less than 0.5% of the entire watershed of the Santa Maria River. However, the US is applying the standard of the now stayed WOTUS rule that would have allowed for a combination of all similarly situated waters in the entire Santa Maria watershed in order to make a determination of significant nexus. Under the 2015 Rule's standard, the US states that the true measure of significance should include 60% of the watershed when all first order streams and their watersheds are combined. The basis for their determination of significance is that, if all these streams were eliminated, there would certainly be a significant nexus on the TNW. No one is proposing such an outcome. The stark difference in how significant nexus is determined under the 2007 EPA/Corps guidance and the WOTUS rule brings to light the necessity of greater scrutiny on the agencies' significant nexus approach.

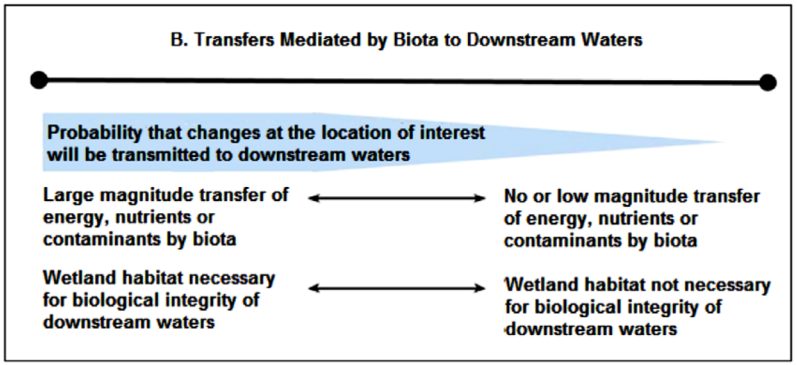
[14] US District Court, Central District of California. CV 11-05097 FMO (SSx)

Table 6-2. Relative abundance of literature by review topic area. The table shows the relative size of the body of literature documented in the report that addresses the physical, chemical, or biological connectivity to and effects on downstream waters. A small dot (·) indicates a relatively smaller body of literature, a medium dot (●) indicates a relatively intermediate body of literature, and a large dot (⬤) indicates a relatively large body of literature. The dot size does not necessarily correspond with the number of associated citations in this report because some citations are review articles or meta-analyses, which summarize information from many references. The dot size also does not correspond with level of confidence in particular conclusions.

Topic	Question		Biological		Chemical		Physical	
			Connection	Effect	Connection	Effect	Connection	Effect
Streams	What are the physical, chemical, and biological connections to and effects of ephemeral, intermittent, and perennial streams on downstream waters?	ephemeral	●	·	⬤	●	⬤	●
		intermittent	⬤	●	⬤	●	⬤	●
		perennial	⬤	⬤	⬤	⬤	⬤	⬤
Riparian/ Floodplain Wetlands	What are the physical, chemical, and biological connections to and effects of riparian or floodplain wetlands and open waters (e.g., riverine wetlands, oxbow lakes) on downstream waters?		⬤	⬤	⬤	⬤	⬤	⬤
Non-floodplain wetlands	What are the physical, chemical, and biological connections to and effects of wetlands and open waters in non-floodplain settings (e.g., most prairie potholes, vernal pools) on downstream waters?		●	·	●	·	·	·

From EPA 2015 Connectivity of Streams & Wetlands to Downstream Waters





From Expert Panel Report (2014) on Connectivity Analysis

Table 6-2. Relative abundance of literature by review topic area. The table shows the relative size of the body of literature documented in the report that addresses the physical, chemical, or biological connectivity to and effects on downstream waters. A small dot (•) indicates a relatively smaller body of literature, a medium dot (●) indicates a relatively intermediate body of literature, and a large dot (⬤) indicates a relatively large body of literature. The dot size does not necessarily correspond with the number of associated citations in this report because some citations are review articles or meta-analyses, which summarize information from many references. The dot size also does not correspond with level of confidence in particular conclusions.

Topic	Question		Biological		Chemical		Physical	
			Connection	Effect	Connection	Effect	Connection	Effect
Streams	What are the physical, chemical, and biological connections to and effects of ephemeral, intermittent, and perennial streams on downstream waters?	ephemeral	●	•	⬤	●	⬤	●
		intermittent	⬤	●	⬤	●	⬤	●
		perennial	⬤	⬤	⬤	⬤	⬤	⬤
Riparian/ Floodplain Wetlands	What are the physical, chemical, and biological connections to and effects of riparian or floodplain wetlands and open waters (e.g., riverine wetlands, oxbow lakes) on downstream waters?		⬤	⬤	⬤	⬤	⬤	⬤
Non-floodplain wetlands	What are the physical, chemical, and biological connections to and effects of wetlands and open waters in non-floodplain settings (e.g., most prairie potholes, vernal pools) on downstream waters?		●	•	●	•	•	•

From 2015 EPA Connectivity of Streams & Wetlands to Downstream Waters

Senator BARRASSO. Thank you so very much for your testimony. We appreciate you being here with us today, Mr. Josselyn.

I would like to now turn to Misha Tseytlin, who is the Solicitor General for the State of Wisconsin, from Madison, Wisconsin. I appreciate you making the trip to Washington, being with us, and I look forward to your testimony.

STATEMENT OF MISHA TSEYTLIN, SOLICITOR GENERAL, STATE OF WISCONSIN

Mr. TSEYTLIN. Thank you, Chairman Barrasso, Ranking Member Carper, and members of this Committee. I am grateful for the opportunity to appear before you today. My name is Misha Tseytlin and I serve as the Solicitor General for the State of Wisconsin.

My State, led by Attorney General Brad Schimel, has played an important role in the multistate coalition litigating against the WOTUS Rule. Our 30-state coalition is broad and geographically diverse, comprising States from Wyoming to West Virginia, from Ohio to Oklahoma, from Alabama to Alaska and beyond.

The reason for the breadth of this coalition, to my knowledge, the largest such coalition challenging any regulation issued by the prior administration, is that the WOTUS Rule is a deeply intrusive invasion upon traditional State authority. Under both the United States Constitution and the Clean Water Act, States have the lead role in regulating most waters and lands within their borders. The Clean Water Act states this explicitly, explaining that it is "the primary responsibility and rights of States to plan the development and use of land and water resources." The Federal Government, in contrast, only has limited authority to protect the Nation's "navigable waters."

The WOTUS Rule is an overbroad assertion of Federal authority over local waters, which are rightfully subject to State, not Federal, regulation. The Rule claims Federal power over streambeds that are dry most of the year and water features connected to navigable waters only once every 100 years. I think a small example will illustrate this point. If you are a Wisconsin farmer and you have a small pond on your land, that pond is automatically subject to Federal jurisdiction if, after a once-in-a-century rainstorm, that pond is within five football fields of any tributary, any navigable water.

This Rule was also adopted without meaningfully consulting the States about their water protective programs. Such consultation would have revealed that States already protect these local features, making Federal regulation unnecessary. Indeed, I would argue that the process that led to the adoption of the WOTUS Rule involved one of the most significant procedural failures in the history of the Administrative Procedures Act.

Earlier testimony from General Peabody demonstrated how EPA cut the Corps out of the process of designing the WOTUS Rule. That is just the tip of the iceberg. EPA cut the entire public, including the States, out of that process. That is because the final Rule that the Agency adopted departed very significantly from the proposed Rule, in a way that the public had no idea about and was not informed about. In particular, EPA formulated many of the central concepts of the Rule behind closed doors and sprang them on an unsuspecting public without public input.

The lack of record support and procedural illegalities of the WOTUS Rule can be summarized with one simple point. When the prior administration filed its 245-page brief before the Sixth Circuit seeking to defend the Rule, it could not cite a single public comment on the central features of the WOTUS Rule's adjacency or case-by-case waters category, either for or against. That is because EPA simply invented those central concepts of the WOTUS Rule out of whole cloth, without any record support or without any public input. That is against the law.

It is, thus, unsurprising how poorly the WOTUS Rule has fared in court. On October 9th, 2015, our broad coalition of States secured a nationwide stay of the WOTUS Rule from the United States Court of Appeals for the Sixth Circuit. As the Sixth Circuit explained, the States demonstrated that they had a "substantial possibility of success on the merits" in their arguments that the WOTUS Rule violated the Clean Water Act and violated the EPA. The United States District Court for the District of North Dakota reached the same conclusion and thus issued a preliminary injunction blocking the WOTUS Rule.

Our coalition of States was extremely pleased that the new Administration heeded the message of the Federal courts and has moved forward with rescinding the Rule.

The work that this Committee is doing here today provides a valuable public service. Given the current Administration's laudable and swift movement toward repealing the WOTUS Rule, the Federal courts are unlikely to have an opportunity to declare, finally, what the Sixth Circuit and the District of North Dakota concluded preliminarily: the Rule is unlawful. This hearing is therefore vital to establish for the public what the States were already well on their way to proving in court.

Thank you for the opportunity to testify before you today. I look forward to answering any questions you may have.

[The prepared statement of Mr. Tseytlin follows:]

Misha Tseytlin
Solicitor General of Wisconsin
Testimony before the
Senate Committee on Environment and Public Works
April 26, 2017

Chairman Barrasso, Ranking Member Carper, and Members of this Committee, I am grateful for the opportunity to appear before you today. My name is Misha Tseytlin and I proudly serve as Solicitor General for the State of Wisconsin. My State—led by Attorney General Brad D. Schimel—has played an important role in the multistate coalition litigating against the illegal WOTUS Rule, 80 Fed. Reg. 37,054 (June 29, 2015). Our 30-state coalition is broad and geographically diverse, comprising States from Wyoming to West Virginia; from Ohio to Oklahoma; from Alabama to Alaska; from Georgia to New Mexico.

The reason for the breadth of this coalition—to my knowledge the largest such coalition of States challenging any regulation issued by the prior Administration—is that the WOTUS Rule is a deeply intrusive assault upon traditional state authority. Under both the United States Constitution and the Clean Water Act, States have the lead role in regulating most waters and lands within their borders. The Clean Water Act states this explicitly, explaining that "[i]t is the policy of the Congress 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 Federal Government, in contrast, has only limited authority to protect the Nation's "navigable waters," defined as the "waters of the United States." 33 U.S.C. §§ 1362(7), 1362(12). The WOTUS Rule is a breathtaking assertion of federal

regulatory authority over local waters, which are rightfully subject to state, not federal, regulation. The Rule claims federal power over stream beds that are dry most of the year, water features connected to navigable waters only once every 100 years, and much more. Simply put, the Rule is overbroad and unlawful. This Rule was adopted without meaningfully consulting the States about their own water-protective programs. Such consultation would have revealed that States already protect these features, making federal intrusion entirely unnecessary.

Given the illegality of the WOTUS Rule, it is unsurprising how poorly it has fared in court. On October 9, 2015, our broad coalition of States secured a nationwide stay of the WOTUS Rule from the United States Court of Appeals for the Sixth Circuit. As the Sixth Circuit explained, the States demonstrated that they have a "substantial possibility of success on the merits" in their arguments that the WOTUS Rule violates the Clean Water Act and the Administrative Procedure Act ("APA"). *See In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). The United States District Court for the District of North Dakota reached the same conclusion and thus issued a preliminary injunction blocking the WOTUS Rule. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Our coalition was extremely pleased that the new Administration heeded the message of the federal courts and has moved forward with rescinding the WOTUS Rule. *See* 82 Fed. Reg. 12,532 (Mar. 6, 2017).

The work that this Committee is doing here today provides an extremely valuable public service. Given the current Administration's laudable and swift movement toward repealing the WOTUS Rule, the federal courts are unlikely to have

an opportunity to declare finally what the Sixth Circuit and the District of North Dakota concluded preliminarily: the Rule is unlawful. This hearing is therefore vital to establish for the public what the States were already well on their way to proving in court. My testimony today provides only a high-level overview of the Rule's illegality under the APA and the Clean Water Act. For a more complete discussion of the Rule's legal shortfalls—including its constitutional infirmities—please see Attachment 1 to this testimony, which is the State Petitioners' comprehensive opening brief before the Sixth Circuit.

OVERVIEW OF THE WOTUS RULE

Under the Clean Water Act, "[i]t is the policy of the Congress 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). Federal authority under the Act is therefore limited to "navigable waters," *id.* § 1362(12), defined as "waters of the United States, including the territorial seas," *id.* § 1362(7). Inclusion of a water within federal jurisdiction has significant consequences for farmers, landowners, and small businesses because of, among other things, the imposition of substantial permitting requirements under the Section 402 National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, and under Section 404 for the discharge of dredged or fill material, *id.* § 1344. The Supreme Court has twice invalidated regulatory efforts to unduly expand the jurisdictional reach of the Clean Water Act under a definition of the "waters of the United States." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006).

The WOTUS Rule, issued by the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps"), is yet another federal effort to expand the scope of the Clean Water Act's jurisdiction beyond what Congress authorized. The Rule starts with primary waters, which it defines as waters "currently used, 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," as well as "all interstate waters, including interstate wetlands" and "territorial seas." 33 C.F.R. § 328.3(a)(1)–(3).[1]

The Rule then claims *per se* federal jurisdiction over an extremely broad swath of local waters and sometimes moist lands. The Rule declares that all "tributaries," 33 C.F.R. § 328.3(a)(5), of primary waters are always within federal jurisdiction. The Rule defines a "tributar[y]" as any "water that contributes flow, either directly or through another water," to a primary water and that is "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark." *Id.* § 328.3(c)(3). This covers even dry channels that provide "intermittent or ephemeral" flow through "any number" of links. 80 Fed. Reg. at 37,076. The Rule also asserts *per se* jurisdiction over all non-farmland waters "adjacent" to primary waters and their tributaries, 33 C.F.R. §§ 328.3(a)(6), (c)(1), including all waters "bordering, contiguous, or neighboring" primary waters, impoundments, or tributaries, *see id.* § 328.3(c)(1). The Rule defines "neighboring" as (1) "all waters" any part of which are

[1] The Rule's definition of "waters of the United States" is located in multiple parts of the Code of Federal Regulations. In my testimony, I cite to 33 C.F.R. Part 328.

within 100 feet of the ordinary high water mark of a primary water or "tributary"; (2) "all waters" any part of which are within 1,500 feet of the ordinary high water mark of a primary water or "tributary" and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high-tide line of a primary water. *Id.* § 328.3(c)(2). So, for example, the Rule sweeps in any local waters connected to navigable waters only after a once-in-a-century rainstorm.

Finally, the Rule permits even further assertions of federal jurisdiction on a case-by-case basis. Waters eligible on a case-by-case basis include "waters [at least partially] located within the 100-year floodplain" of a primary water and "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark" of a primary water, impoundment, or tributary. *Id.* § 328.3(a)(8). Case-by-case waters are included within federal authority if such waters, "either alone or in combination with other similarly situated waters in the region, significantly affect[ ] the chemical, physical, *or* biological integrity of a [primary water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5) (emphasis added). Under this vague multifactor approach to case-by-case waters, there is very little local water in this country that States, farmers, homeowners, and small businesses can be sure is safe from federal intrusion.

THE WOTUS RULE IS ILLEGAL IN NUMEROUS RESPECTS

I. The WOTUS Rule Violates The Administrative Procedure Act

The APA is this country's charter for agency rulemaking, providing both mandatory procedures for creating rules and substantive provisions for adjudicating

rules' legality. The APA's substantive and procedural components are inextricably linked. Under the APA's substantive requirements, a rule is unlawful if it is not supported by the administrative record. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41–42 (1983). Under the APA's procedural components, an agency must build that record by submitting the rule to notice and comment so that the public can provide its input and evidence. *See* 5 U.S.C. § 553(b). A critical aspect of this rulemaking process is that the agency may not adopt a final rule that is not a "logical outgrowth" of the proposed rule. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The rationale for this is that if the final rule is too different from the proposed rule, the final rule would not have been subjected to the mandatory rigors of public notice and comment.

The WOTUS Rule demonstrates what happens when agencies refuse to follow the APA's rulemaking process. As discussed below, five of the Rule's central components are arbitrary, having no support in the administrative record. That is a direct result of the broken rulemaking process leading to the enactment of the WOTUS Rule, where EPA shaped the rule around these five components behind closed doors, while rejecting the Corps' calls for public input.

A. Five Of The WOTUS Rule's Central Components Are Arbitrary And Have No Support In The Record

Under basic principles of administrative rulemaking, a rule is unlawful if it is unsupported by the evidence in the rulemaking record. *See State Farm*, 463 U.S. at 41–42. An agency cannot make up for a lack of record evidence with "conclusory statements." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014)

(citation omitted). EPA built the WOTUS Rule around five distance-based components, but those components have no support in the administrative record.

The WOTUS Rule's first three illegal components deal with its adjacency definition. The Rule declares that all "adjacent" non-farmland waters are always within federal jurisdiction, and then, as relevant here, defines adjacency through three concepts: (1) waters within 100 feet of a primary water, impoundment, or "tributary"; (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary"; and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2). There is no support in the record for these three concepts. To take just one example, nothing in the record supports the Rule's conclusion that every non-farmland water in this country that is connected to a primary water, impoundment, or tributary *once every hundred years*, and is within 1,500 feet of such a feature, is always subject to federal jurisdiction. As the Corps explained to EPA during the rulemaking process, the Rule's approach is "not supported by science or law." Memorandum from Lance Wood, Assistant Chief Counsel for Regulatory Affairs, U.S. Army Corps of Eng'rs, to Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Eng'rs, Legal Analysis of Draft Final Rule on Definition of "Waters of the United States" (Wood Memo), at 5 (April 24, 2015).[2] Put more simply, the inclusion of all three of these

[2] https://www.epw.senate.gov/public/_cache/files/94d5f9d0-2a56-47ee-aa44-4dcf7c9f6a94/07.17.15-army-corps-darcy-with-7-attachments-responses-to-07.16.15.pdf.

central adjacency features was an arbitrary decision, based merely on "conclusory statements," and was thus illegal under the APA. *Amerijet*, 753 F.3d at 1350.

The Rule's next two arbitrary components deal with its case-by-case waters category. The Rule provides that such waters include (1) those within the 100-year floodplain of a primary water, and (2) those within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). Again, there was no support for these components in the administrative record. As the Corps explained to EPA, there is "no basis in science or law" for these "arbitrary" components. *See* Wood Memo at 2. Even though the prior Administration filed a 245-page brief seeking to defend the Rule before the Sixth Circuit, it did not cite any record evidence to support the specific distances it selected either here, or as part of the adjacency definition. *See* Brief For Respondents, 2017 WL 372073 (6th Cir. Jan. 13, 2017). The reason for that glaring deficiency is obvious: no such record evidence exists.

B. The WOTUS Rule's Five Arbitrary Central Components Are The Direct Result Of EPA's Decision To Violate The APA's Rulemaking Process

The illegality of the WOTUS Rule is not mere happenstance; rather, it is the direct result of EPA's unprecedented decision to shut the public out of the rulemaking process, in plain violation of the APA's notice-and-comment requirement.

To understand the broken process that led to the WOTUS Rule, a little background is helpful. The proposed version of the WOTUS Rule, published on April 21, 2014, 79 Fed. Reg. 22,188 (Apr. 21, 2014), took an unbounded view of federal jurisdiction, such that there were no meaningful limitations on either the adjacency

or case-by-case waters categories. In light of the Supreme Court's decisions in *SWANCC* and *Rapanos*, this proposed approach was obviously illegal and could never become the law of the land. *Id.* at 22,269. In attempting to address the problem, EPA decided that the APA's mandatory rulemaking procedures were too cumbersome and took an unprecedented shortcut. Internal memoranda, available on this Committee's website, strongly suggest what occurred: EPA decided—contrary to the plain requirements of the APA and the Corps' advice—to rewrite the WOTUS Rule around the five central components discussed above, without obtaining any public input on whether these components were reasonable and lawful.

This behind-closed-doors approach violated the APA's bedrock rulemaking requirements. The APA mandates that a rule that an agency adopts must be made available for public notice and comment. 5 U.S.C. § 553(b). This process is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). An agency satisfies this obligation only when the final rule is sufficiently grounded in the proposed rule, such that the final rule can fairly be said to be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. That means the agency must select its final rule only from a "range of alternatives being considered" that it informed the public about. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

In adopting the final WOTUS Rule's five distance-based components discussed above, EPA violated this notice-and-comment requirement. Specifically, the proposed rule defined adjacency without any distance-based elements whatsoever. In the final WOTUS Rule, however, adjacency was defined as (1) waters within 100 feet of a primary water, impoundment, or "tributary"; (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary"; and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2). Similarly, with regard to case-by-case waters, the proposed rule included a boundless approach, while the final Rule considered only (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). *There was no suggestion in the proposed rule that any of these five distance-based components were being considered as the way to fix the obvious illegality of the proposal.* The Corps urged EPA to let the public know what it was up to, in order to get public input, but EPA declined to do so. *See* Wood Memo at 4 ("the public did not have the opportunity . . . to comment on [important aspects of the WOTUS Rule] during the public comment period and thus the addition of this limitation likely violates the" APA).

The result of EPA's decision to skirt the law was predictable: even though there were over one million comments submitted on the proposed rule, the prior Administration's 245-page brief before the Sixth Circuit was not able to identify even a single comment discussing the merits or demerits of these five components. As the Sixth Circuit explained in staying the Rule, EPA "failed to identify anything in the

record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered." *In re EPA*, 803 F.3d at 807. The District of North Dakota reached the same conclusion. *See North Dakota*, 127 F. Supp. 3d at 1058.

As the Petitioner States explained to the Sixth Circuit, EPA's decision to cut the public out of the process of evaluating the five distance-based components is "one of the most significant procedural failures in the history of the Administrative Procedure Act." *See* Opening Brief of State Petitioners, 2016 WL 6566251, at *4 (6th Cir. Nov. 1, 2016) (Attachment 1). In prior cases, courts have invalidated agency rules even for failure to get public input on narrow issues, such as the definition of a "small refinery," *Small Refiner*, 705 F.2d at 549, or whether the listing of wastes would play a "supplementary" or "heavy" role in an analysis, *Shell Oil Co. v. EPA*, 950 F.2d 741, 751–52 (D.C. Cir. 1991). The procedural defect in this case was far more serious. EPA decided it could change the meaning of the entire Clean Water Act—an Act that significantly impacts States, farmers, homeowners, and small businesses throughout the country—without even letting the public know that it was considering its five distance-based components. Had EPA taken the lawful approach that the APA requires, and that the Corps urged, the States would have been eager to provide EPA with detailed maps, comments, and data, explaining why the components in the WOTUS Rule were overbroad. EPA's decision to cut the public out of the rulemaking process predictable led to situation where the final Rule that it adopted is entirely arbitrary.

II. The WOTUS Rule Violates The Clean Water Act

The WOTUS Rule is illegal for another reason: it asserts federal authority far beyond what Congress has authorized under the Clean Water Act.

Two Supreme Court decisions are relevant to understanding the WOTUS Rule's violation of the Clean Water Act. First, in *SWANCC*, the Court held that the Corps could not sweep waters into federal jurisdiction simply because those waters "are or would be used as habitat" by migratory birds. 531 U.S. at 164. Second, in *Rapanos*, the Supreme Court held that the Corps had improperly asserted authority over intrastate wetlands that were not substantially connected to navigable-in-fact waters. The Court majority in *Rapanos* included an opinion written by Justice Scalia for four Justices and a separate opinion written by Justice Kennedy. Justice Scalia concluded that the Clean Water Act extends "to only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection to" those waters, *id.* at 742. Justice Kennedy, for his part, concluded that the Act extends only to navigable-in-fact waters and waters having a "significant nexus" to navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). Justice Kennedy explained that federal jurisdiction does not extend to all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776.

The WOTUS Rule violates *SWANCC* and *Rapanos* in numerous respects.

A. *Per Se* Jurisdiction Over All Tributaries. The WOTUS Rule's conclusion that all "tributaries" are *per se* within federal jurisdiction violates *Rapanos*. The Rule defines "tributaries" as any features with "a bed and banks and an ordinary high water mark" that "contributes" any amount of "flow," "either directly or through another water," to a primary water. 33 C.F.R. § 328.3(c)(3). This includes "perennial, intermittent, [and] ephemeral" streams with "flowing water only in response to precipitation events in a typical year." 80 Fed. Reg. at 37,076. The Rule's inclusion of intermittent and ephemeral streams violates Justice Scalia's approach, given that Justice Scalia explained that "channels containing merely intermittent or ephemeral flow" fall outside of federal jurisdiction. 547 U.S. at 733 (Scalia, J., plurality). It also violates Justice Kennedy's approach. Justice Kennedy criticized the Corps' prior reliance on the concept of ordinary high water mark to establish federal jurisdiction, explaining that relying upon this measure could impermissibly sweep in "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* at 781 (Kennedy, J., concurring in the judgment). As the District of North Dakota explained, "the breadth of the definition of a tributary set forth in the Rule . . . is precisely the concern Justice Kennedy had in *Rapanos*." *North Dakota*, 127 F. Supp. 3d at 1056.

B. *Per Se* Jurisdiction Over All "Adjacent" Waters. The WOTUS Rule's coverage over all non-farmland adjacent waters—including waters near tributaries or near navigable-in-fact waters only during once-in-a-century floods—similarly violates *Rapanos*. *See* 33 C.F.R. § 328.3(c)(2). The Rule's adjacency approach is

contrary to Justice Scalia's opinion in *Rapanos*, which requires a federal jurisdictional water to be connected through a "relatively permanent, standing or flowing bod[y] of water." *See Rapanos*, 547 U.S. at 732 (Scalia, J., plurality). The Rule's adjacency category just as plainly violates Justice Kennedy's test. Justice Kennedy explained that the Corps' prior "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 comprising navigable waters as traditionally understood." *Id.* at 782 (Kennedy, J., concurring in the judgment). The Rule adopts precisely the approach that Justice Kennedy held was "prelude[d]," sweeping into federal jurisdiction any water near the 100-year flood plain of a tributary. 33 C.F.R. § 328.3(a)(8). More generally, the Rule's approach to adjacency—covering waters based upon a hydrological connection once a century—is contrary to Justice Kennedy's explanation that "[a] mere hydrologic connection should not suffice in all cases." *Id.* at 784–85.

C. Expansive Approach To Case-By-Case Waters. Under the Rule, a water that is (1) "located within the 100-year floodplain" of a primary water or (2) "located within 4,000 feet of the high-tide line or ordinary high water mark" of a primary water, impoundment or tributary, falls under federal jurisdiction if the water has a "significant nexus" to a primary water. 33 C.F.R. § 328.3(a)(8). The way that the Rule defines "significant nexus" is unlawful. The Rule findings significance by looking at the "chemical, physical, or biological" impact of an isolated water on

primary waters, "either alone or in combination with other similarly situated waters in the region." 33 C.F.R. § 328.3(c)(5). This includes concepts such as "[c]ontribution of flow," "[e]xport of organic matter," "[e]xport of food resources," and "[p]rovision of life cycle dependent aquatic habitat" for "species located in" primary waters, such as "[p]lants and invertebrates" "hitchhiking" on waterfowl. *Id.* §§ 328.3(c)(5)(vi)–(ix); Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence ("Connectivity Study"), 5-5, EPA-HQ-OW-2011-0880-20859.

This approach violates Supreme Court precedent in numerous respects. Most obviously, the Court's decision in *SWANCC* held that the Corps could not base federal jurisdiction on migratory birds regularly landing in a particular intrastate water. *SWANCC*, 531 U.S. at 164. The WOTUS Rule would sweep in these exact waters because "[p]lants and invertebrates" "hitchhik[e]" on migratory birds. Connectivity Study at 5-5. And that is just the tip of the iceberg. Under the WOTUS Rule, EPA would no longer need to adopt the sort of issue-specific rules that the Supreme Court invalidated in *SWANCC*. Had the Rule gone into effect, EPA would have been able to assert jurisdiction over almost any water it wanted by relying upon any number of the virtually limitless concepts that it embedded in its case-by-case waters category.

CONCLUSION

Thank you for giving me the opportunity to testify before this Committee today. I look forward to answering any questions you may have.

Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION, et al., Petitioners,	)	In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, published June 29, 2015 (MCP No. 135)
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	)	On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

OPENING BRIEF OF STATE PETITIONERS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The thirty-one State Petitioners request oral argument to address the significant legal defects identified herein.

JURISDICTIONAL STATEMENT

The U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "Agencies") promulgated the Clean Water Rule on June 29, 2015. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054-37,105 (June 29, 2015) ("Final Rule" or "Rule"). The States filed timely petitions for review within 120 days, as required under 33 U.S.C. § 1369(B)(1). This Court held that it has jurisdiction over the State petitions under 33 U.S.C. § 1369(B)(1)(F). *See In re U.S. Dep't of Defense and U.S. EPA Final Rule,* 817 F.3d 261, 273 (6th Cir. 2016). The States have standing because the Rule's expansion of the Agencies' authority under the Clean Water Act ("CWA") imposes significant and sovereign harm upon them. *See, e.g.*, State Petitioners' Motion for Stay Pending Review & Declarations, No. 15-3799, Dkt. 24, at 15-19 (filed Sept. 9, 2015).

INTRODUCTION

This case is about who has authority to regulate isolated land and water features that are far removed from any navigable waterway: the federal government or the sovereign States. The CWA, like the United States Constitution, reserves that authority to the States. Yet, in the Rule at issue here, the Agencies have asserted federal authority over many of those local resources.

When Congress enacted the CWA over forty years ago, it "chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*") (quoting 33 U.S.C. § 1251(b)). But it granted to the federal government primary jurisdiction over the nation's "navigable waters," defined as "waters of the United States." 33 U.S.C. § 1362(7). The resulting statutory regime balances traditional state authority over land use and water resources within their borders with the need for uniform federal regulation to protect navigable-in-fact waters.

The Agencies have repeatedly sought to undermine this balance, asserting regulatory control over land and water resources far removed from the nation's navigable-in-fact waters. Twice in the last fifteen years, the Supreme Court has rebuked the Agencies for their overreach. In *SWANCC*, the Court invalidated a federal rule that asserted jurisdiction over isolated, local ponds because the ponds were used by migratory birds. 531 U.S. at 174. Then, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court held that the Agencies could not regulate wetlands far removed from navigable-in-fact waters, including those wetlands adjacent to ditches and drains that the Agencies deemed tributaries of navigable waters. *Id.* at 742 (Scalia, J., plurality). In both *SWANCC* and *Rapanos*, the Court made clear

that, in order to preserve the federal-state regulatory balance, the statutory term "waters of the United States" must be given a meaning that is consistent with the primary purpose of the CWA—to protect navigable-in-fact waters. As the Court explained, "[t]he term '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 172; *see also Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment) (a "central requirement" of the Act is that "the word 'navigable' in 'navigable waters' be given some importance").

The Final Rule demonstrates that the Agencies have ignored the lessons of *SWANCC* and *Rapanos*. The Agencies now assert jurisdiction over the *very same* waters that the Supreme Court specifically held in those cases were outside the Agencies' authority. But that is just the tip of the iceberg, as the Rule's scope far exceeds what the Agencies sought to do in *SWANCC* and *Rapanos*. The Rule categorically federalizes stream beds that usually carry no water, and features that are connected to navigable-in-fact waters, if at all, only once a century. It reaches dry arroyos in New Mexico, ephemeral drainages in Wyoming, swales in Ohio farmland, isolated prairie potholes on the North Dakota plains, and thousands of square miles of Alaskan land that is frozen most of the year. The Rule destroys the

careful balance between federal and state authority that Congress struck in the CWA and that the Constitution mandates.

The Rule is also a textbook example of procedural failure. The Agencies finalized a rule that looks nothing like the version submitted for public comment, all while declaring that the "rule does not have federalism implications," 80 Fed. Reg. at 37,102. The Corps determined that the Rule would not have significant environmental or socioeconomic implications, ignoring its obligations under the National Environmental Policy Act ("NEPA"). These deficiencies, coupled with the sheer magnitude of the federal regulation at issue, make the Rule one of the most significant procedural failures in the history of the Administrative Procedure Act ("APA").

Finally, it is worth noting that for decades, the regulatory definition of the foundational term "waters of the United States" in the CWA has been named after the term it defines. But in an attempt to sell the country on an expansive new federal regulation, the Agencies coined a new term for their regulatory program—the "Clean Water Rule." This terminology implies that without this Rule, the nation's waters will be "unclean." The thirty-one States challenging the Rule take deep exception to that implication. All of the States have robust regulatory programs that protect and preserve the natural resources within their boundaries.

ISSUES PRESENTED

1. May the Agencies violate the CWA by asserting federal authority over isolated local land and water resources?

2. May the Agencies define the statutory term "waters of the United States" based on central criteria they did not make available for public comment and that are not supported by the administrative record?

3. May the Agencies violate the Constitution by adopting a rule that (i) deprives the States of their Tenth Amendment rights, (ii) allows the Agencies to exercise power beyond the limits of the Commerce Clause, and (iii) is so vague that it prohibits ordinary people from understanding the CWA's jurisdictional reach?

4. May the Corps violate NEPA by promulgating a major federal rule without preparing an environmental impact statement?

STATEMENT OF THE CASE

A. Statutory Background

The CWA provides that "[i]t is the policy of the Congress 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). Congress granted the Agencies authority only over certain "navigable waters," *see,*

e.g., *id.* § 1362(12), defining such waters as "waters of the United States, including the territorial seas," *id.* § 1362(7).

The definition of "waters of the United States" determines the scope of numerous provisions in the CWA, including obligations imposed upon the States. Subject to certain exclusions, any person who causes pollutant discharges into "waters of the United States" must obtain a permit under the section 402 National Pollutant Discharge Elimination System ("NPDES") program, *id.* § 1342, or under section 404 of the CWA for the discharge of dredged or fill material, *id.* § 1344. Forty-six States have assumed NPDES permitting responsibilities within their borders under 33 U.S.C. § 1342(b), NPDES Program Authorizations, https://www.epa.gov/npdes/npdes-program-authorizations (last visited October 31, 2016); another two have assumed section 404 permitting under 33 U.S.C. § 1344(g), 40 C.F.R. § 233.70-.71. All States are responsible for developing water quality standards for those "waters of the [United] State[s]" that lie within their borders. 33 U.S.C. § 1313. They must report on the condition of those waters to EPA every two years, *id.* § 1315, and if waters are not achieving their designated standards, the States must develop detailed pollution diets for the underperforming waters and submit those plans to EPA for approval, *id.* § 1313(d). Finally, States must issue water quality certifications for every federal permit that is issued by EPA or the Corps within their borders. *Id.* § 1341. In short, the regulatory

obligations of the thirty-one State Petitioners under the CWA are inextricably entwined with the scope of federal jurisdiction established by the term "waters of the United States."

For waters that are not subject to section 402 or 404 permitting requirements, the States regulate the water quality and use of such waters under their independent sovereign authority. *See, e.g.*, N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.*

B. Supreme Court Precedent

The Rule is not the first time the Agencies have attempted to expand their jurisdiction through unlawful interpretation of the statutory phrase "waters of the United States." The Supreme Court has twice in the last fifteen years rejected the Agencies' overbroad reading of that phrase.

In *SWANCC*, the Court invalidated the Migratory Bird Rule, which asserted jurisdiction over waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. at 164. The Corps exceeded its authority, the Court held, because it claimed authority over "nonnavigable, isolated, intrastate waters," *id.* at 172, such as seasonal ponds, *id.* at 163. The Court supported its determination by finding that the Corps' interpretation would "alter[] the federal-state framework by

permitting federal encroachment upon a traditional state power"—specifically, the States' "traditional and primary power over land and water use." *Id.* at 173-74. The Court held that Congress had not, in the CWA, "express[ed] a desire to readjust the federal-state balance in this manner" or to invoke the "outer limits" of its power. *Id.* at 172-74.

In *Rapanos*, the Court rejected the Corps' assertion of authority over intrastate wetlands that are not significantly connected to navigable-in-fact waters. 547 U.S. 715. The Court's majority consisted of a four-Justice plurality opinion and Justice Kennedy's concurrence in the judgment. The plurality concluded that the CWA "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and "wetlands with a continuous surface connection to" those waters, *id.* at 742. The plurality said that "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall" are outside CWA jurisdiction. *Id.* at 739.

Justice Kennedy, in turn, explained that the Agencies only have authority over waters that are navigable-in-fact and waters with a "significant nexus" to such navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment)

(citing *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940)). A water has a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water. *Id.* at 779-80. Under Justice Kennedy's approach, the Agencies are not permitted to assert jurisdiction over all "wetlands (however remote)" or all "continuously flowing stream[s] (however small)." *Id.* at 776; *see also id.* at 769 ("merest trickle, [even] if continuous" is insufficient). Justice Kennedy also specifically rejected the Corps' "theory of jurisdiction," namely, any "adjacency to tributaries, however remote and insubstantial." *Id.* at 780.

C. The Proposed Rule

On April 21, 2014, the Agencies published a proposed rule redefining "waters of the United States." 79 Fed. Reg. 22,188 (Apr. 21, 2014) ("Proposed Rule"). The Agencies proposed to categorize primary waters as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," as well as "[a]ll interstate waters, including interstate wetlands" and "the territorial seas." *Id.* at 22,262. The Proposed Rule then provided three additional categories of waters that would fall within the definition of "waters of the United States": (1) all "tributaries" of primary waters would be per se jurisdictional; (2) all waters "adjacent" to primary waters would be per se jurisdictional, with "adjacency" defined as including all waters lying in a "riparian

area" or "flood plain"; and (3) additional waters, on a case-by-case basis, that "alone or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a" primary water, meaning they "significantly affect[] the chemical, physical, or biological integrity" of a primary water. *Id.* at 22,269.

The Proposed Rule triggered more than one million comments, including comments from the States. A prevailing theme in many of the State comments was that the proposal reached too many local water and land features that are remote from navigable waters. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__);[1] WY DEQ Comments 3, ID-18020 (JA__); AK DEC Comments 27, ID-19465 (JA__); TX AG Comments 6, ID-5143 (JA__). The States also expressed concern that the Connectivity Study, used as the primary scientific support for the Proposed Rule, failed to address adequately the significance of the connection between waters. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); ND Comments 5-6, ID-15365 (JA__). The States were also concerned that only a draft of the Connectivity Study was available during the comment period. *See* AK DEC Comments 11, ID-19465 (JA__). The Agencies failed to release a final and

[1] Citations to record materials within this brief are as follows: short title, a pinpoint page reference if applicable, an abbreviated EPA docket number, and a reference to the joint appendix.

significantly revised version of that report until two months *after* the close of the comment period. *See* Connectivity Study, ID-20859 (JA__); 80 Fed. Reg. 2,100 (Jan. 15, 2015).

Commenters also called for the Corps to comply with NEPA by preparing an Environmental Impact Statement ("EIS") assessing the environmental and socioeconomic effects of the Proposed Rule, as compelled by 42 U.S.C. § 4332(2)(C). *See* AK DEC Comments 15-16, ID-19465 (JA__). The Corps ignored those comments and instead prepared a more streamlined Environmental Assessment ("EA")[2] and corresponding Finding of No Significant Impact ("FONSI"),[3] determining that the Rule fell below the significance threshold triggering the need for full evaluation in an EIS. And it waited to release those reports until six months *after* the close of the public comment period, shielding the Agencies from public scrutiny. *Compare* 79 Fed. Reg. 61,590, 61,591 (Oct. 14, 2014) (comments on proposed rule due November 14, 2014), *with* Final EA, ID-20867 (JA__) (released May 26, 2015).

D. The Final Rule

The Agencies published the Final Rule in the Federal Register on June 29, 2015. The Rule incorporates the proposal's definition of primary waters and

[2] Final EA, ID-20867 (JA__).
[3] FONSI, ID-20867 (JA__).

largely retains the proposal's sweeping approach to "tributaries," but then adopts a significantly different approach to "adjacent" waters and case-by-case waters. Importantly, several of the central components that guide the Rule's approach for adjacent waters and case-by-case waters are not even discussed, let alone analyzed, in the administrative record.

In general, the Rule includes three aspects that are relevant for the States' challenge in the present case:

Tributaries. The Rule claims per se jurisdiction over "[a]ll tributaries," 33 C.F.R. § 328.3(a)(5),[4] defined as any "water that contributes flow, either directly or through another water" to a primary water and that is "characterized by the presence of the physical indicators of a bed and bank and an ordinary high water mark," *id.* § 328.3(c)(3). This includes even usually dry channels that provide "intermittent or ephemeral" flow through "any number" of links. 80 Fed. Reg. at 37,076.

Adjacent Waters. The Rule asserts automatic jurisdiction over all waters "adjacent" to primary waters and their "tributaries." 33 C.F.R. § 328.3(a)(6). The Rule defines "adjacent" as all waters "bordering, contiguous, or neighboring"

[4] The Final Rule's definition of "waters of the United States" is located in multiple parts of the Code of Federal Regulations. For ease of reference, this brief refers to the first location identified in the Rule, 33 C.F.R. Part 328.

primary waters, impoundments, or tributaries. *Id.* §328.3(c)(1). This includes "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like." *Id.* Departing significantly from the Proposed Rule, the Final Rule then defines "neighboring" to cover: (1) "all waters" any part of which are within 100 feet of the ordinary high water mark of a primary water or "tributary;" (2) "all waters" any part of which are within 1,500 feet of the ordinary high water mark of a primary water or "tributary" and within its 100-year floodplain; and (3) all waters any part of which are within 1,500 feet of the high tide line of a primary water. *Id.* §328.3(c)(2).

The Final Rule also adds an exclusion from the adjacent waters categories—not even mentioned in the Proposed Rule—for "[adjacent w]aters being used for established normal farming, ranching, and silviculture activities." *Id.* § 328.3(c)(1). The Agencies did not explain why the per se jurisdictional tributaries category contains no similar exclusion.

Case-by-case Waters. The Final Rule allows the Agencies to exercise authority on a case-by-case basis over waters and land features in a way that differs significantly from the proposal. The Rule grants the Agencies authority, on a case-by-case basis, over those "waters [at least partially] located within the 100-year floodplain of a" primary water and "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water,

impoundment, or tributary so long as the Agencies find a significant nexus with a primary water. *Id.* § 328.3(a)(8).

Under the Final Rule, a water will be deemed to have a "significant nexus" to a primary water if that water, "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water]" based on "any single function or combination of functions performed by the water." *Id.* § 328.3(c)(5) (emphasis added). For example, if bird species like ducks use hydrologically isolated wetlands for foraging and feeding, that use would extend federal jurisdiction to the isolated wetland. *See* 80 Fed. Reg. at 37,093. The same would be true if insects breed in an isolated wetland or marsh and then terminate their life cycle as food for fish or fowl in a non-navigable stream that crosses a state border. *See id.* And isolated wetlands or depressions could be deemed jurisdictional precisely *because of* their isolation—if the Agencies determine that such features store water, trap sediment, or cycle nutrients, they can be deemed jurisdictional individually or in conjunction with other similar waters. *See id.*

E. This Litigation

After the Rule was published in the Federal Register, thirty-one States filed petitions for review in courts of appeals. Pursuant to 28 U.S.C. § 2112, those petitions were consolidated in this Court. On October 9, 2015, this Court stayed

the Rule nationwide, finding that "it is far from clear that the new Rule's distance limitations are harmonious" with *Rapanos*, and that "the rulemaking process by which the distance limitations were adopted is facially suspect." *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015). After granting the stay, this Court held that it has jurisdiction under 33 U.S.C. § 1369(B)(1)(F). *In re U.S. Dep't of Defense and U.S. EPA Final Rule*, 817 F.3d at 274; *id.* at 282-83 (Griffin, J., concurring in the judgment).

SUMMARY OF ARGUMENT

I. The Rule exceeds the Agencies' authority under the CWA.

Agencies can only exercise power that has been delegated to them by Congress. In just the last fifteen years, the Supreme Court has twice rebuked the Agencies for regulating beyond the boundaries set by Congress in the CWA, but the Agencies continue to defy those boundaries. In fact, the Rule regulates the very same waters the Court held fall outside the scope of the CWA in *SWANCC* and *Rapanos*.

The Agencies claim to rely exclusively on Justice Kennedy's *Rapanos* concurrence, but the Rule plainly violates this approach. For example, the Rule's tributaries category sweeps in usually dry channels that at most occasionally carry the "[t]he merest trickle[s]" into navigable waters. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment). The adjacency category covers waters

simply because they are somewhat near a remote "tributary," which are the *very same* waters that Justice Kennedy specifically explained fell outside of the CWA. *See id.* This category also asserts jurisdiction over land features that might link to navigable waters, if at all, only during once-in-a-century rainstorms, which exceeds any reasonable notion of a "significant nexus." And the case-by-case waters category sweeps in—among many other features—the very same waters that the Supreme Court held were not jurisdictional in *SWANCC*, a decision that Justice Kennedy relied upon heavily.

The Rule also fails the test set out in the *Rapanos* plurality opinion because it includes isolated tributaries, non-adjacent waters misleadingly termed "adjacent," and waters on a case-by-case basis that also are without a surface connection to relatively permanent navigable waters. The Agencies do not even argue that the Rule satisfies this test, and any such argument would be impossible.

Even if the Rule were not prohibited by the Supreme Court's clear directives on the meaning of the phrase "waters if the United States," the Rule's assertion of broad authority at, and beyond, constitutional limits requires clear congressional authorization. The Supreme Court in *SWANCC* held that the assertion of federal authority in that case was unlawful, in part, to avoid serious constitutional concerns. These concerns apply with much greater urgency to the Rule, which covers not only the very same waters at issue in *SWANCC*, but innumerable other

local land and water features, the regulation of which is a core sovereign function of the States.

II. The Agencies adopted the Rule in plain violation of the APA.

The Agencies unlawfully built the Final Rule around five distance-based components and an unduly narrow exclusion that are not even arguably a "logical outgrowth" of the proposal. The Final Rule's adjacency and case-by-case waters categories are oriented around several distance-based components that were nowhere mentioned in the Proposed Rule. The Agencies' notice was so lacking as to these components that the Agencies have not been able to identify even a single comment, out of more than a million, that addresses any of the components. This sort of procedural failure would be unacceptable as to any agency rule, but it is particularly egregious given the context of this rulemaking, which defines how millions of acres of local land and water features will be regulated.

The Agencies' failure to comply with the APA's notice-and-comment requirements contributed to another APA violation: the failure to offer record support for the Final Rule. The five distance-based components and the unduly narrow exclusion lack *any* record support, forcing the Agencies to rely upon vague assertions of "reasonable and practical" distinctions and unspecified "experience" to justify their inclusion. 80 Fed. Reg. at 37,085-91. These conclusory statements are insufficient to justify the Rule.

The Agencies' "significant nexus" analysis in support of the Final Rule is similarly problematic. The Agencies rely heavily on the scientific analysis in their Connectivity Study to support their expansive new assertion of jurisdiction. But the science simply supports the unremarkable conclusion that upstream waters are connected to downstream waters. The science does not establish the significance of that connection, as the law requires.

III. The Rule violates the Constitution in three principal ways.

First, it intrudes upon the States' sovereign interests in regulating their land and water resources in violation of the Tenth Amendment, contrary to the core federalism principles also reflected in the CWA. *See* 33 U.S.C. § 1251(b). The Rule asserts jurisdiction over local land and water features that have only a remote connection, if any, to navigable-in-fact waters, turning the Agencies into a "*de facto*" federal "zoning board." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). This imposes significant burdens on the States, and deprives the States of their sovereign land-use authority.

