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S. HRG. 116–45

A REVIEW OF WATERS OF THE U.S. REGULATIONS: THEIR IMPACT ON STATES AND THE AMERICAN PEOPLE

JOINT HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

AND THE

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

JUNE 12, 2019

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



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ONE HUNDRED SIXTEENTH CONGRESS
FIRST SESSION

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A REVIEW OF WATERS OF THE U.S. REGULATIONS: THEIR IMPACT ON STATES AND THE AMERICAN PEOPLE

WEDNESDAY, JUNE 12, 2019

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
JOINTLY WITH THE SUBCOMMITTEE ON FISHERIES,
WATER, AND WILDLIFE,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (Chairman of the Committee) presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Cramer, Braun, Rounds, Sullivan, Boozman, Ernst, Cardin, Merkley, and Van Hollen.

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

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

Today we are holding a joint hearing of the full Committee, as well as the Subcommittee on Fisheries, Water, and Wildlife, on Waters of the United States regulations, or WOTUS.

Since this is a joint hearing, both the full Committee and Subcommittee Chairmen and Ranking Member will give opening statements.

This is the Committee's first hearing on WOTUS since the Trump administration published its proposal to redefine the term earlier this year. The Trump administration is not the first to examine the term "waters of the United States." For more than 45 years, all three branches of Government have struggled to interpret the phrase.

We have heard many times in this Committee about the undue regulatory burden placed on American farmers and ranchers when the term is defined too broadly. Previous definitions have inappropriately and illegally expanded Washington's control over water features all across the country.

You can look no further than the Obama administration's illegal so-called Clean Water Rule. In 2017, the Committee held a hearing on the legal, scientific, and technical basis for the rule. We heard how the U.S. Army Corps of Engineers was cut out of the rulemaking process. Major General John Peabody, who was leader at the Corps during the Clean Water Rule's development, testified to

this Committee that the Clean Water Rule was not based on the Corp's expertise or experience.

Under the prior Administration's rule, ranchers and farmers across the country were told that their irrigation ditches, their ponds, and their puddles were navigable waters and could be regulated by the Federal Government.

The Clean Water Act is a strict liability statute. If the Federal Government claims a landowner has violated the Clean Water Act, that landowner can face thousands or millions of dollars in penalties.

This has played out in my home State of Wyoming. During the Obama administration, the EPA alleged that Andy Johnson, a farmer in Fort Bridger, Wyoming, owed $16 million in fines for putting a stock pond on his land in 2012. It was outrageous.

Congress opposed the Obama administration's rule. Under a joint resolution introduced by Senator Ernst, both houses of Congress disapproved the rule under the Congressional Review Act. President Obama vetoed the resolution and allowed the rule to be implemented.

The courts have since stepped in and blocked the rule from going into effect in a majority of States across the country. Many of those legal battles continue to this day.

Just a few weeks ago, on May 28th, 2019, a Federal judge in Galveston, Texas, was the first judge to rule on the merits of the Obama administration's rule. The judge found that the Obama administration had violated the Administrative Procedure Act when it issued the rule.

While the rule is blocked in a majority of States, it does remain the law in 23 States and in some counties in Arizona. That is why it is critical that the Trump administration expeditiously repeal the Obama administration's rule and issue a new, lawful definition for waters of the United States, a definition that everyone can understand; a definition that doesn't take away States' rights; and a definition that respects the Clean Water Act and the Constitution.

In the past, the complex WOTUS regulations have forced landowners to hire expensive consultants in order to figure out whether a water body on their land is a water of the United States. The Trump administration's proposed rule is an attempt to bring more regulatory certainty to American landowners.

That is why I am so pleased that we have this panel of witnesses today. I look forward to hearing their reactions to the Trump administration's proposal. I want to know if the rule is workable for them. The Administration needs to get this definition right. We need to remove the cloud of uncertainty that landowners, business owners, businesses, and States have faced over the years.

Today's hearing is an important opportunity to hear from stakeholders on how past definitions have gotten it wrong and what the Trump administration can do to get it right.

Before we move to our witnesses today, I would like to turn to Ranking Member Carper for his remarks.

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

Senator CARPER. Thanks, Mr. Chairman.

People ask me what I like about my job and what gives me joy in my work, and one of the things that gives me joy in my work is working across party lines and getting things done. There is a surprising amount of agreement here amongst us on really important issues that affect our air, our water, our planet. This is an issue that there is less agreement, so I just want to telegraph my pitch and ask you to hear me out.

Thanks, Mr. Chairman, for bringing us together, and our thanks to our three witnesses for joining us today.

As I have said before in this Committee, there is perhaps no other sector of the economy more intrinsically tied to environmental quality than our agricultural sector. After all, our farmers need clean water; they need healthy soil to produce high quality crops, and that is something I often hear when I am in Sussex County, which is Delmarva's southernmost county and home to some of the world's finest farms and farmers and producers.

If you drive through Sussex County, you will see sprawling fields, you will see farms growing soybeans, poultry, corn, and grain. You will see a lot of chicken houses, too. If you stop at a farm stand, chances are you will meet someone whose family has farmed in Delaware for generations. Back home in the First State, we have proven time and time again that we can have environmental protection for our environment without hampering our agricultural sector's ability to grow and to prosper.