Second, the Rule exceeds Congress's constitutional authority under the Commerce Clause because it assigns the federal government jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. *See SWANCC*, 531 U.S. at 173.

Third, the Rule violates the Due Process Clause because it is unconstitutionally vague. The Rule defines jurisdictional tributaries based on the presence of ordinary high water marks and other difficult-to-identify features, which are "so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application," *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007). Similarly, the Rule allows the Agencies to assert jurisdiction over waters on a case-by-case basis without providing sufficient guidance for making such a determination, making it impossible for ordinary citizens to know when their lands will be swept within the CWA on an enforcement agent's whim.

IV. The Corps violated NEPA in at least three ways.

First, the Corps violated NEPA by failing to prepare an EIS analyzing the environmental and socioeconomic effects of the Final Rule. As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily triggered NEPA's EIS requirement.

Second, the Corps relied on a wholly inadequate EA to determine that the Final Rule will not have significant effects on the human environment. The EA was devoid of analysis of key factors that, if considered, would have prompted any reasonable agency to prepare an EIS.

Third, the Corps' alternatives analysis was similarly defective. The Corps analyzed only two options: the Final Rule and the existing post-*Rapanos* regulatory regime. The Corps ignored reasonable and feasible alternatives, including several raised by the States during the public comment period on the Proposed Rule. By narrowing the range of alternatives considered, the Corps narrowed its scope of review, depriving the public and the States of meaningful participation.

ARGUMENT

I. THE RULE VIOLATES THE CLEAN WATER ACT.

The Rule's interpretation of the statutory term "waters of the United States" in the CWA cannot be squared with the Act or the Supreme Court's understanding of that term. As the CWA makes clear, "waters of the United States" is synonymous with "navigable waters." 33 U.S.C. §§ 1362(7), 1362(12). This means that any reasonable interpretation of "waters of the United States" must apply to navigable-in-fact waters and, at the very most, additional waters that directly impact the water quality of navigable-in-fact waters. The plain terms of the CWA do not permit the Agencies to sweep in local, isolated waters and land features, which have only a tangential relationship to navigable-in-fact waters. In fact, it is a "central requirement" of the Act that "the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778 (Kennedy, J., concurring in the judgment).

In two opinions, a majority of the Supreme Court in *Rapanos* rejected a previous attempt by the Corps to define the phrase "waters of the United States" in a manner that swept in waters remote from navigable-in-fact waters. A four justice plurality concluded that the phrase applies only to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality). Justice Kennedy concurred in the judgment, explaining instead that "waters of the United States" includes waters "navigable in fact or that could reasonably be so made" and waters with a "significant nexus" to a navigable-in-fact water. *See id.* at 759, 779 (Kennedy, J., concurring in the judgment).

Under *Marks v. United States*, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case[,] . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation omitted). This Court has not yet decided which opinion controls under *Marks*, *see United States v. Cundiff*, 555 F.3d 200, 208-09 (6th Cir. 2009), and it need not do so here. Given that the Agencies justified the Rule based solely on Justice Kennedy's test, the Rule must be held unlawful if it fails that test. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Even if the Agencies are not bound by their reliance on Justice Kennedy's test, the Rule also

fails the plurality's test. And, at the very minimum, if any doubt remains as to the Rule's legality under either test, that doubt is settled under avoidance principles—as invoked by the Supreme Court in *SWANCC*—because the Rule goes to (and beyond) the limits of Congress's constitutional authority and settles questions of deep political significance.

A. The Rule Fails Justice Kennedy's Significant Nexus Test.

In *Rapanos*, Justice Kennedy concluded that the CWA covers only "waters that are or were navigable in fact or that could reasonably be so made" and secondary waters with a "significant nexus" to a navigable-in-fact water. 547 U.S. at 759 (Kennedy, J., concurring in the judgment). A significant nexus exists where the water "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of" a navigable-in-fact water. *Id.* at 780. This means that the CWA does not include waters with a "speculative or insubstantial" nexus to navigable waters. *Id.* at 780. Thus, Justice Kennedy explained that the CWA does not extend to all "wetlands (however remote)," all "continuously flowing stream[s] (however small)," *id.* at 776, and all waters containing "[t]he merest trickle, [even] if continuous," *id.* at 769. Justice Kennedy specifically rejected the Corps' approach of sweeping in all wetlands actually adjacent to tributaries of navigable waters, "however remote and insubstantial," *id.* at 778-79, explaining that the standard's breadth "preclude[d] its

adoption," *id.* at 781. The Rule violates Justice Kennedy's approach in multiple respects.

1. Per Se Coverage Of "Tributaries." The Rule's provision that all "tributaries" of primary waters are per se "waters of the United States" cannot be squared with Justice Kennedy's approach. Under the Rule, a tributary is any land feature with "a bed and banks and an ordinary high water mark" and that "contributes flow"—no matter how ephemeral—"either directly or through another water" to a primary water. 33 C.F.R. § 328.3(c)(3). This covers land features with "one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground)." *Id.* If there is such a break, the feature is still a tributary if it has "a bed and banks and an ordinary high water mark [that] can be identified upstream of the break." *Id.* A feature also qualifies as a tributary if it contributes flow (even through a chain of "any number" of other waters) to a primary water. *Id.*; 80 Fed. Reg. at 37,076. As a result, tributaries under the Rule include typically dry land features that indirectly and only occasionally contribute even a mere trickle into a navigable water. *See* 80 Fed. Reg. at 37,076. This wide-reaching definition fails Justice Kennedy's test because it provides no "assurance" that jurisdictional waters have a *significant* nexus to a

navigable water. *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment).

First, the Rule sweeps in features based upon the fact that they "contribute[] flow," 33 C.F.R. § 328.3(c)(3), even if the flow is "intermittent" or "ephemeral" and "only in response to precipitation events," 80 Fed. Reg. at 37,076-77; *see also id.* (adding that the presence of such "tributaries" may be "infer[red]" through "desktop tools" where not apparent through "direct field observation"). This disregards Justice Kennedy's concern that the "volume and regularity" of flow are relevant to decide whether a feature plays a sufficient role in "the integrity of an aquatic system" to establish a significant nexus to a navigable-in-fact water, *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Justice Kennedy expressly rejected jurisdiction over features with "[t]he merest trickle [even] if continuous." *Id.* at 769.

Second, the Rule's ordinary high water mark ("OHWM") criterion does not sufficiently identify "flow" to satisfy Justice Kennedy's test. The Rule defines an OHWM as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(6). In

Rapanos, Justice Kennedy rejected reliance on the OHWM as a "determinative measure" for establishing a significant nexus. 547 U.S. at 761, 781 (Kennedy, J., concurring in the judgment) (citing 33 C.F.R. § 328.3(e) (2005)). Justice Kennedy concluded that the use of an OHWM as a standard could "provide[] a rough measure of the volume and regularity of flow" if it were consistently applied. *Id.* at 781. "Yet the breadth of this standard . . . 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." *Id.* Such a standard would sweep in waters "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-82.

In fact, the Agencies' own studies demonstrate that the presence of an OHWM has no connection to water flow and fails to provide assurance of a significant nexus to navigable waters. For example, a 2006 Corps study found "no direct correlation between the location of OHWM indicators and the inundation areas" in the arid southwest.[5] Rather, the indicators are "frequently the result of moderate to extreme flood events," and "are not associated with any return interval

[5] Robert W. Lichvar et al., U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability in Identifying the Limits of "Waters of the United States" in Arid Southwestern Channels* 14 (2006), http://acwc.sdp.sirsi.net/client/search/asset/1001678; *see also* AMA Comments 10-11, ID-13951 (JA__).

event or with physical channel features found in the field." *Id.* Similarly, a 2013 Corps study concluded that "OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics."[6] The Rawhide Wash in Scottsdale, Arizona provides a compelling example of why these studies are accurate. The Wash only conveyed flow 12 times over a 15-year period, *for a total of 18 hours during that time*. City of Scottsdale Comments 3, ID-18024 (JA__). Like most washes in the city, the flow is highly episodic and infiltrates the permeable soils long before it reaches a navigable-in-fact water. *Id.* But that does not matter under the Rule, as this and similar dry washes in Arizona and throughout the arid southwest would be subject to automatic federal jurisdiction under the new tributary definition. In short, the presence of OHWM provides no indication of the regularity of flow and no indication of other channel characteristics that could justify a significant nexus.

Third, the "bed and banks" requirement is an even less reliable measure of water flow than the OHWM rejected by Justice Kennedy. For example, "erosional channels or cuts often will appear to have a distinguishable bed and banks . . . , but [those] are not evidence that the channels actually contribute flow to [navigable

[6] Lindsey Lefebvre, et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540; *see also* AMA Comments 11, ID-13951 (JA__).

waters]." AMA Comments 9, ID-13951 (JA__); *see also* WAC Comments 34, ID-14568 (JA__) ("Bed, banks, and OHWM can be seen even in features without ordinary flow."). Particularly in the arid west, channels with a bed and banks do not necessarily convey even a minimal amount of water. *See* Freeport Comments 2, ID-14135 (JA__); City of Scottsdale Comments 3-5, ID-18024 (JA__). The bed and banks requirement thus provides no assurance that a water "significantly affect[s] the chemical, physical, and biological integrity of" a navigable water, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

Fourth, any doubt about the propriety of the Rule's tributaries category is dispelled by its inclusion of the remote "drains, ditches and streams" that Justice Kennedy explained fall outside the CWA. *Id.* at 781. The Rule covers "[d]itches with perennial flow, . . . [d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, . . . [and] [d]itches, *regardless of flow*, that are excavated in or relocate a tributary." 80 Fed. Reg. at 37,078 (emphasis added). These are the "drains, ditches and streams" carrying only minor water volumes that Justice Kennedy references. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in the judgment). The Agencies' explanation that they will identify some ditches based not on current conditions but on the "historical presence of tributaries," 80 Fed. Reg. at 37,078-79, simply confirms their failure to comply with the limits of Justice Kennedy's analysis.

2. Per Se Coverage Of All "Adjacent" Waters. The Rule's per se coverage of all "adjacent" waters is also irreconcilable with Justice Kennedy's approach. The Rule defines adjacent waters as, *inter alia*, (1) "all waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary; (2) all "waters located within the 100-year floodplain of a" primary water, impoundment, or tributary "and not more than 1,500 feet from the ordinary high water mark of such water;" and (3) "all waters [at least partially] located within 1,500 feet of the high tide line of a" primary water. 33 C.F.R. § 328.3(c)(2).

As a threshold matter, because the Rule's per se coverage of "tributaries" is unlawful, any assertion of jurisdiction over "adjacent waters" is illegal to the extent it relies on a connection with a "tributary." As explained above, the Rule's coverage of tributaries violates Justice Kennedy's test by sweeping in waters regardless of frequency, duration, or volume of flow or proximity to navigable waters. It follows that "adjacent waters" included solely on account of their connection to a tributary necessarily lack a "significant nexus" to interstate, navigable waters. Indeed, this aspect of the Rule flagrantly violates Justice Kennedy's explicit holding in *Rapanos*. Justice Kennedy rejected the Corps' prior approach of asserting jurisdiction over all wetlands actually adjacent to tributaries of navigable-in-fact waters. *Rapanos*, 547 U.S. at 778-83 (Kennedy, J., concurring

in the judgment). In the Rule, the Agencies double down on this unlawful assertion of authority by defining adjacency itself far more broadly than the adjacency notion that Justice Kennedy found insufficiently robust when dealing with tributaries of navigable-in-fact waters.

The adjacency definition itself fails to satisfy Justice Kennedy's test, even when not dealing with tributaries.

Most obviously, the first part of the Rule's adjacency definition—per se coverage of all waters within the 100-year floodplain and within 1,500 feet of a primary water or a "tributary," 33 C.F.R. § 328.3(c)(2)(ii)—extends to small ponds, drainages, and wetlands simply because they might have a relationship with such water during a once-in-a-century storm. That plainly violates Justice Kennedy's approach in *Rapanos*, which requires "assurance" that a water "significantly affect[s]" the "chemical, physical, and biological integrity" of a "navigable waters in the traditional sense," 547 U.S. at 779-81 (Kennedy, J., concurring in the judgment). As Justice Kennedy explained, "[a] mere hydrologic connection should not suffice in all cases," because it "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 784-85. A once-in-a-hundred-years hydrologic connection is surely too insubstantial given its infrequency.

Thus, the Rule's categorical claim of federal jurisdiction over all "adjacent" waters as far as 1,500 feet from a "tributary" is far more expansive than the Corps' jurisdictional theory Justice Kennedy rejected in *Rapanos* as "precluded" by the CWA. *See id.* at 781; *see also id.* at 778-79 (Corps cannot regulate simply "whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."). And the Rule's labeling these waters as "adjacent" also fails under *SWANCC*, upon which Justice Kennedy relied in *Rapanos*. After noting that *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), had upheld federal jurisdiction "over wetlands that actually abutted on a navigable waterway," the Court in *SWANCC* rejected jurisdiction over "ponds that are *not* adjacent to open water." 531 U.S. at 167-68; *see also Sackett v. EPA*, 132 S. Ct. 1367, 1370 (2012) (contrasting abutting waters in *Riverside* with non-adjacent waters in *SWANCC* and *Rapanos*); *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (using the *Rapanos* understanding that "adjacent" does not mean "merely 'nearby'" in a Clean Air Act case).

The Rule's other two distance-based adjacency categories—"all waters [at least partially] located within 100 feet of the ordinary high water mark of a" primary water, impoundment, or tributary, and "all waters [at least partially] located within 1,500 feet of the high tide line of a" primary water—are similarly

unlawful. 33 C.F.R. § 328.3(c)(2). EPA's Science Advisory Board noted that "'the available science supports defining adjacency or determination of adjacency on the basis of *functional relationships*,' rather than 'solely on the basis of *geographical proximity of distance* to jurisdictional waters.'" 80 Fed. Reg. at 37,064 (citation omitted) (emphasis added). Yet, the Agencies based definitions of adjacent waters "solely" on "geographical proximity." These definitions do not provide the necessary assurance that the covered land features "play an important role in the integrity of . . . navigable waters," *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring in the judgment).

3. Case-By-Case Waters. The Rule's approach to case-by-case jurisdictional waters is also inconsistent with Justice Kennedy's test. Under the Rule, the Agencies can assert jurisdiction over all waters determined to have a "significant nexus to a" primary water, provided that the waters are: (1) "located within the 100-year floodplain of a" primary water; or (2) "located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment or tributary. 33 C.F.R. § 328.3(a)(8). Based on the "functions performed by the water," a "significant nexus" exists if the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of a [primary water]." 33 C.F.R. § 328.3(c)(5) (emphasis added). The functions include, among others, "[c]ontribution of flow,"

"[e]xport of organic matter," "[e]xport of food resources," and "[p]rovision of life cycle dependent aquatic habitat" for "species located in" primary waters. *Id.* By EPA's own admission, the definition covers "the vast majority of the nation's water features." Economic Analysis 11, ID-20866 (JA__).

The Rule's definition of "significant nexus" covers far more waters than permitted under Justice Kennedy's approach. The Rule permits jurisdiction if a water affects just one aspect of a primary water, not just a navigable water: the "chemical, physical, or biological integrity" of that water. Thus, it expressly permits the Agencies to find a "significant nexus" based solely on a single function, such as "contribution of flow" or "provision of life cycle dependent aquatic habitat" for "species located in" primary waters. 33 C.F.R. § 328.3(c)(5). This means, for example, that the Rule allows for jurisdiction simply if a water affects "dispersal," 80 Fed. Reg. at 37,063, 37,072, 37,094, which is when "[p]lants and invertebrates" "'hitchhik[e]'" on waterfowl. Connectivity Study 5-5, ID-20859 (JA__).

In contrast, Justice Kennedy would permit regulation of an intrastate water only where it "significantly affects" the "chemical, physical, *and* biological integrity" of a navigable water in the traditional sense. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment) (emphasis added). The difference is illustrated by the Supreme Court's decision in *SWANCC*, on which Justice

Kennedy relied in developing his test. In *SWANCC*, the Supreme Court rejected the Corps' argument that it had jurisdiction over isolated sand and gravel pits based merely on the presence of "approximately 121 bird species" that "depend upon aquatic environments for a significant portion of their life requirements." 531 U.S. at 164. As Justice Kennedy explained in *Rapanos*, the Corps' argument in *SWANCC* did not establish a sufficient "connection" between the isolated pits and navigable waters. 547 U.S. at 779 (Kennedy, J., concurring in the judgment). But under the Rule's permissive approach to case-by-case waters, the asserted basis for jurisdiction in *SWANCC* would be sufficient. Several of the bases for jurisdiction discussed above—*e.g.*, provision of "life cycle dependent aquatic habitat[s]" and impact on "dispersal"—are in practical effect no different from the Corps' reliance in *SWANCC* on the mere presence of migratory birds (since, for example, such birds necessarily engage in "dispersal" as they fly from navigable-in-fact to remote waters).

4. Interstate, Non-Navigable Waters. The Rule also violates Justice Kennedy's test because its definition of primary waters—from which the Rule's definitions of tributaries, adjacency, and case-by-case waters then operate—includes a category of waters that are not "navigable in fact," *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment), and "could [not] reasonably be so made," *id.* at 759. Specifically, the Rule's primary waters definition covers

"interstate waters, including interstate wetlands," 33 C.F.R. § 328.3(a)(2), even where such waters are not "navigable in fact" and "could [not] reasonably be so made," *Rapanos*, 547 U.S. at 759, 778 (Kennedy, J., concurring in the judgment). Under Justice Kennedy's test, the CWA protects waters that are navigable and those additional waters that have a significant nexus to such navigable waters. Both Justice Kennedy and the statutory text make clear that non-navigable waters—whether they are interstate or not—are not the focus of the CWA. Accordingly, the Rule should not premise jurisdiction over non-navigable waters on a purported significant nexus to non-navigable interstate waters. To the extent that any category of such interstate waters is covered by the CWA, they could only be included under Justice Kennedy's approach after a showing that they have a significant nexus to navigable-in-fact waters.

B. The Rule Fails The *Rapanos* Plurality's Test.

Although the Agencies are precluded from arguing that the *Rapanos* plurality opinion justifies the Final Rule, *see Chenery*, 318 U.S. at 95, such an argument would fail in any event. The *Rapanos* plurality concluded that the CWA "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)),

and "those wetlands with a continuous surface connection to" those waters, *id.* at 742. It does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739. The Rule violates these principles for at least four reasons.

First, the Rule's tributary definition includes features with intermittent or ephemeral flow in excess of the *Rapanos* plurality's reading of the CWA. The Agencies admit that the Rule covers "perennial, intermittent, [and] ephemeral" streams with "flowing water only in response to precipitation events in a typical year." 80 Fed. Reg. at 37,076. But the plurality specifically found it unreasonable to read "waters of the United States" to include "channels containing merely intermittent or ephemeral flow." *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality).

Second, the Rule's per se coverage of adjacent waters fails the plurality's test because it does not require any continuous surface connection to relatively permanent bodies of water. The Rule includes all waters within the 100-year floodplain and within 1,500 feet of the OHWM of a primary water regardless of actual connectivity or the significance of that connectivity. 33 C.F.R. § 328.3(c)(2)(ii). Many waters in these areas are on average connected to a primary water only once every one-hundred years, which falls far short of a "continuous surface connection" with a relatively permanent water. In addition, the Rule includes waters based solely on a connection to a "tributary," which as

explained earlier can be usually dry channels. Although there may be a connection, that connection is not to a "relatively permanent, standing or flowing bod[y] of water." *See Rapanos*, 547 U.S. at 732. And because the Rule includes waters based solely on certain distances, including from any "tributary" in a long chain, *see* 33 C.F.R. § 328.3(c)(2), it sweeps in waters with no surface connection to any body of water, let alone a continuous surface connection to a primary water.

Third, the Rule's assertion of case-by-case jurisdiction also covers waters with no continuous surface connection to a relatively permanent body of water, in violation of the *Rapanos* plurality. The Rule's definition of "significant nexus" can be satisfied based on any one of a number of functions, which can be present even if a continuous surface connection is absent. For example, a usually dry channel could meet the requirement for "[c]ontribution of flow," 33 C.F.R. § 328.3(c)(5), during a rare heavy rainstorm and yet lack "a continuous surface connection" with the water. Similarly, an isolated body of water that is used by some wildlife might affect the "[p]rovision of life cycle dependent aquatic habitat . . . for species located in a [primary] water," 33 C.F.R. § 328.3(c)(5), and yet lack a "continuous surface connection" with the primary water.

Fourth, the Rule's inclusion of non-navigable interstate waters as a primary water, 33 C.F.R. § 328.3(a), also violates the plurality's approach. The plurality held that the CWA is concerned with protecting "a relatively permanent body of

water connected to traditional interstate navigable waters." *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality). Clearly, non-navigable interstate waters fall outside of that understanding.

C. The Rule Is Not Clearly Authorized By The CWA.

Even if the Rule were not plainly foreclosed by the CWA, the Rule would still exceed the Agencies' statutory authority because its transformational exercise of authority is not clearly authorized by Congress. It is well-established that "'Congress legislates against the backdrop' of certain unexpressed presumptions," *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), two of which apply here. The first is that Congress does not delegate to agencies authority at the outer reaches of Congress's power except in clear terms. *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* The second is that Congress does not grant transformative authority to regulate matters of vast political and economic significance absent a clear statement. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). Both of these presumptions require a clear

statement from Congress to justify the Rule's assertion of the broad authority that it claims. Such a statement is clearly missing here.[7]

First, clear congressional authorization is required for a rule that raises serious federalism concerns. It is a "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089 (internal quotation and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Thus, if Congress intends to legislate "in traditionally sensitive areas, such as legislation affecting the federal balance," it must make its intention plain. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest.'"); *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016) (finding that "[a]ny attempt by the federal government to interpose itself into [the] state-subdivision relationship therefore must come about by a clear directive from Congress").

[7] For these and other reasons, the Agencies are not entitled to any deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* Opening Br. for the Business & Municipal Pet'rs Part III.C.

The Supreme Court applied this clear statement rule in *SWANCC* to invalidate an assertion of CWA jurisdiction by the Corps far less capacious than what is at issue in the Rule. Finding "nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit," the Court rejected the agency's claimed jurisdiction because it "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The Court noted 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.* (quoting 33 U.S.C. §1251(b)).

Similarly, the plurality in *Rapanos* applied the clear statement rule to bolster its rejection of the Corps' attempt to extend CWA jurisdiction to "intermittent" and "ephemeral flows of water." 547 U.S. at 737-38 (Scalia, J., plurality). The plurality found that any attempt to federally regulate such water would not only be "an unprecedented intrusion into traditional state authority," but would also "stretch[] the outer limits of Congress' commerce power and raise[] difficult questions about the ultimate scope of that power." *Id.* at 738. That sort of authority requires a "clear and manifest statement from Congress," and "the phrase 'the waters of the United States' hardly qualifies" as such a statement. *Id.*; *see also*

id. ("[W]e would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

The Rule likewise reaches and even exceeds the outer bounds of Congress's constitutional authority. The Rule's expansion of federal authority over intrastate waters will "impinge[] o[n] the States' traditional and primary power over land and water use," and "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174. The Rule's coverage of intermittent waters, ephemeral waters, and isolated sometimes-wet lands "presses the envelope of constitutional validity," *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality) (citation omitted), far more than the challenged agency actions in *Rapanos* and *SWANCC*.

The Agencies cannot point to a clear statement from Congress authorizing the expansion of authority they assert. The CWA provides only that the Agencies may require permits for pollutant discharges to "navigable waters" defined as "waters of the United States." This text does not support the Agencies' expansive interpretation, and certainly does not do so clearly. *See SWANCC*, 531 U.S. at 174. To the contrary, Congress expressed an intent 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).

Second, recent Supreme Court cases have made clear that agencies cannot exercise transformative power over matters of vast economic and political

significance without clear congressional authorization. In *UARG*, EPA attempted to expand two Clean Air Act programs to cover sources based only on their greenhouse gas emissions. The Supreme Court rejected that effort, explaining that when an agency seeks to "bring about an enormous and transformative expansion" in its authority to make "decisions of vast 'economic and political significance,'" *UARG*, 134 S. Ct. at 2444, under a "long-extant statute," it must point to a clear statement from Congress, *id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The Supreme Court affirmed this principle last year in *King v. Burwell*, 135 S. Ct. 2480 (2015), holding that courts are not to presume that Congress would implicitly delegate to agencies "question[s] of deep 'economic and political significance'" because, if "Congress wished to assign [such] question[s] to an agency, it surely would have done so expressly." *Id.* at 2489 (citation omitted).

In the Final Rule, the Agencies assert transformative authority. The Rule seeks to change fundamentally the allocation of federal and state authority in land and water use. As the plurality noted in *Rapanos*, "extensive federal jurisdiction . . . would authorize the [Agencies] to function as [] *de facto* regulator[s] of immense stretches of intrastate land . . . with the scope of discretion that would befit a local zoning board." 547 U.S. at 738 (Scalia, J. plurality). By the Agencies' own estimate, the Rule will result in an increase in determinations of federal jurisdiction

by 2.84 to 4.65 percent. 80 Fed. Reg. at 37,101. Even accepting as true this under-inclusive estimation of the Final Rule's expansion, *but see, infra,* section IV.A., this seemingly small percentage translates to the assertion of authority over a vast amount of additional water and sometimes-wet land. Such an expansion of authority conflicts with the findings of *Rapanos* and *SWANCC* and allows the Agencies to function as a zoning board with the authority to effectively regulate road construction, building construction, farming, and numerous other activities almost anywhere in the nation. *See, e.g.*, ND Comments 3-4, ID-15365 (JA__); Multi-State Comments 12, ID-7988 (JA__).

The economic implications of the Rule for the landowners, businesses, and public agencies that will be subject to additional federal permitting requirements further demonstrate the Rule's transformative expansion of federal authority. As the Supreme Court observed recently, "[t]he costs of obtaining . . . a permit [from the Corps] are significant," *U.S. Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1812 (2016), and "the permitting process can be arduous, expensive, and long," *id.* at 1815 (citing *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality)). Indeed, "[o]ver $1.7 billion is spent each year by the private and public sectors obtaining wetland permits alone." *Rapanos*, 547 U.S. at 721 (Scalia, J., plurality) (quotation and citation omitted). And those are just the costs associated with permitting. Among other economic implications, the Rule's expansion of the Agencies'

authority will result in lost opportunities when permits improperly required under the expanded federal regime are delayed or are too costly to justify a project in the first place. *See, e.g.*, AK DEC Comments 14, 16, ID-19465 (JA__, __); WAC Comments 78, ID-14568 (JA__).

The Agencies cannot point to a clear statement from Congress authorizing such a transformative expansion of the Agencies' authority over local land and water use. The phrase "waters of the United States" in the CWA cannot plausibly be construed to clearly authorize the wide reach of the Rule.

II. THE RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.

The APA includes two important safeguards relevant to this case. First, an agency must make its rules available for meaningful public comment. 5 U.S.C. § 553(b). Second, a reviewing "court shall . . . hold unlawful and set aside" any final rules that are "arbitrary [or] capricious." *Id.* § 706(2)(A).

There is a critical relationship between these two APA requirements, which this Rule starkly demonstrates. An agency's failure to abide by the strictures of notice-and-comment rulemaking deprives the agency of meaningful comment, increases the likelihood of arbitrary decision-making, and frustrates the courts' ability to conduct meaningful review. For example, when a party challenges a final rule in court, that party is generally "limited to the administrative record" in making its arguments. *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed.*

Highway Admin., 756 F.3d 447, 464-65 (6th Cir. 2014). In turn, the record the party will need to rely upon will often consist of the "responsive data or argument" submitted during the notice-and-comment period. S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945). That is why one of the principal purposes of the notice-and-comment requirement is "to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See Int'l Union, UMWA v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *see also Ohio Dep't of Human Servs. v. U.S. Dep't of Health & Human Servs.*, 862 F.2d 1228, 1236 (6th Cir. 1988). Importantly, when an agency adopts a final rule that is not a "logical outgrowth" of the proposal, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), the result will often be the imposition of significant regulatory requirements on which the record is underdeveloped, or in an extreme example like this case, silent.

The Final Rule here is a textbook example of such a breakdown in the APA's processes. The Agencies constructed the Rule's definition of "waters of the United States" around five central distance-based components and an unduly narrow exclusion that were not even arguably presaged in the proposal. This deprived parties of the opportunity to comment meaningfully on those components, thereby undermining informed agency decision-making and meaningful judicial review. These failures, in turn, contributed to the promulgation of a Rule that is

unsupported by *any* record evidence. These and other failures compel a finding that this rulemaking is arbitrary, capricious, and unlawful.

A. The Agencies Built The Final Rule Around Distance-Based Components And An Unduly Narrow Exclusion That Were Never Submitted For Public Notice-And-Comment.

The APA's notice-and-comment mandate, 5 U.S.C. § 553(b), is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union*, 407 F.3d at 1259. These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). To secure these critical objectives, the final rule must be a "logical outgrowth" of the proposal. *Long Island*, 551 U.S. at 174. A final rule satisfies that test if affected parties "should have anticipated that [the] requirement" embodied in the final rule might be adopted, including because the agency satisfied its duty of informing the public of "the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

The D.C. Circuit has explained that adopting a final rule that is not a logical outgrowth of the proposal "almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). For example, in *Small Refiner*, EPA "gave general notice that it might make unspecified changes in the definition of small refinery." 705 F.2d at 549. The D.C. Circuit held that the agency violated the APA in the final rule by adopting a date-of-ownership limitation on the definition of "small refinery." *Id.* at 548-49. Similarly, in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the court vacated a final rule where the listing of hazardous waste went from a "largely supplementary function" in the proposal to a "heavy emphasis" in the final rule. *Id.* at 751-52. And in *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076 (D.C. Cir. 2009), the agency violated the APA by proposing to allow parties to recommend comparing data from the most recent year, but then adopting a rule that allowed data comparison over the past four years. *Id.* at 1082; *accord Int'l Union*, 407 F.3d at 1259-60; *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

Here, the Final Rule's definition of "waters of the United States" includes five distance-based components and an unduly narrow exclusion that are not a logical outgrowth of the proposal.

1. The first three of these distance-based components involve the definition of per se "adjacent waters." The Proposed Rule defined "adjacent waters" as all

waters within a so-called "riparian area" or "flood plain" of a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies adopted three entirely new distance-based components to define adjacency: (1) waters within 100 feet of a primary water, impoundment, or "tributary;" (2) waters within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or "tributary;" and (3) waters within 1,500 feet of the high-tide line of a primary water. 33 C.F.R. § 328.3(c)(2).

None of these three central "adjacency" distance-based components is a logical outgrowth of the proposal, because no interested party "should have anticipated" them, *Small Refiner*, 705 F.2d at 549. Had proper notice been given, parties from all sides would have submitted comments, data, and detailed maps, addressing the practical import and reasonableness of adopting these particular components. This did not occur because the public had no idea these components were being considered.

Notably, the Agencies cannot identify a single public comment (out of over *one million* submitted) addressing these three distance-based components or the other new components discussed below. The best the Agencies can muster are comments discussing the merits and demerits of distance-based concepts in

general. *See, e.g.*, No. 15-3799, Dkt. 50-1, at 5.[8] The one internal Corps memorandum, No. 15-3799, Dkt. 132-2, that this Court mandated be included in the administrative record confirms this point. Even the Corps was in the dark about these significant modifications to the proposed rule until months after the close of the public comment period. *See* Moyer Memorandum 1, ID-20882 (JA__).

The Agencies' approach thus resulted in a final rule that was never "tested via exposure to diverse public comment," and was adopted in a manner manifestly "[un]fair[] to affected parties," including because it gave "affected parties [no] opportunity to develop evidence in the record to support their objections to the rule." *Int'l Union*, 407 F.3d at 1259. It also deprived the Agencies of information from those "most interested" and "best informed" regarding this subject matter: the regulated community and the state regulators who implement the CWA and related state programs at the field level. *Phillips Petroleum*, 22 F.3d at 620.

The Agencies have argued that they did not violate the APA because in the Proposed Rule they sought comment on "'establishing specific geographic limits'

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[8] Even if the Agencies now manage to locate a comment or two guessing at one of the five standards or the unduly narrow exclusion, this would be of "little significance" because "the agency must itself provide notice of [its] proposal." *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012). Indeed, when comments are "sparse and ambiguous at best," this supports the argument that the notice was not adequate. *Shell Oil*, 950 F.2d at 751.

for adjacency such as 'distance limitations.'" Dkt. 47-1, at 5 (quoting 79 Fed. Reg. at 22,208-09). The Agencies' position appears to be that because they asked about the merits of "geographical limitations" in general, they could then adopt, as a final rule, any distance-based definition of adjacency whatsoever, including both as to the reference point—e.g., "primary water, impoundment, or tributary;" "floodplain;" "high tide line;" *or any other feature*—and to the distance from that reference point—"100 feet," "1,500 feet," *or any other distance*—without seeking public input. This approach could be used to justify virtually "any final [adjacency] rule" and must be rejected. *Envtl. Integrity*, 425 F.3d at 998.

While the Agencies' approach would be unlawful regardless of the context, it is particularly unacceptable given the scope of this rulemaking. The decision as to what qualifies as a "water of the United States" affects how millions of acres of local land and water features are regulated for purposes of the entire CWA. If the Agencies wanted to build the definition of adjacency around distances from certain reference points, they were duty-bound to inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to *both* the particular reference points themselves *and* the particular distances. The Agencies' failure on this score led to an APA failure orders of magnitude more significant than the comparatively banal notice failures involving the definition of "small refinery," *Small Refiner*, 705 F.2d at 549, whether the

listing of wastes would play a "supplementary" or "heavy" role, *Shell Oil*, 950 F.2d at 751-52, or whether data from one or four years could be considered, *CSX*, 584 F.3d at 1078.

2. The next two distance-based components that the Agencies unexpectedly adopted in the Final Rule relate to case-by-case waters. The proposal included a limitless, unlawful approach to these waters, providing that the CWA applied to any water that, in the Agencies' judgment, had a "significant nexus" to a primary water. 79 Fed. Reg. at 22,269. In the Final Rule, the Agencies sought to address the illegality of their proposed approach, but did so in a manner that violated the notice-and-comment requirement (among other defects). Specifically, the Agencies provided that their case-by-case analysis would now relate to, as relevant here: (1) waters within the 100-year floodplain of a primary water; and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. 33 C.F.R. § 328.3(a)(8). The Agencies' decision to add these two distance-based components to the case-by-case waters inquiry violates the notice-and-comment requirement because no regulated parties "should have anticipated," *Small Refiner*, 705 F.2d at 549, that the Agencies would adopt this approach.

The Agencies' defense of their actions with regard to adding these two components is no more credible than with regard to the three adjacency concepts discussed above. The most the Agencies have been able to muster is a citation to

the Proposed Rule's observation that "'distance of hydrologic connection' is one of the factors that could be considered when evaluating a connection with a downstream water." No. 15-3799, Dkt. 50-1, at 6 (quoting 79 Fed. Reg. at 22,214). But this opaque sentence appeared to be addressing factors that the Agencies would take into account *in conducting* their all-things-considered, case-by-case approach. It did not suggest that the Agencies were considering hard-and-fast distance requirements for case-by-case waters, let alone inform the public of "the range of alternatives being considered with reasonable specificity," *Small Refiner*, 705 F.2d at 549, as to either the particular reference points or the particular distances being considered. Notably, the subsections of the proposal that follow this single sentence consist of three-and-a-half pages discussing potential requirements for case-by-case waters, and *none* of the approaches contemplates adopting criteria based upon specific distances from specific reference points. *See* 79 Fed. Reg. at 22,214-17.

3. The sixth and final standard that the Agencies adopted in the Final Rule was that "waters being used for established normal farming, ranching, and silviculture activities" were excluded from per se jurisdiction under the Rule's adjacency category, but not from the tributary category. 33 C.F.R. § 328.3(c)(1). The Agencies "nowhere even hinted," *CSX*, 584 F.3d at 1082, that they were considering treating farmland differently as between the adjacency and "tributary"

categories. Had the Agencies informed the public that they were contemplating this exclusion, the States and farmers would have submitted comments explaining why farmland should be excluded from all per se categories.

B. The Distance-Based Components And Unduly Narrow Exclusion Are Unsupported By The Record.

The APA's judicial review provision provides that a final rule must be "set aside" if that rule is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). While this inquiry is deferential, "[t]he arbitrary-and-capricious standard . . . does not require [courts] merely to rubber stamp the [agency's] decision." *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008) (citation omitted). A rule is arbitrary and capricious if it is unsupported by the record, *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41-42 (1983), does not explain why alternatives were rejected, *id.*, or fails to "treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so," *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). In addition, "conclusory statements will not do; an agency's statement must be one of *reasoning*." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). And judicial review becomes "meaningless where the administrative record is insufficient." *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 648 (D.C. Cir. 1976). All five of the distance-based components and the

unduly narrow exclusion that the Agencies unexpectedly adopted in their Final Rule fail the APA's "arbitrary [or] capricious" standard.

1. With regard to the three adjacency distance-based components, as well as the two case-by-case criteria, nothing in the record supports a per se jurisdictional finding for all waters and lands (1) within 100 feet of a primary water, impoundment, or tributary, (2) within a 100-year floodplain and 1,500 feet of a primary water, impoundment, or tributary, or (3) within 1,500 feet of the high tide line of a primary water. 33 C.F.R. § 328.3(c)(2). The same is true for case-by-case coverage focused upon (1) waters within the 100-year floodplain of a primary water, and (2) waters within 4,000 feet of a primary water, impoundment, or tributary. *Id.* § 328.3(a)(8).

The Agencies argue that these distance-based components are "reasonable and practical," consistent with unspecified "experience," and supported by "the implementation value of drawing clear lines." 80 Fed. Reg. at 37,085-91. Such "conclusory statements" are insufficient, *Amerijet*, 753 F.3d at 1350 (D.C. Cir. 2014), especially given the Agencies' necessary concession that the Final Rule would be arbitrary and capricious if "the administrative record [failed to] support[] the bright-lines that the Agencies crafted," No. 15-3799, Dkt. 50-1, at 8.

And while some bright-line distance approaches could—perhaps—survive review given a proper administrative record, the record here is entirely

"insufficient." *See Nat'l Welfare*, 533 F.2d at 648. To the extent the record says anything about this subject, the Agencies' Science Advisory Board rejected any distance-based approach, arguing that "the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water." SAB 2-3, ID-7531 (JA__).

More generally, nothing in the record supports the Agencies' decision to choose the specific distances—100 feet, 1,500 feet, 4,000 feet—over any alternative distances from any alternative reference points. Given that the Agencies adopted the distance-based components without record support and without explaining why alternative distances and reference points were rejected, *State Farm*, 463 U.S. at 41-42, and then justified these components by "conclusory" statements, *Amerijet*, 753 F.3d at 1350, the Rule is plainly unlawful.

2. The Rule's exclusion of farmland from the per se adjacent waters category, but not the per se tributary category, is also arbitrary and capricious. The Agencies explained that this exclusion was justified in light of "the vital role of farmers in providing the nation with food, fiber, and fuel." 80 Fed. Reg. at 37,080. While the States agree with this rationale, that justification applies just as strongly to excluding farmland from the per se tributary category. The Agencies' failure to explain their decision to exclude farmland from one per se category, but not the

other, violates the mandate that an agency must "treat similar cases in a similar manner unless it can provide a legitimate reason," *Babbitt*, 92 F.3d at 1258.

C. The Rule's Expansive Interpretation Of "Significant Nexus" Is Arbitrary And Capricious.

The Agencies claim that their Rule is grounded in sound science—indeed, the term "science" is repeated ninety times in the preamble to the Rule, with an additional sixty-four references to the Agencies' Connectivity Study. The Agencies also claim that "science," as documented in the Connectivity Study, shows that Justice Kennedy's significant nexus test is satisfied by the Rule's expansive new definitions of "waters of the United States." But the Connectivity Study only highlights a fundamental disconnect between the actual science and the Agencies' claimed reliance on that science.

According to the Agencies, the scientific basis for the Rule is that water flows downhill to create hydrological connections, *see* 80 Fed. Reg. at 37,063, and that the "protection of upstream waters is critical to maintaining the integrity of the downstream waters," *id.* at 37,056. This is nothing but a truism, and implies a limitless expansion of federal power. Of course, upstream waters contribute to downstream waters, but that only establishes—at most—a "nexus" between the two.

Whether any such nexus is "significant," which is the key question in the Agencies' conception of how to define "waters of the United States," is a legal

question that, as the Agencies acknowledge, *science does not answer*. "While the agencies agree defining significant nexus by quantified metrics would improve clarity, for the reasons discussed in the Science Report . . . , such an approach is not supported by the science at this time." RTC, Topic 9, 23, ID-20872 (JA__). At best, the science demonstrates that connectivity occurs along a continuum that "can be described in terms of frequency, duration, magnitude, timing, and rate of change." *Id.* at 19. But the Agencies never explain anywhere in the record how or when these or other scientific factors demonstrate a significant nexus between downstream navigable waters that they have the unquestioned authority to protect, and the upstream waters that are within the States' exclusive jurisdiction unless those waters have *significant* nexus to downstream navigable waters.

Instead, the Agencies admit that while "[t]he science demonstrates that waters fall along a gradient of chemical, physical, and biological connection to traditional navigable waters, . . . it is the agencies' task to determine where along that gradient to draw lines of jurisdiction under the CWA." *Id.* at 21. And the Agencies made that determination based largely on (erroneous) legal and policy considerations, not science. *Id.* at 17 ("The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health.").

As explained above, those legal grounds are legally insufficient. The mere existence of a hydrological connection—*even a continuous one*—is insufficient under Justice Kennedy's approach. *Rapanos*, 547 U.S. at 769. But that is all the Connectivity Study demonstrates; it can at most be used to establish a nexus, but not the significance of that nexus. The Agencies have therefore failed to "articulate a rational connection between the facts found" and the expansive definitions in the Final Rule, one of the hallmarks of arbitrary decision-making. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

III. THE RULE VIOLATES THE CONSTITUTION.

The Final Rule violates the U.S. Constitution in at least three ways. First, it intrudes upon the States' sovereign interests in regulating their land and water resources in violation of the Tenth Amendment. Second, it exceeds Congress's constitutional authority under the Commerce Clause because it provides for federal jurisdiction over isolated, intrastate waters with no meaningful impact on or connection to interstate commerce. And third, it violates the Due Process Clause because it is unconstitutionally vague. As a result, the Rule must be vacated.

A. The Rule Violates The States' Tenth Amendment Rights.

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the

people." U.S. Const., amend. X. Tenth Amendment concerns are implicated when a federal rule regulates the "states as states," when it addresses matters that are indisputably attributes of state sovereignty, and when compliance with the rule would directly impair a State's ability to structure integral operations in areas of traditional state functions. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-87 (1981). The federal system "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

State authority to regulate and manage local lands and waters is a core sovereign interest. Indeed, state authority in this realm "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). That is why Congress so clearly recognized the States' inherent powers over local lands and water resources in the CWA, *see* 33 U.S.C. § 1251(b), and purposefully integrated federalism principles throughout the Act. In *SWANCC*, the Supreme Court relied on this core "traditional state power" to explain its narrower interpretation of the CWA. 531 U.S. at 172-73. The provision of the rule at issue in *SWANCC* exceeded the Agencies' authority, the Court held, because it covered

"nonnavigable, isolated, intrastate waters" such as seasonal ponds. *Id.* at 170-71. The Court supported its determination by finding that the Corps' interpretation would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—specifically, the States' "traditional and primary power over land and water use." *Id.* at 173-74.

The Rule's overbroad assertion of authority over local land and water features that have only a remote connection to navigable-in-fact waters invades the States' sovereign authority, in violation of their Tenth Amendment rights. As already discussed, the definitions in the Rule extend federal jurisdiction to remote, usually-dry, and entirely intrastate land and water features remote from any navigable waterway. Once the Agencies assert federal jurisdiction, they displace state and local land regulation, and act as a "*de facto*" federal "zoning board." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). The issue is not merely the breadth of jurisdiction asserted by the federal government, but also the scope of regulatory power that the federal government would exercise in those areas. *See SWANCC*, 531 U.S. at 173.[9] Here, that regulatory power is the "[r]egulation of land use"—"a

[9] Indeed, once federal jurisdiction is triggered, the potential scope of that power is exceedingly broad. *See, e.g.*, 33 C.F.R. § 320.4(a) (identifying approximately 25 "public interest" factors the Corps considers when determining whether to issue a section 404 permit, including economic, aesthetics, land use, historic properties, safety, and food and fiber production).

quintessential state and local power." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality).

The Rule's expansion of federal jurisdiction over traditional state lands and water resources necessarily regulates "states as states," *Hodel*, 452 U.S. at 286-87, because of the extensive cooperative federalism principles embodied in the CWA. For example, all States are required to develop water quality standards for federal jurisdictional waters within their borders. 33 U.S.C. § 1313. They must also review those standards at least every three years, *id.* § 1313(c), and report to EPA on the quality of all federal waters in the State every other year, *id.* § 1315(b). States must also develop complicated total maximum daily loads for any water not meeting established water quality standards. *Id.* § 1313(d). States are also required to issue water quality certifications for every permit the federal government issues within their borders, including section 404 permits issued by the Corps. *See id.* § 1341(a)(1). For the forty-six States with authority to implement the NPDES program under 33 U.S.C. § 1342, additional federal waters means additional permitting responsibilities. Michigan and New Jersey bear additional obligations, as the two States that have assumed authority to issue dredge and fill permits under 33 U.S.C. § 1344. Finally, expanded federal jurisdiction directly affects state highway, transmission line, and pipeline projects, triggering federal permitting requirements for potential impacts to newly-minted federal waters. *See,*

e.g., AK DEC Comments 14-15, ID-19465 (JA__); ADOT Comments 1, ID-15215 (JA__).

The practical impact upon the States from the Rule's expansion of federal authority is breathtaking. From prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas, the Final Rule extends jurisdiction to virtually every potentially wet area of the country. *See* 33 C.F.R. § 328.3(b). In fact, the Rule sweeps so broadly that the Agencies find it necessary explicitly to disclaim authority over "puddles" and swimming pools "created in dry land." *Id.* § 328.3(b)(4). The Agencies acknowledge that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea" and that the 100-year floodplain encompasses an even larger area. Economic Analysis 11, ID-20866 (JA__). These areas are swept within the jurisdictional reach of the Final Rule.

Alaska presents a telling example. *See* AK DEC Comments 18-20, ID-19465 (JA__). Forty-three percent of Alaska is wetlands, covering more than 174 million acres. Many of those wetlands are frozen much of the year, and are underlain with permafrost. During the warmer seasons, the surface soils become inundated when thawing conditions generate near-surface water that cannot penetrate the underlying permafrost, causing the soils to exhibit wetland-like

characteristics. These areas can extend for hundreds of miles inland from the main navigable-in-fact waterways, as much of northern Alaska is covered in "continuous permafrost." *Id.* at 19, Att. 5 (JA__, __). Under the Rule, these lands are subject to federal jurisdiction by virtue of the straddling provision contained in the Rule's definition of neighboring: "The entire water is neighboring *if a portion* is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain." 33 C.F.R. § 328.3(c)(2)(ii) (emphasis added). As Alaska warned the Agencies, the Proposed Rule would "federalize land use decisions for State, local and private lands" in Alaska because "nearly all waters and wetlands in Alaska" would be subject "to regulation by the EPA and the Corps." AK Gov. Comments 1, ID-19465 (JA__). This conclusion applies just as much to the Final Rule.