Unfortunately, however, our farmers today are facing real adversity, and it is tangible, and it is hurtful. Just this week, my staff heard from someone whose family has been farming for more than a century. Over the years they have figured out how to budget and adjust their growing seasons around unexpected droughts or floods or freezing temperatures, but they could never foresee the impact of this President's trade wars.

I am hearing from farmers who are literally unable to plant a crop because we have so much rain. Too many of our fields are mud. Commodity prices are depressed. Our ability to sell soybeans, for example, to China and other countries has diminished, and we are hurting. Farmers never tell you they are having a great year, but I have never heard so many folks say that it is this bad. I think I am fearful that we are pursuing some policies that are not helping, but making it worse.

Meanwhile, in the Midwest, farmers are still reeling from catastrophic floods. This Administration's surrender on climate change ensures that more devastating floods, worsening droughts, and fires the size of States like my State will continue to keep farmers and crops off their fields. Add to this the erratic tariffs and climate denial this Administration's confusing renewable fuels gamesmanship, which is clearly intended to please everyone, and sadly, satisfies no one.

This is not the way to do business. So I ask a simple question: Why should anyone trust the changes that this Administration proposes to the definition of waters of the U.S. are going to deliver for our agricultural producers? I think the answer is we can't.

Even more important, I think, is that despite the incredible hardships besetting of farmers today, they do not really need the false promises of the Administration's new WOTUS definition. Since the days of Republican President Richard Nixon, Congress and EPA have ensured that farmers engaged in normal farming activities are not covered or affected by Clean Water obligations.

In fact, the economic analysis of the WOTUS rule conducted by this Administration's EPA and U.S. Army Corps of Engineers determined that, on average—get this, on average—only eight farmers per year needed 404 permits requiring mitigation. That is right, eight. Not 800, not 80, not 108. Eight.

Developers, on the other hand, required about 990 permits per year. Eight on the one hand for the farmers; 990 for the developers. If you look at the total of 390,000 permits these agencies included in their economic analysis, you will find that less than 1 percent of the permits were issued for agricultural related purposes. With that, I would ask all of us in this room to consider who truly benefits from the proposals from this Administration on this front.

Instead of the promised clarity and simplicity, I am afraid that the faulty and incomplete definitions in the President's proposal will end up demanding a great deal of time and money, and a boatload of consultants, to figure it out. At the same time, instead of reducing costs and cumbersome hurdles for our constituents, with this rollback, the only thing we are sure to have are degraded wetlands and polluted headwaters. The ephemeral and intermittent streams of our headwaters may be small enough to hop across, but under this proposal they will deliver more pollution, higher costs, and economic burdens, especially to poor and disadvantaged communities downstream.

These communities will see drinking water bills rise as their utilities have more pollution to scrub. These are neither hypothetical nor hysterical predictions. The American Public Works Association, in its comments on the proposed Trump rule, said recently, and I quote—this is not me, this is the American Public Works Association. Here is the quote: "The new proposed rule would likely impose higher costs on local agencies and water providers for those bodies to deliver those services. As a result, those bodies would be faced with a choice between raising rates and potentially pricing members of the community out of those services or risking noncompliance by trying to stretch already thin budgets for water and wastewater treatment."

Meanwhile, many fishermen and hunters will see wetland habitats destroyed, along with major disruptions to the outdoor recreation industry. And what about farmers downstream? Under the Trump proposal, in those waters no longer defined as waters of the U.S., industries would be free to discharge pollutants as they see fit, and land developers will be able to dredge and fill upstream wetlands. I wonder how farmers in Delaware and elsewhere would feel about having to install water treatment facilities to ensure that they have the clean water they need to raise healthy crops and livestock.

I just don't understand why this Administration would propose a definition for waters of the U.S. that provides less clarity—not more clarity—dirtier water—not cleaner water—disrupted wet-

lands, and higher costs to just about everybody represented in this room and far beyond.

My dad used to say to my sister and me when we were little kids growing up and we would pull some bone headed stunt, he would always say, "Just use some common sense." He said that a lot. We must not have had any common sense. You can probably recall things that your parents said to you when you were little and growing up. If my dad were here with us today, he would probably say the same thing about common sense, and he would probably be right. We just need to use some common sense.

Thank you, Mr. Chairman.

Thank you all for joining us.

Senator BARRASSO. Thank you, Senator Carper.

We will now hear from Senator Cramer, Chairman of the Subcommittee on Fisheries, Wildlife, and Water.

OPENING STATEMENT OF HON. KEVIN CRAMER, U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator CRAMER. Thank you, Mr. Chairman. Thank you to you and your staff, and to Senator Carper and his staff for working with me to convene this joint hearing and really for highlighting the importance of this issue by having a joint hearing and raising it here to the full Committee level.

Common sense. I like that. I could probably incorporate that a little bit into my comments; we will see.

Really, ever since the passage of the Clean Water Act in 1972, North Dakota landowners, farmers, ranchers have had to navigate, if you excuse the expression, this very complex regulatory field that changes with water, but also changes with political tides and sort of the culture of the moment.

Under the Obama administration, the uncertainty really reached a pinnacle with the 2015 WOTUS rule when it was proposed and then finalized. There was nothing simple about it. In fact, I have a tendency to be pretty good at simplifying complicated things, and then the lawyers get it.

But remember the EPA Administrator at the time promised us, "that this rule would save us time, keep money in our pockets, cut red tape, and give certainty to business." Well, she was right, it gives certainty: certain death to business, certain death to lots of farmers if in fact it was to go into effect. But certainty isn't always the best. The rule did exactly the opposite, really, especially in North Dakota.