The City of Scottsdale, Arizona provides another compelling example in a completely different ecological region. *See* City of Scottsdale Comments, ID-18024 (JA__). The City is replete with ephemeral drainages that flow in response to "high intensity and short duration storms." *Id.* at 3 (JA__). The flow is limited in duration, and typically infiltrates through the highly permeable soils long before it reaches a navigable-in-fact water, if at all. *See, e.g., id.* (describing Rawhide Wash as flowing 0.014% of the time over a 15-year period). And a single storm may produce flow in one wash, but others a mile away could be bone dry. *See id.* But all washes in the region are marked by a bed and banks and an OHWM,

sometimes created after a single rain event. *See id.* These dry washes will be per se jurisdictional under the Rule, despite historically being treated as non-jurisdictional under the Agencies' post-*Rapanos* guidance. *See id.* at 4 (JA__).

The Rule's additional regulation will come at a steep financial cost to the States. For example, the Agencies have estimated that the Rule will impose additional obligations on the States of between $798,000 and $1.3 million per year under the section 401 water quality certification program. Economic Analysis 19, ID-20866 (JA__). The NPDES storm water permit program will add $360,000 each year to state budgets, *id.* at 25 (JA__), and another $270,000 to regulate confined animal feeding operations, *id.* at 27-28 (JA__). The States believe that these and other estimates in the Agencies' Economic Analysis are grossly understated. *See, e.g.*, AK DEC Comments 17, ID-19465 (JA__); KS Comments 6, ID-14794 (JA__); WY DEQ Comments 5, ID-18020 (JA__). Alaska, for example, paid approximately $8 million to offset wetland and other impacts associated with the development of public projects between 2009 and 2015. AK DEC Comments 16, ID-19465 (JA__). "The[se] costs will only multiply with the additional waters that would become jurisdictional." *Id.* These costs and increased regulatory obligations impair the States' ability "to structure integral operations in areas of traditional state functions." *Hodel*, 452 U.S. at 287-88 (internal quotation and citations omitted). The same is true for local governments. In Scottsdale,

Arizona, for example, the City fears that the per se assertion of jurisdiction over the region's many dry washes will have "detrimental impacts" on "proposed development projects" and on "City transportation, parks, and drainage and flood control projects. These impacts would increase the costs of capital projects and put a greater strain on an ever tightening City budget." City of Scottsdale Comments 7, ID-18024 (JA__).

In addition, through the Rule, the Agencies are asserting regulatory authority over traditionally state-regulated waters. This displacement of state authority impairs the States' abilities to establish and enforce their own policies for their waters and lands. For example, waters that fall outside the scope of federal jurisdiction remain subject to regulation as state waters through local laws and regulations. *See, e.g.,* N.D. Cent. Code §§ 61-28-01 *et seq.*; Mont. Code Ann. §§ 75-5-101 *et seq.*; N.M. Stat. Ann. §§ 74-6-4 *et seq.*; Mo. Rev. Stat. §§ 644.006 *et seq.*; Ark. Code Ann. §§ 8-4-101 *et seq.*; Tex. Water Code §§ 26.001 *et seq.*; Ky. Rev. Stat. §§ 224.70-100 *et seq.* Instead of regulating land and water within their borders to advance their own sovereign interests, the States must now defer to the federal government's framework and policies established under the CWA.

B. The Rule Exceeds Congress's Commerce Clause Authority.

The Constitution grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 3. That power extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Rule imposes federal authority outside of these areas, and thus improperly steps into the realm of the States' regulatory authority.

1. The CWA's protection of "navigable waters" rests entirely upon Congress's authority to regulate the "channels of interstate commerce." *Id.* As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress's "traditional jurisdiction over waters that were or had been navigable-in-fact or which could reasonably be so made.'" 531 U.S. at 172; *id.* at 168 n.3 (finding no indication that "Congress intended to exert anything more than its commerce power over navigation"); *accord Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) ("It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause" as channels of interstate commerce.); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-97 (1824). This understanding of the CWA's constitutional basis is mandated by the statutory text, which asserts jurisdiction only to protect "navigable waters," *see, e.g.*, 33 U.S.C. § 1362(12), and does not invoke Congress's authority to protect instrumentalities of commerce or those matters substantially affecting interstate commerce.

The Rule reaches far beyond Congress's authority to protect in-fact navigable waters; that is, those waters that can be used as channels of interstate commerce. While Congress has authority to regulate more than merely the channels themselves, regulation under this authority must be carefully limited to protecting those channels. For example, "Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941). But as explained above, the Rule sweeps in numerous local land and water features that are not navigable-in-fact and have only an extremely tangential, if any, connection to navigable-in-fact waters, including just once every one-hundred years. Given that the Agencies' assertion of authority in *SWANCC* raised grave constitutional issues because the waters there were somewhat remote from navigable-in-fact waters, 531 U.S. at 174, the far more expansive authority over local land and water features at issue in the Rule moves from mere concern to outright constitutional violation.

2. Since the CWA is based exclusively upon Congress's authority over channels of interstate commerce, the Agencies may not rely on the second or third—and broadest—category of activities that "substantially affect interstate commerce," *Lopez*, 514 U.S. at 558-59, or the aggregation doctrine that the Court has developed and applied exclusively in the context of that third category, *id.* at

560-61. Congress has not adopted a comprehensive scheme for water and land use management, as it had for the regulation of controlled substances at issue in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). Instead, Congress enacted a regime tied to one specific category of waters: those that are navigable-in-fact or could reasonably be made so.

Even if this Court were to analyze the Rule under *Lopez*'s third prong, however, the Rule would not be lawful because it allows for regulation of much more than activities that "substantially affect interstate commerce." And in so doing, the Rule "effectually obliterate[s] the distinction between what is national and what is local," *Lopez*, 514 U.S. at 557 (internal quotations omitted). Importantly, this is not a limited problem of the "de minimis character of individual instances arising under [the Rule]," *Raich*, 545 U.S. at 17, but rather the heart of the Rule's reach.

In both *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court rejected the federal government's attempt to defend the constitutionality of a law regulating non-economic activities based on an argument that those non-economic activities, taken in aggregate, would have a substantial effect on interstate commerce. In *Lopez*, the Court determined that the law reached activity—specifically, the possession of a firearm in a school zone—that was "in no sense an economic activity." 514 U.S. at 567. The Court rejected the argument

that Congress had the authority to reach this non-economic activity because, in aggregate, guns in school zones would have a substantial effect on interstate commerce. Such aggregation would involve "pil[ing] 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.* Similarly, in *Morrison*, the law at issue—the right to bring a civil action in federal court for domestic violence victims—targeted "noneconomic activity," whereas every case "in our Nation's history" that upheld Commerce Clause regulation of intrastate activity involved "activity [that was] economic in nature." 529 U.S. at 613. As in *Lopez*, the federal government's argument relied on an impermissible "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615.

The Rule, to the extent it would be analyzed under the third prong at all, would fail for similar reasons.

First, the Rule allows the Agencies to regulate non-economic activities, which *Lopez* and *Morrison* held cannot be aggregated to produce the required substantial effect on interstate commerce. As the *Rapanos* plurality observed, "[i]n deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" 547 U.S. at

721 (Scalia, J., plurality) (quoting 33 C.F.R. § 320.4(a) (2004)). Thus, for example, the Agencies could prohibit an individual from disposing of leaves or brush in a shallow swale on his or her property provided that the swale is within 1,500 feet of the ordinary high water mark of a "tributary" to a navigable water. That is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

Second, the Rule fails to "express[ly] . . . limit its reach to [activities that] have an explicit connection with or effect on interstate commerce." *Id.* at 562. The Rule's definitions for tributaries, adjacent waters, and case-by-case waters sweep in numerous waters and usually-dry lands that lack any meaningful connection to interstate commerce. For example, the tributary definition extends to any land feature with "a bed and banks and an ordinary high water mark"—whether observable in the field or not—and that "contributes flow"—no matter how ephemeral—"either directly *or through another water*" to a primary water. 33 C.F.R. § 328.3(c)(3) (emphasis added). This includes usually-dry channels that carry a minimal amount of water after a rainstorm to a stream that connects with other streams that *then* eventually flow into a navigable water.

The Rule's assertion of case-by-case jurisdiction is based on an analysis that has little to nothing to do with commerce. For example, the Agencies may assert authority over a water or land because it "[e]xport[s] . . . organic matter," 33

C.F.R. § 328.3(c)(5)(vii), to a primary water. In other words, if a bird flies from a primary water to another water or piece of dry land and a plant or invertebrate "hitchhik[es]," Connectivity Study 5-5, ID-20859 (JA__), on the bird's feathers and travels back to the primary water, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Or if the land feature "[e]xport[s] . . . food resources," 33 C.F.R. § 328.3(c)(5)(viii), because a bird travels to eat, the Agencies could deem it jurisdictional under the Rule. This is precisely the kind of overreach the Supreme Court expressly rejected in *SWANCC*.

Third, as in *Lopez* and *Morrison*, the Rule ultimately relies on an attenuated causal chain that "obliterate[s] the distinction between what is national and what is local," *Lopez*, 514 U.S. at 557 (quotations omitted). In *Lopez* and *Morrison*, the Supreme Court rejected the federal government's theory "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," *Morrison*, 529 U.S. at 617. The Court explained that such reasoning would improperly permit the federal government to take over whole "areas of traditional state regulation." *Id.* at 615. The same is true here, where the Rule's overbroad assertion of authority over local land and water features tramples the States' authority to manage local lands and waters.

C. The Rule Is Unconstitutionally Vague.

A statute or regulation is constitutionally invalid under the Due Process Clause if it prohibits conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 551 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). In *Chicago v. Morales*, 527 U.S. 41 (1999), for example, the Supreme Court found void for vagueness an ordinance that imposed a criminal sanction for loitering, defined as "remaining in any one [public] place with no apparent purpose," with one or more people the police officer reasonably believes are gang members. *Id.* at 47 (quotations and citations omitted). The Court reasoned that it would be difficult for a person to "know if he or she had an 'apparent purpose.'" *Id.* at 57.

A law may be unconstitutionally vague for two independent reasons. "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56. Such vagueness concerns are particularly acute where, as with the CWA, the term at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2556-57 (2015); 33 U.S.C. § 1319(c). Under these standards, the Rule is unconstitutionally vague.

First, the Rule "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Morales*, 527 U.S. at 56. For example, the Rule's tributaries category covers any "water that contributes flow, either directly or through another water" and that is "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 33 C.F.R. § 328.3(c)(3). But as a Corps' 2004 report explains, "selection of reliable OHWM field indicators [is] challenging" and "especially difficult in arid regions" even with respect to present channels.[10] Moreover, the Agencies explain that they will use remote sensing and desktop tools to determine the OHWM and bed and banks of tributaries where "physical characteristics of bed and banks and another indicator of [OHWM] are absent in the field." 80 Fed. Reg. at 37,077. In other words, even where there is no evidence of a bed and bank to the naked eye, the Agencies can assert jurisdiction over an indentation on the landscape that appears through sophisticated digital photography and satellite imaging to which ordinary people do not have access. *See id.*

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[10] R.W. Lichvar & J.S. Wakeley, U.S. Army Corps of Eng'rs, *Review of Ordinary High Water Mark Indicators for Delineating Arid Streams in the Southwestern United States* (2004), http://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/; *see also* AMA Comments 10, ID-13951 (JA__).

Relatedly, the Rule's inclusion of "[d]itches with intermittent flow that are a relocated tributary, or are excavated in a tributary, or drain wetlands, [and] [d]itches, regardless of flow, that are excavated in or relocate a tributary," 80 Fed. Reg. at 37,078, is similarly unconstitutionally vague. The Agencies explain that these ditches will be identified by the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts." *Id*. at 37,078-79. But it is exceedingly difficult under this standard for an ordinary individual to know if a ditch will be covered. Even if the individual has the capability to conduct this research, it is unclear how far back in history the individual must look for the presence of a previously existing tributary.

The Rule's case-by-case waters category presents similar problems for ordinary landowners. That category instructs the Agencies to look at any water that is "[at least partially] located within the 100-year floodplain of a" primary water or "waters [at least partially] located within 4,000 feet of the high tide line or ordinary high water mark of a" primary water, impoundment, or tributary, 33 C.F.R. § 328.3(a)(8), and then to apply a largely unguided case-by-case analysis, looking at whether the water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or*

biological integrity of a [primary water]" based on "any single function or combination of functions performed by the water," *id.* § 328.3(c)(5) (emphasis added). Given the number of factors that staff are instructed to consider in terms of "chemical," "physical" or "biological" impact, *see, e.g.*, 80 Fed. Reg. at 37,093 (referencing sediment trapping, nutrient recycling, food export, flood control, and multiple other factors), it will not be possible for ordinary people to know how any particular jurisdictional inquiry will turn out under the Rule.

Second, for many of the same reasons, the Rule is unconstitutionally vague because it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56. "[W]here the legislature fails to provide . . . minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotations omitted). The Supreme Court has concluded that a statute requiring an individual to provide "'credible and reliable' identification" was vague because it failed "to establish standards by which the officers may determine whether the suspect has complied." *Id.* at 360-61.

The Rule does not provide the Agencies' field staffs with "minimal guidelines" for assessing whether waters are subject to the CWA. For example, with regard to the tributaries category, the Rule does not define bed and banks

precisely, including allowing the Agencies to arbitrarily determine that a bed and banks exist through remote imaging. Moreover, even the presence of a bed, banks, and OHWM provide insufficient restraint against arbitrary enforcement because "OHWM indicators are distributed randomly throughout the [arid west] landscape and are not related to specific channel characteristics." AMA Comments 11, ID-13951 (JA__) (quoting Lindsey Lefebvre, et al., U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns across Arid West Landscapes* 17 (2013), http://acwc.sdp.sirsi.net/client/en_US/search/asset/1017540). And the case-by-case waters category involves the application of numerous different considerations, without clear indication of how any inquiry should turn out.

In many situations, a person subject to the law has no way to know whether his or her land contains a water of the United States before an enforcement action is commenced, unless he or she requests a jurisdictional determination. And the jurisdictional determination process is not required by the CWA. *Hawkes*, 136 S. Ct. at 1816-17 (Kennedy, J., concurring).

D. The Agencies' Repeated Unlawful Interpretations Of "Waters Of The United States" Threaten The Constitutionality Of That Term.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court invalidated the residual clause of the Armed Career Criminal Act—"involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)—after several decades of attempting to give that term a

definite meaning. The Supreme Court explained: "the failure of persistent efforts . . . to establish a standard" under a broadly worded statutory phrase can lead the courts to declare that phrase unconstitutional. *Johnson*, 135 S. Ct. at 2558 (quotation omitted).

The Agencies' repeated failures to provide a lawful definition for the statutory term "waters of the United States" threaten that term's legality. As Justice Kennedy has noted in a recent opinion joined by Justices Thomas and Alito, "the [CWA's] reach is 'notoriously unclear' and the consequences to landowners . . . can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)). 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." *Id.* at 1817.

For the third time now, the Agencies have adopted an interpretation of the term "waters of the United States" that cannot withstand constitutional scrutiny, including because it is vague and "essentially limitless," *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). The States join Chief Justice Roberts in urging the Agencies, in the strongest possible terms, to stop their repeated unlawful practice and to issue a definitional rule that ordinary people can understand and that is consistent with "the clearly limiting terms Congress employed in the Clean Water

Act." *Id.* at 758. If the Agencies persist in their pattern of unlawful conduct, the Supreme Court may well choose to invalidate the term "waters of the United States," just as it did with the residual clause in *Johnson*.

IV. THE RULE VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

"NEPA is a procedural statute, designed to ensure that federal agencies consider the environmental impact of their actions." *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 968 (6th Cir. 2009) (quotations and citation omitted). Unless exempted by statute, all agencies must comply with NEPA. *See Pac. Legal Found. v. Andrus*, 657 F.2d 829, 833 (6th Cir. 1981); 42 U.S.C. § 4332; 40 C.F.R. § 1507.1. EPA enjoys such an exemption for certain activities under the CWA, *see* 33 U.S.C. § 1371(c), but the Corps does not.

NEPA requires the preparation of an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This includes the promulgation of federal regulations. 40 C.F.R. § 1502.4(b).

As one of the most far-reaching regulations ever adopted in the environmental arena, the Rule easily qualifies as a major federal action significantly affecting the quality of the human environment. The Corps, however, elected not to prepare an EIS for the Rule, and instead issued a Finding of No Significant Impact ("FONSI") after preparing a legally deficient Environmental

Assessment ("EA").[11] That finding—that the Rule has no significant impact on the human environment—is arbitrary and capricious and must be set aside. *See Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1193 (6th Cir. 1986).

The Corps also violated NEPA by evaluating an unreasonably restricted range of alternatives, considering only two—the Rule and a "no action" alternative in which the Corps would continue regulating under the existing rule and post-*Rapanos* agency guidance. The failure to consider a reasonable range of alternatives to the proposed agency action violates NEPA. *Partners in Forestry Co-op., Northwood Alliance, Inc. v. U.S. Forest Serv.*, 638 F. App'x 456, 464-65 (6th Cir. 2015).

A. The Corps Failed To Prepare An Environmental Impact Statement.

The Corps' implausible conclusion that the Rule does not significantly affect the quality of the human environment was reached without considering legally-prescribed, mandatory factors for such assessments. "NEPA's regulations state that whether a project is 'significant' requires agencies to consider both the 'context' and the 'intensity' of the project." *Partners in Forestry Co-op.*, 638 F. App'x at 462 (quoting 40 C.F.R. § 1508.27). "Context" focuses "on the affected geographical region and its interests," while "intensity" looks "to the severity of

[11] Agencies may prepare EAs as an initial step in the NEPA process to determine whether an EIS is warranted. *See* 40 C.F.R. § 1508.9; *Charter Twp. of Huron, Mich. v. Richards*, 997 F.2d 1168, 1174 (6th Cir. 1993).

the proposal's environmental impact." *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002).

The Corps did not consider either the "context" or the "intensity" factors in its NEPA analysis. That alone should invalidate the Corps' determination. *See State Farm*, 463 U.S. at 43 (vacatur is required if the agency "entirely failed to consider an important aspect of the problem"). In addition, both factors overwhelmingly support a finding that the Rule will significantly affect the quality of the human environment.

Context. "The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). The Rule is nationwide in scope, affecting all fifty States. In fact, it was the sweeping national effect of this regulation that partially prompted this Court to assert jurisdiction. *See In re U.S. Dep't of Def., U.S. E.P.A. Final Rule*, 817 F.3d at 274.

By the Agencies' own estimates, the Rule will result in "an increase of between 2.8 and 4.6 percent in the waters found to be jurisdictional." Final EA 21, ID-20867 (JA__). Even if these estimates were accurate, they would have profound implications on federal and state regulatory programs, private landowners, and the regulated community. For example, the Agencies have performed more than 400,000 jurisdictional determinations since 2008. 80 Fed.

Reg. at 37,065. Small increases in jurisdiction trigger thousands of additional federal regulatory interactions between the public and private sector each year.

But the Agencies' estimates are grossly understated, and significantly mislead the public regarding the true regulatory and economic implications of the Final Rule. For example, Kansas estimated a 460% increase in federal jurisdiction in that State alone under the Proposed Rule, with an additional 133,000 miles of ephemeral streams subject to per se jurisdiction under the new tributary definition. KS Comments App. A, ID-14794 (JA__). Alaska is concerned that the Rule will regulate "nearly all waters and wetlands" within that State. AK Gov. Comments 1, ID-19465 (JA__). So too is New Mexico. NM ED Comments 10, ID-16552 (JA__) (the Rule "would in effect engulf all streams, drainage systems, and watersheds within the State"). Ninety-six percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," AZ DEQ Comments 2, ID-16437 (JA__), and "approximately 80% of Wyoming's stream miles are intermittent or ephemeral." WY DEQ Comments 4, ID-18020 (JA__); *see also* KY Ag. Comm. Comments 1, ID-14055 (JA__) (expressing concern regarding 92,000 stream miles in Kentucky).

The Corps simply ignored this "context" when proclaiming the Rule lacks significant effect. If the Corps had attempted to accurately quantify the actual impacts of the Rule, there is no way it could have articulated a "rational

connection" between these impacts and its FONSI. *See Bowman Transp.*, 419 U.S. at 285. Indeed, as the Corps' own staff recognizes, absent an EIS "it is not possible to estimate" or "verify" the percentage of water bodies that would be effected by the Rule, and particularly by the changes made between the Proposed Rule and Final Rule. Moyer Memorandum 2, ID-20882 (JA___). Rather, "[t]his is precisely the type of research and analysis that would be undertaken in completing an Environmental Impact Statement (EIS)." *Id*. at 3.

The Corps also ignored the very large regional variations in the nation's waterways when analyzing the potential effects of its Rule. For example, the Corps believes that the largest expansion of its regulatory program will likely be in the "other waters" category. Final EA 21-22, ID-20967 (JA__) (estimating a 34.5% increase in positive federal jurisdictional determinations for other waters). Geographical and hydrological features—including those covered by the "other waters category"—are not evenly distributed across the United States. *See, e.g.*, 33 C.F.R. § 328.3(a)(7). Although the Agencies were well aware of that fact, and were reminded of it during the public comment period, *see, e.g.*, AK DEC Comments 12, ID-19465 (JA__), they unreasonably failed to address this "context" in the EA. Instead, they relied on broad national averages to estimate the total costs and benefits associated with the Rule, marginalizing the potentially disparate treatment for individual States. *See, e.g.*, Final EA 25, ID-20867 (JA__) ("To

estimate annual costs and benefits, the agencies uniformly applied the 2.8 and 4.6 percent incremental change in jurisdiction to the total costs and benefits for the Sections 311, 401, 402, . . . and 404 programs to account for an estimated increase in permitting and regulatory activities that would result.").

Intensity. The "intensity" factors also support a finding that the Final Rule "significantly" affects the human environment. These factors measure the "severity of impact" associated with a federal action, and include:

> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
> . . .
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
> . . .
> (10) Whether the action threatens a violation of Federal, State, or local law . . . .

40 C.F.R. § 1508.27(b). The EA does not discuss or address these, or *any* of the ten available factors, a failure that alone supports a finding of arbitrary and capricious decision-making. *See State Farm*, 463 U.S. at 43 (the agency "entirely failed to consider an important aspect of the problem").

Focusing on just of few of the ten factors, it is clear that the Rule rises to the level of significance that warrants full analysis in an EIS. For example, the Rule is without a doubt highly controversial. *See* 40 C.F.R. § 1508.27(b)(4). "Controversy in the NEPA context does not necessarily denote public opposition to

a proposed action, but a substantial dispute as to the size, nature, or effect of the action." *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (wide disputes regarding the loss of farmland acreage sufficiently controversial to warrant EIS). This case is nothing if not a dispute over the "size, nature, or effect" of the Rule. This factor alone warrants the preparation of an EIS.

The Rule also establishes a precedent for future actions with significant effects and represents a decision in principle about future considerations, *see* 40 C.F.R. § 1508.27(b)(6), because it sets controlling guidelines for hundreds of thousands of future regulatory decisions, *see* 80 Fed. Reg. at 37,065. Each positive jurisdictional determination rendered pursuant to the Rule will have substantial legal, economic, and environmental impacts on the property where it is made and any projects planned for that property. *See Hawkes Co*., 136 S. Ct. at 1814-15. Expanding federal jurisdiction necessarily increases this burden. In *Hawkes*, for example, the required environmental analysis for a CWA permit was estimated at $100,000, and it can be much more. *Id* at 1815.

Finally, as already discussed, the Rule "threatens a violation of Federal, State, or local law," 40 C.F.R. § 1508.28(b)(10), as dozens of organizations and States informed the Agencies during the public comment period on the Proposed Rule. *See, e.g.*, Multi-State Comments 2, ID-7988 (JA__); WAC Comments 3-4, ID-14568 (JA__). Many of those same legal concerns were recognized by this

Court and the District Court for the District of North Dakota in temporarily staying the Final Rule. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

Taking all of these factors into consideration, there is no plausible explanation for failing to prepare an EIS in support of the Final Rule, a fatal flaw the Corps should have easily identified during the EA development process.

B. The Corps Rejected The Need For An Environmental Impact Statement Based On A Flawed Environmental Assessment.

The purpose of an EA is to assess the "environmental impacts of proposed actions and alternatives" to determine whether an EIS is required. *Richards*, 997 F.2d at 1174 (citing 40 C.F.R. § 1508.9). In making that assessment, NEPA requires "a 'hard look' at the environmental consequences" of agency action. *Crounse Corp.*, 781 F.2d at 1193. "A proper consideration of the . . . impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004) (finding an EA inadequate) (quotation omitted). The EA prepared by the Corps falls far short of the "hard look" that NEPA requires.

For example, the "Environmental Consequences" section of the EA provides a brief, two-page description of how much the Rule will cause federal jurisdiction

to expand, but then makes no serious attempt to assess the environmental and socioeconomic effects of that new federal jurisdiction. Final EA 21-23, ID-20867 (JA__). Instead, the EA's "analysis" of environmental consequences, comprising only four pages, has sections relating to wildlife, recreation, and flood risk reduction. *Id.* at 24-27 (JA__). Each of those sections contains only *one* or *two* short paragraphs, and only *one sentence* of analysis, each of which is conclusory and virtually identical. Those single sentences of "analysis" assert that the extension of federal jurisdiction is expected to benefit the environment, but the Corps fails to support this assertion with any evidence or effort to quantify the benefits.

This is but one example: "The additional protections associated with the incremental increase in the amount of waters subject to Clean Water Act jurisdiction is expected to have a beneficial impact on recreation, based on the increase in wildlife available for hunting, fishing, bird watching, and photography." *Id.* at 25 (JA__). Nowhere does the Corps describe why it believes the Rule will lead to an increase in wildlife or attempt to quantify that increase. And most importantly, the Corps fails to mention whether the States are already regulating the same waters under state law and whether the net effect of duplicative regulation would have any positive or negative effect on wildlife. This is precisely

the kind of drive-by analysis the courts have rejected under NEPA. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 996.

The fundamental purpose of NEPA is to force federal agencies to genuinely consider the environmental costs and benefits of major federal actions. That purpose is thwarted here by the Corps' refusal to make any effort to analyze or quantify the environmental, socioeconomic or other effects of its sweeping new Rule, including potential effects on the States, their regulatory programs, or their regulated communities. And the Corps' decision to avoid preparing an EIS, based on the flawed EA, prohibited the States from participating in the NEPA process for the Rule as "cooperating agencies," *see* 40 C.F.R. §§ 1501.6 and 1508.5, further eroding the cooperative federalism principles enshrined in our nation's laws. *See* George T. Frampton, *Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies To Be Cooperating Agencies* 2 (July 28, 1999), *available at* https://ceq.doe.gov/nepa/regs/ceqcoop.pdf ("Considering NEPA's mandate and the authority granted in federal regulation to allow for cooperating agency status for state, tribal and local agencies, cooperator status for appropriate non-federal agencies should be routinely solicited.").

C. The Corps Failed To Consider A Reasonable Range Of Alternatives.

The flawed EA and the resultant failure to prepare an EIS fundamentally undermined the Corps' NEPA analysis of the Rule, but it was not the only fatal

defect. Agencies are required to consider alternatives to their proposed actions to fulfill the mandates of NEPA. 42 U.S.C. § 4332(2)(C)(iii). The Corps' alternatives analysis in the EA fails any objective review of that important requirement.

"An agency is required to 'consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 242 (D.C. Cir. 2008) (citation omitted). The same holds true whether an agency is preparing an EA or an EIS. *Partners in Forestry Co-op.*, 638 F. App'x at 464. "[T]he purpose of an EA, which is defined in regulations of the Council on Environmental Quality (CEQ) as a concise document describing the environmental impacts of *proposed actions and alternatives,* 40 C.F.R. § 1508.9 (1992), is to provide the agency with the basic information needed to decide on the next step." *Richards*, 997 F.2d at 1174 (emphasis added). Agencies do not fulfill their obligation to consider alternatives when—as here—they artificially limit themselves to the two options of the proposed action and a no-action alternative without considering obvious variations. *See Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

The Corps considered only one alternative to the Rule, a "no action" alternative, where "the current procedures, processes, and definitions used by the

USACE to complete jurisdictional determinations would continue to be utilized and the process and procedures would not be impacted by the changes to jurisdiction with the adoption of the final proposed rule." Final EA 23, ID-20867 (JA__). Oddly, the Corps did not consider the Proposed Rule as an option in its NEPA analysis. Apparently, the Corps "considered whether to analyze the draft rule in th[e] Environmental Assessment, but removed it from further consideration because it is no longer a viable option to accomplish the purpose and need for action." *Id.* at 13 (JA__). The Corps did not explain why it was not a "viable option" except that the decision was made "upon a review of the substantive comments received during the public comment period." *Id.*

What is most troubling about the Corps' limited alternatives analysis is that several other perfectly feasible alternatives were available. Many State Petitioners, for example, submitted comments favoring an alternative that would adopt a narrower definition of "waters of the United States" that would enable them to implement their own state laws and policies to protect their own lands and waters using their on-the-ground expertise—such as permitting programs that are capable of issuing necessary permits in a reasonable timeframe and at a reasonable cost. *See, e.g.*, ND Comments 14-15, ID-15365 (JA__); TX CEQ Comments 4, ID-14279 (JA__). The EA was obligated to address the alternative of limiting CWA jurisdiction to traditional navigable waterways and waters that are closely tied to

those waters: "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality). Such an approach would enable state governments to tailor their own laws and regulations more closely to the topography of their land and to make local land use decisions more responsive to the local community directly affected, while still leaving genuine interstate waterways under federal regulation. *See* TX CEQ Comments 4, ID-14279 (JA__); WY DEQ Comments 7, ID-18020 (JA__). Although the purpose of the rulemaking was to respond to a series of Supreme Court decisions holding that the Agencies had been using too broad a definition of "waters of the United States," the Corps did not even consider the possibility of a narrower definition in its EA.

Several commenters also suggested that instead of adopting a single, unitary definition for the entire country, separate definitions could be adopted on a regional or state-by-state basis. *See, e.g.*, AK DEC Comments 11-12, ID-19465 (JA__); PA DOA Comments 2, ID-14465 (JA__) ("Administering a detailed and specific but 'one-size-fits-all' definition applicable nationwide in states with distinct surface and groundwater attributes, and extremely divergent average annual rainfall and snowmelt characteristics will be difficult, and such a rule will undermine existing state law protections."). Separate definitions would take into account the fact that a bed and banks may be indicia of streams in the wetter parts

of the country, but that in other regions beds and banks are often found in bone-dry washes. Regions with extensive farmland that becomes flooded only in rare wet years, such as the northern plains, could have a definition that takes this into account. ND Comments 6, ID-15365 (JA__). And the definition of "waters of the United States" applicable to Alaska could specifically address the complications caused by widespread permafrost. AK DEC Comments 11-12, ID-19465 (JA__). Separate state or regional "waters of the United States" definitions are a perfectly reasonable and feasible alternative that should have been addressed in the EA.

The Corps failed "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," *Am. Radio Relay League, Inc.*, 524 F.3d at 242. The Corps' decision to ignore—without comment—the principle alternatives that had been advocated by the States is arbitrary, capricious and contrary to the fundamental objectives of NEPA.

CONCLUSION

For all the reasons articulated above, the Rule should be vacated.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 20,939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). By order of this Court, State Petitioners' Opening Brief was not to exceed 21,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

Date: November 1, 2016 /s/ Eric E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2016, a true and correct copy of the State Petitioner's Opening Brief was served via the Court's CM/ECF system to the parties registered to receive notice of the filings in this case.

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Case No. 15-3751 (and related cases: 15-3799; 15-3817; 15-3820; 15-3822; 15-3823; 15-3831; 15-3837; 15-3839; 15-3850; 15-3853; 15-3858; 15-3885; 15-3887; 15-3948; 15-4159; 15-4162; 15-4188; 15-4211; 15-4234; 15-4305; 15-4404)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION, et al., Petitioners,	)	In Re: Environmental Protection Agency and Department of Defense, Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, published June 29, 2015 (MCP No. 135)
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	)	On petition for review from the Environmental Protection Agency and the U.S. Army Corps of Engineers

ADDENDUM PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 28(f) TO STATE PETITIONERS' OPENING BRIEF

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1387. Authorization of appropriations.
1388. Requirements.

CODIFICATION

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by act June 30, 1948, ch. 758, 62 Stat. 1155, and amended by acts July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, §§1, 2, 70 Stat. 498–507; June 25, 1959, Pub. L. 86–70, 73 Stat. 141; July 12, 1960, Pub. L. 86–624, 74 Stat. 411; July 20, 1961, Pub. L. 87–88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89–234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89–753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91–224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91–611, 84 Stat. 1818; July 9, 1971, Pub. L. 92–50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92–137, 85 Stat. 379; Mar. 1, 1972, Pub. L. 92–240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The act is shown herein, however, as having been added by Pub. L. 92–500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the act's provisions by Pub. L. 92–500.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called ''Administrator'') shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the

States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, ch. 758, title I, § 101, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub. L. 95–217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub. L. 100–4, title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

AMENDMENTS

1987—Subsec. (a)(7). Pub. L. 100–4 added par. (7).

1977—Subsec. (b). Pub. L. 95–217, § 26(b), inserted provisions expressing Congressional policy that the States manage the construction grant program under this chapter and implement the permit program under sections 1342 and 1344 of this title.

Subsec. (g). Pub. L. 95–217, § 5(a), added subsec. (g).

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–365, § 1, Oct. 8, 2008, 122 Stat. 4021, provided that: ''This Act [amending sections 1268 and 1271a of this title] may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'.''

Pub. L. 110–288, § 1, July 29, 2008, 122 Stat. 2650, provided that: ''This Act [amending sections 1322, 1342, and 1362 of this title] may be cited as the 'Clean Boating Act of 2008'.''

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–303, § 1(a), Nov. 27, 2002, 116 Stat. 2355, provided that: ''This Act [enacting section 1271a of this title, amending sections 1254, 1266, 1268, 1270, 1285, 1290, 1324, 1329, 1330, and 1375 of this title, enacting provisions set out as notes under this section, section 1254 of this title, and section 1113 of Title 31, Money and Finance, and repealing provisions set out as a note under section 50 of Title 20, Education] may be cited as the 'Great Lakes and Lake Champlain Act of 2002'.''

Pub. L. 107–303, title I, § 101, Nov. 27, 2002, 116 Stat. 2355, provided that: ''This title [enacting section 1271a of this title and amending section 1268 of this title] may be cited as the 'Great Lakes Legacy Act of 2002'.''

Pub. L. 107–303, title II, § 201, Nov. 27, 2002, 116 Stat. 2358, provided that: ''This title [amending section 1270 of this title] may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'.''

SHORT TITLE OF 2000 AMENDMENTS

Pub. L. 106–457, title II, § 201, Nov. 7, 2000, 114 Stat. 1967, provided that: ''This title [amending section 1267 of this title and enacting provisions set out as a note under section 1267 of this title] may be cited as the 'Chesapeake Bay Restoration Act of 2000'.''

Pub. L. 106–457, title IV, § 401, Nov. 7, 2000, 114 Stat. 1973, provided that: ''This title [amending section 1269 of this title] may be cited as the 'Long Island Sound Restoration Act'.''

Pub. L. 106–457, title V, § 501, Nov. 7, 2000, 114 Stat. 1973, provided that: ''This title [enacting section 1273 of this title] may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'.''

Pub. L. 106–457, title VI, § 601, Nov. 7, 2000, 114 Stat. 1975, provided that: ''This title [enacting section 1300 of this title] may be cited as the 'Alternative Water Sources Act of 2000'.''

Pub. L. 106–284, § 1, Oct. 10, 2000, 114 Stat. 870, provided that: ''This Act [enacting sections 1346 and 1375a of this title and amending sections 1254, 1313, 1314, 1362, and 1377 of this title] may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'.''

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–431, § 1, Oct. 31, 1994, 108 Stat. 4396, provided that: ''This Act [amending section 1311 of this title] may be cited as the 'Ocean Pollution Reduction Act'.''

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–596, § 1, Nov. 16, 1990, 104 Stat. 3000, provided that: ''This Act [enacting sections 1269 and 1270 of this title, amending sections 1268, 1324, and 1416 of this title, and enacting provisions set out as notes under this section and section 1270 of this title] may be cited as the 'Great Lakes Critical Programs Act of 1990'.''

Pub. L. 101–596, title II, § 201, Nov. 16, 1990, 104 Stat. 3004, provided that: ''This part [probably means title, enacting section 1269 of this title and amending section 1416 of this title] may be cited as the 'Long Island Sound Improvement Act of 1990'.''

Pub. L. 101–596, title III, § 301, Nov. 16, 1990, 104 Stat. 3006, provided that: ''This title [enacting section 1270 of this title, amending section 1324 of this title, and enacting provisions set out as a note under section 1270 of this title] may be cited as the 'Lake Champlain Special Designation Act of 1990'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–653, title X, § 1001, Nov. 14, 1988, 102 Stat. 3835, provided that: ''This title [amending section 1330 of this title and enacting provisions set out as notes under section 1330 of this title] may be cited as the 'Massachusetts Bay Protection Act of 1988'.''

SHORT TITLE OF 1987 AMENDMENT

Section 1(a) of Pub. L. 100–4 provided that: ''This Act [enacting sections 1254a, 1267, 1268, 1281b, 1329, 1330, 1377, 1381 to 1387, and 1414a of this title, amending this section and sections 1254, 1256, 1262, 1281, 1282 to 1285, 1287, 1288, 1291, 1311 to 1313, 1314, 1317 to 1322, 1324, 1342, 1344, 1345, 1361, 1362, 1365, 1369, 1375, and 1376 of this title, and enacting provisions set out as notes under this section, sections 1284, 1311, 1317, 1319, 1330, 1342, 1345, 1362, 1375, and 1414a of this title, and section 1962d–20 of Title 42, The Public Health and Welfare] may be cited as the 'Water Quality Act of 1987'.''

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97–117, § 1, Dec. 29, 1981, 95 Stat. 1623, provided that: ''This Act [enacting sections 1298, 1299, and 1313a of this title, amending sections 1281 to 1285, 1287, 1291, 1292, 1296, 1311, and 1314 of this title, and enacting provisions set out as notes under sections 1311 and 1375 of this title] may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'.''

SHORT TITLE OF 1977 AMENDMENT

Section 1 of Pub. L. 95–217 provided: ''That this Act [enacting sections 1281a, 1294 to 1296, and 1297 of this

title, amending this section and sections 1252, 1254 to 1256, 1259, 1262, 1263, 1281, 1282 to 1288, 1291, 1292, 1311, 1314, 1315, 1317 to 1319, 1321 to 1324, 1328, 1341, 1342, 1344, 1345, 1362, 1364, 1375, and 1376 of this title, enacting provisions set out as notes under this section and sections 1284, 1286, 1314, 1321, 1342, 1344, and 1376 of this title, and amending provisions set out as a note under this section] may be cited as the 'Clean Water Act of 1977'.''

SHORT TITLE

Section 1 of Pub. L. 92–500 provided that: ''That this Act [enacting this chapter, amending section 24 of Title 12, Banks and Banking, sections 633 and 636 of Title 15, Commerce and Trade, and section 711 of former Title 31, Money and Finance, and enacting provisions set out as notes under this section and sections 1281 and 1361 of this title] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972'.''

Section 519, formerly section 518, of Act June 30, 1948, ch. 758, title V, as added Oct. 18, 1972, Pub. L. 92–500, §2, 86 Stat. 896, and amended Dec. 27, 1977, Pub. L. 95–217, §2, 91 Stat. 1566, and renumbered §519, Feb. 4, 1987, Pub. L. 100–4, title V, §506, 101 Stat. 76, provided that: ''This Act [this chapter] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act).''

SAVINGS PROVISION

Pub. L. 92–500, §4, Oct. 18, 1972, 86 Stat. 896, provided that:

''(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall abate by reason of the taking effect of the amendment made by section 2 of this Act [which enacted this chapter]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

''(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972], and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall continue in full force and effect after the date of enactment of this Act [Oct. 18, 1972] until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [this chapter].

''(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in section 202 of the Federal Water Pollution Control Act as amended by this Act [section 1282 of this title] and in subsection (c) of section 3 of this Act.''

SEPARABILITY

Act June 30, 1948, ch. 758, title V, §512, as added by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 894, provided that: ''If any provision of this Act [this chapter], or the application of any provision of this Act [this chapter] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [this chapter], shall not be affected thereby.''

NATIONAL SHELLFISH INDICATOR PROGRAM

Pub. L. 102–567, title III, §308, Oct. 29, 1992, 106 Stat. 4286; as amended by Pub. L. 105–362, title II, §201(b), Nov. 10, 1998, 112 Stat. 3282, provided that:

''(a) ESTABLISHMENT OF A RESEARCH PROGRAM.—The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the 'Program') for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for—

''(1) an environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

''(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

''(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

''(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

''(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

''(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

''(b) ADVISORY COMMITTEE.—(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the 'Committee') shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

''(2) The Committee shall—

''(A) identify priorities for achieving the purpose of the Program;

''(B) review and recommend approval or disapproval of Program work plans and plans of operation;

''(C) review and comment on all subcontracts and grants to be awarded under the Program;

''(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

''(E) provide such other advice on the Program as is appropriate.

''(3) The Committee shall consist of at least ten members and shall include—

''(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

''(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference Executive Board), of whom one shall represent the shellfish industry in each region;

"(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

"(D) one member representing the Shellfish Institute of North America.

"(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

"(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the Program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

"(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee, but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

"(c) CONTRACT WITH CONSORTIUM.—Within 30 days after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will—

"(1) be the academic administrative organization and fiscal agent for the Program;

"(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

"(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

"(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

"(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

"(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

"(d) AUTHORIZATION OF APPROPRIATIONS.—(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98–210; 97 Stat. 1409), there are authorized to be appropriated to the Secretary of Commerce $5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

"(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

"(e) DEFINITIONS.—As used in this section, the term—

"(1) 'Consortium' means the Louisiana Universities Marine Consortium; and

"(2) 'shellfish' means any species of oyster, clam, or mussel that is harvested for human consumption."

LIMITATION ON PAYMENTS

Section 2 of Pub. L. 100–4 provided that: "No payments may be made under this Act [see Short Title of 1987 Amendment note above] except to the extent provided in advance in appropriation Acts."

SEAFOOD PROCESSING STUDY; SUBMITTAL OF RESULTS TO CONGRESS NOT LATER THAN JANUARY 1, 1979

Pub. L. 95–217, § 74, Dec. 27, 1977, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters and to include in this study an examination of technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and to submit the result of this study to Congress not later than Jan. 1, 1979.

STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare.

OVERSIGHT STUDY

Pub. L. 92–500, § 5, Oct. 18, 1972, 86 Stat. 897, authorized the Comptroller General of the United States to conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution conducted, supported, or assisted by any Federal agency pursuant to any Federal law or regulation and assess conflicts between these programs and their coordination and efficacy, and to report to Congress thereon by Oct. 1, 1973.

INTERNATIONAL TRADE STUDY

Pub. L. 92–500, § 6, Oct. 18, 1972, 86 Stat. 897, provided that:

"(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

"(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

"(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

"(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

"(A) does not require its manufacturers to implement pollution abatement and control programs.

"(B) requires a lesser degree of pollution abatement and control in its programs, or

"(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

"(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of

a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

"(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

"(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section [Oct. 18, 1972] of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months."

INTERNATIONAL AGREEMENTS

Pub. L. 92–500, §7, Oct. 18, 1972, 86 Stat. 898, provided that: "The President shall undertake to enter into international agreement to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums."

NATIONAL POLICIES AND GOAL STUDY

Pub. L. 92–500, §10, Oct. 18, 1972, 86 Stat. 899, directed President to make a full and complete investigation and study of all national policies and goals established by law to determine what the relationship should be between these policies and goals, taking into account the resources of the Nation, and to report results of his investigation and study together with his recommendations to Congress not later than two years after Oct. 18, 1972.

EFFICIENCY STUDY

Pub. L. 92–500, §11, Oct. 18, 1972, 86 Stat. 899, directed President, by utilization of the General Accounting Office, to conduct a full and complete investigation and study of ways and means of most effectively using all of the various resources, facilities, and personnel of the Federal Government in order to most efficiently carry out the provisions of this chapter and to report results of his investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

SEX DISCRIMINATION

Pub. L. 92–500, §13, Oct. 18, 1972, 86 Stat. 903, provided that: "No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [see Short Title note above] the Federal Water Pollution Control Act [this chapter], or the Environmental Financing Act [set out as a note under section 1281 of this title]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee."

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION AT FEDERAL FACILITIES

Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, formerly set out as a note under section 1321 of this title.

EX. ORD. NO. 11742. DELEGATION OF FUNCTIONS TO SECRETARY OF STATE RESPECTING THE NEGOTIATION OF INTERNATIONAL AGREEMENTS RELATING TO THE ENHANCEMENT OF THE ENVIRONMENT

Ex. Ord. No. 11742, Oct. 23, 1973, 38 F.R. 29457, provided:

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92–500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

DEFINITION OF "ADMINISTRATOR"

Pub. L. 100–4, §1(d), Feb. 4, 1987, 101 Stat. 8, provided that: "For purposes of this Act [see Short Title of 1987 Amendment note above], the term 'Administrator' means the Administrator of the Environmental Protection Agency."

§1252. Comprehensive programs for water pollution control

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) Planning for reservoirs; storage for regulation of streamflow

(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a

tion, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, ch. 758, title III, §302, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100–4, title III, §308(e), Feb. 4, 1987, 101 Stat. 39.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100–4, §308(e)(2), inserted "or as identified under section 1314(*l*) of this title" after "Administrator" and "public health," after "protection of".

Subsec. (b). Pub. L. 100–4, §308(e)(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows:

"(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

"(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person."

§1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such

calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term ''water quality standards'' includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B) of this section, the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) of this section apply to this subsection, including the requirement in subsection (c)(2)(A) of this section that the criteria protect public health and welfare.

(June 30, 1948, ch. 758, title III, § 303, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100–4, title III, § 308(d), title IV, § 404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub. L. 106–284, § 2, Oct. 10, 2000, 114 Stat. 870.)

REFERENCES IN TEXT

This Act, referred to in subsecs. (a)(1), (2), (3)(B), (C) and (b)(1), means act June 30, 1948, ch. 758, 62 Stat. 1155, prior to the supersedure and reenactment of act June 30, 1948 by act Oct. 18, 1972, Pub. L. 92–500, 86 Stat. 816. Act June 30, 1948, ch. 758, as added by act Oct. 18, 1972, Pub. L. 92–500, 86 Stat. 816, enacted this chapter.

AMENDMENTS

2000—Subsec. (i). Pub. L. 106–284 added subsec. (i).

1987—Subsec. (c)(2). Pub. L. 100–4, § 308(d), designated existing provision as subpar. (A) and added subpar. (B).

Subsec. (d)(4). Pub. L. 100–4, § 404(b), added par. (4).