Rather than focusing on our shared goal of clean water—I think we all have to admit we all want clean water—this rule really was a new, massive Federal power grab of farmers' land that Congress never intended the Federal Government to have. The importance of the issue is demonstrated when the State of North Dakota successfully led several States in challenging the 2015 regulation in Federal court in North Dakota v. the EPA.

The debate that has surrounded WOTUS for decades is really a legal question, a legal and constitutional question, rather than one of science or the water cycle. A lot of members like to go to the water issue. I want to stick with the Constitution and the legal issue. This is a legal question.

It is important to note, again, that we all share the common goal of clean water. In fact, North Dakota farmers, as well as farmers all around the country, know better than anybody; they are the stewards of their own land and water. They have the most to gain by keeping it clean and the most to lose by ruining it. It is very serious, and it is very personal to them.

So we should dispel the notion that those of us who oppose the 2015 WOTUS rule are somehow advocating for dirty water and unscientific water management. It is a matter of who manages your water, not whether it should be managed.

The reality is we have to live within the confines of the law and of the Constitution. In 2001 and again in 2005, the Supreme Court ruled that the Federal agencies went too far when they tried to claim regulatory authority over wetlands and non-navigable waters that had no significant connection to interstate commerce. In both cases the Supreme Court made clear that the Federal Government has limited jurisdiction under the Clean Water Act.

Now, Commissioner Goehring knows this about us, about me, and where we all live. A lot of us have pontoons, and we drive them on the Missouri River. It is pretty clear to us it is navigable. Now, of course, you can't go to the next State anymore because there is a dam every few hundred miles, but that is navigable. But I can't put it on my uncle's slough and get to the Missouri River; I can only stay on my uncle's slough.

It is not complicated. Interstate commerce requires the movement of let's say North Dakota grain on the Mississippi River. We understand that to be navigable. We understand that to be interstate commerce. When it gets more complex than that, that is when my brain starts hurting.

When the Obama administration released the rule in 2015, a Federal District Court in North Dakota granted a preliminary injunction blocking implementation of the rule in 13 States. The Chairman referenced that as part of a group of lawsuits. After the 2019 proposal was released, outside groups like Ducks Unlimited expressed opposition, citing supposed scientific evidence. To quote them specifically, they said that the proposed rule will leave geographically isolated wetlands without protection.

Now, there are two problems with that statement. First of all, it makes my argument. Isolated is not navigable. Isolated is the very definition that opposes the idea of navigable. Second of all, it ignores that the Federal Government is not the only protector of water in the country. In fact, the Constitution gives the primary responsibility of that to States. So, with all due respect, it is incorrect, and it is not very sound legal argument. The key question is what the legal constraints are established under the law.

I am going to submit the rest of my opening statement for the record and spare you the rest of it.

[The prepared statement of Senator Cramer was not received at time of print.]

Senator CRAMER. I do want to, if I could, Mr. Chairman, without objection, place into the record some of the documents that the comments that were presented by North Dakota farm groups and our attorney general, Wayne Stenehjem.

Senator BARRASSO. Without objection.

[The referenced information follows:]

April 15, 2019

Submitted Electronically Via Regulations.gov

Water Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Comments of the State of North Dakota on the Proposed *Revised Definition of "Waters of the United States"* (Docket ID No. EPA-HQ-OW-2018-0149; FRO-99880-15-OW)

Dear Administrator Wheeler:

On behalf of the State of North Dakota, I am submitting these comments on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively "Agencies") proposed *Revised Definition of "Waters of the United States"* ("2019 WOTUS Proposal"), published on February 14, 2019 (84 Fed. Reg. 4154).

North Dakota appreciates the Agencies' efforts on the 2019 WOTUS Proposal, including addressing many of North Dakota's prior comments to the Agencies regarding revisions necessary to bring any final rule into compliance with the limits of the U.S. Constitution and the Clean Water Act ("CWA"). The primary purpose for these comments is to support the general direction the Agencies have taken in the 2019 WOTUS Proposal; to provide input on areas where the 2019 WOTUS Proposal still violates the U.S. Constitution, the CWA, and/or infringes on state authority; and to address specific requests for comments solicited by the Agencies in the 2019 WOTUS Proposal. Separately, North Dakota also requests that the Agencies not diminish (but instead maintain or increase) the funding provided to states under the CWA in order to allow states such as North Dakota to better implement their regulatory authority over sovereign state water and land resources.

For the reasons stated herein, North Dakota urges the Agencies to move forward with the 2019 WOTUS Proposal. At the same time, North Dakota urges the Agencies to ensure that any final rule is consistent with the U.S. Constitution, the CWA, and U.S. Supreme Court precedent as set forth in these comments, and to continue to work with North Dakota to further the cooperative federalism framework established by Congress in the CWA by returning regulatory authority of state and local water resources to North Dakota.