§ 1313a. Revised water quality standards

The review, revision, and adoption or promulgation of revised or new water quality standards pursuant to section 303(c) of the Federal Water Pollution Control Act [33 U.S.C. 1313(c)] shall be completed by the date three years after December 29, 1981. No grant shall be made under title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.] after such date until water quality standards are reviewed and revised pursuant to section 303(c), except where the State has in good faith submitted such revised water quality standards and the Administrator has not acted to approve or disapprove such submission within one hundred and twenty days of receipt.

(Pub. L. 97–117, § 24, Dec. 29, 1981, 95 Stat. 1632.)

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in text, is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816. Title II of the Act is classified generally to subchapter II (§ 1281 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of this title and Tables.

CODIFICATION

Section was enacted as part of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

§ 1314. Information and guidelines

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(c) Application of State law

Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

(June 30, 1948, ch. 758, title III, § 308, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 858; amended Pub. L. 95–217, § 67(c)(1), Dec. 27, 1977, 91 Stat. 1606; Pub. L. 100–4, title III, § 310, title IV, § 406(d)(1), Feb. 4, 1987, 101 Stat. 41, 73.)

AMENDMENTS

1987—Subsec. (a). Pub. L. 100–4, § 406(d)(1), substituted "1345, and 1364" for "and 1364" in cl. (4).

Subsec. (a)(B). Pub. L. 100–4, § 310(a)(2), inserted "(including an authorized contractor acting as a representative of the Administrator)" after "representative".

Subsec. (b). Pub. L. 100–4, § 310(a)(1), substituted a period and "Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter." for ", except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter."

Subsec. (d). Pub. L. 100–4, § 310(b), added subsec. (d).

1977—Subsec. (a)(4). Pub. L. 95–217 inserted "1344 (relating to State permit programs)," after "sections 1315, 1321, 1342," in provisions preceding subpar. (A).

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that

any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term ''organization'' means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term ''serious bodily injury'' means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term ''person'' means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term ''hazardous substance'' means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste

the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,,[1] or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutant into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the ''Secretary'') finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on

[1] So in original.

the record in accordance with section 554 of title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(June 30, 1948, ch. 758, title III, §309, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 859; amended Pub. L. 95–217, §§54(b), 55, 56, 67(c)(2), Dec. 27, 1977, 91 Stat. 1591, 1592, 1606; Pub. L. 100–4, title III, §§312, 313(a)(1), (b)(1), (c), 314(a), Feb. 4, 1987, 101 Stat. 42, 45, 46; Pub. L. 101–380, title IV, §4301(c), Aug. 18, 1990, 104 Stat. 537.)

REFERENCES IN TEXT

The Solid Waste Disposal Act, referred to in subsec. (c)(7), is title II of Pub. L. 89–272, Oct. 20, 1965, 79 Stat. 997, as amended generally by Pub. L. 94–580, §2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (§6901 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of Title 42 and Tables.

AMENDMENTS

1990—Subsec. (c)(1)(A), (2)(A), (3)(A). Pub. L. 101–380 inserted "1321(b)(3)," after "1318,".

1987—Subsec. (c). Pub. L. 100–4, §312, amended subsec. (c) generally, revising provisions of par. (1), adding pars. (2), (3), (5), and (7), redesignating former pars. (2) and (4) as (3) and (6), respectively, and revising provisions of redesignated par. (4).

Subsec. (d). Pub. L. 100–4, §313(a)(1), inserted ", or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title," after second reference to "State,".

Pub. L. 100–4, §313(b)(1), substituted "$25,000 per day for each violation" for "$10,000 per day of such violation".

Pub. L. 100–4, §313(c), inserted at end "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation."

Subsec. (g). Pub. L. 100–4, §314(a), added subsec. (g).

1977—Subsec. (a)(1). Pub. L. 95–217, §§55(a), 67(c)(2)(A), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title" and "1342 or 1344 of this title" for "1342 of this title".

Subsec. (a)(2). Pub. L. 95–217, §56(a), substituted "except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation" for "the Administrator shall enforce any permit condition or limitation".

Subsec. (a)(3). Pub. L. 95–217, §§55(b), 67(c)(2)(B), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title" and inserted "or in a permit issued under section 1344 of this title by a State" after "in a permit issued under section 1342 of this title by him or by a State".

Subsec. (a)(4). Pub. L. 95–217, §56(b), struck out provision that any order issued under this subsection had to be by personal service and had to state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Administrator determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. See section subsec. (a)(5) of this section.

Subsec. (a)(5), (6). Pub. L. 95–217, §56(c), added pars. (5) and (6).

Subsec. (c)(1). Pub. L. 95–217, §67(c)(2)(C), substituted "by a State or in a permit issued under section 1344 of this title by a State, shall be punished" for "by a State, shall be punished".

Subsec. (d). Pub. L. 95–217, §§55(c), 67(c)(2)(D), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title" and inserted "or in a permit issued under section 1344 of this title by a State," after "permit issued under section 1342 of this title by the Administrator, or by a State,".

Subsec. (f). Pub. L. 95–217, §54(b), added subsec. (f).

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–380 applicable to incidents occurring after Aug. 18, 1990, see section 1020 of Pub. L. 101–380, set out as an Effective Date note under section 2701 of this title.

SAVINGS PROVISION

Pub. L. 100–4, title III, §313(a)(2), Feb. 4, 1987, 101 Stat. 45, provided that: "No State shall be required before July 1, 1988, to modify a permit program approved or submitted under section 402 of the Federal Water Pollution Control Act [33 U.S.C. 1342] as a result of the amendment made by paragraph (1) [amending this section]."

DEPOSIT OF CERTAIN PENALTIES INTO OIL SPILL LIABILITY TRUST FUND

Penalties paid pursuant to subsection (c) of this section and sections 1321 and 1501 et seq. of this title to be deposited in the Oil Spill Liability Trust Fund created under section 9509 of Title 26, Internal Revenue Code, see section 4304 of Pub. L. 101–380, set out as a note under section 9509 of Title 26.

INCREASED PENALTIES NOT REQUIRED UNDER STATE PROGRAMS

Pub. L. 100–4, title III, §313(b)(2), Feb. 4, 1987, 101 Stat. 45, provided that: "The Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.] shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act [33 U.S.C. 1319(d)] which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1) [amending this section]. Nothing in this paragraph shall affect the Administrator's authority to establish or adjust by regulation a minimum acceptable State civil penalty."

ACTIONS BY SURGEON GENERAL RELATING TO INTERSTATE POLLUTION

Act July 9, 1956, ch. 518, §5, 70 Stat. 507, provided that actions by the Surgeon General with respect to water pollutants under section 2(d) of act June 30, 1948, ch. 758, 62 Stat. 1155, as in effect prior to July 9, 1956, which had been completed prior to such date, would still be subject to the terms of section 2(d) of act June 30, 1948, in effect prior to the July 9, 1956 amendment, but that actions with respect to such pollutants would nevertheless subsequently be possible in accordance with the terms of act June 30, 1948, as amended by act July 9, 1956.

§ 1320. International pollution abatement

(a) Hearing; participation by foreign nations

Whenever the Administrator, upon receipts of reports, surveys, or studies from any duly constituted international agency, has reason to believe that pollution is occurring which endangers the health or welfare of persons in a foreign country, and the Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State or States in which such discharge or discharges originate and to the appropriate interstate agency, if any. He shall also promptly call such a hearing, if he believes that such pollution is occurring in sufficient quantity to warrant such action, and if such foreign country has given the United States essentially the same rights with respect to the prevention and control of pollution occurring in that country as is given that country by this subsection. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the hearing, and the representative of such country shall, for the purpose of the hearing and any further proceeding resulting from such hearing, have all the rights of a State water pollution control agency. Nothing in this subsection shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of pollution in waters covered by those treaties.

(b) Functions and responsibilities of Administrator not affected

The calling of a hearing under this section shall not be construed by the courts, the Administrator, or any person as limiting, modifying, or otherwise affecting the functions and responsibilities of the Administrator under this section to establish and enforce water quality requirements under this chapter.

(c) Hearing board; composition; findings of fact; recommendations; implementation of board's decision

The Administrator shall publish in the Federal Register a notice of a public hearing before a hearing board of five or more persons appointed by the Administrator. A majority of the members of the board and the chairman who shall be designated by the Administrator shall not be officers or employees of Federal, State, or local governments. On the basis of the evidence presented at such hearing, the board shall within sixty days after completion of the hearing make findings of fact as to whether or not such pollution is occurring and shall thereupon by decision, incorporating its findings therein, make such recommendations to abate the pollution as may be appropriate and shall transmit such decision and the record of the hearings to the Administrator. All such decisions shall be public. Upon receipt of such decision, the Administrator shall promptly implement the board's decision in accordance with the provisions of this chapter.

(d) Report by alleged polluter

In connection with any hearing called under this subsection, the board is authorized to require any person whose alleged activities result in discharges causing or contributing to pollution to file with it in such forms as it may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall

amended Pub. L. 95–217, §§61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

***(l)* Limitation on permit requirement**

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES PERMIT REQUIREMENTS FOR SILVICULTURAL ACTIVITIES.—The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

(B) OTHER REQUIREMENTS.—Nothing in this paragraph exempts a discharge from silvicultural activity from any permitting requirement under section 1344 of this title, existing permitting requirements under section 1342 of this title, or from any other federal law.

(C) The authorization provided in Section[1] 1365(a) of this title does not apply to any nonpermitting program established under 1342(p)(6)[2] of this title for the silviculture activities listed in 1342(*l*)(3)(A)[2] of this title, or to any other limitations that might be deemed

[1] So in original. Probably should not be capitalized.

[2] So in original. Probably should be preceded by "section".

to apply to the silviculture activities listed in 1342(*l*)(3)(A)[2] of this title.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if—

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if—

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(*o*) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if—

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater dis-

charges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(q) Combined sewer overflows

(1) Requirement for permits, orders, and decrees

Each permit, order, or decree issued pursuant to this chapter after December 21, 2000, for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy signed by the Administrator on April 11, 1994 (in this subsection referred to as the ''CSO control policy'').

(2) Water quality and designated use review guidance

Not later than July 31, 2001, and after providing notice and opportunity for public comment, the Administrator shall issue guidance to facilitate the conduct of water quality and designated use reviews for municipal combined sewer overflow receiving waters.

(3) Report

Not later than September 1, 2001, the Administrator shall transmit to Congress a report on the progress made by the Environmental Protection Agency, States, and municipalities in implementing and enforcing the CSO control policy.

(r) Discharges incidental to the normal operation of recreational vessels

No permit shall be required under this chapter by the Administrator (or a State, in the case of a permit program approved under subsection (b)) for the discharge of any graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines, or any other discharge that is incidental to the normal operation of a vessel, if the discharge is from a recreational vessel.

(June 30, 1948, ch. 758, title IV, § 402, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 880; amended Pub. L. 95–217, §§ 33(c), 50, 54(c)(1), 65, 66, Dec. 27, 1977, 91 Stat. 1577, 1588, 1591, 1599, 1600; Pub. L. 100–4, title IV, §§ 401–404(a), 404(c), formerly 404(d), 405, Feb. 4, 1987, 101 Stat. 65–67, 69, renumbered § 404(c), Pub. L. 104–66, title II, § 2021(e)(2), Dec. 21, 1995, 109 Stat. 727; Pub. L. 102–580, title III, § 364, Oct. 31, 1992, 106 Stat. 4862; Pub. L. 106–554, § 1(a)(4) [div. B, title I, § 112(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A–224; Pub. L. 110–288, § 2, July 29, 2008, 122 Stat. 2650; Pub. L. 113–79, title XII, § 12313, Feb. 7, 2014, 128 Stat. 992.)

AMENDMENTS

2014—Subsec. (*l*)(3). Pub. L. 113–79 added par. (3).

2008—Subsec. (r). Pub. L. 110–288 added subsec. (r).

2000—Subsec. (q). Pub. L. 106–554 added subsec. (q).

1992—Subsec. (p)(1), (6). Pub. L. 102–580 substituted ''October 1, 1994'' for ''October 1, 1992'' in par. (1) and ''October 1, 1993'' for ''October 1, 1992'' in par. (6).

1987—Subsec. (a)(1). Pub. L. 100–4, § 404(c), inserted cl. (A) and (B) designations.

Subsec. (c)(1). Pub. L. 100–4, § 403(b)(2), substituted ''as to those discharges'' for ''as to those navigable waters''.

Subsec. (c)(4). Pub. L. 100–4, § 403(b)(1), added par. (4).

Subsec. (*l*). Pub. L. 100–4, § 401, inserted ''Limitation on permit requirement'' as subsec. heading designated existing provisions as par. (1) and inserted par. heading, added par. (2), and aligned pars. (1) and (2).

Subsecs. (m) to (p). Pub. L. 100–4, §§ 402, 403(a), 404(a), 405, added subsecs. (m) to (p).

1977—Subsec. (a)(5). Pub. L. 95–217, § 50, substituted ''section 1314(i)(2)'' for ''section 1314(h)(2)''.

Subsec. (b). Pub. L. 95–217, § 50, substituted in provisions preceding par. (1) ''subsection (i)(2) of section 1314'' for ''subsection (h)(2) of section 1314''.

Subsec. (b)(8). Pub. L. 95–217, § 54(c)(1), inserted reference to identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into treatment works and programs to assure compliance with pretreatment standards by each source.

Subsec. (c)(1), (2). Pub. L. 95–217, § 50, substituted ''section 1314(i)(2)'' for ''section 1314(h)(2)''.

Subsec. (d)(2). Pub. L. 95–217, § 65(b), inserted provision requiring that, whenever the Administrator objects to the issuance of a permit under subsec. (d)(2) of this section, the written objection contain a statement of the reasons for the objection and the effluent limitations and conditions which the permit would include if it were issued by the Administrator.

Subsec. (d)(4). Pub. L. 95–217, § 65(a), added par. (4).

Subsec. (e). Pub. L. 95–217, § 50, substituted ''subsection (i)(2) of section 1314'' for ''subsection (h)(2) of section 1314''.

Subsec. (h). Pub. L. 95–217, § 66, substituted ''where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit,'' for ''where no State program is approved,''.

Subsec. (*l*). Pub. L. 95–217, § 33(c), added subsec. (*l*).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency under this section relating to compliance with national pollutant discharge elimination system permits with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy sub-

sequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

PERMIT REQUIREMENTS FOR DISCHARGES FROM CERTAIN VESSELS

Pub. L. 110–299, §§1, 2, July 31, 2008, 122 Stat. 2995, as amended by Pub. L. 111–215, §1, July 30, 2010, 124 Stat. 2347; Pub. L. 112–213, title VII, §703, Dec. 20, 2012, 126 Stat. 1580; Pub. L. 113–281, title VI, §602, Dec. 18, 2014, 128 Stat. 3061, provided that:

''SECTION 1. DEFINITIONS.

''In this Act:

''(1) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Environmental Protection Agency.

''(2) COVERED VESSEL.—The term 'covered vessel' means a vessel that is—

''(A) less than 79 feet in length; or

''(B) a fishing vessel (as defined in section 2101 of title 46, United States Code), regardless of the length of the vessel.

''(3) OTHER TERMS.—The terms 'contiguous zone', 'discharge', 'ocean', and 'State' have the meanings given the terms in section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362).

''SEC. 2. DISCHARGES INCIDENTAL TO NORMAL OPERATION OF VESSELS.

''(a) NO PERMIT REQUIREMENT.—Except as provided in subsection (b), during the period beginning on the date of the enactment of this Act [July 31, 2008] and ending on December 18, 2017, the Administrator, or a State in the case of a permit program approved under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), shall not require a permit under that section for a covered vessel for—

''(1) any discharge of effluent from properly functioning marine engines;

''(2) any discharge of laundry, shower, and galley sink wastes; or

''(3) any other discharge incidental to the normal operation of a covered vessel.

''(b) EXCEPTIONS.—Subsection (a) shall not apply with respect to—

''(1) rubbish, trash, garbage, or other such materials discharged overboard;

''(2) other discharges when the vessel is operating in a capacity other than as a means of transportation, such as when—

''(A) used as an energy or mining facility;

''(B) used as a storage facility or a seafood processing facility;

''(C) secured to a storage facility or a seafood processing facility; or

''(D) secured to the bed of the ocean, the contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

''(3) any discharge of ballast water; or

''(4) any discharge in a case in which the Administrator or State, as appropriate, determines that the discharge—

''(A) contributes to a violation of a water quality standard; or

''(B) poses an unacceptable risk to human health or the environment.''

STORMWATER PERMIT REQUIREMENTS

Pub. L. 102–240, title I, §1068, Dec. 18, 1991, 105 Stat. 2007, provided that:

''(a) GENERAL RULE.—Notwithstanding the requirements of sections 402(p)(2)(B), (C), and (D) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(B), (C), (D)], permit application deadlines for stormwater discharges associated with industrial activities from facilities that are owned or operated by a municipality shall be established by the Administrator of the Environmental Protection Agency (hereinafter in this section referred to as the 'Administrator') pursuant to the requirements of this section.

''(b) PERMIT APPLICATIONS.—

''(1) INDIVIDUAL APPLICATIONS.—The Administrator shall require individual permit applications for discharges described in subsection (a) on or before October 1, 1992; except that any municipality that has participated in a timely part I group application for an industrial activity discharging stormwater that is denied such participation in a group application or for which a group application is denied shall not be required to submit an individual application until the 180th day following the date on which the denial is made.

''(2) GROUP APPLICATIONS.—With respect to group applications for permits for discharges described in subsection (a), the Administrator shall require—

''(A) part I applications on or before September 30, 1991, except that any municipality with a population of less than 250,000 shall not be required to submit a part I application before May 18, 1992; and

''(B) part II applications on or before October 1, 1992, except that any municipality with a population of less than 250,000 shall not be required to submit a part II application before May 17, 1993.

''(c) MUNICIPALITIES WITH LESS THAN 100,000 POPULATION.—The Administrator shall not require any municipality with a population of less than 100,000 to apply for or obtain a permit for any stormwater discharge associated with an industrial activity other than an airport, powerplant, or uncontrolled sanitary landfill owned or operated by such municipality before October 1, 1992, unless such permit is required by section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

''(d) UNCONTROLLED SANITARY LANDFILL DEFINED.—For the purposes of this section, the term 'uncontrolled sanitary landfill' means a landfill or open dump, whether in operation or closed, that does not meet the requirements for run-on and run-off controls established pursuant to subtitle D of the Solid Waste Disposal Act [42 U.S.C. 6941 et seq.].

''(e) LIMITATION ON STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to affect any application or permit requirement, including any deadline, to apply for or obtain a permit for stormwater discharges subject to section 402(p)(2)(A) or (E) of the Federal Water Pollution Control Act [33 U.S.C. 1342(p)(2)(A), (E)].

''(f) REGULATIONS.—The Administrator shall issue final regulations with respect to general permits for stormwater discharges associated with industrial activity on or before February 1, 1992.''

PHOSPHATE FERTILIZER EFFLUENT LIMITATION

Pub. L. 100–4, title III, §306(c), Feb. 4, 1987, 101 Stat. 36, provided that:

''(1) ISSUANCE OF PERMIT.—As soon as possible after the date of the enactment of this Act [Feb. 4, 1987], but not later than 180 days after such date of enactment, the Administrator shall issue permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)] with respect to facilities—

''(A) which were under construction on or before April 8, 1974, and

''(B) for which the Administrator is proposing to revise the applicability of the effluent limitation established under section 301(b) of such Act [33 U.S.C. 1311(b)] for phosphate subcategory of the fertilizer manufacturing point source category to exclude such facilities.

''(2) LIMITATIONS ON STATUTORY CONSTRUCTION.—Nothing in this section [amending section 1311 of this title and enacting this note] shall be construed—

''(A) to require the Administrator to permit the discharge of gypsum or gypsum waste into the navigable waters,

''(B) to affect the procedures and standards applicable to the Administrator in issuing permits under section 402(a)(1)(B) of the Federal Water Pollution Control Act [33 U.S.C. 1342(a)(1)(B)], and

"(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act."

LOG TRANSFER FACILITIES

Pub. L. 100–4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

"(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

"(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

"(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term 'log transfer facility' means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft."

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95–217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95–217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98–67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

"(C) to affect the authority of any State to deny or condition certification under section 401 of such Act [33 U.S.C. 1341] with respect to the issuance of permits under section 402(a)(1)(B) of such Act."

LOG TRANSFER FACILITIES

Pub. L. 100–4, title IV, §407, Feb. 4, 1987, 101 Stat. 74, provided that:

"(a) AGREEMENT.—The Administrator and Secretary of the Army shall enter into an agreement regarding coordination of permitting for log transfer facilities to designate a lead agency and to process permits required under sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344], where both such sections apply, for discharges associated with the construction and operation of log transfer facilities. The Administrator and Secretary are authorized to act in accordance with the terms of such agreement to assure that, to the maximum extent practicable, duplication, needless paperwork and delay in the issuance of permits, and inequitable enforcement between and among facilities in different States, shall be eliminated.

"(b) APPLICATIONS AND PERMITS BEFORE OCTOBER 22, 1985.—Where both of sections 402 and 404 of the Federal Water Pollution Control Act [33 U.S.C. 1342, 1344] apply, log transfer facilities which have received a permit under section 404 of such Act before October 22, 1985, shall not be required to submit a new application for a permit under section 402 of such Act. If the Administrator determines that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act satisfies the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act [33 U.S.C. 1311, 1312, 1316, 1317, 1318, and 1343], a separate application for a permit under section 402 of such Act shall not thereafter be required. In any case where the Administrator demonstrates, after an opportunity for a hearing, that the terms of a permit issued on or before October 22, 1985, under section 404 of such Act do not satisfy the applicable requirements of sections 301, 302, 306, 307, 308, and 403 of such Act, modifications to the existing permit under section 404 of such Act to incorporate such applicable requirements shall be issued by the Administrator as an alternative to issuance of a separate new permit under section 402 of such Act.

"(c) LOG TRANSFER FACILITY DEFINED.—For the purposes of this section, the term 'log transfer facility' means a facility which is constructed in whole or in part in waters of the United States and which is utilized for the purpose of transferring commercially harvested logs to or from a vessel or log raft, including the formation of a log raft."

ALLOWABLE DELAY IN MODIFYING EXISTING APPROVED STATE PERMIT PROGRAMS TO CONFORM TO 1977 AMENDMENT

Pub. L. 95–217, §54(c)(2), Dec. 27, 1977, 91 Stat. 1591, provided that any State permit program approved under this section before Dec. 27, 1977, which required modification to conform to the amendment made by section 54(c)(1) of Pub. L. 95–217, which amended subsec. (b)(8) of this section, not be required to be modified before the end of the one year period which began on Dec. 27, 1977, unless in order to make the required modification a State must amend or enact a law in which case such modification not be required for such State before the end of the two year period which began on Dec. 27, 1977.

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

(June 30, 1948, ch. 758, title IV, §403, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 883.)

DISCHARGES FROM POINT SOURCES IN UNITED STATES VIRGIN ISLANDS ATTRIBUTABLE TO MANUFACTURE OF RUM; EXEMPTION; CONDITIONS

Discharges from point sources in the United States Virgin Islands in existence on Aug. 5, 1983, attributable to the manufacture of rum not to be subject to the requirements of this section under certain conditions, see section 214(g) of Pub. L. 98–67, set out as a note under section 1311 of this title.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the dis-

charge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term ''Secretary'' as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than 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 shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Ad-

ministrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program approved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E) of this section, or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

***(l)* Categories of discharges not subject to requirements**

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(o) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material

[1] So in original. Probably should be "action".

in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.

(June 30, 1948, ch. 758, title IV, §404, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95–217, §67(a), (b), Dec. 27, 1977, 91 Stat. 1600; Pub. L. 100–4, title III, §313(d), Feb. 4, 1987, 101 Stat. 45.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (r), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1987—Subsec. (s). Pub. L. 100–4 redesignated par. (5) as (4), substituted "$25,000 per day for each violation" for "$10,000 per day of such violation", inserted provision specifying factors to consider in determining the penalty amount, and struck out former par. (4) which read as follows:

"(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

"(B) For the purposes of this paragraph, the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer."

1977—Subsec. (a). Pub. L. 95–217, §67(a)(1), substituted "The Secretary" for "The Secretary of the Army, acting through the Chief of Engineers," and inserted provision that, not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary publish the notice required by this subsection.

Subsecs. (b), (c). Pub. L. 95–217, §67(a)(2), substituted "the Secretary" for "the Secretary of the Army".

Subsecs. (d) to (t). Pub. L. 95–217, §67(b), added subsecs. (d) to (t).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers' dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

MITIGATION AND MITIGATION BANKING REGULATIONS

Pub. L. 108–136, div. A, title III, §314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

"(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

"(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003]."

REGULATORY PROGRAM

Pub. L. 106–377, §1(a)(2) [title I], Oct. 27, 2000, 114 Stat. 1441, 1441A–63, provided in part that: "For expenses necessary for administration of laws pertaining to regulation of navigable waters and wetlands, $125,000,000, to remain available until expended: *Provided*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use funds appropriated herein to: (1) by March 1, 2001, supplement the report, Cost Analysis For the 1999 Proposal to Issue and Modify Nationwide Permits, to reflect the Nationwide Permits actually issued on March 9, 2000, including changes in the acreage limits, preconstruction notification requirements and general conditions between the rule proposed on July 21, 1999, and the rule promulgated and published in the Federal Register; (2) after consideration of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106–377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers' progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal

Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106–60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army, acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission.''

AUTHORITY TO DELEGATE TO STATE OF WASHINGTON FUNCTIONS OF THE SECRETARY RELATING TO LAKE CHELAN, WASHINGTON

Pub. L. 95–217, § 76, Dec. 27, 1977, 91 Stat. 1610, provided that: ''The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation.''

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limita-

''(B) an aggregate aboveground storage capacity greater than or equal to 20,000 gallons; or

''(C) a reportable oil discharge history; or

''(2) allow certification by the owner or operator of the farm (via self-certification) for a farm with—

''(A) an aggregate aboveground storage capacity less than 20,000 gallons and greater than the lesser of—

''(i) 6,000 gallons; and

''(ii) the adjustment quantity established under subsection (d)(2); and

''(B) no reportable oil discharge history; and

''(3) not require compliance with the rule by any farm—

''(A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of—

''(i) 6,000 gallons; and

''(ii) the adjustment quantity established under subsection (d)(2); and

''(B) no reportable oil discharge history; and

''(4) not require compliance with the rule by any farm with an aggregate aboveground storage capacity of less than 2,500 gallons.

''(c) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b), the aggregate aboveground storage capacity of a farm excludes—

''(1) all containers on separate parcels that have a capacity that is 1,000 gallons or less; and

''(2) all containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of Food and Drugs.

''(d) STUDY.—

''(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [June 10, 2014], the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water.

''(2) ADJUSTMENT.—Not later than 18 months after the date on which the study described in paragraph (1) is complete, the Administrator, in consultation with the Secretary of Agriculture, shall promulgate a rule to adjust the exemption levels described in paragraphs (2) and (3) of subsection (b) in accordance with the study.''

ENVIRONMENTAL COURT FEASIBILITY STUDY

Pub. L. 92–500, §9, Oct. 18, 1972, 86 Stat. 899, authorized the President, acting through the Attorney General, to study the feasibility of establishing a separate court or court system with jurisdiction over environmental matters and required him to report the results of his study, together with his recommendations, to Congress not later than one year after Oct. 18, 1972.

TRANSFER OF PUBLIC HEALTH SERVICE OFFICERS

Pub. L. 89–234, §2(b)–(k), Oct. 2, 1965, 79 Stat. 904, 905, authorized the transfer of certain commissioned officers of the Public Health Service to classified positions in the Federal Water Pollution Control Administration, now the Environmental Protection Agency, where such transfer was requested within six months after the establishment of the Administration and made certain administrative provisions relating to pension and retirement rights of the transferees, sick leave benefits, group life insurance, and certain other miscellaneous provisions.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term ''State water pollution control agency'' means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term ''interstate agency'' means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term ''State'' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term ''municipality'' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term ''person'' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term ''pollutant'' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) ''sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces'' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term ''navigable waters'' means the waters of the United States, including the territorial seas.

(8) The term ''territorial seas'' means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term ''contiguous zone'' means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term ''ocean'' means any portion of the high seas beyond the contiguous zone.

(11) The term ''effluent limitation'' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term ''discharge of a pollutant'' and the term ''discharge of pollutants'' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term ''toxic pollutant'' means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term ''point source'' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term ''biological monitoring'' shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term ''discharge'' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term ''schedule of compliance'' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term ''industrial user'' means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of ''Division D—Manufacturing'' and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term ''pollution'' means the manmade or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term ''medical waste'' means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) COASTAL RECREATION WATERS.—

(A) IN GENERAL.—The term ''coastal recreation waters'' means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) EXCLUSIONS.—The term ''coastal recreation waters'' does not include—

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) FLOATABLE MATERIAL.—

(A) IN GENERAL.—The term ''floatable material'' means any foreign matter that may float or remain suspended in the water column.

(B) INCLUSIONS.—The term ''floatable material'' includes—

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) PATHOGEN INDICATOR.—The term ''pathogen indicator'' means a substance that indicates the potential for human infectious disease.

(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term ''oil and gas exploration, production, processing, or treatment operations or transmission facilities'' means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) RECREATIONAL VESSEL.—

(A) IN GENERAL.—The term ''recreational vessel'' means any vessel that is—

(i) manufactured or used primarily for pleasure; or

(ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION.—The term ''recreational vessel'' does not include a vessel that is subject to Coast Guard inspection and that—

(i) is engaged in commercial use; or

(ii) carries paying passengers.

(26) TREATMENT WORKS.—The term ''treatment works'' has the meaning given the term in section 1292 of this title.

(June 30, 1948, ch. 758, title V, §502, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 886; amended Pub. L. 95–217, §33(b), Dec. 27, 1977, 91 Stat. 1577; Pub. L. 100–4, title V, §§502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub. L. 100–688, title III, §3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 104–106, div. A, title III, §325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub. L. 106–284, §5, Oct. 10, 2000, 114 Stat. 875; Pub. L. 109–58, title III, §323, Aug. 8, 2005, 119 Stat. 694; Pub. L. 110–288, §3, July 29, 2008, 122 Stat. 2650; Pub. L. 113–121, title V, §5012(b), June 10, 2014, 128 Stat. 1328.)

AMENDMENTS

2014—Par. (26). Pub. L. 113–121 added par. (26).

2008—Par. (25). Pub. L. 110–288 added par. (25).
2005—Par. (24). Pub. L. 109–58 added par. (24).
2000—Pars. (21) to (23). Pub. L. 106–284 added pars. (21) to (23).
1996—Par. (6)(A). Pub. L. 104–106 substituted "'sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces'" for "'sewage from vessels'".
1988—Par. (20). Pub. L. 100–688 added par. (20).
1987—Par. (3). Pub. L. 100–4, §502(a), inserted "the Commonwealth of the Northern Mariana Islands," after "Samoa,".
Par. (14). Pub. L. 100–4, §503, inserted "agricultural stormwater discharges and" after "does not include".
1977—Par. (14). Pub. L. 95–217 inserted provision that "point source" does not include return flows from irrigated agriculture.

EFFECTIVE DATE OF 2014 AMENDMENT

Amendment by Pub. L. 113–121 effective Oct. 1, 2014, see section 5012(c) of Pub. L. 113–121, set out as a note under section 1292 of this title.

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

DEFINITION OF "POINT SOURCE"

Pub. L. 100–4, title V, §507, Feb. 4, 1987, 101 Stat. 78, provided that: "For purposes of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the term 'point source' includes a landfill leachate collection system."

§ 1363. Water Pollution Control Advisory Board

(a) Establishment; composition; terms of office

(1) There is hereby established in the Environmental Protection Agency a Water Pollution Control Advisory Board, composed of the Administrator or his designee, who shall be Chairman, and nine members appointed by the President, none of whom shall be Federal officers or employees. The appointed members, having due regard for the purposes of this chapter, shall be selected from among representatives of various State, interstate, and local governmental agencies, of public or private interests contributing to, affected by, or concerned with pollution, and of other public and private agencies, organizations, or groups demonstrating an active interest in the field of pollution prevention and control, as well as other individuals who are expert in this field.

(2)(A) Each member appointed by the President shall hold office for a term of three years, except that (i) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of the members first taking office after June 30, 1956, shall expire as follows: three at the end of one year after such date, three at the end of two years after such date, and three at the end of three years after such date, as designated by the President at the time of appointment, and (iii) the term of any member under the preceding provisions shall be extended until the date on which his successor's appointment is effective. None of the members appointed by the President shall be eligible for reappointment within one year after the end of his preceding term.

(B) The members of the Board who are not officers or employees of the United States, while attending conferences or meetings of the Board or while serving at the request of the Administrator, shall be entitled to receive compensation at a rate to be fixed by the Administrator, but not exceeding $100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons in the Government service employed intermittently.

(b) Functions

The Board shall advise, consult with, and make recommendations to the Administrator on matters of policy relating to the activities and functions of the Administrator under this chapter.

(c) Clerical and technical assistance

Such clerical and technical assistance as may be necessary to discharge the duties of the Board shall be provided from the personnel of the Environmental Protection Agency.

(June 30, 1948, ch. 758, title V, §503, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 887.)

REFERENCES IN TEXT

Travel expenses, including per diem in lieu of subsistence as authorized by law, referred to in subsec. (a)(2)(B), probably means the allowances authorized by section 5703 of Title 5, Government Organization and Employees.

CONTINUATION OF TERM OF OFFICE

Pub. L. 87–88, §6(c), July 20, 1961, 75 Stat. 207, provided that members of the Water Pollution Control Advisory Board holding office immediately preceding July 20, 1961 were to remain in office as members of the Board as established by section 6(a) of Pub. L. 87–88 until the expiration of the terms of office for which they were originally appointed.

TERMS OF OFFICE OF MEMBERS OF WATER POLLUTION CONTROL ADVISORY BOARD

Act July 9, 1956, ch. 518, §3, 70 Stat. 507, provided that the terms of office of members of the Water Pollution Control Advisory Board, holding office on July 9, 1956, were to terminate at the close of business on that date.

TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law. See sections 3(2) and 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

§ 1364. Emergency powers

(a) Emergency powers

Notwithstanding any other provision of this chapter, the Administrator upon receipt of evi-

litical subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, ch. 758, title V, §510, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 893.)

§1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899, (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441–451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C. 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

(June 30, 1948, ch. 758, title V, §511, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 893; amended Pub. L. 93–243, §3, Jan. 2, 1974, 87 Stat. 1069.)

REFERENCES IN TEXT

Act of March 3, 1899, referred to in subsec. (a), is act Mar. 3, 1899, ch. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

The Rivers and Harbors Act of 1910, referred to in subsec. (b), probably means act June 23, 1910, ch. 359, 36 Stat. 593.

The Supervisory Harbors Act of 1888, referred to in subsec. (b), probably means act June 29, 1888, ch. 496, 25 Stat. 209, as amended, which is classified generally to subchapter III (§441 et seq.) of chapter 9 of this title. For complete classification of this Act to the Code, see Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (c), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

1974—Subsec. (d). Pub. L. 93–243 added subsec. (d).

§1372. Labor standards

The Administrator shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this chapter shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality, as determined by the Secretary of Labor, in accordance with sections 3141–3144, 3146, and 3147 of title 40. The Secretary of Labor shall have, with respect to the labor standards specified in this subsection,[1] the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176) and section 3145 of title 40.

(June 30, 1948, ch. 758, title V, §513, as added Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 894.)

REFERENCES IN TEXT

Reorganization Plan Numbered 14 of 1950, referred to in text, is Reorg. Plan No. 14 of 1950, eff. May 24, 1950,

[1] So in original. Probably should be "section,".

(aa) "zero emission vehicle" means a vehicle that produces zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions.

SEC. 20. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use

of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appro-

[1] So in original. The period probably should be a semicolon.

priate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91–190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91–190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91–190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the ''Council''). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

human health or environmental effects on minority or low-income populations, because it does not adversely affect the level of protection provided to human health or the environment.

The rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of ''waters of the United States'' is intended to benefit all regulators, stakeholders, and interested parties. In addition, this rule is national in scope and, therefore, is not specific to a particular geographic area.

In the spirit of E.O. 12898, input from environmental justice stakeholders was requested during the rule development process, through a series of stakeholder meetings between April and November 2014. On May 12, 2014, EPA held a focused teleconference with non-traditional stakeholders, including environmental justice and faith-based stakeholders, to solicit their individual input on the proposed rule. The agencies have used the feedback from public outreach as the source of early guidance and recommendations for refining the proposed rule. Stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in today's rule, and incorporate increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as ''waters of the United States.''

The agencies prepared a report summarizing their outreach to the environmental justice community, analysis of potential impacts, and how these results informed the development of the rule. This report, *Environmental Justice Report for the Clean Water Rule: Definition of ''Waters of the United States'' Under the Clean Water Act; Final Rule* (Docket Id. No. EPA–HQ–OW–2011–0880), is available in the docket for this rule.

K. Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a ''major rule'' as defined by 5 U.S.C. 804(2) based on potential indirect costs.

L. Environmental Documentation

In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing sections 301, 304, 306, 311, 402 and 404, while the Army is making substantively identical revisions to its regulations under section 404 of the CWA. Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes 'a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]''.

The Army has prepared a final environmental assessment and Findings of No Significant Impact consistent with the National Environmental Policy Act (NEPA). The Army has determined that the rule is not a major federal action significantly affecting the quality of the human environment that would require the preparation of an environmental impact statement. The assessment is contained in the record for this rulemaking. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for general permits and specifically for each and every standard individual permit application before making final permit decisions.

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co.* v. *Train,* 430 U.S. 112 (1977); *NRDC* v. *EPA,* 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer.* v. *EPA,* 553 F.3d 927(6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates* v. *EPA,* 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades* v. *EPA,* 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

See **DATES** section for information regarding the timing for seeking judicial review of this rule.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401

Environmental protection, Water pollution control.

Dated: May 27, 2015.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: May 27, 2015.

Jo-Ellen Darcy,

Assistant Secretary of the Army, (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term ''waters of the United States'' means:

(1) All waters which are currently used, 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;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1)

through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding 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.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions.* In this section, the following definitions apply:

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring.* The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this

section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by removing the definition of ''wetlands'' and revising the definition of ''navigable waters'' to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (l) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) O*rdinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 6. Section 112.2 is amended by removing the definition of ''wetlands'' and revising the definition of ''Navigable waters'' to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the

100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the

chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean ''waters of the United States, including the territorial seas.''

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Prior converted cropland. Notwithstanding 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.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (l) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider

the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§117.1 Definitions.

* * * * *

(i) *Navigable waters* is defined in section 502(7) of the Act to mean ''waters of the United States, including the territorial seas.''

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (i)(3)(iii) of this section, of waters identified in paragraphs (i)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (i)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (i)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (i)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) O*rdinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 12. Section 122.2 is amended by:
■ a. Lifting the suspension of the last sentence of the definition of ''Waters of the United States'' published July 21, 1980 (45 FR 48620);
■ b. Removing the definition of ''wetlands'' and revising the definition of ''Waters of the United States'' and
■ c. Suspending the last sentence of the definition of ''Waters of the United States'' published July 21, 1980 (45 FR 48620).

The revision reads as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S. means:*

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 13. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 14. Section 230.3 is amended by:

■ a. Removing paragraph (b) and reserved paragraphs (f), (g), (j) and (l).

■ b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).
■ c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f).
■ d. Redesignating paragraph (k) as paragraph (g).
■ e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l).
■ f. Redesignating paragraph (q-1) as paragraph (m).
■ g. Redesignating paragraph (r) as paragraph (n).
■ h. Redesignating paragraph (s) as paragraph (o).
■ i. Revising newly redesignated paragraph (o).
■ j. Removing paragraph (t).
The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(o) The term *waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 15. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 16. Section 232.2 is amended by removing the definition of ''wetlands'' and revising the definition of ''Waters of the United States'' to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this

definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (l) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINTENCY PLAN

■ 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 18. Section 300.5 is amended by revising the definition of ''navigable waters'' to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition

where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is

characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

■ 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of ''navigable waters'' to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands

found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified

in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 20. The authority citation for part 302 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 21. Section 302.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus,

the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with

similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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PART 401—GENERAL PROVISIONS

■ 22. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 23. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (l)(2) of this section, the term ''waters of the United States'' means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (l)(3)(iii) of this section, of waters identified in paragraphs (l)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (l)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (l)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (l)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (l)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (l)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (l)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (l)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (l)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (l)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (l)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (l)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not ''waters of the United States'' even where they otherwise meet the terms of paragraphs (l)(1)(iv) through (viii) of this section.

(i) Prior converted cropland. Notwithstanding 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.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (l), the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (l)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (l)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (l)(1)(i) through (v) or are located at the head of a water identified in paragraphs (l)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (l)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (l)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (l)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (l)(1)(iv) of this section), to a water identified in paragraphs (l)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (l)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (l)(1)(i) through (iii) of this section. The term ''in the region'' means the watershed that drains to the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (l)(3)(v)(A) through (l) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (l)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (l)(1)(i) through (iii) of this section.

(vi) O*rdinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

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Senator BARRASSO. Thank you very much, Mr. Tseytlin. We are very grateful for your testimony.

I would like to now turn to Ken Kopocis, who is Assistant Professor, American University Washington College of Law, Washington, DC.

Thank you very much for joining us today.

STATEMENT OF KEN KOPOCIS, ASSOCIATE PROFESSOR, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. KOPOCIS. Thank you. Chairman Barrasso and Ranking Member Carper, thank you for the request to appear today to discuss the Clean Water Rule, a rule issued jointly by the U.S. Environmental Protection Agency and the Department of the Army to clarify the scope of the Clean Water Act. I appear today in my personal capacity.

In 1972, Congress enacted the Clean Water Act and made clear that the objective of restoring and maintaining the Nation's waters would best be achieved by controlling pollutants at their source. The Clean Water Rule assists that effort by making the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science. The Rule interprets the Clean Water Act; it does not expand it.

It is critical to note that the Clean Water Act permitting requirements are triggered only where there will be a discharge of a pollutant into a jurisdictional water. If a jurisdictional water is not going to be polluted or destroyed, the Clean Water Act does not affect the use of that water.

The Supreme Court has considered the scope of waters protected by the Clean Water Act from pollution and destruction three times: Riverside Bayview, SWANCC, and Rapanos. In each of those cases every Justice has supported that the term navigable waters applies to waters beyond those considered to be traditionally navigable.

In Rapanos, no opinion could gather a majority, and the nine Justices wrote five separate opinions. That confusion evident on the Court carried over into the regulated community and the two agencies. In both SWANCC and Rapanos, the agencies' regulations were left intact by the Court.

Interested parties demanded that the agencies take regulatory action to clarify which waters would have their water quality protected by the Clean Water Act and which would not. Every interest group that approached the agencies, and this includes agriculture, property development, environmental groups, resource extraction, hunters, fishers, conservationists, mayors, Governors, Federal and State legislators on both sides of the aisle, and countless others, all recommended that the agencies take action to address the post-Rapanos confusion. No one argued for the agencies to do nothing.

In response, the agencies spent several years developing the Rule, and its development included countless conversations with all of the interested parties I previously mentioned.

The Rule is informed and supported by the best available peer-reviewed science on the relationship of waters and the impacts of protecting water quality, or not protecting water quality, on downstream and adjacent waters. EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on

how waters are connected to each other and how they impact downstream waters. The Science Report was peer-reviewed by EPA's independent Science Advisory Board and subject to public comment. Science was reviewed by the board, not policy.

The final Science Report provides several key conclusions in support of the Rule. Additionally, the Science Advisory Board indicated that available science provided an adequate basis for key components of the Rule.

The Rule recognizes three categories of jurisdiction: waters jurisdictional in all instances, but limited by definitions that address issues such as connectivity and significance of nexus; a narrow category of waters that will continue to be subject to case-specific significant nexus analysis of SWANCC and Rapanos; and an expanded list of waters that are excluded from jurisdiction. The Rule also establishes transparency and how the agencies will make significant nexus determinations, rather than leaving that to the discretion of an agency employee.

Because of the Clean Water Rule's greater clarity and specificity compared to the rule it replaced, no longer would many waters need a time-consuming individual analysis to determine whether there was a significant nexus to a downstream jurisdictional water. The Rule carries forward the jurisdictional exclusions and adds several new ones. People would, for the first time, be able to read the Rule and better know that a water body or feature was not subject to the Act without the need for an expert or individual analysis.

For greater detail on inclusions and exclusions, I attached the Rule to my testimony.

The Clean Water Rule is a carefully considered rule that was developed with unprecedented public engagement and comment. It was available for public comment for over 200 days, and during that period EPA held over 400 public meetings and calls. I personally attended about 70 of those in my prior capacity.

The Rule applies the law as written by Congress and interpreted by the Supreme Court. It relies upon the best available peer-reviewed science and it is a product of over 40 years of technical expertise of the U.S. EPA and the Army, working with the Corps of Engineers on the Clean Water Act.

Unfortunately, the Rule's benefits of clarity, predictability, and consistency have been put on hold by the Sixth Circuit, but that will ultimately be resolved. While I personally am very aware of the controversy surrounding the scope of the Clean Water Act, I also believe that it is a disservice to the public that the current Administration has indicated that it will undertake a new rulemaking to repeal and replace. That effort is guaranteed to continue the post-Rapanos confusion for many, many years to come.

The work of the Clean Water Act is far from finished. State-generated water quality reports indicate hundreds of impaired waters in need of reduced pollution and increased protection. Narrowing the scope of the Act does not advance these joint Federal and State efforts.

In my 30-plus years in water law, I have never heard that the water in our rivers, lakes, streams, and ponds is too clean; that there are too many healthy fish to catch and eat; that our drinking

water is too clean and abundant; or that we need more beach closures due to pollution.

The Clean Water Rule advances the cause of restoring and maintaining the integrity of our Nation's waters. Thank you again, and I am pleased to answer any questions you may have.

[The prepared statement of Mr. Kopocis follows:]

Opening Statement

Ken Kopocis

Hearing before the Senate Committee on Environment and Public Works

April 26, 2017

Chairman Barrasso, Ranking Member Carper, thank you for the request to appear here today to discuss the Clean Water Rule, a rule issued jointly by the U.S. Environmental Protection Agency and the Department of the Army to clarify which waters are and are not protected by the Clean Water Act. I appear today in my personal capacity.

In 1972, Congress established the objective of the Clean Water Act, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Congress made clear that this objective would be best achieved by controlling pollutant discharges at their source, and reemphasized that objective through the substantial amendments of 1977 and 1987 that tightened controls on pollutant discharges. Congress made water quality the heart of the statutory and regulatory program.

Clean water in adequate supply is essential to our existence. Whether illustrated by the drought in California or the lead contamination in Flint, Michigan, we have daily reminders that water is essential to life. Waters are also important to the environment in which we live. Rivers, lakes, ponds and wetlands supply and cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for flood waters, and enhance our quality of life by providing essential habitat, myriad recreational opportunities, as well as important water supply and power generation benefits.

Consider these facts about the value of clean water to Americans:

- Manufacturing companies use nine trillion gallons of fresh water every year.
- 31 percent of all water withdrawals in the U.S. are for irrigation, highlighting the extent to which the nation's farmers depend on clean water.
- About 40 million anglers spend $45 billion annually to fish in U.S. waters.
- The beverage industry uses more than 12 billion gallons of water annually to produce products valued at $58 billion.
- About 60 percent of stream miles in the U.S. only flow seasonally or after rain, but are critically important to the health of downstream waters.

- Approximately 117 million people – one in three Americans – get their drinking water from public systems that rely on seasonal, rain-dependent, and headwater streams.

The Clean Water Rule was developed and issued by the two agencies to ensure that the Nation's waters could continue to provide these essential benefits, making waters better protected from pollution and destruction by having the scope of the Clean Water Act easier to understand, more predictable, and more consistent with the law and peer-reviewed science.

The Supreme Court has considered the scope of waters protected by the Clean Water Act from pollution and destruction three times – *U.S.* v. *Riverside Bayview Homes* in 1985, *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers* in 2001, and *Rapanos* v. *U.S.* in 2006. In each of those cases, in every opinion written by the justices, whether it was 9 – 0 in *Riverside Bayview*, 5 – 4 in *SWANCC*, or 4 – 1 – 4 in *Rapanos*, every justice has supported that the Clean Water Act term "navigable waters" is broader than the traditional understanding of that term. The Clean Water Act applies to waters beyond those considered to be traditionally navigable.

The Clean Water Rule was developed following the U.S. Supreme Court decisions usually referred to simply as *SWANCC* and *Rapanos*.

In *SWANCC*, a majority of the Court invalidated the agencies' practice of using the presence of migratory birds as a sole basis for establishing Clean Water Act jurisdiction, and the agencies complied. The Court did not invalidate any aspect of the agencies' regulations.

In *Rapanos*, the Court considered two consolidated cases involving wetlands that did not immediately abut traditionally navigable waters. In *Rapanos*, no opinion could gather a majority, and the nine justices wrote five separate opinions. The confusion evident on the Court carried over into the regulatory responsibilities of the two agencies and resulted in the George W. Bush Administration issuing guidance in 2003 and 2008 to reconcile the several opinions of the Court with the existing regulations defining the scope of the Clean Water Act. Again, the agencies' regulations were left intact by the Court.

Following the confusion generated by *Rapanos*, interested parties demanded that the agencies take action to clarify which waters would have their quality protected by the Clean Water Act, and equally important which would not. Every interest group that approached the agencies, and this includes the agriculture community, the property development community, the environmental community, the resource extraction community, the hunting and fishing community, mayors, governors and Federal and State legislators on both sides of the aisle, and countless others recommended that the agencies take action to address the post-*Rapanos* confusion. No one argued for the agencies to do nothing.

To respond to these stakeholder requests, the agencies spent several years developing the Rule. Its development was subject to countless conversations with outside groups, including all of those I mentioned previously – State, local and Federal interests in the public and private sectors. When the agencies considered issuing additional guidance as an interim measure, that effort had both strong support and strong criticism. The agencies abandoned that effort in pursuit of the option of formal rule-making.

The Clean Water Rule clarifies the jurisdiction of the Clean Water Act and would reduce the costly and time-consuming case-specific significant nexus analysis that resulted from the *Rapanos* decision. The Rule interprets the Clean Water Act, it does not expand it. It does so consistent with the Act's legislative history and the court cases that followed the Act's enactment.

The Rule is supported by the best available peer-reviewed science on the relationship of waters, their connectivity, and the impacts of protecting water quality or not protecting water quality on downstream and adjacent waters. EPA's Office of Research and Development prepared an exhaustive synthesis of peer-reviewed science on how waters are connected to each other and how they impact downstream waters. This science report was also peer-reviewed by EPA's independent Science Advisory Board and subject to public comment. The science report informed the agencies actions in response to the policy guidance provided by the Supreme Court in both the *SWANCC* and *Rapanos* decisions – how best to consider the significant nexus between upstream and downstream waters.

The final science report provides several key conclusions based on review of the peer-reviewed scientific literature:

1. All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, biologically, and chemically connected to downstream rivers and this connection influences the integrity of downstream rivers.

2. Wetlands and open waters in floodplains and riparian areas are physically, chemically and biologically connected with downstream rivers and influence the ecological integrity of such rivers.

3. Non-floodplain wetlands and open waters (i.e., isolated waters) provide many functions that benefit downstream water quality and ecological integrity.

4. The connectivity of streams, wetlands and other surface waters, taken as a whole, to downstream waters occurs along a continuum from highly connected to highly isolated – but these variations in the degree of connectivity are critical to the ecological integrity and sustainability of downstream waters.

5. The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their function considered over time.

Because of the Clean Water Rule's greater clarity and specificity compared to the rule it replaced, no longer would many waters, such as some tributaries, adjacent waters, ditches and wetlands, need a level of individual analysis to determine whether there was a significant nexus to a downstream water that *Rapanos* required and the old regulatory definition did not provide. Because of the new exclusions in the Clean Water Rule, people would for the first time be able to read the Rule and better know that a water body or feature was not subject to the Clean Water Act without the need for an individual analysis.

The Clean Water Rule continues to apply the protections of the Clean Water Act to traditionally navigable waters, interstate waters, the territorial seas, impoundments of otherwise jurisdictional waters, tributaries, and adjacent wetlands. The Clean Water Rule deletes the jurisdiction of the Clean Water Act over waters "the use, degradation or destruction of which could affect interstate or foreign commerce" and replaces it with the significant nexus analysis first established in *SWANCC* and carried forward in *Rapanos* by Justice Kennedy. The Rule also establishes transparency in the Rule in how the agencies will make significant nexus determinations instead of leaving those decisions within the discretion of the agency employee.

The Clean Water Rule carries forward the jurisdictional exclusions for waste treatment systems and prior converted cropland. It also adds new regulatory exclusions such as for certain ditches, artificially irrigated areas, farm and stock water ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, cooling ponds, reflecting and swimming pools, ornamental waters, water-filled depressions incidental to mining or construction, erosional features and grassed waterways, groundwater including tile drains, stormwater features, wastewater recycling and groundwater recharge.

For greater detail on the inclusions and exclusions, the complete text of the Clean Water Rule is attached as an appendix to this statement.

The Clean Water Rule is a carefully considered rule that was developed with unprecedented public engagement and comment. The Rule applies the law as written by Congress and interpreted by the Supreme Court; it relies upon the best available peer-reviewed science to support its scope; and it is the product of over 40 years of technical expertise of the U.S. EPA and the Department of the Army working with the Corps of Engineers in administering the Clean Water Act.

Unfortunately, the Rule's benefits of clarity, predictability and consistency have been put on hold by the Sixth Circuit, but that will ultimately be resolved. I personally am very aware of the controversy surrounding the scope of the Clean Water Act, but I also believe it is a disservice

to the public that the current administration has indicated that it will undertake a new rule-making to replace the Clean Water Rule. That effort is guaranteed to continue the post-*Rapanos* confusion for many, many years to come.

The Clean Water Act is often referred to as our most effective environmental law, and it has resulted in great improvements in water quality. However, the work is far from finished – State generated water quality reports indicate hundreds of impaired waters in need of reduced pollution and increased protection. Continuing the confusion on how to protect water quality does not advance these joint efforts at the State and Federal level. In my thirty-plus years in water law, I have never heard been told that the water in our rivers, lakes, streams and ponds is too clean, that there are too many healthy fish to catch and eat, that our drinking water is too clean and abundant, or that we need more beach closures due to pollution. The Clean Water Rule advances the cause.

Thank you again, I am pleased to answer any questions you may have.

APPENDIX to Statement of Ken Kopocis

The following definition was published on June 29, 2015 by EPA and the Department of the Army as the Clean Water Rule. On October 9, 2015, the 6th Circuit Court of Appeals stayed the use of the revised rule. The revised rule is reproduced below.

Code of Federal Regulations

(Revised 2015 by Clean Water Rule, currently stayed by 6th Circuit.)

Title 40 - Protection of Environment. CHAPTER I - ENVIRONMENTAL PROTECTION AGENCY (CONTINUED). SUBCHAPTER D - WATER PROGRAMS. PART 122 - EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM. Subpart A - Definitions and General Program Requirements.

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

Source: 80 FR 37054, June 29, 2015

§ 122.2 Definitions.

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

* * * * *

Waters of the United States or *waters of the U.S.* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term "waters of the United States" means:

(i) All waters which are currently used, 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;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) Prairie potholes. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) Carolina bays and Delmarva bays. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) Pocosins. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) Western vernal pools. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) Texas coastal prairie wetlands. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when

performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland. Notwithstanding 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.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) Adjacent. The term adjacent means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) Neighboring. The term neighboring means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is

located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) Tributary and tributaries. The terms tributary and tributaries each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) Wetlands. The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,

(B) Nutrient recycling,

(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Senator BARRASSO. Thank you, Mr. Kopocis, for being with us today and sharing your testimony.

I would like to now turn to Collin O'Mara, who is the President as well as the Chief Executive Officer of the National Wildlife Federation from Reston, Virginia.

Thank you very much for joining us. We look forward to your testimony.

STATEMENT OF COLLIN O'MARA, PRESIDENT & CHIEF EXECUTIVE OFFICER, NATIONAL WILDLIFE FEDERATION

Mr. O'MARA. Thank you. Mr. Chairman, Senator Carper, members of the Committee, on behalf of our six million members of the National Wildlife Federation, our more than 50 State and territorial affiliates, our millions of hunters and anglers, thank you or holding this hearing and talking about ways we can improve water quality. We are committed to finding bipartisan, collaborative solutions to making sure that we avert the wildlife crisis that we are facing so we can all enjoy the great outdoors.

I think we would all agree that clean water is absolutely essential for public health. It is essential for wildlife; it is essential for local economies. As I have traveled to all 50 States across this Country, Americans of all backgrounds, of every zip code all agree that they are united on the need for safe drinking water and healthy rivers. We have seen, unfortunately, in the past few years what happens when we do not take care of our water supplies. We saw this in Flint, Michigan and Toledo, Ohio. We saw this in Eden, North Carolina and Charleston, West Virginia. We saw this in the Animus and in the Yellowstone River. Where I live in Delaware, more than 90 percent of our waterways have excess nutrients and legacy pollution.

One of the best ways to clean up America's waterways is to reduce pollution at its source. I think we knew this in 1972, when Ed Muskie was in this very Committee thinking about how to clean up America's waterways, and the National Wildlife Federation was proud to stand along at the Anacostia River, at the boathouse, as the Earth Conservation Corps, our D.C. affiliate, when the Clean Water Rule was finalized.

Today I would like to cover four points about the Clean Water Rule: the underlying science of connectivity, the case law, the economic benefits, and the importance to wildlife and sportsmen.

First, the science of connectivity. There is broad scientific agreement, as I think you have heard from this panel, that keeping America's rivers healthy starts upstream. Just like the tree that depends on its roots, the healthy river is tied to the health of the streams that feed into it. Aquatic systems are interrelated and interconnected, as Senator Howard Baker once said. This makes common sense. As this Chairman said, we learn this at an early age, about the water system and that the pollution enters into small tributaries and makes its way into the main stems. Pollution that is added to the Schuylkill River in Pennsylvania affects my Delaware River downstream. Nebraskans that depend on the Platte can not ensure the health of the Platte unless they reduce the pollution coming from Colorado through the Southern Platte tributary.

As Wendell Berry once said, we should adopt the water golden rule, if you will: do unto those downstream as you would have those upstream do unto you. Cleaning up America's waterways has to start with headwaters and tributaries.

Now, the Science Advisory Board overwhelmingly confirmed this fact, and I think you have heard this. Although there are disagreements about the gradients, there is broad consensus that the definition of navigable waterways needs to extend into these headwaters.

That brings me to the law. EPA and the Army Corps developed the Clean Water Act because the Supreme Court directed them to do so. From both Chief Justice Roberts and Justice Breyer, they clearly called for the agencies to act in the Rapanos decision and in subsequent decisions, and there is agreement that the jurisdiction extends beyond just navigable waterways into these tributaries.

The approach that is most widely accepted by the U.S. Court of Appeals is Justice Kennedy's significant nexus test. This requires showing the ecological linkages between smaller and more remote water bodies and the navigable waterways. The Clean Water Rule closely tracks Kennedy's test, grounding its definitions of which waters are included in its science-based finding to show the connectivity between tributaries to traditional navigable and interstate waters, wetlands and lakes and other water bodies that are adjacent to these tributaries that provide critical filtration.

Also the Rule is very clear, both the Corps and the EPA were very clear about which waters are excluded and which activities are not under the jurisdiction of the Act. This clarification is incredibly important; it is actually essential to providing regulatory certainty. As the former Secretary of Natural Resources for the first State of Delaware, I can attest to the uncertainty on the ground and how the uncertainty leads to confusion because of the court decisions and the previous regulations that are just completely confounding to the average landowner.

Businesses and landowners need predictability. They need a way to make decisions, and having these ambiguous decisions that they are trying to hire experts to hope that the recommendations are given will hold up in court is creating a lot of paralysis on the landscape. This Rule clarifies which waterways are covered and strengthens those exemptions in a way that is much more narrow than the scope of the included waterways prior to 2001.

That brings me to my third point, which is economics. In addition to increasing predictability, the Rule supports America's $800 billion outdoor economy and the millions of jobs that depend on the health of American waterways. These jobs, retail outfitters, fishing and river guides, bate shops, hotels, restaurants, they are important in rural communities like where I grew up in upstate New York. Many of these communities are struggling with high unemployment and they depend upon healthy waters for boating, fishing, hunting, and wildlife watching. Fishing alone supports $200 billion in economic activity and 1.5 million jobs, and that requires clean water.

Finally, for wildlife and sportsmen, clean water is exceptionally important. More than 50 million Americans, including many on

this Committee, hunt and fish. It should come as no surprise that duck hunters and anglers care deeply about water quality. More than 8 in 10 hunters and anglers across this Country support Federal protections for smaller streams and wetlands. Further, restoring wetland and waterway health is an important way that we can proactively solve America's growing wildlife crisis and recovering aquatic species that are at risk of potential extinction, things like amphibians, bivalves, mussels, and oysters, and a range of freshwater fish.

In conclusion, in our lifetime we have the potential to fulfill the promise of the Clean Water Act, when 45 years ago this Committee said that they were going to make sure that America's waters were fishable, swimmable, and drinkable. It will take a combination of common sense protections, as well as collaborative conservation efforts like the Chairman mentioned. We need things like good conservation programs in the Farm Bill, the State Revolving Funds, efforts like the Great Lakes Restoration Initiative, efforts like the Chesapeake Bay Program, the Delaware Bay Conservation Act.

There are a lot of things that we need to do to make sure we are enhancing collaborative conservation. We also need common sense protections. The Clean Water Rule is an important part of this effort and it is a product of years of transparent scientific and public deliberations, and it protects the drinking water for more than 117 million Americans.

Thank you for the time. We encourage you to support the Rule.

[The prepared statement of Mr. O'Mara follows:]

Testimony of Collin O'Mara, President and CEO of the National Wildlife Federation

Before the Environment and Public Works Committee of the United States Senate
Reviewing the Technical, Scientific, and Legal Basis of the Waters of the U.S. Rule
April 26, 2017

On behalf of the National Wildlife Federation, our six million members and supporters—including millions of conservation-minded hunters, anglers, and outdoor enthusiasts—and more than fifty state and territorial affiliates, we thank you for the opportunity to testify before your committee and submit this written testimony on an issue of great importance to our members and the wildlife they champion: Clean Water. The National Wildlife Federation has championed clean and healthy rivers and streams since our founding in 1936. Conserving our Nation's wetlands, streams, and rivers for fish, wildlife, and communities is at the core of our mission. We worked closely with Senator Muskie to pass the Clean Water Act in 1972 and have worked hard to fulfill its promise of clean water for all Americans ever since. We believed then—and still believe today—that the best way to improve water quality is to prevent pollution at its source, which is much cheaper than trying to remove pollution downstream. Since the *SWANCC* and *Rapanos* U.S. Supreme Court decisions issued in 2001 and 2006, respectively, we have been actively engaged in the effort to clarify the definition of "Waters of the United States" that underpins the 1972 Clean Water Act. We appreciate this opportunity to submit testimony reviewing the strong technical, scientific, legal, and public support for the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule defining "Waters of the United States" under the Clean Water Act.

We respectfully offer nine key points about the Clean Water Rule for the Committee's consideration:

1. The Clean Water Rule Responds to – and Is Consistent With – the Supreme Court's Direction in *SWANCC* and *Rapanos*.
2. The Final Clean Water Rule Clarifies and Limits -- But *Does Not Expand* – the Historic Scope of Clean Water Act Jurisdiction.
3. The Clean Water Rule is based on a state-of-the-art review of the science, incorporating the basic principles and findings of connectivity science in order to meet the goals of the Clean Water Act.
4. The Clean Water Rule Strengthens the Clean Water Act's Federal-State Cooperative Federalism Framework and Empowers States to Better Protect State Waters within this Framework
5. The Final Clean Water Rule Addresses Many of the Concerns Raised by State, Agricultural, and Small Business Stakeholders during the Extended and Rigorous Rulemaking Process.
6. The Clean Water Rule Proactively Protects Water Supplies and Reduces the Need for More

Expensive Downstream Pollution Removal Investments.
7. The Clean Water Rule's Protection of Headwater Streams and Wetlands is Essential to the Conservation of Thousands of Aquatic Species That Face Potential Extinction.
8. The Clean Water Rule Fosters Strong Local Economies and Millions of Jobs that Depend upon Clean and Abundant Water and Healthy Wetlands and Waterways.
9. The Clean Water Rule, like the Clean Water Act, Enjoys Widespread, Bi-Partisan Support.

Background: The goal of the 1972 Clean Water Act was to "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters" to ensure fishable, swimmable, drinkable waters. This has historically been a bipartisan goal and we believe it still is—and must be. For more than 40 years, driven by the Clean Water Act, we have invested in and shared responsibility for the cleanup of our rivers, streams, and iconic lakes and bays - from Puget Sound and Oregon's Williamette River to the Platte River that flows from Wyoming and Oregon through Nebraska. From the Buffalo National River in the Arkansas Ozarks to Lake Michigan, and the Chesapeake and Delaware Bays.

Whereas capital investments in water infrastructure are essential to make water supplies safe to drink and remove pollution from wastewater, the Clean Water Act is the best tool our nation has to proactively protect our water resources and reduce our long-term capital requirements. Clearly defining the "Waters of the United States" within the Act's safeguards is essential for the Act to work effectively, which is why EPA Administrators serving Republican Presidents, from Russell Train (1973-1977) to William Reilly (1989-1993), strongly supported broad protections for wetlands and streams. Republican leader Senator Howard Baker of Tennessee echoed these words of support when the Clean Water Act was amended in 1977: "[t]he once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the *entire resource*."[1] In 1986, the Reagan administration developed the inclusive definition of waters of the United States[2] and President George H.W. Bush confirmed "no net loss" of wetlands as his administration policy in January, 1989.

Members of this Committee have historically understood the importance—and the challenges—of clearly and carefully defining the Waters of the United States in a manner that ensures the health of our critical water resources while also respecting landowners, safeguarding downstream communities, restoring fish and wildlife populations, and protecting water resources that are the foundation for a robust economy.

The Clean Water Rule was developed by the EPA and the Army Corps of Engineers after several years of stakeholder engagement and after a state-of-the-art evaluation of the science on the connectivity of wetlands and headwater streams. Sportsmen, conservation groups, and many other stakeholders submitted over one million public comments that helped to shape the final rule, which was broadly celebrated for restoring guaranteed protections to headwater streams and millions of acres of wetlands previously at greater risk of being polluted or destroyed because of legal

[1] 123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added).
[2] See http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf at 37056.

confusion. We believe the rule that was developed was legally sound, scientifically supported, and represented an appropriate jurisdictional balance consistent with the Clean Water Act.

Key point: The National Wildlife Federation strongly encourages the Committee to support the Clean Water Rule. To rescind the Rule and instead use former Supreme Court Justice Antonin Scalia's plurality opinion in *Rapanos v. United States* as a basis for revision could harm the drinking water supplies of more than 117 million Americans by leaving nearly as many as 60% of U.S. streams without the protection of the Clean Water Act. At least 20 million acres of wetlands, many of which provide essential water quality, flood protection, and fish and wildlife habitat, are at risk as well. In fact, the rate of wetlands loss increased by 140% during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration. Such a rollback of stream and wetland protections will cause irreparable harm for fish and wildlife, hunting and fishing, the outdoor recreation economy, and clean drinking water.

Economic Benefits: Clean water is not simply good for the environment, it is essential for a thriving economy. As we document in our statement below, this rule clarifying and restoring Clean Water Act protections fosters strong local economies and millions of jobs. Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs—more than 30% of the total $646 billion outdoor economy. Further, in some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represents billions of dollars in commerce. These fishing and river guides, outfitters, bait shops, hotels and coffee shops are true small businesses that form the backbone of many rural communities. And they depend upon clean water and healthy wetlands, lakes, and streams.

Before providing detail on our nine key points, I would like to share with the committee a bit of my experience as a former Secretary of Natural Resources of the State of Delaware related to water quality and the Clean Water Act. The State of Delaware may have limited landmass, but the challenges we face in Delaware in keeping our water resources clean, healthy, and productive—and the importance of a strong Clean Water Act as a foundation for our state efforts—are similar to those faced in states across the country. Right now more than 90% of Delaware waterways fail to meet either drinking, swimming, or fishing standards. Further, more than $100 million in additional annual investment is needed if Delaware is to achieve its water quality and flood abatement goals, which have been challenging to achieve due to toxic legacy pollution, increased stormwater runoff pollution, and pollution originating beyond Delaware's borders.

Here are a few takeaways from my home state:

- Delaware is primarily a rural state, sharing the Delmarva Peninsula with Maryland and Virginia, with hundreds of miles of headwater streams and creeks that flow (at times through shallow groundwater) either to the Chesapeake Bay on the west, the Delaware

River and estuary to the north and east, or the Inland bays associated with the Delaware beaches to the southeast.

- As in many states, the health of our economy and our residents is directly linked to the health of our natural resources. To protect the health and welfare of our Delaware residents, we must foster economic productivity while also protecting water supplies and waterways crucial to the health and welfare of all Delawareans, as well as to businesses that depend on clean water. Agriculture, including poultry production, is a key industry in Delaware, as are commercial shellfishing and manufacturing—all of which depend upon abundant clean water. Delaware also benefits from a multibillion dollar tourism economy that is fueled by healthy waterways and beaches, including a robust wildlife-based recreation economy with an estimated $325 million spent annually on wildlife recreation in Delaware annually, including $104 million on fishing alone. More than 344,000 Delaware residents and visitors participated in these recreational activities throughout the state. Further, Delaware's thriving craft beer brewing industry also relies on clean water and contributes almost $200 million to our economy every year and support more than 1,800 jobs.

- To protect Delaware's water resources, we must continue to work to reduce pollution from key sectors including development, agriculture, and industrial operations, which discharge runoff pollution into Delaware's smaller streams that more than 281,400 Delawareans (30%) depend upon for their drinking water.

- EPA estimates that 55% of Delaware's streams are headwater streams with no other streams flowing into them, and that only 11% do not flow year-round. These smaller streams are among those for which the extent of Clean Water Act protections has been questioned, particularly based on the *Rapanos* plurality jurisdictional test.

- Many of the "ditches" found in Delaware are really streams that have been relocated, straightened, enlarged or otherwise modified by humans at some point over the past 200 years. These ditch and stormwater systems connect non-navigable streams and adjacent wetlands to downstream waters, conducting pollutants downstream into the Chesapeake, Delaware, and Inland Bays.

- Commenting in support of the Clean Water Rule in 2014, former Secretary of Natural Resources and Environmental Control David Small said: "Delaware needs clear and consistent support from the EPA and Corps that irreplaceable Delmarva Bays are protected by the CWA…Delaware has authority to only regulate tidal wetlands and is dependent upon the Corps to administer CWA Section 404 to regulate non-tidal wetlands. There are diminishing resources in the Corps Philadelphia District in recent years which affects the regulatory application and enforcement of Section 404 in Delaware. These necessary resources are essential to protecting non-tidal wetlands and waters for the people of Delaware."

- Delaware has consistently supported an clear, consistent definition of Waters of the U.S. Delaware joined 34 other states in 2006 to urge the Supreme Court to uphold strong federal

clean water protections and in 2003 opposed Bush administration efforts to roll back protections for small streams and wetlands. DNREC's 2014 rulemaking comments supporting the Clean Water Rule added: "The proposed rule affects the implementation of CWA Sections 303(d), 319, 402 and 404, and states need direction, clarification and consistency within the proposed rule to administer these water authorities."

Additional Background on Key Points:

1. **The Clean Water Rule Responds to – and Is Consistent With – the Supreme Court's Direction in *SWANCC* and *Rapanos*.**

The Clean Water Rule revises the longstanding definition of "waters of the United States" subject to the Clean Water Act in response to the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*,[3] and *Rapanos v. United States*.[4] The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) took on this historic rulemaking because at least two of the Supreme Court Justices clearly called for it in their *Rapanos* concurring opinions: Chief Justice Roberts[5] and Justice Breyer,[6] and a majority in *Rapanos* embraced the role of expert agency regulations to clarify which waters are – and are not – "waters of the United States."

The 2001 *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the existing waters of the U.S. regulatory definition, including the provision protecting waters beyond those that qualify as tributaries or adjacent wetlands. In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. In the ensuing litigation implementing the Court's opinions, Justice Kennedy's opinion establishing the "significant nexus" analysis has been widely accepted by the U.S. Courts of Appeals. Justice Kennedy's "significant nexus" test requires a showing – through regulation or case-by-case review – that the ecological linkages between smaller or more remote waterbodies and navigable waters, "alone or in combination," must be more than "speculative or insubstantial."

The Clean Water Rule closely tracks Kennedy's pivotal significant nexus test, grounding its definition of which waters are protected in science-based findings of significant nexus to traditionally navigable and interstate waters. The Federal Register preambles to the proposed and final rules include an extensive legal analysis documenting the rule's reliance on the significant nexus test. **As a binding rule, promulgated through a rigorous, transparent, and extended rulemaking process, the rule's revised definition of "waters of the United States" will provide greater certainty and consistency in jurisdictional determinations for landowners, federal and state agency field staff, and the courts. It will also ensure that longstanding clean water**

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[3] 531 U.S.159 (2001).
[4] 126 S. Ct. 2208 (2006).
[5] 547 U.S. at 757-58.
[6] 547 U.S. at 812.

protections continue to safeguard millions of wetland acres and stream miles that have been in legal limbo for more than a decade.

2. <u>The Final Clean Water Rule Clarifies and Limits -- But *Does Not Expand* – the Historic Scope of Clean Water Act Jurisdiction</u>.

The final rule clarifies and definitively restores Clean Water Act protection to two major categories of waters, while drawing clarifying and limiting boundaries:

1. Tributaries to traditionally navigable and interstate waters and the territorial seas. For example, intermittently-flowing headwater streams that have a defined bed and bank and ordinary high water mark, and flow to a traditionally navigable or interstate water body; and

2. Wetlands, lakes, and other water bodies located adjacent to these tributaries (including those within the 100-yr floodplain up to a maximum distance of 1,500 ft.).

Based on a careful review of the wetland science and the "significant nexus" test, the final rule also authorizes protections for waters that are "similarly situated" and located beyond river floodplains when they significantly affect downstream waters' condition. As independent scientific advisors recommended, the rule also finds that specified wetlands -- prairie potholes in the Dakotas, western vernal pools in California, Carolina and Delmarva bays and pocosins along the Atlantic coastal plain, and Texas coastal prairie wetlands along the Gulf of Mexico -- are "similarly situated" in how they provide fish and wildlife habitat, especially for waterfowl, important flood storage and drought resistance, and critical pollution filtration..

While these clarifications remove uncertainty, and better protect many wetlands and streams that have been at risk for the last decade, the fact is that the final Clean Water Rule actually *narrows* the historic scope of Clean Water Act jurisdiction, excluding protections for some wetlands and other waters protected for almost 30 years prior to 2001. Indeed, in our view, a couple of the 2015 Clean Water Rule's waters of the U.S exclusions go too far, removing protections for wetlands and other waters that the science indicates are likely to have a significant nexus to downstream traditionally navigable or interstate waters.

First and foremost, the rule deletes the pre-existing and longstanding "other waters provision that provided Clean Water Act jurisdiction over many types of waters based on their potential effect on interstate commerce. Given the breadth of the federal commerce clause power, and the Clean Water Act legislative intent to regulate to the full extent of that power, this provision provided for Clean Water Act coverage for over millions of wetland acres protected for almost 30 years prior to 2001. In response to the Court's consideration of waters' ecological links to downstream waters, EPA and the Corps deleted this section and instead expressly linked all jurisdictional "waters of the U.S." determinations to science-based findings of significant nexus to downstream waters. As a result, many of the intrastate, non-navigable, geographically "isolated" wetlands, lakes, and ponds previously covered by the Clean Water Act regulations will no longer be covered under the final Clean Water Rule.

Second, the definition of "waters of the U.S." includes – for the first time -- a clear definition

of "tributary" that both clarifies and limits Clean Water Act jurisdiction over streams, ditches, and other tributaries. To be guaranteed protection as a tributary, a waterway must have a bed, bank, and ordinary high water mark. To further clarify what is *not* a protected tributary, the final rule expressly excludes – again for the first time – several types of ditches, as well as gullies, rills, non-wetland swales, and lawfully constructed grassed waterways.

In further response to concerns from agricultural and water treatment and delivery sectors, and in addition to existing exemptions for prior converted cropland and waste treatment systems, **the final rule also explicitly excludes from the definition of waters of the U.S. other water features in dry land, including artificially irrigated areas, stormwater control features and wastewater recycling systems**.

In addition, the final rule adds physical and measurable distance limits to define adjacent waters, further narrowing jurisdiction and excluding wetlands and other waterbodies previously covered by the Clean Water Act.

And, of course, the final rule does not alter the Clean Water Act provisions generally excluding several activities from applicable permitting requirements:

- Common farming and ranching practices, including "**plowing, cultivating, seeding, minor drainage, harvesting** for the production of food, fiber, and forest products;"
- "Construction or maintenance of **farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches**;"
- "**Agricultural stormwater discharges and return flows from irrigated agriculture**;"
- "Construction of **temporary sediment basins** on a construction site;" and
- "Construction or maintenance of **farm or forest roads or temporary roads for moving mining equipment.**"

3. <u>The Clean Water Rule is based on a state-of-the-art review of the science, incorporating the basic principles and findings of connectivity science in order to meet the goals of the Clean Water Act.</u>

Closely tracking Justice Kennedy's pivotal significant nexus test, the Clean Water Rule definition of which waters are protected is grounded in the agencies' science-based findings of significant nexus to traditionally navigable and interstate waters and EPA's Connectivity Report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*.[7] Below are excerpted and summarized some of the key principles and findings of wetland and stream scientists derived from the Connectivity Report that form the scientific foundation for the Clean Water Rule. *See* Connectivity Report; Scientists Letter to the Chair and Ranking Member of the Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife *re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters*, dated May 18, 2015;

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[7] *See* *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782*

and the Amicus Curiae Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler in Support of Upholding the Clean Water Rule in *Murray Energy Corporation et al v. U.S EPA, et al* (6th Cir. January 20, 2017).

Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. Longstanding and robust scientific research (like those studies included in EPAs Connectivity Report) has demonstrated that ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.

A sizable portion of a river network is in intermittent and headwater streams. In arid states such as Arizona, Utah, and Colorado, from 71 to 96% of stream miles have been classified as ephemeral or intermittent. Intermittent streams are also significant in states that receive more rainfall. In Alabama, 80% of stream miles in the National Forests are considered intermittent because they go dry during late summer or autumn; intermittent streams in Michigan comprise 48% of the length of stream channels in the state. These examples illustrate the extent of intermittent streams in river networks throughout the Nation.

As the Science Advisory Board (SAB) concluded from the 2014 *Connectivity Report:*

> **There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.**

Small streams and wetlands contribute to the physical integrity of navigable rivers – they help retain water during storms and can decrease the intensity of floods. They also help recharge groundwater and other sources of water for drinking, irrigation, and industry.

Small streams and wetlands also contribute to the chemical integrity of navigable rivers –they help reduce contaminants and help with nutrient removal. For example, Delmarva bay wetlands help protect water quality and improve functions for water that flows through them to the Chesapeake Bay.

Small streams and wetlands contribute to the biological integrity of navigable rivers. They supply food resources to riparian and downstream ecosystems. Small streams are a refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including many prized sport fishes. Small streams and wetlands also provide critical habitat for a number of species.

As the SAB concluded from the 2014 *Connectivity Report:*

> **The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters.**

The SAB also advised EPA:

> **The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.**

The SAB also concluded:

> **The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.**

The SAB further concluded:

> **There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States.**

4. <u>The Clean Water Rule Strengthens the Clean Water Act's Federal-State Cooperative Federalism Framework and Empowers States to Better Protect State Waters within this Framework</u>.

In 2006, more than 30 state attorneys general filed an amicus brief in *Rapanos* recognizing the essential Federal-State cooperative federalism framework for protecting the Nation's waters and supporting the Bush Administration's inclusive view of Clean Water Act coverage to meet the goals of the Clean Water Act. In September 2014, the State Attorneys General of New York, Connecticut, Delaware, Illinois, Maryland, Rhode Island, and Washington, and the District of Columbia submitted comments to EPA Administrator McCarthy in support of the proposed Clean Water Rule, reiterating the importance of inclusive Clean Water Act jurisdiction to protecting the waters of their states and the health and welfare of their citizens. In 2015, the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, and Washington, and the District of Columbia, reiterated these views when they moved to intervene in court in support of the Clean Water Rule.

The state attorneys general explained their interest in the Clean Water Rule as follows:

> *"First*…. The health and integrity of watersheds, with their networks of tributaries and wetlands that feed downstream waters, depend upon protecting the quality of upstream headwaters and adjacent wetlands. Moreover, watersheds frequently do not obey state boundaries, with all of the lower forty-eight states having waters that are downstream of the waters of other states. Thus, coverage under the Act of ecologically connected waters secured by the Rule is essential to achieve the water quality protection purpose of the Act, and to protect Proposed Intervenor States from upstream pollution occurring outside their borders.
>
> *"Second*, by clarifying the scope of "waters of the United States," the rule promotes predictability and consistency in the application of the law, and in turn helps clear up the confusing body of case law that has emerged in the wake of the Supreme Court's *Rapanos* decision. The Rule accomplishes this by reducing the need for case-by-case jurisdictional determinations and, where such determinations are needed, by clarifying the standards for conducting them. Each of the Proposed Intervenor States implements programs under the Act. Thus, the rule is of direct benefit to movants because it helps alleviate administrative burdens and inefficiencies in carrying out those programs. In addition, the rule would help the States in administering the federal dredge-and-fill program if they choose to do so. *See* 33 U.S.C. §1344 (allowing States to implement a permitting program for dredge and fill material).
>
> *"Third*, the rule advances the Act's goal of securing a strong federal "floor" for water pollution control, thereby protecting the economic interests of Proposed Intervenor States and other downstream states. The Rule allows movants to avoid having to impose costly, disproportionate, and economically harmful limits on instate pollution sources to waters within their borders, in order to offset upstream discharges that would otherwise go unregulated if the upstream waters are deemed to fall outside the Act's jurisdiction and are not otherwise regulated by upstream states. **The Rule protects the economies of Proposed Intervenor States because it serves to "prevent the 'Tragedy of the Commons' that might result if jurisdictions can compete industry and development by providing more liberal limitations than their neighboring states."** *NRDC*, 568 F.2d at 1378 (quoting *Train*, 510 F.2d at 709)."[8]

On a practical level, the state of play that preceded the Clean Water Rule (reflected in EPA/Army Corps guidance from 2008) has resulted in delays, confusion and uncertainty for applicants seeking permits along with increased workloads for Corps and EPA officials. EPA's costs to enforce CWA 402, 404, and 311 have increased significantly due to the incremental resources required to assert jurisdiction post *SWANCC* and *Rapanos*.[9] Because it can be difficult to establish where the CWA applies after the Supreme Court's decisions in *SWANCC* and *Rapanos*, enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement

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[8] NY et al Motion to Intervene (6th Cir. August 28, 2015) (emphasis added).
[9] *See* 2014 EPA Economic Analysis at 30-31, at: http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation's waters.

A key attribute of the Clean Water Rule is its additional clarity, relieving federal and state agencies and landowners alike of the confusing and burdensome case-by-case jurisdictional determinations required under the guidance for plans to discharge pollutants into most wetlands and streams. Ironically, the Clean Water Rule litigation and the current stay of the final rule not only extend but actually contribute to confusion and delay by discouraging EPA and the Corps from providing things like field level training and workshops concerning the implementation of the rule. Rescinding the Clean Water Rule will only extend the confusion, delay, and inconsistencies in Clean Water Act jurisdictional determinations.

5. The Final Clean Water Rule Addresses Many of the Concerns Raised by State, Agricultural, and Small Business Stakeholders during the Extended and Rigorous Rulemaking Process.

The final Clean Water Rule is the product of four years of rigorous and transparent scientific and public policy deliberation. See the attached Timeline 2001-2016. In 2011, in the face of congressional inaction, EPA and the Corps formally launched an administrative effort to clarify the "waters of the U.S." The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance.

In 2011-2012, on a parallel track, the EPA Office of Research and Development compiled a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report).[10] This scientific report, based on peer-reviewed literature and an additional review by independent scientists, was prepared to inform the Administration's proposed rule clarifying which waters are protected under the Clean Water Act. In July 2013, the EPA Science Advisory Board (SAB) launched an SAB Expert Scientific Peer Review of the Connectivity Report.[11] In September 2013, the agencies released the Draft Connectivity of Streams and Wetlands Science Report for public comment. Also in September 2013, after holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

In March 25, 2014, after months of interagency review, the EPA and the Army Corps of Engineers jointly proposed the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 2-page proposed rule text in the federal register was thoroughly explained and supported by a lengthy preamble, including both scientific and legal

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[10] *See* *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414&CFID=56176401&CFTOKEN=47329782*

[11] *See* SAB Peer Review process at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.1#2.

appendices, the publicly available Connectivity Science Report, and a thorough Economic Analysis. **The 200-day public comment period ended November 14, 2014.[12] Americans submitted over 1 million comments on the proposed rulemaking, and these comments were overwhelmingly in support of the rulemaking.**

In late September-early October 2014, the SAB issued reports affirming the scientific basis for the proposed rule (SAB Rule Letter) [13] and affirming – with recommendations for enhancing – the scientific accuracy of the Connectivity Report (SAB Connectivity Peer Review Letter).[14] The Connectivity Report was revised and strengthened in accordance with the SAB recommendations and was released in final form in January 2015.[15] **Both the SAB report and the Final Connectivity Report inform the agencies' final "waters of the U.S." rule.**

Throughout 2014, EPA held hundreds of stakeholder meetings, including repeated meetings with agricultural, municipal, small business entities, and other stakeholders seeking improved clarity in the rulemaking. This rigorous and transparent rulemaking process offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides significantly more clarity.

6. <u>The Clean Water Rule Proactively Protects Water Supplies and Reduces the Need for More Expensive Downstream Pollution Removal Investments</u>.

The United States has an estimated water infrastructure investment deficit of more than $40 billion dollars per year for the next 25 years.[16] Much of this investment is needed to treat contaminated drinking water supplies to ensure they meet basic public health standards for consumption. There is no better investment to reduce this ever growing investment deficit that preventing additional pollution in the first place. In this case an ounce of prevention is truly worth a pound of cure—and while we must continue to invest in modernizing drinking water, wastewater, and storm water systems (including significantly expanding investments in natural infrastructure like wetland and stream restoration that remove pollution), we can avoid exacerbating the problem further by

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[12] *See* EPA Waters of the U.S. rulemaking process materials at: http://www2.epa.gov/uswaters.
[13] EPA SAB letter to Administrator McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"* (September 30, 2014) (SAB Rule Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf
[14] EPA SAB letter to Administrator McCarthy, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (October 17, 2014) (SAB Connectivity Peer Review Letter) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf
[15] *Final EPA Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 2015) at: http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download
[16] http://www.infrastructurereportcard.org/cat-item/drinking-water/

reducing the amount of additional pollution that enters our water supplies.

7. <u>The Clean Water Rule's Protection of Headwater Streams and Wetlands is Essential to the Conservation of Thousands of Aquatic Species That Face Potential Extinction.</u>

Research shows that, of the best-known groups of U.S. species, including birds, mammals, amphibians, fish and plants—most of which depend upon healthy freshwater systems—fully one third are at risk of extinction.[17] This includes one third of the 5,743 known species of frogs, toads, salamanders and caecilians.[18] Research also shows that one-third of native freshwater fish and nearly two-thirds of native freshwater mussels are at-risk of extinction across North America.[19] Further, the conservation of wetlands and headwater streams are important to game species from waterfowl to trout. Protecting and investing in headwater streams and wetlands is one of the best investments that we can make to save America's diverse fish and wildlife resources—and prevent the need for more restrictive regulations under the Endangered Species Act.

8. <u>The Clean Water Rule Fosters Strong Local Economies and Millions of Jobs that Depend upon Clean and Abundant Water and Healthy Wetlands and Waterways</u>.

EPA's economic analysis demonstrates that this rule to clarify and restore clean water protections is good for the economy. EPA estimates that the change in benefits of CWA programs exceeds the costs by a ratio of greater than 1:1. The economic analysis finds that the rule will provide at least $339 million and up to $572 million annually in benefits to the public, including reducing flooding, filtering pollution, providing fish and wildlife habitat, supporting hunting and fishing, and recharging groundwater. [20]

Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that **anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs**.[21] The U.S Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than $2.3 billion, supporting more than 27,000 private sector jobs.[22]

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including

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[17] Stein, B.A., L.S. Kutner, and J.S. Adams. 2000. *Precious Heritage: The Status of Biodiversity in the United States*. New York: Oxford University Press.

[18] http://www.natureserve.org/library/amphibian_fact_sheet.pdf

[19] "National Strategy for the Conservation of Native Freshwater Mussels" The National Native Mussel Conservation Committee. *Shellfish Research, Vol. 17, No. 5, 1419-1428, 1998.*

[20] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37101 (June 29, 2015).

[21] American Sportfishing Association, *Sportfishing in America* (January 2013).

[22] Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

boating, fishing and wildlife watching, represent billions of dollars in commerce.[23] In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output.[24]

Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains to protect the quality of its water supply rather than constructing water treatment plants which could cost as much as $6-8 billion. (Dailey et al. 1999). In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a $5 million wastewater treatment plant would be required (http://water.epa.gov/type/wetlands/people.cfm).

The kinds of waters for which the rule guarantees protection also help filter out pollution that fuels hazardous algae outbreaks. These algal "blooms" can cause health problems and inflict high economic costs. For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion. This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.

By any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy.

9. <u>The Clean Water Rule, like the Clean Water Act, Enjoys Widespread, Bi-Partisan Support</u>.

Poll after poll shows broad public support for clean water, the Clean Water Act, and the Clean Water Rule. In 2015, the bi-partisan team of Public Opinion Strategies and Greenberg Quinlan Rosner Research found that **83% of hunters and anglers supported using the Clean Water Act to protect small streams and wetlands.**[25] Due to the hunting and angling focus, the poll represented a conservative sample with 49% of the overall respondents identifying with the Tea Party. Duck hunters and anglers especially care about the health of waterways and wetlands, because they provide essential habitat for all species of ducks and freshwater fish. So it's not surprising that support for this policy was strong among sportsmen and women across the political spectrum with 77% of Republicans, 79% of Independents and 97% of Democrats in favor. **Fully 89% said that the Clean Water Act has been "more of a good thing" for the country, with**

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[23] Western Resource Advocates 2014 Rule Comments.

[24] SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), *available at* http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

[25] http://www.nwf.org/~/media/PDFs/Water/2015/2015-Sportsmen-Poll/National_NWF-Sportsmen-Water-Survey_2015.pdf

majorities of every single demographic sub-group echoing this sentiment. It comes as no surprise, then, that the Clean Water Rule enjoyed overwhelming public support through the extended rulemaking process.

It is worth remembering that in 2003, in the face of strong opposition, the Bush Administration's EPA was forced to withdraw an advanced notice of proposed rulemaking to potentially remove from Clean Water Act jurisdiction many non-navigable, intrastate wetlands, streams and other waters. That spring, 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act. Later that year, over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."

CONCLUSION

The National Wildlife Federation strongly supports this historic "waters of the United States" rulemaking as legally required, good for the domestic economy, and the best chance in a generation to clarify which waters are – and are not – "waters of the United States" protected by the 1972 Clean Water Act. The final Clean Water Rule, if allowed to stand and be affirmed by the Courts, would strengthen local economies, provide greater long-term certainty for landowners, and better protect important streams and wetlands and the fish, wildlife, and communities that depend upon them, while advancing our collective efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

ATTACHMENTS:

Clean Water Rule Timeline 2001-2016

Scientists Letter to the Chair and Ranking Member of the Senate Committee on Environment and Public Works, Subcommittee on Fisheries, Water, and Wildlife *re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters*, dated May 18, 2015

Amicus Curiae Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler in Support of Upholding the Clean Water Rule **in** *Murray Energy Corporation et al v. U.S EPA, et al* (6th Cir. January 20, 2017).

Clean Water Rule Timeline: 2001 – 2016

- **January 2001 Supreme Court decides *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers (SWANCC)*:** The Supreme Court held (in a 5-4 opinion) that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis to find Clean Water Act jurisdiction over such waters.

- **2002 Introduction of the Clean Water Authority Restoration Act**: A bill to amend the 1972 Clean Water Act to clarify the jurisdiction of the United States over the Waters of the United States. Essentially this same legislation was introduced in each congressional session from 2002 through 2010.

- **January 2003 Advanced Notice of Proposed Rulemaking (ANPRM) and SWANCC Guidance:** The Bush Administration's EPA issues SWANCC guidance (immediately effective without advance public notice and comment) with an advanced notice of proposed rulemaking.

- **Spring 2003 Comments Opposing ANPRM:** 39 state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act.

- **November 2003 Congress Opposes Narrowing CWA Jurisdiction:** Over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act."

- **December 2003 Withdrawal of ANPRM:** The Bush Administration abandons its rulemaking to reduce the scope of waters covered by the Clean Water Act, but retains the SWANCC Guidance, effectively removing CWA protections for an estimated 20 million so-called "isolated" wetland acres.

- **June 2006 Supreme Court decides *Rapanos vs. the United States* and Carabell v. United States:** The Supreme Court issues a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. A four justice plurality found that "waters of the U.S" covers "relatively permanent, standing or continuously flowing bodies of water" (including some seasonally flowing rivers) that are connected to traditional navigable waters, as well as wetlands with a "continuous surface connection" to such relatively permanent waters. Justice Kennedy's concurring opinion disagrees with the plurality opinion, and concludes that "waters of the U.S." includes wetlands that possess a "significant nexus" with navigable waters. He finds that wetlands possess the requisite significant nexus if they "either alone or in combination with similarly situated [wet] lands in the region, significantly affect the chemical, physical, and biological integrity" of other covered waters more readily understood as navigable. Three of the various opinions urged the agencies to initiate a rulemaking clarifying the "waters of the U.S". The decision was a 4-1-4 ruling.