State of North Dakota
April 15, 2019
Comments on Proposed *Revised Definition of "Waters of the United States"*
Docket ID No. EPA-HQ-OW-2018-0149; FRO-99880-15-OW

I. INTRODUCTION

In general, the Agencies have taken substantial steps in the 2019 WOTUS Proposal to remedy the prior statutory and constitutional jurisdictional overreach present in the 2015 Clean Water Rule: *Definition of "Waters of the United States"*, 80 Fed. Reg. 37054 ("the 2015 WOTUS Rule"). The 2015 WOTUS Rule significantly impinges on North Dakota's sovereign authority over land and water use, and incorrectly interprets and applies judicial precedent to jurisdictional determinations – creating broad jurisdictional categories that violate the CWA and the U.S. Constitution. It is therefore critical that the Agencies replace the 2015 WOTUS Rule with a rule that more properly adheres to the constitutional and statutory limits of the CWA – and the 2019 WOTUS Proposal has started down the right path in that regard.

In the 2019 WOTUS Proposal the Agencies also have demonstrated a greater and more appropriate respect (than the 2015 WOTUS Rule) for the concept of cooperative federalism. The 2019 WOTUS Proposal largely returns to States the authority to regulate state and local resources traditionally and constitutionally under State control. This is a positive development that allows North Dakota to exercise its own well-developed expertise in the regulation of its own of vital state land and water resources.

While North Dakota believes the 2019 WOTUS Proposal is a significant step in the right direction, there are still additional changes the Agencies must incorporate into the proposal to ensure that it is consistent with the boundaries of the U.S. Constitution set forth in the Commerce Clause and the Tenth Amendment. The Agencies must also further develop the 2019 WOTUS Proposal to adhere to cooperative federalism principles set forth in the CWA, respecting North Dakota's sovereign authority over local land and water resources. Finally, the Agencies must ensure that any final rule complies with existing Supreme Court precedent.

In particular, the Agencies must address the constitutional and CWA limitations on their jurisdictional authority, and further narrow the definition of "waters of the United States" to only include those waters adequately linked to navigable waters, and avoid asserting jurisdiction over waters with only an attenuated relationship to navigable waters. The Agencies should therefore further narrow and tailor the 2019 WOTUS Proposal's definitions for traditionally navigable waters, interstate waters, impoundments, tributaries, ditches, lakes and ponds, and wetlands as set forth below in Section IV.

To properly narrow the jurisdictional scope of the 2019 WOTUS Proposal, the Agencies should tailor the proposal to interpret and apply the term "navigable waters" consistent with Justice Scalia's plurality opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006), and require that "a continuous surface connection to bodies that are 'waters of the United States' in their own right" be required for a non-navigable water to be considered jurisdictional. This approach is consistent with longstanding Supreme Court precedent on the proper scope of jurisdictional waters under the CWA, and will comply with President Trump's Executive Order 13778 titled Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12497 (March 3, 2017).

II. NORTH DAKOTA'S SIGNIFICANT INTEREST IN THE WATERS OF THE UNITED STATES RULEMAKING

North Dakota has participated extensively in the litigation regarding the legality of the 2015 WOTUS Rule. *See North Dakota v. EPA,* No. 3:15-cv-00059 (D.N.D. 2015). North Dakota is the lead plaintiff for a coalition of states which obtained a preliminary injunction enjoining the the 2015 WOTUS Rule in 14 states. *Id.* at Document No. 70, *Memorandum Opinion and Order Granting Plaintiffs' Motion For Preliminary Injunction* (August 27, 2015). The legality of the 2015 WOTUS Rule has been fully briefed by all parties to that litigation, and is awaiting oral argument or a decision by the court without argument. *See* Attachment A, *Plaintiff States' Memorandum In Support Of Motion For Summary Judgment*; Attachment B, *Plaintiff States' Reply In Support Of Motion For Summary Judgment.* While North Dakota is supportive of the efforts by the Agencies in the 2019 WOTUS Rule to more closely adhere to the constitutional scope of federal jurisdiction over "waters of the United States," it encourages the Agencies to continue to monitor that litigation. The Agencies should be prepared to further craft the jurisdictional scope of the 2019 WOTUS Rule to adhere to any final decision in that ongoing litigation which further clarifies the permissible jurisdictional scope of "waters of the United States" under the CWA and the U.S. Constitution.

North Dakota has also commented at each stage of the Agencies' recent rulemaking efforts to redefine "waters of the United States," starting with the Agencies' 2015 WOTUS Rule. *See* Attachment C, *Comments of the State of North Dakota on the Proposed Definition of Waters of the United States,* Docket ID No. EPA-HQ-OW-2011-0880 (November 14, 2014); Attachment D, *Comments of the States of West Virginia, Wisconsin, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Utah, and the Commonwealth of Kentucky on the U.S. Environmental Protection Agency's request for comment on the definition of "waters of the United States"*, Docket ID No. EPA-HQ-OW-2017-0203-13716, (June 19, 2017); Attachment E, *Comments of the North Dakota Attorney General on the Proposed Definition of "Waters of the United States" – Recodification of Preexisting Rules,* 82 Fed. Reg. 899, Docket ID No. EPA-HQ-OW-2017-0203; FRL-9962-34-OW (September 27, 2017); Attachment F, *Comments of the State of North Dakota on the Proposed Definition of "Waters of the United States" – Recodification of Preexisting Rule*, Docket ID No. EPA-HQ-OW-2017-0203; COE-2017-0005-0004 (August 18, 2018). North Dakota renews many of the same issues in these comments, as further detailed below.

North Dakota's extensive involvement in 2015 WOTUS Rule litigation, and extensive participation in the Agencies' subsequent rulemakings demonstrates North Dakota's commitment to maintaining regulatory control over its own sovereign land and water resources. North Dakota has long supported a "waters of the United States" rule that conforms to the jurisdictional limitations of the U.S. Constitution and the CWA, and encourages the Agencies to ensure that any final rule complies with those limitations. North Dakota, as a long participant in the conversation surrounding "waters of the United States," is well qualified to comment on the proper jurisdictional scope of "waters of the United States" under the Commerce Clause, CWA, and U.S. Supreme Court precedent. As North Dakota has extensively commented on the illegality of the 2015

WOTUS Rule (per the attachments, *supra*), it will not rehash those comments here. Instead, in these comments North Dakota will emphasize the jurisdictional limits of the U.S. Constitution, the CWA, and Supreme Court precedent in order to further guide the Agencies' development of the 2019 WOTUS Proposal into a final rule.

III. THE AGENCIES REQUEST FOR COMMENTS ON THE LEGAL CONSTRUCT OF THE 2019 WOTUS PROPOSAL

The Agencies' 2019 WOTUS Proposal proposes to replace the 2015 WOTUS Rule and redefine the scope of "waters of the United States" that are "subject to federal regulation under the [CWA]" to be consistent with "U.S. Supreme Court cases . . . and consistent with Executive Order 13778." 84 Fed. Reg. at 4155. The Agencies are now proposing to define "waters of the United States" in "simple, understandable, and implementable terms to reflect the ordinary meaning of the statutory term, as well as to adhere to constitutional and statutory limitations, the policies of the CWA, and case law, and to meet the needs of regulatory agencies and the regulated community." 84 Fed. Reg. at 4163. As noted, North Dakota strongly supports these objectives.

Under the 2019 WOTUS Proposal, the Agencies propose that jurisdictional "waters of the United States" will only include "[t]raditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters." *Id.* at 4155. This new jurisdictional application of "waters of the United States" is "intended to ensure that the agencies are operating within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution." *Id.*

The Agencies are therefore soliciting "comment on all aspects of the proposed definition and whether it would strike the proper balance between the regulatory authority of the Federal government and states . . . and adhere . . . to the overall structure and function of the CWA by ensuring the protection of the nation's waters." *Id.* at 4169. In this section, North Dakota provides comments that outline limits imposed on the Agencies' authority under the CWA and the U.S. Constitution, and then applies those limits in light of U.S. Supreme Court precedent in order to demonstrate areas in which the Agencies must further narrow the jurisdictional definitions in the 2019 WOTUS Proposal by adopting Justice Scalia's plurality opinion in *Rapanos* for virtually all jurisdictional determinations under the proposal.

A. "Waters of the United States" Must Be Construed Consistent with the Limitations of the Clean Water Act and Congress Delegable Authority Under the Commerce Clause

The starting point for determining the Agencies' jurisdiction under the CWA is the plain language of the statute. The Agencies' jurisdictional authority under the CWA is limited to "navigable waters." For example, EPA's permitting authority under the CWA is limited to the

discharge of pollutants to "navigable waters," (33 U.S.C. § 1362), as is its authority to establish effluent limitations to protect water quality (33 U.S.C. § 1312).

In the CWA, Congress defined the term "navigable waters" to mean "waters of the United States, including the territorial seas." There can be no meaningful discussion of "waters of the United States" outside the statutory term it is intended to define: "navigable waters." Therefore, the Agencies must ensure that the 2019 WOTUS Proposal limits jurisdictional waters to those waters that closely relate to "navigable waters" – the parent term conferring jurisdictional authority on the Agencies under the CWA.

The limits of the term "navigable waters" are rooted in Congress' delegable authority. Congress can only delegate to the Agencies that which it "may rightfully exercise itself." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41 (1825). Therefore, any discussion of the limits of the Agencies' jurisdictional authority under the CWA must also understand the limits of Congress' own authority over "navigable waters."

The U.S. Constitution grants 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 commerce;" and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). As the Supreme Court explained in *SWANCC*, the CWA is authorized by Congress' "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"). Therefore, a "central requirement" of the CWA is that "the word 'navigable' in 'navigable waters' be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring).

Based on these considerations, the Agencies' 2019 WOTUS Proposal would regulate waters beyond the limits of the CWA and Congress' Commerce Clause authority by failing to give adequate effect to the term "navigable waters." In the 2019 WOTUS Proposal, the Agencies still assert jurisdiction over waters with only attenuated connections to navigable waters, often including bodies of water with only intermittent contacts to navigable-in-fact waters. *See e.g.* 84 Fed. Reg. at 4155 (acknowledging that tributaries with only intermittent connections to navigable waters are considered jurisdictional). Therefore, the Agencies must further tailor their definitions for interstate waters, impoundments, tributaries, ditches, lakes and ponds, and wetlands as set forth below in Section IV.

B. The Term "Waters of the United States" Must be Consistent with State Sovereignty as Protected by the Tenth Amendment, and with the Cooperative Federalism Principles Mandated by the Clean Water Act

The Agencies solicit comment on whether the 2019 WOTUS Proposal "would strike the proper balance between the regulatory authority of the Federal government and States." 84 Fed.

Reg. at 4169. While the 2019 WOTUS Proposal makes significant strides in returning to States the authority over local land and water resources, the Agencies must further narrow the jurisdictional categories in the final WOTUS rule to strictly adhere to the limits of "navigable waters" under the CWA.