- **2006-2014: Federal Court Litigation on "Waters of the U.S" Mounts Post-Rapanos, adding to costly litigation, uncertainty, delay, and hampered Clean Water Act enforcement.**

- **2007-2008 Bush Administration Rapanos Guidance:** The Bush EPA issues immediately effective Rapanos Guidance without advance public notice and comment. This guidance largely ignores the Kennedy direction to base significant nexus determinations based on the combination of similarly situated waters and imposes a confusing and burdensome case-by-case jurisdictional requirement on most wetlands and streams. Modest revisions were made to the Bush Administration Guidance in 2008.

- **2009 Clean Water Restoration Act (CWRA) is favorably reported to the Senate Floor by the Senate Environment and Public Works Committee, but is stalled in Congress through 2010.** CWRA would have restored the historical scope of the Clean Water Act to those waters protected by the Act prior to the 2001 SWANCC decision, but not expanded the scope of jurisdiction beyond those covered at that time.

- **April 2011 Proposed Guidance:** EPA and the Corps proposed guidance for determining CWA jurisdiction to replace guidance issued in 2003 and 2008. The proposal also announced the agencies' plans to proceed with rulemaking. The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance. The proposed guidance would provide more certain and predictable protections for many streams and wetlands by comparison to the existing 2003 and 2008 guidance documents. The 2011 guidance still required a case-specific finding of significant nexus, but it found that based on the combined downstream effects of tributaries and adjacent waters within a watershed, significant nexus and CWA jurisdiction were highly likely to be established for these categories of waters.

- **2011-2012: EPA Office of Research and Development compiles a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence***. This scientific report, based on peer-reviewed literature and an additional review by independent scientists, informs the Administration's proposed rule clarifying which waters are protected under the Clean Water Act.

- **July 2013: EPA Science Advisory Board (SAB) Launches an SAB Expert Scientific Peer Review of the Connectivity Report.** SAB peer review process and substance available throughout process at: https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.2#2.

- **September 2013: Administration Releases Draft Connectivity of Streams and Wetlands Science Report for public comment.**

- **September 2013: Administration Sends Proposed Clean Water Rule to OMB:** After holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

- **March 25, 2014: Administration Formally Proposes Clean Water Rule**: The EPA and the Army Corps of Engineers jointly propose the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 200+-day comment period ended November 14, 2014.

    - **EPA held over 100 meetings with state entities as well as many with agricultural and other stakeholders during the comment period:**
        - EPA Headquarters Proposed Rule Meetings/Events For Docket EPA-HQ-OW-2011-0880 (following the release of the proposed rule): http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13183
        - 2014 EPA Regional Proposed Rule Meetings/Events for Docket EPA-HQ-OW-2011-0880: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-13182

- **Summer 2014: Connectivity Report Peer-Review Wraps Up:** affirming the scientific synthesis and concluding that the scientific synthesis provides a sufficient scientific foundation for the Proposed Clean Water Rule.

- **October 17, 2014:** The Science Advisory Board's final peer review report supporting the draft Connectivity Report is formally issued.

- **November 14, 2014: Clean Water Rule public comment period ended, with over 1 million comments submitted.**

    - **EPA held dozens of meetings with stakeholders before finalizing the Clean Water Rule:** EPA Headquarters Stakeholder Meetings for Docket EPA-HQ-OW-2011-0880 Occurring After the Close of the Comment Period (November 14, 2014): http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-20870

- **May 27, 2015: EPA and the Army Corps of Engineers signed the final Clean Water Rule.** The final rule was published in the federal register on June 29, 2015, available at https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf and became effective on August 28, 2015.

- **October 9, 2015:** The Sixth Circuit U.S. Court of Appeals, ruling on the consolidated petitions from multiple circuits, issued a nationwide stay of the Clean Water Rule pending further resolution of the multi-district litigation challenging the rule.

- **February 22, 2016:** The Sixth Circuit panel found jurisdiction to review the merits of the Clean Water Rule. A petition to review en banc is under consideration.

- **Pending lifting of stays of the Clean Water Rule, the 2003 and 2008 guidance documents requiring cumbersome and confusing case-by-case jurisdictional determinations remain in effect.**

Case No. 15-3751/15-3799/15-3817/15-3820/15-3822/15-3823/15-3831/
15-3837/15-3839/15- 3850/15-3853/15-3858/15-3885/15-3887/15-3948/
15-4159/15-4162/15-4188/15-4211/15-4234/15-4305/15-4404

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MURRAY ENERGY CORPORATION et al.,	)	In re: ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF DEFENSE, FINAL RULE: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES," 80 FED. REG. 37,054 (JUNE 29, 2015)
Petitioners,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY; UNITED STATES ARMY CORPS OF ENGINEERS; JOHN MCHUGH; JO-ELLEN DARCY,	)	
Respondents.	)	

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency and the United States Army Corps of Engineers

Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler as Amici Curiae in Support of Respondents and in Support of Upholding the Clean Water Rule

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A. As a legal matter, CWA jurisdiction requires a "significant nexus" to a primary water. 8

B. As a scientific matter, the Clean Water Rule's approach to "significant nexus" is sound. 9

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are wetland and water scientists, actively involved in research and teaching about the fresh and estuarine waters of the United States. As practicing scientists who have spent our careers studying streams, wetlands, and other aquatic ecosystems, we—and many in our profession—have long explored the ways in which human activities that affect one part of a watershed can also affect—and damage—other parts of that watershed. In doing so, we have applied the basic tools of our profession: literature review, on-site observations, measurements, experimental manipulations, studies of "natural experiments," and modeling based on observations and our understanding of the physical sciences. Based upon these tools, we believe that current science provides sound support for the Clean Water Rule.

As scientists, we weigh in on the definition of "waters of the United States" under the Clean Water Act (CWA), 33 U.S.C. §1251 et seq. (1972), relying on our research and experience with tributaries and geographically proximate adjacent waters. In this brief, we elaborate on the scientific basis behind efforts to address human activities that alter the integrity of aquatic ecosystems. Damage to these systems can affect society in a number of ways, including: harming human welfare

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), this brief was not authored in whole or in part by a party's counsel, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amici curiae or their counsel—contributed money that was intended to fund preparing or submitting the brief.

and property via flooding, impairing human health via water pollution, loss of recreational opportunities, and threatening species, including commercial species harvested in fisheries, via water pollution and a loss of connectivity. Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Wetlands and Water* 1–3 (José Sarukhán et al. eds., 2005); *The Economic and Market Value of Coasts and Estuaries: What's at Stake?* (Linwood H. Pendleton ed., 2008), *available at* http://www.era.noaa.gov/pdfs/052008final_econ.pdf; *see also* David Moreno-Mateos & Margaret A. Palmer, *Watershed Processes as Drivers for Aquatic Ecosystem Restoration*, *in Foundations of Restoration Ecology* (Margaret A. Palmer et al. eds., 2d ed. 2016). We believe that the Clean Water Rule's definition of "waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), is a scientifically justified approach to address these impacts.

I. The Clean Water Rule is scientifically sound.

In drafting the Clean Water Rule, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) utilized many methodologies employed by amici in our research and by others. The agencies studied key chemical, physical, and biological features of water systems and relied upon studies that used rigorous and respected methodologies in researching aquatic ecosystems.

A. Key chemical, physical, and biological features are used to study water systems.

An early major National Research Council report, *Wetlands: Characteristics and Boundaries* (1995), which amici Joy Zedler and Carol Johnston co-authored, outlined three structural components of wetlands that apply generally to all water systems: water, substrate (physical and chemical features), and biota (animal, plant, and microorganism life). *Id.* at 3–4; *see also* Figure 1. Each component interacts with the others to shape the functions (services) of water systems. In

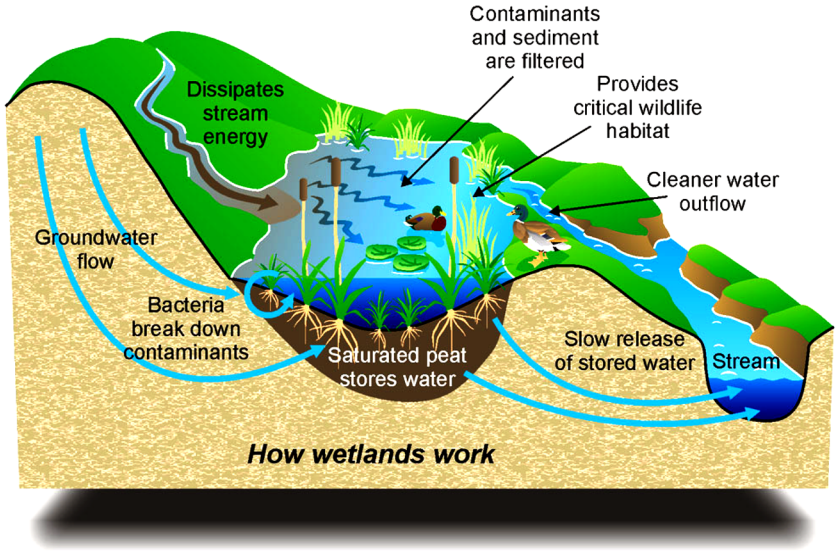


Figure 1. How Wetlands Work. Source: Delaware Wetland Monitoring and Assessment Program.

the study underlying the Clean Water Rule, the EPA and the Corps examined connections among these three factors to provide an integrated perspective on water systems. EPA Office of Research & Dev., *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* 1-2 to 1-19 (Jan. 2015) [hereinafter *Connectivity Report*].

B. Rigorous research methods are used to study these attributes, and to study aquatic ecosystems as a whole.

The study of water systems integrates several scientific disciplines. In the context of understanding wetlands, hydrology, geology, and chemistry are used to examine how wetlands regulate stream flow, filter pollutants and sediment, incorporate excess nutrients, act to control flooding, and connect to groundwater. *See, e.g.*, Carol A. Johnston, *Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality*, 21 Critical Rev. Envtl. Control 491–565 (1991); Donald L. Hey & Nancy S. Philippi, *Flood Reduction Through Wetland Restoration: The Upper Mississippi River Basin as a Case History*, 3 Restoration Ecology 4–17 (2006); Peter J. Hancock et al., *Preface: Hydrogeoecology, the Interdisciplinary Study of Groundwater Dependent Ecosystems*, 17 Hydrogeology J. 1–3 (2009). Ecological research can be used to examine the role of wetlands as habitats for fish and wildlife, and their support of food webs within and among interconnected water systems. *See, e.g.*, Matthew J. Gray et al., *Management of Wetlands for Wildlife*, in 3 *Wetland Techniques:*

Applications and Management 121–80 (J.T. Anderson & C.A. Davis eds., 2013); Michael E. Sierszen et al., *Watershed and Lake Influences on the Energetic Base of Coastal Wetland Food Webs Across the Great Lakes Basin*, 38 J. Great Lakes Res. 418–28 (2012). Underlying this cross-disciplinary approach is a focus on the various methodologies noted above. We do not apply these methods independently of each other, but rather actively compare them to ensure that our results are robust and reproducible. *Cf.* David Goodstein, *How Science Works*, in Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 37, 44 (3d ed. 2011).

To study water systems, we use a wide range of sampling and analytical methods to make our on-site observations and measurements. *See* R.D. DeLaune et al., *Methods in Biogeochemistry of Wetlands* (2013). These methods include examining the chemical and physical characteristics of the waters, characterizing soil and sediment samples, and sampling plant communities. *See generally id.*; *see also Tools in Fluvial Geomorphology* (G. Mathias Kondolf & Hervé Piégay eds., 2d ed. 2016). These sampling and analytical methods are well-established, rigorous, and refined over time; we use them to enhance our understanding of the relationships between the various components of water systems.

Watershed or hydrologic studies may make use of "natural experiments" (a form of observational study), which focus on comparing a natural event or feature with areas (or times) with and without the event or feature. Fed. Judicial Ctr.,

Reference Manual on Scientific Evidence 290 (2011); *see also* Judith A. Layzer, *Natural Experiments: Ecosystem-Based Management and the Environment* (2008). In studying developed and undeveloped watersheds, for example, the assignment of subjects (e.g., watersheds) to groups (e.g., developed or not) is akin to randomization. Such natural experiments are often necessary because ethical considerations (i.e., concerns of deliberately damaging those systems), size, and cost create barriers for actual experiments on existing systems. *See* Susan Haack, *Defending Science—Within Reason: Between Scientism and Cynicism* (2003). Rather than disrupting existing systems, we look toward variations to extrapolate the effects of differences on the overall water system.

We also rely on modeling methods to enhance our understanding of the water-system relationships. *See* Nat'l Judicial Coll., *Hydrologic Modeling Benchbook* 31 (2010) (describing computer-based models as "essential" for understanding water systems). Models serve multiple purposes. First, they enable us to test our understanding of interrelationships between different components of a water system. *Id.* Second, they enable us to predict the outcomes of potential human activities that may cause damage—without modifying those systems. *Id.* Models also make it possible to study processes at scales of watersheds to continents that are too extensive to be investigated by observations alone, and to simulate scenarios of hydrologic and other wetland/watershed processes drawn

from historical record. *E.g.*, Kangsheng Wu & Carol A. Johnston, *Hydrologic Comparison Between a Forested and a Wetland/Lake Dominated Watershed Using SWAT*, 22 Hydrological Processes 1431–42 (2008).

The Connectivity Report reached its conclusions using studies that applied all of these methodologies. Indeed, the EPA, in its Connectivity Report, compiled these studies in a manner to ensure the use of high-quality, relevant research. *Connectivity Report*, *supra* at 1-17; *see also* U.S. Envtl. Prot. Agency & U.S. Dep't of Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 158–63 (May 27, 2015) [hereinafter *Technical Support Document*] (describing the extensive process of peer review of the Connectivity Report itself, including the use of a panel of 27 technical experts from an array of relevant fields, as well as other public processes). Moreover, the Connectivity Report included only studies that were peer reviewed or otherwise verified for quality assurance. *Id.* The focus on high standards and verification through peer review means that the Connectivity Report used the best available science to develop the Clean Water Rule. *See* Clean Water Rule, 80 Fed. Reg. at 37,055; *see also, e.g.*, P.J. Sullivan et al., *Report: Best Science Committee*, *Defining and Implementing Best Available Science for Fisheries and Environmental Science, Policy, and Management*, 31 Fisheries 460, 462 (2006) (describing assurance of data quality and use of rigorous peer review as aspects of best available science).

II. "Waters of the United States" is a legal determination informed by science.

Jurisdiction under the CWA has both legal and scientific components. The CWA defines the term "navigable waters" as "waters of the United States," which has been further refined by case law, regulation, and agency guidance. There is no question that traditional navigable waters, interstate waters, and the territorial seas (hereinafter collectively referred to as "primary waters") are "waters of the United States." For other waters, such as tributaries and waters adjacent to those tributaries, scientific research plays a critical role in determining how they affect the chemical, physical, and biological integrity of primary waters, and thus their qualifications for CWA protection.

A. As a legal matter, CWA jurisdiction requires a "significant nexus" to a primary water.

While "waters of the United States" include more than primary waters, the CWA's jurisdictional scope has limits. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the U.S. Supreme Court noted that the term "navigable" has some import in CWA jurisdictional determinations. 531 U.S. 159, 172 (2001). Accordingly, agencies and courts have employed the "significant nexus" analysis, endorsed by Justice Kennedy in *Rapanos v. United States*. 547 U.S. 715, 759 (2006) (Kennedy, J., concurring in the judgment). This approach

recognizes that upstream waters must be protected to ensure the integrity of primary waters. *Id.* at 774–75.

B. As a scientific matter, the Clean Water Rule's approach to "significant nexus" is sound.

The Clean Water Rule relies on the best available science to establish criteria for the requisite "significant nexus" between primary waters and other waters. Primary waters do not exist in isolation. Nat'l Research Council, *Compensating for Wetland Losses Under the Clean Water Act* 46–59 (2001). Rather, they are heavily influenced by their interactions with streams, wetlands, and open waters within their watersheds. As the Connectivity Report correctly emphasizes:

> The structure and function of downstream waters highly depend on materials—broadly defined as any physical, chemical, or biological entity—that originate outside of the downstream waters. Most of the constituent materials in rivers, for example, originate from aquatic ecosystems located upstream in the drainage network or elsewhere in the drainage basin, and are transported to the river through flowpaths[.]

Connectivity Report, *supra*, at ES-15. The Clean Water Rule appropriately defines "significant nexus" using scientifically supported functions to demonstrate strong chemical, physical, and biological connections between upstream waters and primary waters.

Scientific literature strongly supports the nine functions listed in the Clean Water Rule's "significant nexus" definition. First, each function relates to the

chemical, physical, and/or biological integrity of primary waters. For example, wetlands enhance the chemical integrity of downstream waters through trapping, transforming, and filtering pollutants. *See* Carol A. Johnston et al., *The Cumulative Effect of Wetlands on Stream Water Quality and Quantity: A Landscape Approach*, 10 Biogeochemistry 105–41 (1990). Wetlands also recycle nutrients and export organic material. *See* Michael E. McClain et al., *Biogeochemical Hot Spots and Hot Moments at the Interface of Terrestrial and Aquatic Ecosystems*, 6 Ecosystems 301–12 (2003); Nathan J. Smucker & Naomi E. Detenbeck, *Meta-Analysis of Lost Ecosystem Attributes in Urban Streams and the Effectiveness of Out-of-Channel Management Practices*, 22 Restoration Ecology 741–48 (2014).

Similarly, the functions of streams, wetlands, and open waters affect the physical integrity of downstream waters. *See, e.g.*, Tim D. Fletcher et al., *Protection of Stream Ecosystems from Urban Stormwater Runoff: The Multiple Benefits of an Ecohydrological Approach*, 38 Progress in Physical Geography 543–55 (2014). These waters contribute flow to primary waters. *See, e.g.*, Carol A. Johnston & Boris A. Shmagin, *Regionalization, Seasonality, and Trends of Streamflow in the U.S. Great Lakes Basin*, 362 J. Hydrology 69–88 (2008). Research has shown that many wetlands without a year-round surface connection to primary waters flow into perennial streams a significant amount of the time, thereby contributing water and other materials downstream. *See, e.g.*, Owen T.

McDonough et al., *Surface Hydrologic Connectivity Between Delmarva Bay Wetlands and Nearby Streams Along a Gradient of Agricultural Alteration*, 35 Wetlands 41–53 (2015); Heather E. Golden et al., *Hydrologic Connectivity Between Geographically Isolated Wetlands and Surface Water Systems: A Review of Select Modeling Methods*, 53 Envtl. Modelling & Software 190–206 (2014).

Wetlands also retain and attenuate floodwaters, as well as store runoff. *See* Hisashi Ogawa & James W. Male, *Simulating the Flood Mitigation Role of Wetlands*, 112 J. Water Resources Plan. & Mgmt. 114–28 (1986); Carol A. Johnston, *Material Fluxes Across Wetland Ecotones in Northern Landscapes*, 3 Ecological Applications 424–40 (1993). In addition, they trap sediment, thereby preventing the degradation of downstream water quality. *See* Carol A. Johnston et al., *Nutrient Trapping by Sediment Deposition in a Seasonally Flooded Lakeside Wetland*, 13 J. Envtl. Quality 283–90 (1984).

The Clean Water Rule's definition of "significant nexus" also recognizes how streams, wetlands, and open waters affect the biological integrity of downstream waters. Such waters provide important foraging, nesting, breeding, spawning, and nursery habitat for species that occur in primary waters. *See* Marcus Sheaves, *Consequences of Ecological Connectivity: The Coastal Ecosystem Mosaic*, 391 Marine Ecology Progress Series 107–15 (2009); Raymond D. Semlitsch & J. Russell Bodie, *Are Small, Isolated Wetlands Expendable?*, 12

Conservation Biology 1129–33 (1998); Shannon E. Pittman et al., *Movement Ecology of Amphibians: A Missing Component to Understanding Amphibian Declines*, 169 Biological Conservation 44–53 (2014).

Connectivity refers to "the degree to which components of a watershed are joined and interact by transport mechanisms that function across multiple spatial and temporal scales." *Connectivity Report*, *supra*, at ES-6. Whether the functions of a particular stream, wetland, or open water (or a group of "similarly situated" waters) satisfy the legal threshold of "significant nexus" depends on the extent of its connectivity with primary waters. We examine the Clean Water Rule's categorical application of the "significant nexus" test below.

III. Best available science supports the Clean Water Rule's categorical treatment of tributaries.

Our research and that of other scientists demonstrates extensive connections between tributaries and their downstream primary waters sufficient to warrant categorical inclusion under the Clean Water Rule. *See* R. Eugene Turner & Nancy N. Rabalais, *Linking Landscape and Water Quality in the Mississippi River Basin for 200 Years*, 53 BioScience 563–72 (2003). The U.S. Supreme Court has held that federal agencies may craft a categorical rule to assert CWA jurisdiction over certain waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). The Court noted that so long as "it is reasonable . . . to conclude that, in the

majority of cases" the category of waters has "significant effects on water quality and the aquatic ecosystem, its definition can stand." *Id.* at 135 n.9.

A. The Clean Water Rule's definition of tributary is scientifically sound.

The Clean Water Rule defines "tributary" in a manner consistent with our scientific understanding. At its most basic level, a tributary is simply a waterbody that flows into a larger waterbody. From a scientific perspective, "a tributary is the smaller of two intersecting channels, and the larger is the main stem." Lee Benda et al., *The Network Dynamics Hypothesis: How Channel Networks Structure Riverine Habitats*, 54 BioScience 413, 415 (2004). A standard stream ordering system classifies the smallest streams as first-order streams; when two streams meet, they form a second-order stream and so on. *See* Arthur N. Strahler, *Quantitative Analysis of Watershed Geomorphology*, 38 Transactions of American Geophysical Union 913–20 (1957). The smaller waters are intrinsically linked to primary waters both structurally and functionally. *See* Dennis F. Whigham et al., *Impacts of Freshwater Wetlands on Water Quality: A Landscape Perspective*, 12 Envtl. Mgmt. 663–71 (1988). Indeed, "[t]he great majority of the total length of river systems is comprised of lower-order or headwater systems." J. David Allan & María M. Castillo, *Stream Ecology: Structure and Function of Running Waters* 2 (2d ed. 2007); *see also* Ken M. Fritz et al., *Comparing the Extent and Permanence*

of Headwater Streams from Two Field Surveys to Values from Hydrographic Databases and Maps, 49 J. Am. Water Resources Ass'n 867–82 (2013).

Under the Clean Water Rule, a "tributary . . . contributes flow, either directly or through another water" to primary waters and is "characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 80 Fed. Reg. at 37,105. The Clean Water Rule notes that tributaries may be natural or human-made and include "rivers, streams, [and] canals," as well as ditches that are not otherwise excluded by the Rule. *Id.* From a scientific perspective, whether a tributary is natural or human-made is immaterial; what matters is whether the water contributes flow to another waterbody.

Under the Clean Water Rule, a water meets the definition of a tributary even if it contributes flow to a primary water through a non-jurisdictional water. This approach is also sound because the scientific definition of tributary focuses on the hydrologic connection between waters.

From a scientific perspective, the Clean Water Rule's definition of "tributary" could be considered conservative. In addition to requiring a bed and banks (channels), it also provides that a tributary must have an ordinary high water mark (OHWM). In comments to the EPA, however, the Scientific Advisory Board noted that not all tributaries have OHWMs. Ltr. from EPA Sci. Advisory Bd., to Gina McCarthy, EPA Administrator, *Science Advisory Board (SAB) Consideration*

of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule Titled "Definition of Waters of the United States Under the Clean Water Act" (Sept. 30, 2014) (on file with epa.gov). The OHWM requirement (which is ultimately a limitation on what constitutes a water of the United States) is not dictated by science, but we recognize that the agencies must set boundaries along gradients to apply the CWA on a national basis.

B. Compelling scientific evidence demonstrates that tributaries significantly affect the chemical, physical, and biological integrity of primary waters.

The National Academy of Sciences has extensively documented the connections between tributaries and downstream waters. *See, e.g.*, Nat'l Research Council, *Achieving Nutrient and Sediment Reduction Goals in the Chesapeake Bay: An Evaluation of Program Strategies and Implementation* (2011); Nat'l Research Council, *Missouri River Planning: Recognizing and Incorporating Sediment Management* (2011). Scientific studies demonstrate how tributaries significantly affect the functions and integrity of downstream waters through chemical, physical, and biological interrelationships, especially regarding how physical aspects (e.g., flow) can influence chemical processes (e.g., pesticide contamination), which in turn can affect the biological features (e.g., species) of a water. Below we highlight a few examples of connections between tributaries and primary waters.

We find evidence of strong chemical connections between tributaries and downstream primary waters in the movement of contaminants and pathogens. Sediment-laden waters typically transport some contaminants (such as mercury) from tributaries to downstream waters. *See* Willem Salomons & Ulrike Förtsner, *Metals in the Hydrocycle* (1984). Waterborne pathogens (such as bacteria and viruses) that originate from agricultural and municipal wastes are also transported to downstream waters through tributaries. *See* Pramod K. Pandey et al., *Contamination of Water Resources by Pathogenic Bacteria*, 4 AMB Express (2014); Cassandra C. Jokinen et al., *Spatial and Temporal Drivers of Zoonotic Pathogen Contamination of an Agricultural Watershed*, 41 J. Envtl. Quality 242–52 (2012); Isabelle Jalliffier-Verne et al., *Cumulative Effects of Fecal Contamination from Combined Sewer Overflows: Management for Source Water Protection*, 174 J. Envtl. Mgmt. 62–70 (2016). Pathogens may pose a risk to human health, highlighting the importance of regulating and protecting tributaries to ensure the integrity of primary waters.

Tributaries also have important physical connections with downstream primary waters. The water flow from tributaries helps to create and maintain river networks. Indeed, most of the water in most rivers comes from tributaries. *See, e.g.*, Richard B. Alexander et al., *The Role of Headwater Streams in Downstream Water Quality*, 43 J. Am. Water Resources Ass'n 41–59 (2007).

Furthermore, tributaries support the metabolism of river ecosystems. For example, they export organic matter (dissolved and particulate) that is incorporated into the food webs of downstream waters, and the resulting turbid water shades and protects fish and amphibians from damage by ultraviolet radiation. *E.g.*, Paul C. Frost et al., *Environmental Controls of UV-B Radiation in Forested Streams of Northern Michigan*, 82 Photochemistry & Photobiology 781–86 (2006). Other biological connections relate to the passive and active transport of living organisms. *See* Judy L. Meyer et al., *The Contribution of Headwater Streams to Biodiversity in River Networks*, 43 J. Am. Water Resources Ass'n 86 (2007) (discussing how organisms rely on streams); Moreno-Mateos & Palmer, *supra*; Carol A. Johnston, *Beaver Wetlands*, in *Wetland Habitats of North America: Ecology and Conservation Concerns* 161–72 (Darold P. Batzer & Andrew H. Baldwin eds., 2012).

Accordingly, the Clean Water Rule's categorical treatment of tributaries reflects scientific reality.

IV. Best available science supports the Clean Water Rule's categorical treatment of adjacent waters based on geographic proximity.

Our research demonstrates that adjacent waters warrant regulation under the Clean Water Rule because of their chemical, physical, and biological connections to downstream primary waters.

A. Compelling scientific evidence demonstrates that waters within 100 feet of an OHWM significantly affect the chemical, physical, and biological integrity of primary waters.

Waters, including wetlands, ponds, oxbows, and impoundments, within 100 feet of an OHWM are "hotspots" of ecological function/processes and species diversity affecting the flux of materials (water, sediment, energy, organic matter, pollutants, and organisms) to primary waters. *See* Peter M. Groffman et al., *Down by the Riverside: Urban Riparian Ecology*, 1 Frontiers Ecology & Env't 315–21 (2003). These adjacent waters affect the movement of pollutants from uplands into streams and rivers; regulate stream temperatures, light, and flow regimes; reduce downstream flooding; and provide nursery areas and critical habitat for aquatic biota, including threatened and endangered species. *See* J. V. Ward et al., *Riverine Landscape Diversity*, 47 Freshwater Biology 517–39 (2002). Riparian wetlands act as buffers, effectively reducing concentrations of nutrients and other pollutants. For example, riparian wetlands may remove up to 100% of the nitrate-nitrogen that enters them. *See* M. S. Fennessy & J. Cronk, *The Effectiveness and Restoration Potential of Riparian Ecotones for the Management of Nonpoint Source Pollution, Particularly Nitrate*, 27 Critical Revs. Envtl. Sci. & Tech. 285–317 (1997). Nitrate is a serious water pollutant and a major contributor to coastal algal blooms, as in the Gulf of Mexico's hypoxic "dead zone," as well

as nuisance algal blooms in many other surface waters. *See* William J. Mitsch et al., *Nitrate-Nitrogen Retention in the Mississippi River Basin*, 24 Ecological Engineering 267–78 (2005).

These adjacent waters can act as sources, sinks, or transformers of materials from upland habitats. As sources, adjacent waters contribute organic materials, such as leaf litter, that provide food (energy) for many in-stream species. *See* Robin L. Vannote et al., *The River Continuum Concept*, 37 Canadian J. Fisheries & Aquatic Sci. 130–37 (1980). They also carry woody debris, which increases habitat complexity and biodiversity. *See* J. David Allan, *Stream Ecology: Structure and Function of Running Waters* (1st ed. 1995); J. V. Ward et al., *Riverine Landscape Diversity*, 47 Freshwater Biology 517–39 (2002).

Adjacent waters are also major sinks for materials. By capturing and storing sediment eroded from nearby uplands, they reduce downstream sediment transport and its negative effects on fish feeding and spawning, macroinvertebrate communities, and overall habitat quality. *See* C. P. Newcombe & D. D. MacDonald, *Effects of Suspended Sediments on Aquatic Ecosystems*, 11 N. Am. J. Fisheries Mgmt. 72–82 (1991). These adjacent waters convert materials from one form to another; plants and algae can consume nutrients and bind them in their tissues, reducing the risk of downstream eutrophication. Wetlands in particular mitigate nonpoint source pollution, such as insecticides and fertilizers, thus

protecting stream water quality and drinking water supplies. *E.g.*, Robert Everich et al., *Efficacy of a Vegetative Buffer for Reducing the Potential Runoff of the Insect Growth Regulator Novaluron*, in *Pesticide Mitigation Strategies for Surface Water Quality* 175–88 (2011); Mitsch et al., *supra.* Adjacent waters also slow the movement of materials and biota, by providing temporary storage of excess water during times of high precipitation to dissipate the energy of flows (reducing erosion and soil loss) and attenuate flood peaks. *See* William J. Mitsch & J. Gosselink, *Wetlands* (5th ed. 2015).

Hydrologic connections do not need to be continuous to have a substantial effect on downstream primary waters. Hydrologic connectivity involves longitudinal, lateral, and vertical exchange, and adjacent waters are intimately linked to streams and rivers both in space (i.e., proximity to the OHWM), and time (e.g., by means of high water and flood events). Seasonal high water levels increase connectivity, promoting the lateral movement of animals between lakes, wetlands, stream channels, and their adjacent waters. This facilitates use of critical spawning and nursery habitats by fish, and supports the biological integrity of the system. Many fish are sustained by varied habitats dispersed throughout the watershed for spawning, nurseries, growth, and maturation. *See* Kurt D. Fausch et al., *Landscapes to Riverscapes: Bridging the Gap Between Research and Conservation of Stream Fishes*, 52 BioScience 483–98 (2002).

Overall, the benefits of protecting waters within 100 feet of an OHWM accrue both locally (at that point on the river system) and cumulatively (at the watershed scale). The Clean Water Rule's categorical inclusion of these adjacent waters reflects scientific reality.

B. Compelling scientific evidence demonstrates that waters within 100-year floodplains significantly affect the chemical, physical, and biological integrity of primary waters.

The Clean Water Rule's coverage of waters within 100-year floodplains is based on scientific understanding of watershed dynamics. These dynamics include not only surface expressions of connectivity (floods), but also underlying hydrologic conditions.

Every primary water has a watershed, which can be described as the land area that drains into that primary water and its tributaries. *See* Paul R. Bierman & David R. Montgomery, *Key Concepts in Geomorphology* (2014). During any flood event, primary waters and their tributaries may overflow their banks. *Id.* The proportion of land that becomes obviously flooded (the "floodplain") depends upon rate and total amount of rainfall. The geographic extent of the floodplain also depends upon the watershed's topography, soil saturation, and geological characteristics. *See* W. R. Osterkamp & J.M. Friedman, *The Disparity Between Extreme Rainfall Events and Rare Floods—With Emphasis on the Semi-Arid American West*, 14 Hydrological Processes 2817–29 (2000). A landscape with

more topographic relief (steeper) will have a smaller floodplain than a flatter landscape where floodwaters more readily spread outward. *See* A.D. Howard, *Modelling Channel Evolution and Floodplain Morphology*, in *Floodplain Processes* 15–62 (Malcolm G. Anderson et al. eds., 1996).

Although every flood is unique in extent and duration, we describe floodplains statistically to characterize other hydrologic (non-flooding) features. *See* G. R. Pandy & V.-T.-V. Nguyen, *A Comparative Study of Regression Based Methods in Regional Flood Frequency Analysis*, 225 J. Hydrology 92–101 (1999). For example, the "100-year floodplain" represents the land area covered by floodwaters that have a 1% chance of occurring in any given year (1/100 likelihood). This definition is entirely statistical; such floods can occur more often in a 100-year floodplain, even two years or more in a row. It is incorrect to conclude that waters on a 100-year floodplain have a connection with a primary water only once in a century because the actual hydrologic connections extend beyond surface flooding alone.

Furthermore, changes in land use can affect flood dynamics. Increasing the proportion of the landscape that is covered with impermeable surfaces (such as streets and roofs) may increase flood intensity and duration. *See* E. S. Bedan & J.C. Clausen, *Stormwater Runoff Quality and Quantity from Traditional and Low*

Impact Development Watersheds, 4 J. Am. Water Resources Ass'n 998–1008 (2009).

Floodwaters are only the surface expressions of a flood. Rainfall permeates into the soil and often moves underground toward open waterbodies, such as primary waters. *See* William M. Alley et al., *Flow and Storage in Groundwater Systems*, 296 Sci. 1985–90 (2002); Florian Malard et al., *A Landscape Perspective of Surface-Subsurface Hydrological Exchanges in River Corridors*, 47 Freshwater Biology 621–40 (2002). Groundwater movement occurs in the absence of a 100-year flood. The results from tracing techniques demonstrate how large proportions of streamflow are derived from groundwater. *E.g.*, Alley et al., *supra*.

We in the water science community understand that factors other than surface flooding determine the actual extent of hydrologic connections between waters in a floodplain. The direction of movement and the rate at which the water moves depends upon topography, geology, and rainfall. *See* Jack A. Stanford & J.V. Ward, *An Ecosystem Perspective of Alluvial Rivers: Connectivity and the Hyporheic Corridor*, 12 J. N. Am. Benthological Soc'y 48–60 (1993); Alley et al., *supra*. Impermeable subsurface layers, like clay layers under sand and/or limestone in Florida, can reduce the downward movement of water and force it to move laterally. *See* Peter W. Bush & Richard H. Johnston, *Ground-Water Hydraulics, Regional Flow, and Ground-Water Development of the Floridan Aquifer System in*

Florida and in Parts of Georgia, South Carolina, and Alabama: Regional Aquifer-System Analysis (U.S. Geological Survey, Professional Paper 1403-C, 1988), *available at* https://pubs.usgs.gov/pp/1403c/report.pdf. Often subsurface impermeable (or semi-permeable) layers are not level; they may slope toward waterbodies, and this subsurface lateral flow may re-emerge in a surface waterbody, such as a primary water. However, subsurface lateral flow can occur even without sloping impermeable layers; when more water pools in a particular subsurface location, lateral flow will occur from areas of higher pressure to areas of lower pressure, which may be river channels, wetlands, or lakes. *See* Jacob Bear, *Hydraulics of Groundwater* (2012).

Many different types of waterbodies can occur in 100-year floodplains. Tributaries and other waters can be connected to a primary river in more than one way. *See* C. Amoros & G. Bornette, *Connectivity and Biocomplexity in Waterbodies of Riverine Floodplains*, 47 Freshwater Biology 761–76 (2002). Headwaters and tributaries may flow directly into primary waters, adding organic matter and constituents that create unique water chemistry in the primary water. *See* Takashi Gomi et al., *Understanding Processes and Downstream Linkages of Headwater Systems: Headwaters Differ from Downstream Reaches by Their Close Coupling to Hillslope Processes, More Temporal and Spatial Variation, and Their Need for Different Means of Protection from Land Use*, 52 BioScience 905–16

(2002). Wetlands may border primary waters, buffering the input of floodwaters, altering the water chemistry of floodwaters and the primary water itself, and providing habitat and resources for local biota. *See* Joy B. Zedler, *Wetlands at Your Service: Reducing Impacts of Agriculture at the Watershed Scale*, 1 Frontiers in Ecology & Env't 65–72 (2003).

Even other waterbodies with no obvious surface connections to primary waters may still be hydrologically connected to them. Lakes, ponds, wetlands, and streams that flow into these apparently isolated waterbodies may have no surface connections to the primary water but, in addition to storing water as previously described, can have subsurface connections through groundwater. Bear, *supra*. These subsurface connections can carry water to primary waters; for example, water seeping down out of an apparently isolated waterbody may hit an impermeable layer and move laterally until it emerges in the primary waterbody. *See* Geoffrey C. Poole, *Fluvial Landscape Ecology: Addressing Uniqueness Within the River Discontinuum*, 41 Freshwater Biology 641–60 (2002). Therefore, loss of an apparently isolated waterbody can reduce water volume and alter flow characteristics of a primary water.

Evidence for these connections can be observed in the physical and chemical properties of primary waters. *See* Malard et al., *supra*. Temperature, alkalinity, salinity, nitrate, other chemicals and pollutants, and dyes have been used as tracers

to show the impact of groundwater connections to surface waters. *See* C. Soulsby et al., *Inferring Groundwater Influences on Surface Water in Montane Catchments from Hydrochemical Surveys of Springs and Streamwaters*, 333 J. Hydrology 199–213 (2007). Furthermore, additions of pollutants into apparently isolated waterbodies or disparate areas of the watershed can affect primary waters. *See* David N. Lerner & Bob Harris, *The Relationship Between Land Use and Groundwater Resources and Quality*, 26 Land Use Pol'y S265–S273 (2009). Tracer and stable isotope studies have established the path and rate of water movements in Florida, substantiating that a distant source can pollute primary waters. *See* M. Badruzzaman et al., *Sources of Nutrients Impacting Surface Waters in Florida: A Review*, 109 J. Envtl. Mgmt. 80–92 (2012). These studies highlight the chemical, physical, and biological connections between a primary water and other waterbodies that are located within its 100-year floodplain, thus justifying the inclusion of these adjacent waters in the Clean Water Rule.

C. Compelling scientific evidence demonstrates that waters within 1500 feet of high tide lines of tidally influenced primary waters or OHWMs of the Great Lakes significantly affect the integrity of these primary waters.

Scientific evidence strongly supports protecting waters located within 1500 feet of such primary waters. These waters have the same types of connections and functions as the tributaries and other adjacent waters discussed *supra*. Adjacent waters within 1500 feet of primary waters have important chemical connections to

those waters. Adjacent waters that were thought to be isolated have become more saline, providing empirical data regarding the groundwater connection between adjacent waters and primary waters. *See, e.g.*, Cameron Wood & Glenn A. Harrington, *Influence of Seasonal Variations in Sea Level on the Salinity Regime of a Coastal Groundwater-Fed Wetland*, 53 Groundwater 90–98 (2014). In addition, adjacent waters in the 1500-foot zone may release freshwater into coastal waters, thereby reducing the salinity of these waters. *See, e.g.*, Fred H. Sklar & Joan A. Browder, *Coastal Environmental Impacts Brought About by Alterations to Freshwater Flow in the Gulf of Mexico*, 22 Envtl. Mgmt. 547–62 (1998).

Indeed, the inputs of groundwater into coastal waters are quite large, and groundwater can contain high levels of dissolved solids and nutrients. *See, e.g.*, Willard S. Moore, *Large Groundwater Inputs to Coastal Waters Revealed by 226-Ra Enrichments*, 380 Nature 612–614 (1996); Matthew A. Charette et al., *Utility of Radium Isotopes for Evaluating the Input and Transport of Groundwater-Derived Nitrogen to a Cape Cod Estuary*, 46 Limnology & Oceanography 465–70 (2001); J. M. Krest et al., *Marsh Nutrient Export Supplied by Groundwater Discharge: Evidence from Radium Measurements*, 14 Global Biogeochemical Cycles 167–76 (2000). As in inland systems, coastal wetlands remove nutrients, such as nitrate, thereby reducing down-gradient eutrophication in primary waters. *See* Marcelo Ardón et al., *Drought-Induced Saltwater Incursion Leads to Increased Wetland*

Nitrogen Export, 19 Global Change Biology 2976–85 (2013). Thus, adjacent waters protect and improve the quality of primary waters by removing harmful contaminants or transforming and transporting nutrients to primary waters. *See* Clifford N. Dahm, *Nutrient Dynamics of the Delta: Effects on Primary Producers*, 14 S.F. Estuary & Watershed Sci. Art. 4 (2016).

Adjacent waters also physically influence primary waters through surface and subsurface connections. *See* Figure 2. Adjacent waters contribute flow to

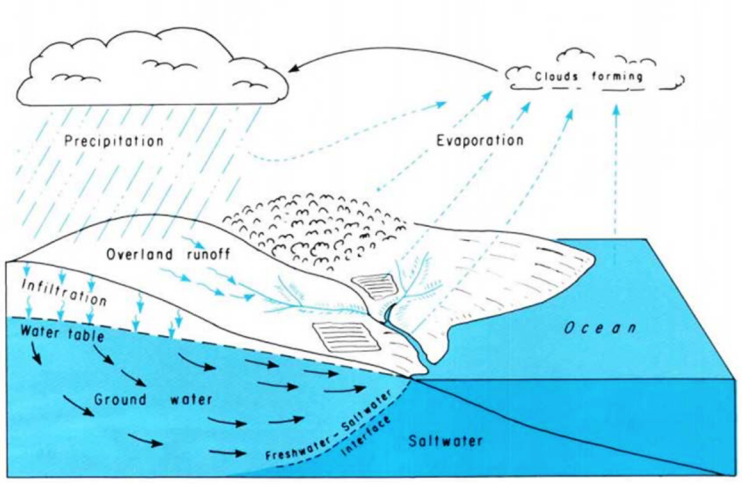


Figure 2. Freshwater-Saltwater Interface. Adapted from Ralph C. Heath, *Basic Ground-Water Hydrology* (U.S. Geological Survey, Water-Supply Paper 2220, 1998), *available* at http://pubs.er.usgs.gov/pubs/wsp/wsp2220.

nearby primary waters and retain floodwaters and sediments. *See, e.g.*, Paul M. Barlow, *Ground Water in Freshwater-Saltwater Environments of the Atlantic*

Coast (U.S. Geological Survey, Circular 1262, 2003), *available at* https://pubs.usgs.gov/circ/2003/circ1262/pdf/circ1262.pdf. Further, adjacent waters have a significant impact on the biological integrity of primary waters. Wetlands near tidally influenced primary waters can serve as a critical source of freshwater for some species that use wetlands and coastal waters. *See Technical Support Document*, *supra*, at 292–93. Adjacent wetlands, lakes, ponds, and other waters also provide important foraging and breeding habitat for coastal species. *See, e.g.*, David J. Jude & Janice Pappas, *Fish Utilization of Great Lakes Coastal Wetlands*, 18 J. Great Lakes Res. 651–72 (1992); Michael E. Sierszen et al., *A Review of Selected Ecosystem Services Provided by Coastal Wetlands of the Laurentian Great Lakes*, 15 Aquatic Ecosystem Health & Mgmt. 92–106 (2012).

Distance is but one factor that affects the connectivity between waters, and as with the other geographical distance limitations discussed *supra*, the agencies' selection of 1500 feet as the distance limitation is conservative from a scientific perspective. Indeed, waters located beyond this threshold can be chemically, physically, and biologically connected to tidally influenced primary waters or the Great Lakes. While the categorical jurisdictional line could have been drawn farther from high tide lines, we find strong scientific support connecting the majority of lakes, wetlands, ponds, and other waters located within this 1500-foot area to primary waters.

Once again, the Clean Water Rule's categorical inclusion of these adjacent waters reflects scientific reality.

V. Conclusion

The U.S. Supreme Court has held that federal agencies may protect waters on a categorical basis if most waters in that category have a significant effect on primary waters. The best available science overwhelmingly demonstrates that the waters treated categorically in the Clean Water Rule have significant chemical, physical, and biological connections to primary waters. Accordingly, we write in support of upholding the Clean Water Rule.

Date: January 20, 2017

Respectfully submitted,

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Date: January 20, 2017

/s/ Royal C. Gardner
Royal C. Gardner

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I electronically filed a true and correct copy of the foregoing Brief of Dr. M. Siobhan Fennessy, Dr. Carol A. Johnston, Dr. Marinus L. Otte, Dr. Margaret Palmer, Dr. James E. Perry, Professor Charles Simenstad, Dr. Benjamin R. Tanner, Dr. Dan Tufford, Dr. R. Eugene Turner, Dr. Kirsten Work, Dr. Scott C. Yaich, and Dr. Joy B. Zedler as Amici Curiae in Support of Respondents and in Support of Upholding the Clean Water Rule with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's appellate CM/ECF system, which will send notification of this filing to the attorneys of record.

Date: January 20, 2017

/s/ Royal C. Gardner
Royal C. Gardner

ADDENDUM

Amici Curiae Biographies[2]

Dr. M. Siobhan Fennessy is the Jordan Professor of Biology and Environmental Studies at Kenyon College where she teaches and conducts research on wetland ecosystems. She serves on the National Research Council's Water Science and Technology Board, and had been appointed to two NRC committees. A Fulbright Fellow, she was recently appointed to the Intergovernmental Platform on Biodiversity and Ecosystem Services for the global assessment of land degradation and restoration, and to the Ramsar Convention's Scientific and Technical and Review Panel.

Dr. Carol A. Johnston is a Professor at South Dakota State University, where she teaches ecology and environmental science. She served on the National Research Council's Water Science and Technology Board and on NRC committees studying wetland mitigation, wetland delineation, and watershed management. She is a Fellow of the Society of Wetland Scientists, and received the National Wetlands Award for Science Research from the Environmental Law Institute in 2009.

Dr. Marinus L. Otte is a Professor in the Department of Biological Sciences at North Dakota State University, and has been specializing in many aspects of wetland science for more than 25 years. He has worked on both coastal and inland wetlands in the United States (Minnesota, North Dakota, and South Carolina), China, Ireland, and the Netherlands. He teaches Wetland Science, Ecotoxicology, Environmental Science, and Plant Systematics. He has served as Editor-in-Chief of the scientific journal *Wetlands* since 2012.

Dr. Margaret Palmer is Director of the National Socio-Environmental Synthesis Center, a National Science Foundation and University of Maryland supported research center. A Distinguished University Professor at the University of Maryland, she oversees a research group focused on watershed science and restoration ecology. Having worked on streams, wetlands, and estuaries for more than 30 years, she is past Director of the Chesapeake Biological Laboratory, currently serves on the editorial boards of the journals *Restoration Ecology* and *Science*, and is an elected fellow of the Society for Freshwater Science.