Congress must comply with the Tenth Amendment's protection of States' sovereign interests in regulating their land and water. Congress exercises its Commerce Clause power "subject to the limitations contained in the Constitution," including the Tenth Amendment. *New York v. U.S.*, 505 U.S. 144, 156 (1992). The "Tenth Amendment thus directs [the Agencies] to determine . . . whether an incident of state sovereignty is protected by a limitation" on Congress' Commerce Clause power. *Id.* at 157.

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. CONST., amend. X. Under North Dakota's sovereign authority, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982); *accord City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States"). As referenced above, in the CWA Congress recognized the limitations of the Tenth Amendment and included an express directive that it is "the policy of 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." 33 U.S.C. § 1251(b).

The Agencies must therefore ensure that the final WOTUS rule adheres to the CWA's express directive for cooperative federalism. In order to "strike the proper balance between the regulatory authority of the Federal government and States" (84 Fed. Reg. at 4169), the Agencies must continue to narrow the jurisdictional categories of "waters of the United States" to ensure that the Agencies are only asserting jurisdiction over waters not constitutionally reserved to the states. In other words, any impermissible statutory or constitutional jurisdictional overreach in 2019 WOTUS Proposal is a direct infringement of North Dakota's sovereign right to regulate is own local land and water resources under the Tenth Amendment. North Dakota therefore insists that the Agencies further narrow the scope of jurisdictional waters under the 2019 WOTUS Proposal as set forth in Section IV, *infra*.

C. Justice Scalia's Plurality Opinion in *Rapanos* Provides the Proper Framework for the Jurisdictional Scope of "Waters of the United States"

At a threshold level the Agencies are soliciting comment on "their interpretation of the *Rapanos* opinions and whether the significant nexus standard, articulated by a single justice, must be a mandatory component of any future definition of ''waters of the United States.,' or whether the Agencies may use the plurality and concurring opinions in *Rapanos* to "craft a new standard established by rule." 84 Fed. Reg. at 4177. To that end the Agencies are soliciting comment on whether the proposed definition of "waters of the United States" under the 2019 WOTUS Proposal "incorporates the important aspects of Justice Kennedy's opinion, together with the plurality, to

craft a clear and implementable definition that stays within our statutory and constitutional mandates" and "whether the agencies have previously overread Justice Kennedy's opinion to mandate the significant nexus test outside the actual holding of Justice Kennedy's opinion, which was limited to the wetlands at issue in that case." *Id.* at 4167

The Agencies are also soliciting "comment on the proper reading of *SWANCC*," and "whether to revoke their 2003 guidance on" *SWANCC*. 84 Fed. Reg. at 4165. The Agencies are also soliciting "comment on their reliance on Justice Kennedy's opinion, particularly as compared to their treatment of the *SWANCC* decision" and "whether they should revoke their 2008 Rapanos Guidance." *Id.* at 4167.

North Dakota submits that in order for the Agencies to define "waters of the United States" in "simple, understandable, and implementable terms to reflect the ordinary meaning of the statutory term, as well as to adhere to constitutional and statutory limitations, the policies of the CWA, and case law," (84 Fed. Reg. at 4163) the Agencies should revoke their 2003 Guidance on *SWANCC*, revoke their 2008 *Rapanos* Guidance, and rely on Justice Scalia's plurality opinion in *Rapanos* as the proper framework for jurisdictional determinations and categories in any final rule based on the 2019 WOTUS Proposal. In doing so, the Agencies should only incorporate Justice Kennedy's concurring opinion in the narrow context of the specific wetlands at issue in *Rapanos* as set forth below.

Relying Justice Scalia's plurality opinion in *Rapanos* as the proper framework for making CWA jurisdictional determinations will enhance the certainty of those jurisdictional determinations. Justice Scalia's opinion provides a bright-line and easily applied test that will provide both federal and State regulators with a certainty absent from the 2015 WOTUS Rule. Relying on Justice Scalia's plurality opinion will allow the Agencies to discard their past 2003 *SWANNC* and 2008 *Rapanos* guidance documents, and create one comprehensive jurisdictional rule that will provide certainty to both regulators and regulated entities. Certainty and predictability will be further improved by removing from CWA jurisdictional determinations the complex and often practically unworkable "significant nexus" test. Countless pages of rulemaking preambles, comments and briefs have been generated on this topic, including in the 2015 WOTUS Rule and this 2019 WOTUS Proposal. Much of this debate has centered on waters whose connections to navigable-in-fact waters are, at best, speculative. It is time for the Agencies to end this debate – and to rely on the bright-line test in Scalia's opinion that is capable of consistent application by both federal and State regulators, and citizens across the United States.

Further, under current case law the Agencies have the authority to codify Scalia's plurality as the determinative *Rapanos* opinion. Under *Marks v. U.S.*, when a fragmented court decides a case and there is no single rationale explaining the result, the opinion that "concurred in the judgment on the narrowest grounds" will control. 430 U.S. 188, 193 (1977). Courts of Appeals across the country have been inconsistent in applying *Marks* and deciding whether the plurality or the concurrence in *Rapanos* (or both) should apply. *See United States v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009) (discussing myriad circuit court rulings failing to agree which opinion in *Rapanos* should apply, and concluding that the Agencies may appropriately apply either the

plurality or the concurrence). *Bailey* specifically noted that "there is little overlap between the plurality's and Justice Kennedy's opinions," and "it is difficult to determine which holding is the narrowest."