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[2] Affiliations of amici curiae and their counsel are provided for identification purposes only.

Dr. James E. Perry is a Professor of Marine Science at the College of William and Mary's Virginia Institute of Marine Science. A past president of the Society of Wetland Scientists (SWS), he has overseen its Professional Certification Program and its Ethics Committee. He is also a member of the Coastal and Estuarine Research Federation, Ecological Society of America, and Society of Ecological Restoration. He has published over 50 peer-reviewed journal articles and book chapters.

Charles Simenstad is a Research Professor in the School of Aquatic and Fishery Sciences, at the University of Washington, where he focuses on the structure and function of tidal wetlands within the broader landscape context of estuarine and coastal ecosystems. He is Co-Editor-in-Chief of the scientific journal *Estuaries and Coasts*, serves on the Environmental Advisory Board to the Chief of the U.S. Army Corps of Engineers, and contributed to the NRC Committee on Compensating for Wetland Losses.

Dr. Benjamin R. Tanner is an Assistant Professor of Environmental Science and Studies at Stetson University, where his research focuses on wetland sediment records of environmental change. He has worked on both tidal saline and inland freshwater wetlands at multiple sites in Florida, the Carolinas, and Maine. He teaches advanced courses on wetland systems, soils and hydrology, and wetland identification and delineation.

Dr. Dan Tufford focuses his research on watershed ecology and water resources management. His work ranges from field studies to simulation modeling and includes water quality, hydrology, and landscape interactions. His recent projects include integrating climate science and water management, and watershed modeling for the North Inlet-Winyah Bay National Estuarine Research Reserve. He is currently a member of the Board of Directors for the Columbia Audubon Society and on the state Advisory Board for Audubon South Carolina.

Dr. R. Eugene Turner is the 71st Boyd Professor in the Louisiana State University System where he teaches restoration and wetland ecology courses and maintains a healthy research program. He has been Chair or Co-Chair of the INTECOL Wetlands Working Group (WWG) since 1976, Executive Board Member of INTECOL and of the non-profit Green Lands, Blue Waters, and serves on various national scientific committees, and two editorial boards. He has been on NRC committees including the Committee on Compensating for Wetland Losses.

Dr. Kirsten Work is a Professor in the Stetson University Biology Department. Over the course of her career, she has studied a broad range of freshwater systems, from lakes in the upper Midwest and Alaska to streams, rivers, and reservoirs in the Great Plains to springs, lakes, and wetlands in Florida. She is particularly interested in the role of disturbance aquatic on ecosystem function. Her current studies focus on fish diversity in Florida springs.

Dr. Scott C. Yaich has worked in the field of wetland conservation for over 30 years, has been a Certified Wetland Scientist, and is a Certified Wildlife Biologist. He worked as the Wetlands and Waterfowl Program Coordinator, Chief of Wildlife Management, and Assistant Director of Conservation for the Arkansas Game and Fish Commission, and as a specialist in wetland habitat conservation for the U.S. Fish and Wildlife Service. He also served as staff and Council member of the North American Wetlands Conservation Council.

Dr. Joy B. Zedler is Professor Emerita (Botany and Aldo Leopold Professor of Restoration Ecology) at the University of Wisconsin-Madison. She continues to publish her wetland ecology research, to advise on Adaptive Restoration, and to help edit two journals, *Restoration Ecology* and *Ecosystem Health and Sustainability*. She is a member of the California Delta's Independent Science Board and a Trustee of the Wisconsin Chapter of The Nature Conservancy. She served on four NRC committees and chaired its Committee on Mitigating Wetland Losses.

Revised and submitted for the record 5.28.15
with additional scientist signatures

May 18, 2015

The Honorable Dan Sullivan
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

The Honorable Sheldon Whitehouse
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Committee on Environment and Public Works
U.S. Senate
Washington, D.C. 20510

Re: Scientists Strongly Oppose S.1140, Legislation Undermining Needed Protections for the Nation's Streams, Wetlands, and Other Waters

Chairman Sullivan and Ranking Member Whitehouse:

The undersigned scientists strongly oppose S.1140, misleadingly titled the "Federal Water Quality Protection Act." S.1140 would derail a near-final rulemaking process to clarify the Clean Water Act. The rulemaking has the potential to restore longstanding protections for millions of wetlands and headwater streams that contribute to the drinking water of 1 in 3 Americans, protect communities from flooding, and provide essential fish and wildlife habitat.

Of central concern to us as scientists is that the bill disregards the rigorous science on which the Clean Water Rule is based, hamstringing the agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to water quality.

As scientists who have spent careers studying streams and wetlands, we are aware of the need to restore protections for these aquatic ecosystems under the Clean Water Act. For years now we have urged the Administration to address this issue through a rulemaking to clarify which waters are protected. To inform this critically important rulemaking, we have joined many of our colleagues in contributing to the Environmental Protection Agency's ambitious connectivity science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2014). We have contributed to the underlying peer-reviewed scientific studies, informal reviews of the draft Connectivity Report, and the formal Science Advisory Board peer review of the Connectivity Report. The undersigned are professional scientists with broad knowledge and expertise in stream and wetland ecosystems, including their physical structure, chemistry, and biology. The scientists who have signed this letter include leading researchers on the ecology, water quality, and biota of rivers, streams, and wetlands.

Now, just as the agencies are on the verge of finalizing this important science-based rulemaking, S. 1140 would not only derail this rulemaking, but seeks to prohibit any future rulemaking that does not meet its "principles;" "principles" that disregard the connectivity science – as well as the goals, framework, and legislative intent of the 1972 Clean Water Act. S. 1140 hamstrings the

agencies' ability to protect many of the small, seasonal, and rain-dependent streams, water bodies nearby such tributaries, and various other waters the science shows are critical to "maintaining and restoring the physical, chemical, and biological integrity of the nation's waters."

Wetland and stream science has consistently demonstrated the importance of small streams and wetlands for flood control, groundwater recharge, reducing concentrations of pollutants in drinking water sources, reducing erosion, and providing essential habitat for plant and animal species, all of which provide significant public benefit.

Below, borrowing from our 2011 letter to the Council on Environmental Quality, and updated with quotes from the Science Advisory Board 2014 letter to the Environmental Protection Agency regarding the scientific basis of the proposed rule, we briefly outline basic principles and findings of connectivity science that are rejected by S. 1140, but must be reflected in the Clean Water Rule in order to meet the goals of the Clean Water Act:

1. Rivers are networks, and their downstream navigable portions are inextricably linked to small headwaters just as fine roots are an essential part of the root structure of a tree or our own circulatory system is dependent on the function of healthy capillaries. The small intermittent stream is not isolated from the mighty river. Longstanding and robust scientific research has demonstrated the longitudinal connectivity of river networks, i.e., that **ecological processes in navigable rivers reflect what is occurring in their headwaters as well as in associated geographically isolated wetlands, floodplains, and tributaries.**

2. **A sizable fraction of channel length in a river network is in intermittent and headwater streams.** In arid states such as Arizona, Utah, and Colorado, from 71 to 96% of stream miles have been classified as ephemeral or intermittent. Intermittent streams are also significant in states that receive more rainfall. In Alabama, 80% of stream miles in the National Forests are considered intermittent because they go dry during late summer or autumn; intermittent streams in Michigan comprise 48% of the length of stream channels in the state. These examples illustrate the extent of intermittent streams in river networks throughout the Nation.

3. As the SAB concluded from the 2014 *Connectivity Report:*

   There is strong scientific evidence to support the EPA's proposal to include all tributaries within the jurisdiction of the Clean Water Act. Tributaries, as a group, exert strong influence on the physical, chemical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of physical, chemical and biological processes.

4. From a wetland perspective, the EPA and Army Corps of Engineers estimate that over 20 million acres of wetlands in the contiguous 48 states could be considered "geographically isolated." Despite often not having a connection to navigable waters that is direct or that exists throughout the year, **the scientific literature demonstrates that these wetlands**

are nevertheless often interconnected with navigable waters and are often not ecologically and/or hydrologically isolated.

5. As the SAB concluded from the 2014 *Connectivity Report:*

   The available science supports the EPA's proposal to include adjacent waters and wetlands as waters of the United States. This is because **adjacent waters and wetlands have a strong influence on the physical, chemical, and biological integrity of navigable waters. Importantly, the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity.** Thus, the Board advises the EPA that adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.

6. The SAB also concluded:

   The scientific literature has established that "other waters" can influence downstream waters, particularly when considered in aggregate. Thus, it is appropriate to define "other waters" as waters of the United States on a case-by-case basis, either alone or in combination with similarly-situated waters in the same region.

7. The SAB further concluded:

   There is also adequate scientific evidence to support a determination that certain subcategories and types of "other waters" in particular regions of the United States (e.g., Carolina and Delmarva Bays, Texas 18 coastal prairie wetlands, prairie potholes, pocosins, western vernal pools) are similarly situated (i.e., they have a similar influence on the physical, biological, and chemical integrity of downstream waters and are similarly situated on the landscape) and thus are waters of the United States.

8. And furthermore:

   … [A]s the science continues to develop, other sets of wetlands may be identified as "similarly situated." The Board notes, however, that **the science does not support excluding groups of "other waters" (or subcategories of them, e.g., Great Plains playa lakes) that may influence the physical, chemical and biological integrity of downstream waters.**

9. The SAB also advised EPA:

The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections.

10. And that:

…[T]here is a lack of scientific knowledge to help discriminate between ditches that should be excluded or included. For example, many ditches in the Midwest would be excluded under the proposed rule because they were excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, these ditches may drain areas that would be identified as wetlands under the Cowardin classification system and may provide certain ecosystem services."

11. **Small streams and wetlands contribute to the physical integrity of navigable rivers.** They provide hydrologic retention capacity (i.e., the ability to hold and store water), and when they have been eliminated as a result of human activity, the frequency and intensity of flooding increases downstream, and base flows are lower. For example, studies have shown that the loss of two-thirds, or about 14 million acres, of prairie pothole wetlands (considered within the "geographically isolated wetland" designation) has contributed significantly to increases in the flooding and associated damages of the Red River and other navigable rivers of the region. Small streams and wetlands also improve water quality by storing eroded sediment, thereby reducing downstream sediment transport during storms, and are critically important in recharging groundwater and other sources of water for drinking, irrigation and industry.

12. **Small streams and wetlands also contribute to the chemical integrity of navigable rivers.** These are the channels of the drainage network in closest contact with the soil and are the sites of extensive chemical and biological activity that influences water quality downstream. Small streams and wetlands are the sites of active uptake, transformation, and retention of nutrients; their degradation results in increased downstream transport of nutrients, which can result in eutrophication (e.g., nuisance algal blooms) of downstream rivers, lakes, and estuaries. Nutrients and contaminants enter streams from non-point sources primarily during storms, and it is during storms when small streams and wetlands are most likely to contain water and provide nutrient removal services. Likewise, Delmarva bay wetlands provide similar water quality protection and improvement functions for water that flows through them in transit to the Chesapeake Bay. Likewise, playa lake wetlands of the southern Great Plains, a class of "geographically isolated wetland," collect and improve the quality of water that ultimately filters through them and recharges the Ogallala aquifer, which provides drinking and irrigation water for eight states.

13. **Small streams and wetlands contribute to the biological integrity of navigable rivers.** They supply food resources to riparian and downstream ecosystems. For example,

invertebrate inhabitants of headwater streams are sources of food to fish, and emerging aerial adults of aquatic insects provide food for birds and bats. Small streams provide a thermal refuge at critical life history stages or during critical times of the year for many fish species. They also serve as vital spawning and nursery habitats for many fish species including many prized sport fishes. Small streams and wetlands also provide critical habitat for unique and threatened species of invertebrates, amphibians and fishes. For example, prairie potholes provide the breeding habitat that produces an estimated 50-70% of the total annual duck production in North America. Approximately one-half of the continent's bird species are wetland-dependent or associated, and most of these are migratory birds shared across international borders and by all states in each of the four flyways covering the U.S.

Small streams and wetlands are an integral part of the nation's network of waters, and provide numerous ecological goods and services of significant value to society. Although they may not have a permanent or direct hydrologic connection to a navigable river, they have a demonstrable functional connection with and a direct impact on the physical, chemical, and biotic integrity of navigable rivers.

On the basis of decades of scientific research, it is clear that small streams and wetlands are not isolated or unrelated to the ecological integrity of navigable waterways. If our nation hopes to achieve the goals of the Clean Water Act, small streams and wetlands must remain within its jurisdiction.

S. 1140 rejects these key scientific principles and findings, undermining our ability to protect and restore our nation's streams, lakes, rivers, wetlands and bays.

- **Many streams would be harder to protect.** The bill would include streams identified in a USGS data set that, among other limitations, doesn't generally pick up streams that are less than a mile long. The bill erects an enormous hurdle to including additional streams, requiring a showing that pollutants from any single stream reach would degrade water quality in a navigable waterway.

- **Wetlands bordering tributary streams would also be hard to protect** – the bill appears to require a wetland-by-wetland analysis of their capacity to prevent pollutants moving into navigable waterways.

- **So-called "isolated" waters would not be protected.** The bill would exclude any "isolated pond, whether natural or manmade," and would only allow the protection of wetlands that are "next to" other protected waterways. The effect of these exemptions would be to allow dumping of wastes into wetlands or ponds, even with substantial groundwater connections to other waterways, and even if they help keep downstream waters safe and clean by trapping flood water or filtering out pollution.

- **The bill appears to exclude certain long-protected water bodies by narrowly defining "body of water" to ignore many man-made tributaries, even where they**

essentially function as natural streams, and even though such waters have significant impacts on downstream waters.

- **The bill rejects jurisdiction based on the use of waters by fish, wildlife, or any "organism,"** despite the science and the law supporting protections based on biological factors, such as for waters providing fish spawning grounds.

- **The bill ignores the science and the law supporting protections based on physical factors, such as for upstream waters contributing to or helping abate downstream flooding.**

- **The bill also rejects the strong science affirming that the collective function of these waters is closely related to downstream water quality.**

We are on the verge of securing a scientifically sound Clean Water Rule that will bolster the effectiveness of the Clean Water Act in maintaining and restoring our nation's waters. We urge Congress to support the agencies' final Clean Water Rule, respecting decades of robust scientific literature that demonstrate the critical role of aquatic systems and clarifying and restoring longstanding protections for these vital waters by clarifying their coverage under the Clean Water Act.

Respectfully Submitted,

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cc: Administrator McCarthy, Environmental Protection Agency
Asst. Secretary Darcy, United States Army Corp of Engineers
Secretary Vilsack, United States Department of Agriculture
Secretary Jewell, United States Department of Interior
Chair Christy Goldfuss, Council on Environmental Quality

Senator BARRASSO. Thank you very much for your testimony.

I thank each and every one of you for being here today.

We are going to ask the members now to join in the questioning, and I will start with you, Dr. Josselyn, if I may.

We have gotten to the point where the WOTUS Rule is a punchline. As you can see, cartoonists are joking about navigable water on Mars. It says Nassau discovers evidence of flowing water on Mars, federally protected wetland, EPA, Clean Water Act advisory. Here we have this as a punchline because Mars has erosion features. Do a lot of other places. Water creates erosion when it runs downhill.

The second picture is of a highway project in Indiana where the WOTUS sign, an Indiana highway project, it says: Notice Waters of U.S. It is an actual sign in Indiana. The contractor put up the sign because they were concerned that the EPA and the Corps would consider this hillside a water of the United States because the WOTUS Rule could regulate the hill as a tributary, as there are real streams somewhere maybe nearby. What you can see is the issue related to adjacent water.

My question is does the EPA Science Report support the conclusion that these kinds of erosion features, both on Mars and here in Indiana, have a significant nexus to navigable water?

Mr. JOSSELYN. Thank you, Senator. I look at that figure and I have to say that I have seen that similar situation in other areas of the U.S. where the EPA and the Corps have taken jurisdiction over what look like very ephemeral features.

Obviously, the presence of an ordinary high water mark is the only indicator that they use there. As I testified, the science does not support that type of feature as having a significant nexus, and it goes back to the chart which I showed earlier, is that the probability of a significant nexus when coming to features that have very infrequent flows, low magnitudes of flows indicates that the probability downstream of an effect is very minimal. This was something that was found by the Science Panel in their review.

Senator BARRASSO. Thank you so much.

General Peabody, is it true that the Corps of Engineers was really cut out of the process of drafting the final WOTUS Rule and that you asked that the Corps' name be taken off of the technical support document and the economic analysis that were supposed to be used to justify the Rule?

General PEABODY. Sir, I believe I characterized it in my written testimony that the Corps was marginalized, but the time period is important because when I arrived at the headquarters in late 2013, the process was already underway. The Rule had just been proposed and the proposed Rule was promulgated in April 2014. Throughout that period, based on the advice I got from Corps professionals, the Corps was involved. We certainly did not always agree on everything, but I think that is normal. People have reasonable disagreements based on their perspectives.

My characterization of the Corps' involvement starting in approximately November 2014 is that our involvement was limited, distinctly limited, I would say. It was unclear to us whether the efforts we made to have our concerns understood were in fact understood. We clearly had opportunities to comment on various aspects

of the Rule. We sought a couple of opportunities to talk to Secretary Darcy about the Rule, and she heard us out, but our concerns went largely unaddressed.

Senator BARRASSO. In many places the Preamble, the technical support document says that the Rule is based on agencies' experience and expertise. It is my understanding that the Corps, not the EPA, performs the vast majority of the determinations of which waters are Federal. If the Corps is kind of cut out or marginalized from the process, is it fair for me to conclude that the statements that the Rule is based on the agency's experience and expertise are not accurate?

General PEABODY. The Corps did not believe at that time, and I want to continue to emphasize I do not speak for the Corps today. I only speak for the Corps to the extent that I understood it at that time. We did not believe that our judgment and experience was adequately incorporated into the Rule to reflect the experience you reference. Yes, it is also true that we had no role, the Corps had no role in analyzing the technical support document or doing the analysis, I should say, for the technical support document or the economic analysis.

Senator BARRASSO. Mr. Tseytlin, you have heard what General Peabody said; you heard what Dr. Josselyn has said. Can the WOTUS Rule definition, from your role as Solicitor General involved in the suits, can the WOTUS Rule definition of adjacent water actually hold up in court, then?

Mr. TSEYTLIN. No, I do not believe it can. I think the clearest way to describe why it cannot is that in the Rapanos decision Justice Kennedy specifically said that one of the things the Court tried to do there was it tried to base Federal jurisdiction on adjacency to tributaries. Justice Kennedy specifically said, whatever else you think, you can not base it on adjacency to tributaries.

Remarkably, in the WOTUS Rule, EPA once again attempted to base adjacency to tributaries for Federal jurisdiction. There are many other problems with the adjacency definition, the five football field thing that we talked about before, but that is just the most obvious one, that Justice Kennedy clearly said you could not do this and then EPA went ahead and did it.

Senator BARRASSO. The 1,500 feet that they used, the arbitrary number that has been grasped.

Mr. TSEYTLIN. Absolutely. That is exactly right.

Senator BARRASSO. Thanks.

Senator CARPER.

Senator CARPER. My understanding, in 1972, in this room they were debating the Clean Water Act. I was over in Southeast Asia, not following very closely what was going on, but I had a chance to read up on it a little bit since then, and my understanding of the intent of the Congress and then-President Nixon was to clean up water. They are pretty expansive in their scope of doing so.

We have ended up, over the years, my time as Governor of Delaware—I want to especially welcome Collin today and thank him for his service to our State and the good work that he is doing today. What I heard from folks in Delaware was farmers, we have quite a few farmers in the little State, a lot of developers, and what I heard pretty consistently was it was hard for them to know what

they could do or could not do, and they just wanted some certainty, some predictability, some clarity.

It is not just a few people, a few developers, a few farmers that were saying this, this was like the message from all over the Country. When you look at what the Supreme Court did, what was the decision, one to four, a plurality? There is not a whole lot of guidance there. When I listen to this testimony and try to read my briefing notes, this is not an easy thing to understand, so I can understand why the Supreme Court might have wrestled with the issue of clarity too.

I want to ask Mr. Kopocis what was your role in all of this as this Rule was being developed? Just very briefly what was your role?

Mr. KOPOCIS. Well, initially when I went over to EPA, I was serving as a senior advisor as the President's nominee to be the AA for the Office of Water. When the Rule was finalized, I was the Deputy Assistant Administrator for the Office of Water, effectively running the Office of Water.

Senator CARPER. All right. Now, I might be mistaken, but I was under the impression that the EPA did a pretty good job in terms of listening. They asked folks who had views on this, give us your opinion. My recollection is about a million people, businesses, farmers, did just that.

I understand that there were hundreds of meetings in the States across the Country, maybe as many as 400. I was under the impression that this was a partnership between EPA and the Army Corps of Engineers, and General Peabody's comments today are troubling to me. I was under the impression that the Army Corps had actually felt that the Rule was not rigorous enough based on the Army Corps' analysis of science. That might be wrong.

Could you give us some clarity on that point?

Mr. KOPOCIS. Thank you. Yes, we did have countless discussions with all the interested groups, as I said in my testimony. In particular, with the States, we had special meetings with the States during the pendency of the consideration of the Rule. We met with ECOS, the environmental commissioners, Aqua, the people that actually run the water programs, and also the State wetlands managers. We convened special panels of their representatives so that they could participate in our conversations, and we also formed a special subcommittee of the local government advisory committee to go around the Country and listen to governmental concerns on the Rule.

We did coordinate extensively with our colleagues of the Department of the Army and the Corps of Engineers. Ultimately, when it became time to decide what was going to be in the Rule, Administrator McCarthy coordinated with Assistant Secretary Darcy as to what would be in the Rule. The concerns that General Peabody has talked about that were raised in the memos we were made aware of very late in the process. Those were internal items to the Department of the Army and the Corps of Engineers. Those documents were never brought to our attention in a time where something could have been changed.

We looked to the head of the Corps, the Assistant Secretary of the Army, I should say the political person responsible for policy,

to see whether the path that the agencies were following was one that they agreed with or not. As I believe Jo-Ellen Darcy, Assistant Secretary Darcy testified at this Committee that she agreed with the final recommendations and the final text of what was in the Rule.

Obviously, there were differences of opinion within the Corps. There were differences of opinion at EPA as well. As you said in your opening remarks, nobody has characterized it as a perfect rule, and different people, depending on whether they could write it by themselves, would have written it differently.

Senator CARPER. All right. I hope we have a chance for another round. My time has just about expired. Thank you all.

Collin, I hope I have a chance to ask a question of you. Thank you.

Senator BARRASSO. Thank you, Senator Carper.

Senator INHOFE.

Senator INHOFE. Thank you, Mr. Chairman.

First, I have a document here from the American Road and Transportation Builders. This Committee is very familiar with them as we passed our FAST Act and all of our highway bills, and I ask that their comments on this, Mr. Chairman, may be made a part of the record.

Senator BARRASSO. Without objection.

[The referenced information follows:]



A Review of the Technical, Scientific and Legal Basis of the WOTUS Rule

Statement of the American Road and Transportation Builders Association

Submitted to the United States Senate Committee on Environment and Public Works

April 26, 2017

On behalf of the American Road and Transportation Builders Association (ARTBA) and its more than 6,000 member firms and public agencies nationwide, the association would like to thank Chairman Barrasso and Ranking Member Carper for holding today's hearing on, "A Review of the Technical, Scientific and Legal Basis of the WOTUS Rule"

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. Transportation construction is directly tied to the economic health and development of the United States. According to Federal Highway Administration data, every $1 billion spent on highway and bridge improvements supports almost 28,000 jobs, many of which are in small businesses. Given these broad direct and indirect economic contributions, the impact on transportation development should be taken into account when analyzing new federal regulations.

ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the Clean Water Act (CWA). ARTBA actively works to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources.

Overview

One of the main reasons for the success of the CWA is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources…"

This structure of shared responsibility allows states the essential flexibility they need to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, making necessary improvements to their transportation infrastructure. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.[1]

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of "wetlands."[2] This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners and is consistent with the original scope of the CWA's jurisdiction. As an example of this, official ARTBA policy recommends defining a "wetland" as follows: "If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland."

The Waters of the United States (WOTUS) Rule Runs Counter to Supreme Court Precedent.

ARTBA has also been actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. Most

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1 *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

2 Many states define wetlands as well other types of water resources and prescribe regulatory regimes that are appropriate to each. The federal government tries a one-size fits all approach essentially requiring water resources viewed by states as not being wetlands to be regulated as if they were wetlands under federal law.

recently, the Supreme Court's decision in *Rapanos v. United States*[3] benefited the transportation project delivery process by setting limits on Corps' jurisdiction.

At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not a tenuous connection between a wetland and "navigable water" is enough to allow regulation by the Corps, or if there is a minimal standard that should be applied. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

> "By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources…In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."[4]

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos'* wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

> "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by the members who concurred in the judgments on the narrowest grounds.'"[5]

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3 547 U.S. 715 (2006).

4 *Rapanos v. United States*, 547 U.S. 715 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.

5 *Marks v. United States*, 430 U.S. 188, 193 (1977).

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the "migratory molecule" theory of jurisdiction. Justice Kennedy specifically rejects the idea of the "migratory molecule" by noting that a "central requirement" of the Clean Water Act is "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[6]

Justice Kennedy also explains the CWA's establishment of certain basic recognizable limits to the Corps' excluding man-made ditches and drains by refuting portions of Justice Stevens' dissent:

> "[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[7]

Further, Justice Kennedy notes such an over-expansive view of the Corps' authority is incompatible with the CWA:

> "Yet the breadth of this standard—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 towards 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 comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters that the isolated ponds held to fall beyond the Act's scope in SWANCC."[8]

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

> "Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it

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6 *Rapanos v. United States*, 547 U.S. 715 (2006) (Kennedy, J. concurring).

7 *Id.*

8 *Id.*, referring to the holding in SWANCC

> seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute."[9]

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[10] (*SWANCC*) decision first recognized the jurisdiction of the Corps needed to be limited:

> "Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[11]

Finally, Justice Breyer's dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

> "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[12]

Thus, the lesson of the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying existing wetlands regulations. It is essential for any administrative clarification of federal wetlands jurisdiction to preserve the federal-state partnership embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges. The WOTUS rule, as written, does not maintain this balance, but instead places all regulatory authority on the federal level, leaving states with none.

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9 *Id.*

10 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001)

11 *Id.* (Roberts, C.J., concurring).

12 *Id.* (Breyer, J., dissenting).

Roadside Ditches Should Not Be Covered by the WOTUS Rule.

ARTBA is particularly concerned with the treatment of roadside ditches under the WOTUS rule. Current federal regulations say nothing about ditches, but the WOTUS rule expands Environmental Protection Agency (EPA) and Corps jurisdiction to the point where virtually any ditch with standing water could be covered. Federal environmental regulation should be applied when a clear need is demonstrated and regulating all roadside ditches under the theory of interconnectedness fails to meet this threshold. A ditch's primary purpose is safety and they only have water present during and after rainfall. In contrast, traditional wetlands are not typically man-made nor do they fulfill a specific safety function. As such, roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands because the only time they contain water is when they are fulfilling their intended purpose.

The unacceptable length of the environmental review and approval process for federal-aid highway projects has been routinely documented and acknowledged by both Republican and Democrat administrations. Adding more layers of review—for unproven benefits—will only lengthen this process. Further, requiring wetland permits for ditch construction and maintenance would force project sponsors and the private sector to incur new administrative and legal costs which would lead to increased project costs. The potential delays and increased costs that would result from the WOTUS rule would divert resources from timely ditch maintenance activities and potentially threaten the role ditches play in promoting roadway safety.

In addition, the WOTUS rule creates a completely new concept of allowing for "aggregation" of the contributions of all similar waters "*within an entire watershed.*" This concept results in a blanket jurisdictional determination—meaning the EPA and Corps could regulate the complete watershed. Such a broadening of jurisdiction would literally leave no transportation project untouched regardless of its location, as there is no area in the United States not linked to at least one watershed. While there are certainly instances where a permit is appropriate for the impacts of transportation construction, these situations should be evaluated on a case-by-case basis where specific environmental benefits can be evaluated.

EPA's WOTUS Rule Could Jeopardize Progress on Project Streamlining.

It should also be noted that there has been recent bipartisan progress in the area of streamlining the project review and approval process for transportation projects. Members of both parties agree that transportation improvements can be built more quickly without sacrificing necessary environmental protections. The current surface transportation reauthorization law, the "Fixing America's Surface Transportation (FAST) Act as well as its predecessor, the "Moving Ahead for Progress in the 21st Century" (MAP-21) Act both contained significant reforms to the project delivery process aimed at reducing delay.

Under the WOTUS rule, the progress of the project delivery reforms in both MAP-21 and the FAST Act would be jeopardized. Any reduction in delay gained from improvements to the project delivery process would likely be negated by the increased permitting requirements and opportunities for litigation caused by the WOTUS rule's expansion of federal jurisdiction.

Alternative Solutions are Available.

One method of establishing clarity would be to develop a classification system for wetlands based on their ecological value. This would allow increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands that are considered to have little or no value. Also, there should be a "de minimis" level of impacts defined which would not require any permitting process to encompass instances where impacts to wetlands are so minor that they do not have any ecological effect. A "de-minimis" standard for impacts would be particularly helpful for transportation projects and allow projects to avoid being delayed by minimal impacts to areas which are non-environmentally sensitive areas.

Furthermore the WOTUS rule does not recognize one of the biggest factors creating the confusion in defining federal jurisdiction—multiple agencies being involved in the jurisdictional determination process. ARTBA has repeatedly stated the involvement of multiple agencies in wetlands regulation hinders the overall efforts of the federal permitting program. One of the principal problems plaguing the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]."[13]

Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps, not the EPA, to take the lead and build a stronger, more predictable permitting program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program as its staff has the technical expertise and practical knowledge to ensure fair implementation of federal wetlands policy. The WOTUS rule should acknowledge the Corps' status as the sole intended decision-making agency in jurisdictional determinations and the EPA should be removed from the permitting process entirely.

Conclusion.

The committee should also note that there have been multiple legislative attempts in recent years to expand the jurisdiction of the CWA to include all "waters of the United States." Each of these efforts met with broad bipartisan opposition and none have resulted in new law or even a successful committee mark-up. It is clear that a consensus among policymakers and affected stakeholders has not yet been reached regarding appropriate federal wetlands jurisdiction. Congress should direct the EPA to take note of these developments and instead of seeking to "connect" all waters, work with the regulated community to identify those specific types of water bodies which are currently not being covered and craft more appropriate, targeted measures to protect them.

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[13] *Rapanos v. United States*, 547 U.S. 715 (2006).

ARTBA looks forward to continuing to work with the committee in order to continue to protect, sustain and improve our nation's infrastructure while addressing the future challenges of the CWA.

Senator INHOFE. I have to say this about the whole WOTUS thing. I go back to Oklahoma when it was first proposed. The head of the Farm Bureau of the State of Oklahoma, Tom Buchanan, said of all the problems that farmers and ranchers are facing in America right now, it really has nothing to do with anything that is in the Ag bill; it is overregulation of the EPA. They single out the WOTUS Rule as being the greatest concern. We are talking about this is nationwide. This is how significant people feel about this.

I remember also, General, back when we were putting this thing together, I was chairman of the Committee in 2009 when they established this data base called DARTER, which keeps track of the permits and it provides the EPA with the ability to constantly look over the Corps' shoulders. I said at the time that it seems to me that the EPA employees are not trained to do jurisdictional determinations, so it does not make sense for them to be second-guessing the decisions the Corps has made.

Now, is not this a duplication of effort, in your opinion?

General PEABODY. Senator, I believe the DARTER data base is for enforcement actions. It is an EPA data base, and I would defer to Mr. Kopocis to talk about that in more detail. However, the Corps data base that tracks permitting actions and jurisdictional determinations is called ORM2.

Senator INHOFE. My question is are they really—well, I would ask you, Mr.——

General PEABODY. I believe they are two different data bases for two different purposes. That is my understanding.

Senator INHOFE. Okay.

Any comments, Mr. Josselyn?

General PEABODY. I am sorry, sir?

Senator INHOFE. Okay, never mind.

We are interested in removing barriers to building infrastructure. Do you have any recommendations, General, for us how to streamline the 404 permitting process?

General PEABODY. Sir, the first thing I would say is that the process is much more streamlined than most people give it credit for thanks to the general permit. There are several general permit provisions that enable that. As I indicated, about 80 percent of all actions are permitted within 60 days from finalizing a policy-compliant application.

The trouble gets into because the volume is so high, there were approximately 79,000 actions in 2016, that it does not take a small percentage to result in a large number of actions that are not processed efficiently.

One of the things I think that could be done is that our partner agencies have time limits associated with their input into these actions. The Corps must coordinate with them to ensure that their responsibility, statutory responsibilities are addressed adequately. Sometimes on-the-ground, figuring out the science to address endangered species and the like takes a lot of time.

I would recommend putting a limit on a period of time for an individual permit action, some number of years, short number of years, two, three, or four, and then elevating those for processing above the level of the——

Senator INHOFE. From every 5 years to maybe every 10 years?

General PEABODY. Sir, the time period I would defer to the Corps and the EPA to make recommendations, and other natural resource agencies to make recommendations. There are actions that have gone on for over 10 years.

Senator INHOFE. Yes, I know.

General PEABODY. To me, that is unconscionable.

Senator INHOFE. There is one out in California.

Mr. Tseytlin, there is a lot of confusion around the staying of the courts on this Rule, and after hearing from the testimony about the lack of technical and scientific jurisdiction for the Rule, do you think that—well, when the stay came on, it did not talk about the merits of the Rule. How do you think that would hold up in court?

Mr. TSEYTLIN. A necessary prerequisite for the issuance of a stay is a finding of likelihood of success on the merits. The Sixth Circuit has already found that the States are likely to succeed on the merits, proving that the WOTUS Rule is illegal under both the Clean Water Act and the EPA. I think a final judgment on that would have been finalized if the Rule had——

Senator INHOFE. That is very clear. Thank you very much.

Let me just say, Mr. O'Mara, that a comment that was made by the Chairman during his line of questioning, and I have a great deal of respect for your organization, but it was to have more of the landowners' participation in these decisions than you normally get out of a bureaucracy. He called to your attention the Fish and Wildlife Partnership Program that has been tremendously successful, and I assume that you agree with that, with that concept and what has made that successful.

Mr. O'MARA. Absolutely. We have enjoyed working with you and your team trying to promote those kinds of collaborative vehicles. I think the one thing that we see is that if there is a way to reduce pollution at the source, again, not regulating activities that are not affected by it, and then combining that with some of the collaborative efforts, we could actually achieve the water quality goals. Collaboration is always best.

Senator INHOFE. Thank you very much.

Senator BARRASSO. Senator Duckworth.

Senator DUCKWORTH. Thank you, Mr. Chairman. I also thank the Ranking Member for convening this very important conversation.

My constituents in Illinois are concerned about how WOTUS or the Clean Water Rule will affect public health and the economy. It is our responsibility and duty as public servants to ensure that these objectives are balanced and that one does not outweigh or thrive at the expense of the other.

I am really glad, General Peabody, that you mentioned the role of the Corps, especially in dealing with endangered species as well. It is why I also urge the Trump Administration to make strong science and robust public engagement as the foundation of WOTUS as we move forward.

WOTUS is about water quality, and we will have a water quality crisis in Illinois if the Great Lakes Restoration Initiative is not prioritized. Today's discussion is fundamentally about water quality. WOTUS does play a factor with the GLRI. In my State and all across the Midwest, the Great Lakes Restoration Initiative is the

program that protects and safeguards the quality of the largest system of fresh surface water in the world, and WOTUS feeds into that.

Mr. O'Mara, the Trump Administration's skinny budget includes a proposal to completely eliminate the Great Lakes Restoration Initiative. In your view, how would eliminating this Initiative challenge our ability to protect drinking water across the Great Lakes region?

Mr. O'MARA. One of the most successful water quality programs in American history has been the Great Lakes Restoration Initiative, and I think the Chairman summed it up perfectly in his comments at the beginning, that we want to foster collaborative activity on the ground. If you cut that program, the $400 million that has gone to collaborative partnerships on the ground making good habitat projects, water quality projects, trying to reduce invasives, you will see a deterioration of water quality quickly for the most important freshwater supply in our entire Country.

It is not just that. The proposal to remove the headquarters of Region 5 out of Chicago, the idea that the place where we just had the Flint water crisis, the place where we had the sheen on the Chicago River, the place where we just had the challenges in Flint. To not have an important center and the resources to take care of the Great Lakes would be devastating for the Country's resources.

Senator DUCKWORTH. Definitely. Can you speak a little bit to the economic impact of the Great Lakes Restoration Initiative? I mean, we talk about just the quality of the water, but we are talking about a region in this Country that spans all across the Midwest, goes all the way up into New York, and really was the place where so much of our economic growth happened in the last century. Let's talk about the economic impacts of the Great Lakes Restoration Initiative.

Mr. O'MARA. Sure. The return on investment of the Great Lakes Restoration Initiative is one of the highest of any government investment you can make. You are talking about a 5:1, 10:1 kind of return when you look at the millions of people that are employed because of the freshwater in the Great Lakes, because of the number of companies that locate in the region because of access to that, the tourism industry that comes from it.

The thing that excites me about the Great Lakes, as much as any place in the Country, is that you have a bipartisan consensus for action, and the fact that when proposals are made to reduce funding, Republicans and Democrats come together because it is a value. It is not a partisan football. The economic impact is as big as any region in the Country, in the billions, hundreds of billions of dollars of benefit.

Senator DUCKWORTH. Thank you. You mentioned the proposed closing of EPA Region 5 office, which is the office that oversees the entire Midwest region. My constituents across the region are deeply concerned, not just those in Illinois, but those across the Midwest, about this potential closing of this office and how it would undermine EPA's ability to do its job. I believe that more than our policy, our people are the backbone of the environmental and public health protections; scientists like Miguel Del Toral, the EPA Region

5 scientist who raised the red flag on the Flint water crisis, all of the teams that come out that are the rapid response teams.

We are about to get into tornado season in the Midwest. Actually, we are in it already. With tornado season comes the effects of disaster, followup with disasters. The EPA actually has people who come out as part of a disaster response team that responds when anything like this happens. To not have an office in Chicago would literally add days of travel to any team that must come in from outside the Midwest region.

Mr. Kopocis, in your view as a former Acting Assistant Administrator for EPA, how can we reasonably expect EPA to deliver on its mission of protecting public health if regional offices like Region 5 are eliminated or consolidated?

Mr. KOPOCIS. EPA's regional offices are a key component of accomplishing the mission of the Agency. They are the front line that deal with State and local issues. The examples that you have raised throughout the Midwest are key. The Chicago office, in particular, played a key role in making sure that the Great Lakes Initiative was carried out in the most effective and responsible way. They were also on the front line in dealing with State issues as they come up. Most States do not initially contact the EPA headquarters office; they contact their regional office, so that role is invaluable.

Senator DUCKWORTH. Thank you. I am running out of time.

Mr. Chairman, I would like to submit a letter for the record on behalf of the Healing Waters Coalition, which works on the Great Lakes issues.

Senator BARRASSO. Without objection.

[The referenced information follows:]



HEALTHYLAKES.ORG Healing Our Waters-Great Lakes Coalition

April 25, 2017

The Honorable Tammy Duckworth
Ranking Member, Subcommittee on Fisheries, Water and Wildlife
Senate Committee on Environment and Public Works
Washington, DC 20510

The Honorable Kirsten Gillibrand
United States Senate
Washington, DC 20510

Dear Sens. Duckworth and Gillibrand:

As Great Lakes members of the Senate Committee on Environment and Public Works, I ask that you submit this letter for the record for the Committee's April 26 hearing entitled "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule."

The HOW Coalition believes that the Clean Water Rule, finalized by the previous administration, is one of many important steps needed to protect and restore our Great Lakes. We view the actions that the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers took were under the authority granted to them by Congress under the Clean Water Act to legally clarify the statute's jurisdiction and are scientifically justified. Our coalition supported this rulemaking and supports this rule and urges Congress to take no action to undermine the clean water benefits it provides.

Clean Water Protections at Risk

For years the Clean Water Act protected all wetlands and streams, which was Congress' intent when it recognized the interconnectedness of U.S. waters when passing the act in 1972. It clearly articulated its intent that the tributaries of navigable waters be protected when it stated in a January 1973 report: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[1]

Prior to this rule many of the waters on which the Great Lakes depend were at increased risk and had been for nearly fifteen years. Supreme Court decisions in 2001 (SWANCC vs. Army Corps of Engineers) and 2006 (Rapanos vs. United States) and subsequent agency actions had created a confusing, time-consuming, and frustrating process for determining what waters were protected under the Clean Water Act and state laws. This threat in particular left

[1] Congressional Research Service. 1973. "A Legislative History of the Water Pollution Control Act Amendments of 1972." Library of Congress, Washington, D.C. Volume 2, P. 77.

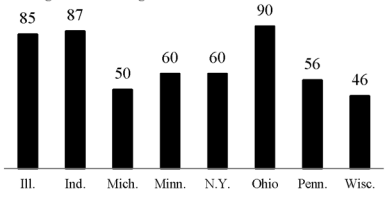
intermittent and headwater streams vulnerable to pollution and adjacent wetlands open to be filled and destroyed. Half of the streams in Great Lakes states do not flow all year, putting them, and adjacent wetlands, at risk of increased pollution and destruction. Over 117 million Americans get their drinking water from surface waters, including nearly 37 million people in Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York. More importantly, 83 percent of the population in Great Lakes states are dependent on public drinking water systems that rely in intermittent, ephemeral, and headwater streams (See Table 1).[3] In addition, according to the U.S. Fish and Wildlife Service, the rate of wetlands loss accelerated nationally by 140 percent from 2004 to 2009, the years immediately after the Supreme Court rulings.[4] The Great Lakes region has already lost 66 percent of their historic wetlands (See Figure 1).[5]

Table 1: Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Completed by U.S. EPA in July 2009

State	Population Served by Public Drinking Water Systems using surface water[2]	Population Dependent on Public Drinking Water Systems relying on I/E/H	% Population on Public Drinking Water Systems relying on I/E/H	Total Stream Miles in Source Protection Areas	Miles of I/E/H in SPAs	% of streams in SPAs that are I/E/H
Ill.	4,872,325	1,680,948	34%	9,894	5,688	57%
Ind.	1,951,112	1,703,230	87%	2,330	1,158	50%
Mich.	1,977,536	1,400,633	71%	1,342	551	41%
Minn.	1,068,598	978,928	92%	1,736	627	36%
N.Y.	11,471,432	11,146,815	97%	10,436	5,728	55%
Ohio	5,894,716	5,285,318	90%	11,605	6,978	60%
Penn.	8,215,216	8,035,216	98%	18,604	10,720	58%
Wisc.	1,392,700	391,531	28%	504	254	50%
Total	36,843,635	30,622,619	83%	56,453	31,703	56%

The Trump Administration is now seeking to rescind the Clean Water Rule and replace it with a rule that will likely cover fewer waters. The President's executive order requires the EPA and Army Corps to base a new legal analysis regarding what waters should be covered under a much narrower interpretation of the Clean Water Act written for a minority of Supreme Court Justices by former Justice Antonin Scalia. Experts estimate that the Scalia opinion's narrow view of the Clean Water Act's scope would leave millions of acres of wetlands and tens of thousands of river miles and streams completed unprotected from pollution under federal law.

Figure 1: Percentage of Total Historic Wetlands Lost



[2] All data found at: http://water.epa.gov/lawsregs/guidance/wetlands/upload/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf

[3] U.S. Environmental Protection Agency. 2009. "Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S."

[4] Dahl, T.E. 2011. "Status and trends of wetlands in the conterminous United States 2004 to 2009." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 45.

[5] Dahl, T.E. 1990. "Wetlands Losses in the United States 1780's to 1980's." U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. P. 6.

Our Great Lakes are Connected and Important

Protecting and restoring wetlands and streams is critical to the restoration and protection of the Great Lakes. According to a review of more than a thousand publications from peer-reviewed scientific literature conducted by an EPA Science Advisory Board, streams, tributaries (e.g., headwater, intermittent, ephemeral), and wetlands are connected to downstream waters. The overwhelming science concludes that upstream waters in tributaries (intermittent, ephemeral, etc.) exert strong influence on the physical, biological, and chemical integrity of downstream waters. Common sense also tells us this is true. Pollution in a tributary is carried downriver into bigger and bigger waterways. Upstream waters also feed water to rivers and lakes, like the Great Lakes.

Additionally, other water features connected to rivers and lakes also play important roles. Healthy wetlands improve water quality by filtering polluted runoff from farm fields and city streets that otherwise would flow into rivers, streams, and water bodies across the country, including the Great Lakes. Wetlands and tributaries provide vital habitat to wildlife, waterfowl, and fish; reduce flooding; and replenish groundwater supplies. According to the SAB, all of this science provides an adequate basis for the key components of the rule.

A good example of how pollution upstream impacts bigger waters downstream is the 2014 drinking water crisis in Toledo, Ohio. Excess phosphorus and other pollutants washing off the land and impervious urban surfaces during heavy rains flow into the Maumee River, which empties into Lake Erie. Excess phosphorus mixes with a complicated brew of threats in the lake (like zebra and quagga mussels) driving the re-emergence of harmful algal blooms.[6] The blooms that shut off Toledo's drinking water produced deadly toxins harmful to human health requiring city officials to issue 'do not drink' orders. To protect drinking water systems like Toledo's, it is vital to protect the source of drinking water upstream, which the proposed rule does by covering streams and tributaries that play a vital role in keeping our waters clean and ensuring access to safe drinking water.

Clean Water Rule Supports Great Lakes Restoration Investments

Recognizing the important role wetlands and streams play in the overall health of the Great Lakes, the region's business, environmental, and governmental leaders endorsed a plan that calls for the restoration of more than 1 million acres of wetlands.[7] Over the last seven years, the U.S. Congress and has invested more than $2.2 billion to restore the Great Lakes. These efforts are producing results in communities around the region—including the restoration of more than 150,000 acres of wetlands and other habitat.[8] The Clean Water Rule supports Great Lakes restoration efforts and ensures that restoration gains are protected so that as we take one step forward we aren't also taking two steps back.

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[6] According to the Ohio Lake Erie Phosphorus Task Force, "…there are multiple contributors to phosphorus into Lake Erie, but agriculture is the leading source [of phosphorus] due to the majority of land use in agriculture in the Maumee River…." See: Ohio Department of Agriculture, et.al. 2013. "Ohio Lake Erie Phosphorus Task Force II Final Report." P. 1. Members of this Task Force included the Ohio Department of Agriculture, Ohio Farm Bureau Federation, and Ohio Environmental Council, among others.

[7] Great Lakes Regional Collaboration. 2005. "Strategy to Restore and Protect the Great Lakes." Found at: http://www.glrc.us/documents/strategy/GLRC_Strategy.pdf

[8] U.S. Environmental Protection Agency. 2016. "Fiscal Year 2017: Justification of Appropriation Estimates for the Committee on Appropriations." Washington, D.C. P. 289.