North Dakota submits that under *Marks*, Justice Scalia's opinion is the one that "concurred in the judgment on the narrowest grounds," and it therefore should control in other different cases. Justice Kennedy's concurrence should apply only to the isolated wetlands at issue in that case. This result gives effect to Justice Kennedy's concurrence, while still keeping the key term in the CWA that grants the Agencies their jurisdiction – "navigable waters," – as the guide and boundary for jurisdictional determinations. Further, the public will be well-served by the Agencies' charting a clear course based on the *Rapanos* plurality, removing the unnecessary uncertainty over the appropriate standard, and eliminating the confusion surrounding the Agencies' attempted codification of the significant nexus standard in the 2015 WOTUS Rule. Finally, this result is consistent with President Trump's Executive Order 13778, which directs the Agencies to "consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Scalia in *Rapanos*."

IV. THE AGENCIES' REQUESTS FOR COMMENTS ON JURISDICTIONAL CATEGORIES

A. Traditional Navigable Waters

The Agencies are not making any substantive changes to the types of waters defined as traditional navigable waters, but are soliciting comment on instances where the current "*Rapanos* Guidance," and in particular Appendix D to that guidance, may have allowed for regulation of waters that are not navigable-in-fact within the legal construct established for such waters by the courts." 84 Fed. Reg. at 4170. The Agencies are also soliciting comment on whether the "existing guidance regarding the scope of traditional navigable waters should be updated to help improve clarity and predictability of the agencies' regulatory program," and whether traditional navigable waters "can be clarified through existing, modified, or new exclusions to the term 'waters of the United States,' or other regulatory changes." *Id.* at 4170-71.

North Dakota has identified instances where the current *Rapanos* Guidance has led to regulation of waters that are not navigable-in-fact. For example, the *Rapanos* Guidance states that the Agencies will "assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3(a)(1) and 40 C.F.R. § 230.3(s)(1)," and then asserts jurisdiction over "wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters." *Rapanos* Guidance, at 4 (December 2, 2008). The *Rapanos* Guidance goes on to define adjacency in extremely broad terms, including waters "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.* at 5. Regulation of wetlands simply by the *Rapanos* Guidance's adjacency criteria has led to the regulation of water features in North Dakota that are not navigable-in-fact, such as Prairie Potholes and certain floodplains. Therefore, it is appropriate for the Agencies to revoke the 2008 *Rapanos* Guidance

which overbroadly applies Justice Kennedy's concurrence from *Rapanos*, and instead codify the 2019 WOTUS Proposal which properly adheres to Justice Scalia's plurality opinion.

As discussed in Section III.C., *supra*, North Dakota is encouraging the Agencies to revoke their existing 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance and instead apply Justice Scalia's plurality opinion from *Rapanos* to future jurisdictional determinations. Justice Scalia's plurality opinion will largely eliminate instances where water features that are not navigable-in-fact are considered jurisdictional under the Agencies' prior Guidance documents, reduce uncertainty in jurisdictional determinations, and provide a clear guideline that both regulators and the regulated public can rely on moving forward.

B. Interstate Waters

The Agencies are proposing to "eliminate 'interstate waters' as a separate category" of jurisdictional waters, and are soliciting comments on whether their proposal to eliminate "interstate waters" as a *per se* jurisdictional category is appropriate. 84 Fed. Reg. at 4172.

North Dakota supports the Agencies proposal to eliminate interstate waters as a separate category of *per se* jurisdictional waters. The inclusion of all interstate waters as jurisdictional is a long-standing overreach by the Agencies in violation of the CWA and the U.S. Constitution. Interstate waters are only properly jurisdictional when they are navigable-in-fact waters or waters that meet the jurisdictional test enunciated by Justice Scalia's plurality opinion in *Rapanos*. Interstate waters are not necessarily "navigable waters," and there is no independent basis for interstate waters to be *per se* jurisdictional under Congress' Commerce Clause authority or the CWA.

The Agencies have also solicited comment on whether the "agencies have in the past asserted jurisdiction over waters based solely on the fact that such waters were interstate and otherwise not connected to a traditional navigable water." *Id.* North Dakota has long experienced a jurisdictional overreach in this area. For example, the Agencies have regulated Prairie Potholes, isolated waters with features of both ponds and wetlands in past rules, which should not be jurisdictional. Eliminating the interstate waters as an independent jurisdictional category will remedy these jurisdictional overreaches and avoid intrusion on North Dakota's state sovereignty as protected by the Tenth Amendment.

C. Impoundments

The Agencies are not proposing any changes to the impoundment category of "waters of the United States," but are soliciting comments on whether impoundments are needed as a separate category of "waters of the United States" or whether the other categories of waters in this proposed rule, such as the lakes and ponds category," effectively incorporate the impoundment of other jurisdictional waters. 84 Fed. Reg. at 4173. The Agencies are also soliciting "comment on whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream

such that the flow is less than intermittent." *Id.* Finally, the Agencies are soliciting comment as to whether an impounded wetland that becomes a pond should remain jurisdictional even when it fails to meet "the elements of the lakes and ponds category." *Id.* Finally, the Agencies solicit comment on any other aspects of the proposed impoundment category.

North Dakota does not take a position on whether impoundments should be a separate category of "waters of the United States." North Dakota supports the Agencies clarifying in any final rule that when an impounded wetland becomes a pond, it will not remain jurisdictional if it fails to meet the jurisdictional elements of the lakes and pond category. North Dakota is characterized by a relatively flat topography that frequently results in water features that share characteristics with wetlands, impoundments, and ponds and lakes. The Agencies clarifying that water features should be treated by the category of water feature they currently meet will create more certainty in jurisdictional determinations.