The clean water and restoration investments protected by the rule also support good-paying jobs and lay the foundation for long-term prosperity. Investments in Great Lakes restoration are creating jobs and leading to long-term economic benefits for the Great Lakes states and the country. A Brookings Institution report shows that every $1 invested in Great Lakes restoration generates at least $2 in return.[9] Research from Grand Valley State University shows that the return for certain projects is closer to 6-to-1.[10] The University of Michigan has also demonstrated that over 1.5 million jobs are connected to the Great Lakes, accounting for more than $60 billion in wages annually.[11] Great Lakes businesses and individuals account for about 33 percent of the U.S. gross domestic product, according to a profile of Bureau of Economic Analysis data presented by World Business Chicago.[12]

The Clean Water Rule helps protect our investment in restoring and protecting our Great Lakes by safeguarding vital wetlands and other waterways from pollution and/or destruction. In particular, the rule provides clear and predictable protections for many streams, wetlands, and other waters and it provides certainty in how far safeguards extend to nearby waters. The effect of this is to give greater certainty to the regulated community by providing better guidance from federal and state regulators. This helps streamline the permitting process and reduces the use of case-specific analyses of waterbodies.

While the rule covers waters that have historically been covered by the Clean Water Act, it does not extend coverage to new types of waters that have not historically been under the Act's jurisdiction, such as groundwater. It does not add any new requirement for agriculture or regulate most ditches. The rule also does not cover any artificial lakes, ponds, and artificial ornamental waters or water-filled depressions incidental to construction activity.

Conclusion

The HOW Coalition strongly supports this rule. The Great Lakes region cannot protect the Great Lakes alone. They need the help from the Clean Water Act to ensure all Great Lakes rivers, streams, and wetlands can provide clean drinking water, habitat for wildlife, and safe opportunities for fishing, paddling, and swimming. The rule's clarifications provide just that support.

Please do not hesitate to contact Chad Lord, our Coalition's Policy Director, at (202) 454-3385 or clord@npca.org with questions.

Sincerely,

Todd Ambs
Campaign Director

[9] Austin, et.al. 2007. "Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem." Metropolitan Policy Program, The Brookings Institution. Washington, D.C. 16 pp.
[10] Isely, et.al. 2011. "Muskegon Lake Area of Concern Habitat Restoration Project: Socio-Economic Assessment." Grand Valley State University, Grand Rapids, Michigan. P. 23
[11] Michigan Sea Grant. 2011. "The Great Lakes: Vital to our Nation's Economy and Environment." University of Michigan. 2 pp.
[12] Found at: https://www.worldbusinesschicago.com/files/data/GLSL_Economy_2013%20%282011%20data%29.pdf

Senator DUCKWORTH. Thank you, Mr. Chairman. I yield back.

Senator BARRASSO. Thank you very much for your questions.

Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

In my State and others in the Prairie Pothole Region, farmers plant in prairie potholes in dry years and plow around them in wet years; keeps the land in production. But under the WOTUS Rule, those voluntary efforts would be swept aside by regulation.

Dr. Josselyn, in your testimony you State that the threshold for establishing a significant nexus under the WOTUS Rule is very low. Under the Rule, could any prairie pothole be regulated?

Mr. JOSSELYN. Yes, sir. The Rule does take prairie potholes as a group and says that those areas, not just a single area, but all of those prairie potholes, similarly situated is the term that they use, and that can combine into then making a test that is positive for significant nexus.

Senator ROUNDS. Is that result consistent with the recommendation of the panel of scientists who reviewed the Rule?

Mr. JOSSELYN. No, on that particular element, where wetlands of a particular characteristic are all combined, was not reviewed by the Panel.

Senator ROUNDS. General Peabody, the Corps has not regulated any geographically isolated wetlands since the 2001 Supreme Court decision in SWANCC. Is not it true that Corps counsel raised concerns about how the WOTUS Rule treats isolated waters? In fact, did not the Corps counsel say that "this assertion of CWA jurisdiction over millions of acres of isolated waters undermines the legal and scientific credibility of the Rule"?

General PEABODY. Yes, sir.

Senator ROUNDS. Just curious, as chairman of the subcommittee on regulatory oversight, we had extensive hearings on making certain that the EPA is using the best science available in the regulatory process and would take into consideration public comments, especially those from scientists and State and local officials.

Gentlemen, do you believe the Agency adequately took scientific opinion into consideration and relied on sound science when crafting this Rule? Do you believe the Agency properly incorporated public, agency, and other scientific comments into its review?

Dr. Josselyn?

Mr. JOSSELYN. Senator, the Science Panel was really focus on establishing whether systems are connected, but when it came to the Rule itself, they looked at arbitrary distances and they set those up, and those were not issues that the Panel in fact strongly argued against. I believe that the WOTUS Rule as finally published was not something that the Panel could have supported at that point.

Senator ROUNDS. General Peabody, did that come into the discussion with regard to the Corps of Engineers and their analysis?

General PEABODY. Yes, sir, it did. One of our greatest concerns was that notwithstanding incredible effort led by EPA to amass all this science, do this report, bring in all of these peer review experts and put them to the Science Advisory Board review, some of the final judgments in the Corps opinion at that time did not reflect what the science said. For example, in my personal view, the most

stark example of this was the 4,000-foot jurisdictional limit that was proposed. I definitely understood the desire to provide clarity; I think that is a laudable goal. The challenge is that under the significant nexus standard, which legal counsel told me and I understood to be the common view of the administration to be the overriding legal standard that would apply, that you cannot have such a clear distinction, a fixed distance that is not supported in the underlying science. That was of great concern to us that was making the Rule legally vulnerable.

Senator ROUNDS. Thank you.

I want to change subjects just a little bit.

Mr. O'Mara, I am just curious, are you familiar with the Conservation Reserve Program?

Mr. O'MARA. Absolutely.

Senator ROUNDS. I think one of the finest conservation products this Country has ever had. Set-aside land, many of it some of the least productive farm land, the most at risk with drought or flood, and basically you put it back into grassland and you set it there for a period of up to 10 years. Farm bill coming up. Would you give me your thoughts about the value with regard to water resources and what it does for water if the Conservation Reserve Program and whether or not it is an effective way to actually help in a cooperative effort to make for clean water and basically a good sound conservation practice?

Mr. O'MARA. Thank you, Senator. As someone who pheasant hunts in your great State, I appreciate it greatly. The water benefits are huge. If you are able to protect lands through those types of programs and not have additional nutrients coming onto the landscape, it is a great way to prevent pollution in a very collaborative way. One of the challenges is that in the last few farm bills we have seen those programs cut, and the amount of dollars going to the Dakotas has gone down precipitously. I would much rather have folks getting a little bit of incentive to have their land growing ducks and pheasants, as opposed to being marginal and kind of hard to make commodity prices. We would love to work with your office to make that a lot bigger in the next farm bill.

Senator ROUNDS. Thank you.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Rounds.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Professor Kopocis, if you look at the Supreme Court decisions on point, the three major ones are Riverside Bayview, the Northern Cook County decision, and Rapanos. Across all of those three decisions has any Supreme Court Justice ever held that actual navigability is the proper standard under the Clean Water Act?

Mr. KOPOCIS. No, sir.

Senator WHITEHOUSE. Not one.

Mr. KOPOCIS. Not one.

Senator WHITEHOUSE. If an administrative agency were to try to follow that standard and then there was a challenge in court, how would it predictably turn out?

Mr. KOPOCIS. Well, I assume it would not be upheld because it would be contrary to the views of the three times the Supreme Court has spoken.

Senator WHITEHOUSE. We can agree that the Rapanos decision left much to be desired in terms of clarity. It was a plurality situation with no majority decision, and you have to decipher the different parts to pull the meaning out of it. It is my understanding that every single circuit court that has looked at this has decided that the Kennedy rule, the significant nexus rule, is the operative rule to extract from the Rapanos decision. Is that your view of the law as well?

Mr. KOPOCIS. Every circuit court that has opined has said that the Agency's use of the Kennedy test was appropriate.

Senator WHITEHOUSE. Okay. Significant nexus is obviously something different than actual navigability. If we are to hypothesize a seasonal stream, and you know every year in the rainy season it is going to run down into the navigable water, is it not necessary and logical and should not the people who live and recreate in the navigable water be able to count on the Federal Government saying, no, you can not dump pollutants in the dry season into that streambed, when we all know perfectly well that when the rains come it is all going to be washed down into the navigable waters?

Mr. KOPOCIS. Yes. It is simply physically impossible and technically impossible to protect the water quality of the navigable waters without protecting at least some of the tributaries that feed into it.

Senator WHITEHOUSE. From a practical point of view, Mr. O'Mara, that is what the hunters and the fishers and the people who live by and swim and boat in our lakes and other freshwater resources expect, is it not?

Mr. O'MARA. Absolutely. If you look at the millions of jobs and the billions of dollars of economic activity, if there is no water quality, there is no fish. If there is not healthy wetlands, there is no ducks. I mean, it comes down to the basics.

Senator WHITEHOUSE. If the Federal Government sat by and let polluters dump pollutants into a streambed when everybody would know perfectly well that when the rains came that would go down into the navigable and recreational waters and ruin the public's enjoyment of that, how would your millions of members feel about how responsible the Federal Government had been in letting that happen?

Mr. O'MARA. We have done polling on it among sportsmen and women across the Country, and more than 80 percent of sportsmen and women support protecting those streams for that reason, because they do not want to have the places they love and the places they depend on economically being destroyed by the pollution.

Senator WHITEHOUSE. Foreseeing rain is not too challenging a project to expect the Federal Government to be able to achieve, correct?

Mr. O'MARA. More of it to come.

Senator WHITEHOUSE. Yes, more of it to come.

Now, we also have something in common from your previous life. You are a Delawarean, if that is the right word, and I am a Rhode Islander. Both of our States are coastal States and both of our

States are downstream States. If the EPA is not actively defending upstream conditions outside of our States, who looks out for us in our small downstream States?

Mr. O'MARA. The challenge we have, as Senator Carper often says, we are kind of the tailpipe on the air emission side and kind of the sewer on the water side. I mean, the State of Delaware could eliminate every single source of pollution in its States that is winding up in its waterways and still not have a healthy estuary for the Delaware or for its part of the Chesapeake. Unless you are having like regional compacts and basically voluntary agreements with adjacent States, there is no way to make sure that we actually have healthy waterways.

Senator WHITEHOUSE. Professor Kopocis, back to lawyering again. In my hypothesis that a foreseeable rain is going to wash a known pollutant into navigable waters, do you think that a WOTUS Rule that failed to protect against that foreseeable event would pass scrutiny under the significant nexus test?

Mr. KOPOCIS. No, sir, I do not.

Senator WHITEHOUSE. Would not make any sense, would it?

Mr. KOPOCIS. No, sir. In fact, those kinds of concepts were specifically rejected by Justice Kennedy, saying that they made little sense and were unpersuasive.

Senator WHITEHOUSE. To some extent, a lot of the complaining that has been done about the EPA rule here is actually complaining about the significant nexus test, but that is the law, correct?

Mr. KOPOCIS. Yes, sir, it is.

Senator WHITEHOUSE. Okay. My time is up.

Thank you, Chairman.

Senator BARRASSO. Thank you very much, Senator Whitehouse.

Senator Ernst.

Senator ERNST. Thank you, Mr. Chairman, and thank you very much, everyone, for this great discussion today.

I do want to point out we still have the Clean Water Act, and I hope that within that Act we are not allowed to dump pollutants willy nilly. I think what we are talking about right now is the expanded definition of waters of the U.S., not the original Clean Water Act. I hope we are protecting our citizens without that expanded definition. I think that is what we are dealing with today.

Mr. Josselyn, as part of the propaganda campaign that the Government Accountability Office found to be illegal, the Obama EPA tried to get people to believe that unless they regulate ephemeral water, which, by definition, is a stream that flows only briefly during and following a period of rainfall, so essentially rainwater runoff, that the drinking water of 117 million people would be at risk. Mr. Kopocis and Mr. O'Mara repeat this claim in their testimony.

EPA put up a map on their website to support this claim, and this is this chart right here. However, if you read EPA's summary of the analysis, which is, of course, buried on a different web page than this map, you find out that EPA based this claim on a study of streams that are visible at medium resolution, which is what you see behind me. At this scale, you are only going to see major streams.

Does a study of those major streams at that scale have anything to do with ephemeral streams?

Mr. JOSSELYN. Thank you, Senator. In response to your question, the map scale is about 100,000 scale. You know, when I was a Boy Scout, I used 7.5 minute quadrangle maps, and they have a scale of 24,000. The scale is quite large, so that is a problem with that.

Also, the data base that they used I am very familiar, the NHD data base plus. That data base really only maps perennial and intermittent streams. In fact, the definition that they use is any stream that flows more than after immediate rainfall. Ephemeral streams are defined as streams which flow only after rainfall. The NHD data base that they used ignores those kinds of features.

The study really, although provides useful information, it is not accurate in its conclusion.

Senator ERNST. Yes. Thank you very much.

Mr. Tseytlin, as a legal matter, is it correct to say that EPA has to regulate ephemeral streams to protect drinking water?

Mr. TSEYTLIN. Absolutely not. Also with regard to the drinking water point in particular, of course, Federal law outside the Clean Water Act, the Federal Safe Drinking Water Act is the primary Federal protection. I believe that the focus on drinking water is part of that GAO found illegal propaganda campaign, which was meant to drum up, illegally again, support for the WOTUS Rule.

Senator ERNST. Yes. Thank you.

Mr. Tseytlin, the Obama EPA claimed that farmers did not need to worry about the WOTUS Rule because it exempted "ordinary farming activities from permits." Are you familiar with the Duarte case in California?

Mr. TSEYTLIN. I am.

Senator ERNST. In that case, the Corps and the Department of Justice claimed that a farmer needed a permit to plow his own land because the tops, again, right here, the tops of the plowed furrows dry out in the sun and constitute, and no jokes, folks, mini mountain ranges. Mini mountain ranges. Plowing does not qualify as an ordinary farming activity. My farmers would beg to differ.

Here is a picture of those mountain ranges from the report written by DOJ's expert witness. I guess under this definition Iowa is one of the most mountainous States in the United States.

What is left of the ordinary farming exemptions if you can not even plow your own soil?

Mr. TSEYTLIN. You are exactly right, Senator, and that is exactly the danger of expanding the jurisdictional reach of the Clean Water Act, which is what the WOTUS Rule tries to do, which is why the American Farm Bureau and the Wisconsin Farm Bureau and farmers all over the Country oppose very strongly the WOTUS Rule.

Senator ERNST. Yes. By these definitions, the entire expanded definition, 97 percent of the State of Iowa is regulated by that expanded definition and considered waters of the U.S.

Thank you very much.

Thank you, Mr. Chair.

Senator FISCHER. [Presiding.] Thank you, Senator Ernst.

Senator Harris.

Senator HARRIS. Thank you.

I have three committee meetings all scheduled at the same time this morning.

Mr. Kopocis, thank you for being here. The Clean Water Act is very important to me, and the Act ensures, of course, that there will be environmental justice for all communities. It ensures that all Americans have access to clean and safe drinking water. However, the Clean Water Act has lacked clarity in defining jurisdiction for Federal agencies to protect the sources of drinking water.

During your tenure at the EPA, I understand that you also worked closely on the Clean Water Rule. Do you believe that the Clean Water Rule was promulgated to provide clarity to the Clean Water Act?

Mr. KOPOCIS. The primary purpose of issuing that rule was to provide greater clarity, certainty, and predictability that was lacking in the post-Rapanos world.

Senator HARRIS. Thank you.

The Obama administration finalized the Clean Water Rule after extensive analysis of legal statute, after multiple agencies' technical expertise, millions of comments during the public comment period, and the best available peer-reviewed science. This past Saturday Americans from all over the Country marched in support of science and its value in creating sound policy like the Clean Water Rule.

Could you please explain to me the extent to which the EPA, during your tenure, used science-driven research into the final determination of the Clean Water Rule? In the event that this Administration decides to reevaluate the Clean Water Rule, what must the EPA do to guaranty that any future version of the Clean Water Rule is held to the same standard?

Mr. KOPOCIS. The agencies looked at what the Supreme Court has said and recognized that they needed to do a better analysis of the science of how waters were interconnected with each other and the impacts of upstream waters on downstream waters. The Agency challenged its Office of Research and Development to do an extensive research on the literature as to what existed to inform the Agency. ORD looked at about 1,200 different peer-reviewed documents in coming up with its synthesis of the Science Report.

Unfortunately, science does not address issues such as significant nexus. Science talks about how waters are interrelated to each other. As Mr. Josselyn said earlier, one of the recommendations of the SAB is that the Agency needed to recognize that waters are connected on a continuum, that there is not a single point that you can place on that continuum if you are looking at it from a purely science background.

However, the agencies use science to inform its policy decisions. Science was not going to decide the issue necessarily for the agency because the Agency had to operate within the confines of a statute and the guidance from the Supreme Court. Science was the informative information that the Agency used to come up with Rule going forward.

Senator HARRIS. Do you have any instruction for the EPA, or guidance or good advice, if they should reevaluate the Clean Water Rule?

Mr. KOPOCIS. Well, my first recommendation would be to do not do it, but they have announced that they are going to.

Senator HARRIS. They seem intent on doing it.

Mr. KOPOCIS. Absent that, then I would suggest that they take a look at the science. If there is new and better science, then I would encourage the Agency to look at it. If what the Agency chooses to do instead, as is stated in the Executive Order, is rely on Justice Scalia's plurality opinion, that will greatly narrow the scope of the Clean Water Act over what it is, and that will be a narrowing that is contrary to the science that was developed by us in the prior Administration.

Senator HARRIS. Thank you.

Could you describe the process of public engagement that was followed in proposing and issuing the Clean Water Rule, and what feedback the EPA received? Could you share with the Committee your understanding of what sort of process the current Administration has committed to it in its efforts to replace the Rule? Emphasis here on the public process.

Mr. KOPOCIS. What we did, we had extensive meetings with all interested parties, State and local governments, etcetera, before the Rule was drafted and put out for public comment. During the public comment period, which lasted over 200 days, we met with interested parties again. We had over 400 public meetings or phone calls, teleconferences. I personally, in my capacity, attended about 70 of those. We visited farms; we went out in the field to talk to people. We evaluated about, I believe the final number was close to 1.3 million comments on the Rule. We responded to those comments in a several hundred page long response to comments document that was prepared jointly by us and the Army Corps. We took all of that information to develop what is the final Rule.

I cannot speak to the plans of the current Administration; however, I have not yet seen signs that there is that same level of public involvement because those meetings have not yet occurred.

Senator HARRIS. Thank you.

Thank you all.

Senator FISCHER. Thank you, Senator Harris.

Dr. Josselyn, today, General Peabody has testified that the Corps staff were concerned that the bright line geographic tests in the WOTUS Rule could include water that should not be regulated and could exclude water that should be regulated. I want to focus on whether the WOTUS Rule would actually exclude any water.

You note in your testimony that the EPA found "the vast majority of the Nation's water features were located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." That finding is supported by the analysis performed by Geosyntec for the American Farm Bureau Federation in a sampling of States. Specifically, Geosyntec analysis shows that 100 percent of the land area of Virginia is located within 4,000 feet of something that meets the WOTUS Rule definition of tributary. The same is true for 99.7 percent of Missouri, 99 percent of Montana, 99 percent of Pennsylvania, as Senator Ernst said, 97 percent of Iowa, 95 percent of Oklahoma, 95 percent of California, and 92 percent of Wisconsin.

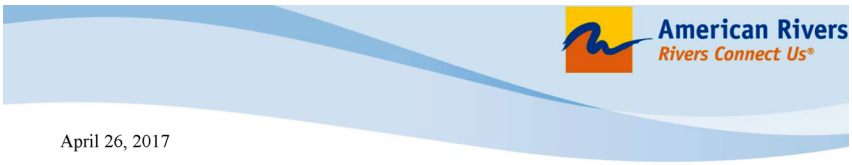
You are from California, so I would like to use that as an example. Based on the definition of significant nexus, which we have tossed around here today, but based on that definition in the WOTUS Rule, and assuming that the Geosyntec analysis is correct, would you agree that any water located in 95 percent of the land in California could be regulated under that Rule?

Mr. JOSSELYN. Yes, Senator. Thank you. We also did an analysis in the San Francisco Bay area, and we found that all the land in the San Francisco Bay area would be covered under that 4,000-foot standard, except for the core urban areas of San Francisco, Oakland, and San Jose. It is quite true, and the significant nexus test itself has a very low threshold in terms of what would be required to have a significant nexus, so most of those areas would be regulated.

Senator CARDIN. Could I ask my colleague to just yield for one moment? I am not going to be able to ask questions because of time restrictions. I would just ask consent that the American River statement be made part of the record, and I will ask my questions for the record.

Senator FISCHER. Without objection.

[The referenced information follows:]



April 26, 2017

The Honorable John Barrasso
Chairman, Committee on Environment and Public Works
United States Senate
307 Dirksen Senate Office Building
Washington DC 20510

The Honorable Thomas Carper
Ranking Member, Committee on Environment and Public Works
United States Senate
513 Hart Senate Office Building
Washington, DC 20510

RE: Comments for the Hearing, "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule."

Dear Chairman Barrasso and Ranking Member Carper:

American Rivers thanks the U.S. Senate Committee on Environment and Public Works for the opportunity to provide written comments for the hearing "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule." Please accept these comments for the hearing's official record.

For nearly thirty years following its enactment in 1972, the Clean Water Act was broadly interpreted to provide comprehensive protections for our nation's waters. A U.S. Supreme Court case in 2006 put protections for small streams and wetlands into question, leaving them vulnerable to pollution and degradation. These vulnerable waters contribute to the drinking water supplies of 117 million Americans and provide critical flood storage, pollutant removal, and habitat for fish and wildlife.

The Clean Water Rule is legally and scientifically sound and once implemented will provide protection for our nation's waters. American Rivers is supportive of the Rule and wants it to be implemented as soon as possible so as to protect our nation's river system and all the benefits it provides to surrounding communities and the environment.

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The Need for the Clean Water Rule

The primary objective of the Clean Water Act ("CWA") is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] The Act asserts federal jurisdiction over "navigable waters," which are defined under the CWA as "waters of the United States, including the territorial seas."[2] This definition was a purposeful expansion beyond waters "navigable-in-fact"[3] to extend protection to a broad array of waters, waterways, and wetlands in the United States. Congress's broad jurisdictional scope for the CWA, was upheld by a federal court in 1975.[4] The court found that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Clean Water Act, the term is not limited to traditional tests of navigability."[5] This was further emphasized in *International Paper Co. v. Ouellette*, in which the Supreme Court determined that, "the Act applies to all point sources and virtually all bodies of water…"[6]

Unfortunately, two U.S. Supreme Court decision in 2001 and 2006 put into question protections for small streams and wetlands were put into question. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")* the Supreme Court held that the non-navigable, intrastate, isolated waters in dispute (abandoned sand and gravel pits that were filled with water and varied in size from one-tenth of an acre to several acres and in depth from several inches to several feet) could not be classified as a "water of the United States" based solely on the fact that they are a habitat for migratory birds.[7] In a 5-4 opinion, the Court held that use of the Migratory Bird Rule[8] exceeds the Corps' authority under Section 404 of the Clean Water Act.[9] Although the Court held the Corps exceeded its authority here, the holding was very narrow and, when applied to later cases, restricts the Corps' ability to apply jurisdiction over isolated waters using *only* the Migratory Bird Rule.[10] This can be regarded as allowing the Corps to assert jurisdiction over isolated wetlands, as long as their decision is not solely based on the

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[1] 33 U.S.C. § 1251(a) (2013).
[2] 33 U.S.C. § 1362(7) (2013).
[3] Waterways are "navigable-in-fact" when, "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557 at 563 (1870).
[4] Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).
[5] *Id.*
[6] International Paper Company v. Ouellette, 479 U.S. 481, 492 (1987).
[7] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001).
[8] The Corps 'attempted to modify the definition of "waters of the United States" in order to clarify the scope of their §404 permit program. The Corps would have their jurisdiction extend to waters, "a) which are or would be used as habitat by birds protected by Migratory Bird Treaties; or b) which are or would be used as habitat by other migratory birds which cross state lines…" Final Rule for Regulatory Programs of the Corps of Engineers, 51 Federal Register 291, 41217 (13 November1986).
[9] *SWANCC*, 531 U.S. 159.
[10] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Federal Register 10, 1993 (15 January 2003).

migratory bird rule. But that begs the question as to what else is needed for a non-adjacent wetland to be deemed jurisdictional.

The U.S. Supreme Court was not able to reach a majority opinion in the consolidated cases of *Rapanos v. United States and Carabell* v. *United States Army Corps of Engineers* (referred to together as "*Rapanos*"). The plurality opinion sets forth a two prong test to determine if a wetland is jurisdictional: "First, that the adjacent channel contains a 'water of the United States,' 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."[11] However, this approach does not take into consideration the connection that water has that is not on the surface and is not present at all times but that is significant to the chemical, physical, and biological integrity of waterbody. The concurring opinion by Justice Kennedy found that a water or wetland possesses a "significant nexus" and is thus jurisdictional if, the water "alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity of other covered waters understood as navigable."[12] Justice Kennedy's opinion put forth a clear test that can be applied nationwide and that allows for the protection of important small streams and wetlands. The absence of a majority opinion in *Rapanos* has resulted in a variation in how the lower courts have interpreted the split decision.

Uncertainty following the *SWANCC* and *Rapanos* cases has put the health of our rivers at risk, especially small streams and wetlands. According to EPA, over 60 percent of streams in the United States and millions of acres of wetlands are lacking adequate safeguards from degradation.[13] Streams and wetlands are the origin of rivers and are an integral part of our nation's river networks, and as such should be protected by the CWA. The questions that these Supreme Court cases left unanswered are resolved in the Clean Water Rule.

The Clean Water Rule applies Justice Kennedy's significant nexus test to determine categories of waters that are always significant and covered by the Clean Water Rule, categories of water that are sometimes significant and thus a significant nexus test should be applied on a case-by-case basis, and categories of waters that are never significant and are exempt the Clean Water Act. This resolves the *Rapanos* issue of a split decision by codifying Justice Kennedy's significant nexus test and resolves the isolated wetland problem presented in *SWANCC* by requiring isolated wetlands to receive a case-by-case significant nexus determination or by excluding them from Clean Water Act protection depending on where they are situated.

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[11] Rapanos v. United States, 547 U.S. 715, 742 (2006).
[12] *Id*. at 780.
[13] EPA Administrator Gina McCarthy, *Clean Water Drives Economic Growth,* Huffington Post, The Blog (Aug 29, 2014), http://www.huffingtonpost.com/gina-mccarthy/clean-water-act_b_5900734.html.

Impacts to Rivers

The Clean Water Rule is based on sound science, drawing from the EPA's scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. This report demonstrates the importance of small streams and wetlands to downstream water quality. The report is based on current scientific research from peer-reviewed literature. The EPA's report concludes that there is an undeniable chemical, physical, and biological connection between small streams, wetlands and floodplains to downstream waterbodies such as lakes, estuaries, oceans, and larger river systems.[14]

The EPA's Connectivity Report also concludes that, "all tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers..."[15] Upstream waters can impact the chemical integrity of downstream waters through the transport of nutrients, dissolved organic matter, ions, as well as contaminants.[16] Physical connections include the act of transporting water, heat and energy (temperature), sediment, wood and leaves, and other materials downstream through the current.[17] Upstream waters can impact the biological integrity of downstream waters through the movement of organisms such as fish, invertebrates, plants, and even genes.[18] Wetlands are also chemically, physically, and biologically connected to downstream waters. They are intrinsically linked to rivers by providing a reserve of groundwater, a storage area for flood waters, a sink for excess nutrients, and a habitat for aquatic organisms.[19] These services help to maintain the water quality and flow of downstream waterways.

Streams are not simply conduits for transporting material, they are also able to store and process nutrients and contaminants. Chemical, physical, and biological processes that take place in tributaries help to mitigate the effect of pollutants in the water column, such as nitrogen and phosphorus. In small, shallow streams, water has greater contact with the stream bed, which is a hotspot for nutrient removal.[20] Small streams and wetlands play an important role in the storage

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[14] U.S. Environmental Protection Agency, Office of Research and Development, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,* (Jan. 2015) [hereinafter *EPA Connectivity Report], available at* http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=52141.
[15] *EPA Connectivity Report, supra* note 1, at 6-1. *Also See,* Letter from Dr. Amanda D. Rodewald, Chair, SAB Panel for the Review of the EPA Water Body Connectivity Report to EPA Administrator Gina McCarthy, *SAB Review of the Draft EPA Report, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* 26, 35 (Oct. 17, 2014) [Hereinafter *SAB review of the Connectivity Report*], *available at* http://yosemite.epa.gov/sab%5Csabproduct.nsf/AF1A28537854 F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf.
[16] *EPA Connectivity Report*, *supra* note 1, at 3-21.
[17] *Id.* at 3-5.
[18] *Id.* at 3-38.
[19] *Id.* at 4-1. *See also*, *SAB review of the Connectivity Report*, *supra* note 15, at 39.
[20] J.L. Meyer, L.A. Kaplan, J.D. Newbold, D.L. Strayer, C.J. Woltemade, J.B. Zedler, R. Beilfuss, Q. Capenter, R. Semlitsch, M.C. Watzin, & P.H. Zedler, *Where Rivers are Born: The Scientific Imperative for Defending Small*

and transformation of nutrients and other pollutants, which helps to protect drinking water supplies for communities across the country. [21]

Small streams and wetlands are the source of our nation's waters and their degradation can adversely affect all downstream waters including rivers, lakes, and bays. As headwater tributaries and wetlands are filled or paved over during land development, they lose their ability to provide important ecological functions that benefit downstream waterbodies. The loss of headwaters reduces the amount of rainwater and runoff that the stream network can handle before flooding, and the magnitude of flooding in downstream tributaries increases. Increased flooding leads to scoured channels that are prone to larger and more frequent floods, and less able to recharge groundwater, trap sediment, or recycle nutrients.[22] As a result, downstream receiving waters carry greater sediment loads, have poorer water quality, and less diverse aquatic life; all of which can lead to algal blooms, fish kills, and sedimentation.[23] This can compromise recreation, navigation, commercial and recreational fisheries, as well as increase the cost of water filtration for drinking supply and industrial use.[24]

At the most basic level, the health of our rivers depends on the health of upstream waters. If a waterway is polluted, filled in, or otherwise compromised the stream network will be adversely affected. Not only will the pollutants and fill material directly harm the water but the overall effects they cause will disturb the chemical, physical, and biological processes that keep our waterways healthy. It is important that we implement the Clean Water Rule in order to protect our rivers as well as their tributaries and wetlands so as to optimize the health of all our waterways.

Impacts to Drinking Water Supply

Approximately 286 million Americans get their water from a public water system monitored and regulated by the EPA.[25] Of those, 117 million get their drinking water from public systems that rely on seasonal, intermittent, and ephemeral headwater streams.[26] Restoring protections to these small streams and surrounding wetlands under the proposed rule is critical to protecting drinking water. The status quo puts protections for these waters into question, leaving them vulnerable to pollution and degradation.

Streams and Wetlands. American Rivers and Sierra Club 8 (February 2007), *available at* http://www.americanrivers.org/assets/pdfs/ reports-and-publications/WhereRiversAreBorn1d811.pdf? 422fcb

[21] *Id.*at 10.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 12.

[25] U.S. EPA, EPA 816-K-07-004, *FACTOIDS: Drinking Water and Ground Water Statistics for 2007* 4 (March 2008), *available at* http://www.epa.gov/ogwdw/databases/pdfs/data_factoids_2007.pdf.

[26] EPA, *Geographic Information System Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, http://water.epa.gov/lawsregs/guidance/wetlands/ surface_drinking_water_index.cfm (last updated Oct. 29, 2013).

Americans obtain two-thirds of their drinking water from surface water sources and the other one-third from groundwater.[27] However, surface water and groundwater are not exclusive entities. Groundwater can recharge surface water and surface waters can discharge into groundwater. The recharge that occurs from groundwater can be significant. In dry regions during the dry season as much as 95% of a stream's flow can come from groundwater.[28] Headwater streams and wetlands play a vital role in recharge due to their large surface area of soil to water contact.[29] If wetlands and small streams become altered and lose their connection to groundwater then downstream flow could be adversely impacted and may even start to dry up.

There are many examples of water utilities utilizing source water protection techniques to protect water quality and reduce the cost of service to ratepayers. For example, New York City recognizes the importance of protecting the watershed containing the tributaries and wetlands surrounding their water supply. It has acquired 176,500 acres of land and easements around the reservoirs that supply New York City with its drinking water.[30] The State of New York owns another 200,000 acres of undeveloped land surrounding the watershed area.[31] This extra buffer of land helps to reduce degradation of their water supply by trapping and removing sediment, nutrients, and contaminants from runoff. As a result EPA has granted New York City a Filtration Avoidance Determination which exempts the City from a requirement to build and operate a multimillion dollar water filtration facility.

The public benefit provided by investments in watershed health is a direct demonstration of the economic and public health value of protecting the upper reaches and wetlands within a watershed. While many communities also benefit from healthy, protected watersheds (San Francisco, Seattle, and Boston, for example), others struggle to maintain safe drinking water quality from source waters that are susceptible to contamination. The Clean Water Rule will help to protect everyone's drinking water supply by protecting the headwaters and floodplains of jurisdictional waterways.

The Clean Water Rule Should be Implemented

The Clean Water Rule is based upon Justice Kennedy's "significant nexus" test combined with scientific parameters so that jurisdictional determinations can be made in a consistent manner throughout the United States. This affords waterways protection while at the same time giving

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[27] Meyer, *supra* note 20, at 11.
[28] *Id.*
[29] *Id.*
[30] New York City Environmental Protection, *New York City 2013 Drinking Water Supply and Quality Report* 3 (2013), *available at* http://www.nyc.gov/html/dep/pdf/wsstate13.pdf.
[31] *Id.*

stakeholders the clarity and reliability they need to make informed decisions about the water on their property.

The Environmental Protection Agency and the U.S. Army Corps of Engineers have developed a fair Rule that protects the water of all Americans and is based on science and the law. American Rivers will continue to work to support the Clean Water Rule to ensure that protections are restored to the small streams, wetlands, and other waters that are vital to the health of our rivers and the communities that depend upon them.

Thank you for taking our comments into consideration.

Sincerely,



Meghan Boian
Associate Director, Policy & Government Relations
American Rivers

Senator FISCHER. What about States that are not included in that analysis? Nebraska was not included. Can you conclude that over 90 percent of the State would be regulated under that final WOTUS Rule?

Mr. JOSSELYN. In fact, in the WOTUS Rule, in the Preamble, they talk about the fact that the 4,000-foot limit was meant to include most all of the wetlands in any State.

Senator FISCHER. Mr. Tseytlin, do you believe that the Clean Water Act regulates all water in a State?

Mr. TSEYTLIN. That is not within the coverage of the Act. The Act applies to navigable waters and, under Justice Kennedy's approach, waters that have a significant nexus to those navigable waters.

Senator FISCHER. Dr. Josselyn, in November 2015, 4 months after the final Rule was published, EPA added a review of 199 jurisdictional determinations to the WOTUS Rule docket, and in this review EPA found that only 2 positive jurisdictional determinations would change to negative, affecting approximately 1 acre of wetlands. EPA used this analysis to show that the Rule would not cut-off jurisdiction.

However, the EPA's analysis also shows how the Rule expands Federal control over land, and of the 199 jurisdictional determinations EPA evaluated, 57 were negative. In 47 of those 57 negative jurisdictional determinations, the Corps concluded that Federal jurisdiction did not exist because there was no surface connection to navigable water.

Based on the definition of significant nexus under the WOTUS Rule, the new one, do you agree that most of the 47 negative jurisdictional determinations evaluated by the EPA could become positive jurisdictional determinations under the final Rule?

Mr. JOSSELYN. Senator, I did look at that study and the WOTUS Rule also includes shallow subsurface groundwater connections as a potential, so that could make some of those features that had isolated surface water to be connected.

Second, the WOTUS Rule expands the definitions of tributaries, so there could be far more tributaries mapped in proximity to these features and that could also expand the jurisdiction for those areas.

Senator FISCHER. Thank you.

Mr. Tseytlin, the Department of Justice used the November 2015 document to defend the Rule in the brief that they filed on January 13th of this year. Would the EPA's post hoc rationalization of their 4,000-foot threshold be credible to a court? What is your opinion on that?

Mr. TSEYTLIN. It would not be legally permissible to be stated in court under the Supreme Court's Chenery case. A rule can only be upheld on the basis of the record that was before the Agency wanting to issue the final Rule.

Senator FISCHER. Okay. Thank you very much.

Mr. Chairman, I hand you back your gavel. Thank you.

Senator BARRASSO. [Presiding.] Thank you, Senator Fischer. Appreciate your line of questioning and taking the chair.

Mr. Tseytlin, Mr. Kopocis just testified that the EPA relied on the Corps' political appointee instead of the Corps' experts. If the Rule is not based on agency experts, is it arbitrary and capricious?

Mr. TSEYTLIN. Well, the arbitrary and capricious nature of Rule reviews the entire record, and as I believe the testimony of some of my fellow colleagues here says, the record does not support the underpinnings of the Rule. Furthermore, as Professor Kopocis conceded, the science that EPA relied upon cannot be the basis for significant nexus finding because that was not what the Science Report was doing. With regard to the significant nexus finding, that is a legal conclusion. As the Sixth Circuit preliminarily concluded and as the District of North Dakota preliminarily concluded, the legal basis for the Rule was lacking.

Senator BARRASSO. Mr. Kopocis also testified that Justice Kennedy's opinion controls the definition of waters of the United States. Is the WOTUS Rule consistent, do you believe, with Justice Kennedy's opinion?

Mr. TSEYTLIN. It is not consistent. I gave an example earlier, the most obvious example, which is that Justice Kennedy said in no uncertain terms in Rapanos, Corps, you can not base Federal jurisdiction on adjacency to tributaries. They did the exact same thing here and they doubled-down on it by adding the 100-year floodplain concept, which, to be clear, the connection is based on a connection that happens on a once in a century rainstorm.

Senator BARRASSO. Mr. Kopocis, I see you wanting to join in.

Mr. KOPOCIS. Yes. Yes, if I could. I wanted to draw the distinction, though, on Justice Kennedy's opinion. Justice Kennedy said that in the situation that was presented to him, that the Corps had asserted jurisdiction based solely on the grounds of adjacency to a tributary. He said that that was not the basis on which they should have made their decision; instead, they should have made their decision based on the significant nexus presence or lack of presence, and that he suggested that that was the correct test.

I do not look at Justice Kennedy's opinion in the same way in saying that he said that you could not look at adjacency to tributaries. What he said was you should not have solely relied on that and you looked at the wrong test.

Senator BARRASSO. Mr. Tseytlin, anything else that you would like to add?

Mr. TSEYTLIN. Right. This is what Justice Kennedy said. He said, "Drains, ditches, streams remote from entering navigable in fact waters and carrying only minor volumes toward it are not a sufficient basis, especially when it is done on adjacency."

The Rule, on its face, covers drains, ditches, remote streams remote from entering navigable water and carrying only minor volumes. It could not be clearer.

Senator BARRASSO. General Peabody, your written testimony says the Corps does not believe that the Rule and Preamble, as ultimately finalized, "were viable from a factual, scientific, and legal basis." Then you went on to say it would be incredibly difficult for Corps leaders, regulatory and legal staff, to advance and defend this Rule.

You have also testified that statements and characterizations of the WOTUS Rule as a joint product of EPA and the Corps are flat out wrong. Given these facts, do you agree that the WOTUS Rule should be withdrawn?

General PEABODY. Senator, I believe a lot has transpired since I retired almost 2 years ago. It is now in litigation and I think the facts of the litigation would have to be considered to make that policy judgment. It was my position that the Corps is responsible for executing policy decisions before they are made. It is also the responsibility of Corps leaders to ensure that the Corps' professional judgment is clearly understood, and that was my primary motivator in writing those memoranda.

Senator BARRASSO. It is not just the final Rule, to me, that needs to be withdrawn, because on January 13th of this year the Department of Justice filed a brief that makes the same statements about the Corps' involvement in the Rule, and I believe that brief also needs to be withdrawn.

General PEABODY. Sir, to be clear, it was the Corps' opinion, and I believe this is unanimous of all the people I consulted with, that the Rule needed to be changed in order to be scientifically supportable and legally defensible.

Senator BARRASSO. The Rule is going to regulate any water that meets the new definition of adjacent water. In a stark departure from current practice, this means that water or wetlands do not need to be connected to any other water to be regulated, just needs to be within a certain distance.

General Peabody, on April 2015, a memo from the Army Corps counsel to you says, "Federal courts may find that common sense dictates that a water body located 1,500 feet from a stream"—and I think, Mr. Tseytlin, you referred to this as the five football fields that you have been referring to in your testimony as well as your answering of questions—"1,500 feet from a stream is too far away from that stream to be defined as neighboring and, thus, adjacent to that stream." It went on to say that "non-science based tests based on distances from other water makes the draft final Rule legally vulnerable."

Are you aware of any analysis by anyone that says that any water or wetland located five football fields away from any other regulated water has a significant nexus to that navigable water?

General PEABODY. Is this for me, sir?

Senator BARRASSO. Yes, sir.

General PEABODY. Sir, the only analysis I am aware of, and I would defer to Dr. Josselyn, but in the Connectivity Report I believe it states that there is scientific evidence that 300 feet can establish connectivity for a variety of scientific reasons. That is the only analysis I am aware of that addresses a specified distance.

Senator BARRASSO. Three hundred feet, but not five times that.

General PEABODY. Sir, I was not aware at that time, and I am not aware now, of any basis for a 1,500-foot or 4,000-foot or other distance beyond the 300 feet I just discussed.

Senator BARRASSO. Thank you.

Senator CARPER.

Senator CARPER. Thanks so much.

I am going to ask a question of Collin O'Mara. Collin O'Mara did a great job as our Secretary of the Department of Natural Resources and Environmental Control, a role previously filled by the fellow sitting right behind me, Christophe Tolou, so we are sort of getting the band back together here this morning.

One of the things that Collin and Christophe talk a lot about are secrets to being married for a long time. When Collin got married, he sent a handwritten note with a gift to he and his wife last year, I think, and I think I recommended him to keep in mind the three Cs: communicate, compromise, collaborate. The secret to a long marriage. It is also the secret to a vibrant democracy.

I listened to the testimony here today, and we are talking, but I do not know that we are in a collaborative mood here. I do not feel a sense of compromise. This is kind of like we are talking past each other.

Collin, with that in mind, one of the things we tried to do in Delaware with our friends from other States, things we try to do in Delaware is like embrace the three Cs. We kind of call it the Delaware way and it is part of the secret for our success.

Am I just misreading this or is there something to what I am saying?

Mr. O'MARA. This is incredibly complicated. There is a reason why the Supreme Court had five different opinions in a single decision. There is a reason why it has taken years to get to this point.

The science, I think, is fairly clear, and I think the clarity that is offered through the Rule does offer a path forward. I am not going to say there are not enforcement mistakes that are made. I am not going to defend every single action of the agencies. I do think if we could get to a conversation about the focus of the scope of where the pollutants are coming from and how we can actually have healthy water in this world and then complement that work with investments and things like the State Revolving Funds and collaborative programs where you could actually achieve healthy water. I think at the end of the day it is going to take good folks being around the table.

I do think that the EPA process was exhaustive. I think they did a very good job going out. It is something that affects a lot of people, though.

Senator CARPER. They came to Delaware. We actually had a meeting on a farm and a bunch of farmers around us. We had the leadership of the Delaware Farm Bureau and I thought it was pretty amazing. My guess is it is probably not the only farm they went to among those 400 stakeholders they met with.

Thank you.

Let me ask a question of Mr. Kopocis. I think I may have been out of the room when Senator Ernst asked this question, but I think she may have cited a number of examples of farming activities that she believes cannot be conducted under the Clean Water Rule that we are discussing today. I would just ask is plowing allowed under the Rule?

Mr. KOPOCIS. Yes. Yes. The statute specifically provides a permit exemption for normal farming practices, including plowing.

Senator CARPER. All right, thank you. Is the definition of waters of the U.S. more expansive than it was prior to the 2001 and 2006 court decisions? Is it more expansive or less?

Mr. KOPOCIS. The new Rule is less expansive than the prior Rule.

Senator CARPER. Why do you suppose we hear so much from around the Country that would suggest otherwise?

Mr. KOPOCIS. Well, Senator, it is difficult to say. I do think that some of that is based on while the prior Rule itself was more expansive in a post-SWANCC and post-Rapanos world, the agencies were perhaps administering it in a more narrow way. The Bush era guidance in the post-Rapanos world allowed for the assertion of jurisdiction over isolated waters, but created an incredibly cumbersome way to do it, and that is why earlier the Committee heard that the agency had not asserted jurisdiction over those waters. Those waters were still able to be analyzed for jurisdiction; they simply were not in fact being done.

Senator CARPER. All right. A question, if I could, Mr. Kopocis, for you and General Peabody. Would a new rule based on Justice Scalia's opinion be more expansive or more restrictive than the Clean Water Rule?

Mr. KOPOCIS. Well, a rule based solely on Justice Scalia's opinion would be considerably narrower than the Clean Water Rule, and in our many conversations with the Department of Army and the Corps, what we heard repeatedly was a concern that in fact the limitations that were being written into the Clean Water Rule made the Rule too restrictive. It seems to me that a rule written solely on the Scalia opinion would be even more restrictive than what is currently out.

Senator CARPER. Okay.

General Peabody, would you take a shot at the same question? I will just restate the question. Would a new rule based on Justice Scalia's opinion be more expansive or more restrictive than the Clean Water Rule?

General PEABODY. Senator, I believe that the Corps would need to analyze that based on all the jurisdictional determinations that it has made; however, I do think that it is probably fair to draw that supposition. I would want to see the evidence before I was sure of that one way or the other.

Senator CARPER. All right.

General PEABODY. I do not have any evidence one way or the other.

Senator CARPER. Okay.

My time has expired again. I have some questions I am going to submit for the record, and would appreciate the time to respond. Did you want to say something, Ken?

Mr. KOPOCIS. Well, I just wanted to make sure that the Committee understood that EPA and the Army and Corps worked very closely together. Obviously, there were some differences of opinion as the Rule was coming to an end. We still, on behalf of my time at EPA, we still worked very hard to try to maintain a collaborative effort. I do not want the Committee to go away without remembering that since 1979, when Attorney General Civiletti issued his opinion, that the final, the final responsibility for determining what is a water of the United States, the jurisdiction of the Clean Water Act, belongs to EPA.

Senator CARPER. All right, thanks.

General PEABODY. Senator, if I could add to that. I also want to clarify that Mr. Kopocis and I worked many issues during the time that we served in government, and we did not always agree, but we always worked hard to try to find solutions to those issues. The

limited nature of the engagement of the Corps in this particular instance was atypical of my experience working in government.

Senator CARPER. Well, I appreciate that clarification.

Thank you so much.

Senator BARRASSO. Well, I want to thank all the witnesses for being here today. If there are no more questions, members are also allowed, as Senator Carper just mentioned, will be submitting followup questions for the record. The hearing record will be open for 2 weeks.

I want to thank all of you for being here.

The hearing is adjourned.

[Whereupon, at 12:05 p.m. the committee was adjourned.]

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