Additionally, North Dakota believes that upland impoundments only releasing water in response to precipitation (ephemeral) should be exempt from being a jurisdictional water, as the connection between the impoundment and any downstream jurisdictional water is ephemeral and insufficient to become jurisdictional under *Rapanos.*

D. Tributaries

The Agencies are soliciting comment on "whether the definition of ''tributary'' should be limited to perennial waters only." 84 Fed. Reg. at 4177. The Agencies are also soliciting comment on "whether the tributary definition should include streams that contribute less than intermittent flow to a traditional navigable water or territorial sea in a typical year." *Id.* Additionally, the Agencies are soliciting comment on "whether less than intermittent flow in a channel breaks jurisdiction of upstream perennial or intermittent flow and under what conditions that may happen." *Id.* The Agencies are also soliciting comment on "whether the definition of 'tributary' as proposed should indicate that the flow originate from a particular source, such as a requirement for groundwater interface, snowpack, or lower stream orders that contribute flow." *Id.*

North Dakota urges the Agencies to further narrow their definition of tributary under the 2019 WOTUS Proposal to more closely track Justice Scalia's plurality opinion in *Rapanos.* North Dakota also urges the Agencies to limit jurisdictional tributary waters to perennial waters only. Under the Agencies' current definition in the 2015 WOTUS Rule, jurisdictional tributary waters include virtually all streams, regardless of size, contribution to flow, length of contribution, and potential impact on a downstream, "target" water body. By limiting the definition of jurisdictional tributary waters to only those tributaries that are perennial, the Agencies will be closely adhering to Justice Scalia's plurality opinion in *Rapanos* which requires a continuous surface connection between tributaries and navigable-in-fact waters. Further, limiting jurisdictional tributary waters to those that are perennial will provide clarity and certainty for federal and state regulators, and the regulated public alike, making jurisdictional determination less burdensome and more easily administrable.

North Dakota therefore favors a simple categorical treatment for tributary waters that avoids site-specific determinations. Even the current perennial/intermittent classification for tributaries discussed in the 2019 WOTUS Proposal (84 Fed. Reg. at 4176-4177) indicates significant uncertainty in jurisdictional determinations for those waters, with many factors affecting jurisdictional determinations that are not easily discernable for regulators or the regulated public (*e.g.* groundwater contributions). These determinations are complicated by climate non-stationarity, which, between typical 30-year record periods, can vary in status for both ephemeral streams (which, can in very wet cycles, flow intermittently), and intermittent streams (which can, in very wet cycles, flow perennially, or in very dry seasons, become ephemeral). These climate variations are common in North Dakota and throughout the northern Great Plains, and likely elsewhere.

For a bright-line categorical treatment, the Agencies need to simplify determinations by limiting the jurisdictional definition to perennial waters. This will greatly simplify determinations, avoid ongoing necessity for monitoring classifications of flow, and ground the federal jurisdiction more clearly within the platform of navigation with respect to interstate commerce.

Separately, North Dakota believes that the 2019 WOTUS Proposal's inclusion of springs and seeps as jurisdictional tributaries should be removed. Springs and seeps are often the most distant features from the navigable-in-fact or other jurisdictional water body, supply very little water contribution to that water body, and have no contaminants, being at the discharge point from a natural system. In addition, they are often located in uplands, and discharge from seasonally high-water tables or artesian formations, and inclusion of these upland springs as jurisdictional extends federal jurisdiction far up into farmland and very minor water bodies. Springs and seeps, regardless of whether they are intermittent or perennial, should be excluded under the 2019 WOTUS Proposal as non-jurisdictional.

E. Ditches

In the 2019 WOTUS Proposal the Agencies have proposed to add ditches as a new category of "waters of the United States." 84 Fed. Reg. at 4179. The Agencies propose to define ditches as "artificial channels used to convey water." *Id.* The Agencies then delineate a category of ditches considered jurisdictional, and exclude all other ditches as non-jurisdictional. *Id.* Ditches that are jurisdictional under the 2019 WOTUS Proposal include: ditches that are traditional navigable waters, ditches constructed in a jurisdictional tributary, and ditches constructed in an adjacent jurisdictional wetland. *Id.* All other ditches are excluded from being jurisdictional "waters of the United States."

The Agencies are soliciting comment on all aspects of their creation of a separate jurisdictional category for ditches, and the "utility and clarity of proposing a separate category of jurisdictional ditches." *Id.* at 4181. The Agencies are also soliciting comment "on the exclusion of all ditches constructed in upland, regardless of flow regime, and whether that is consistent with the plurality and concurring opinions in *Rapanos*." *Id.* at 4182. Finally, the agencies are soliciting

comment on "whether a ditch can be both a point source and a 'water of the United States,' or whether these two categories as established by Congress are mutually exclusive."

North Dakota supports the Agencies creation of a separate jurisdictional category for ditches in the 2019 WOTUS Proposal. North Dakota believes that the jurisdictional status of ditches has long created confusion under prior rules, and that clearly defining what categories of ditches are jurisdictional provides clarity for regulators and the regulated public. Creating a categorical "bright line" definition avoids prior confusing case-by-case delineations and provides much needed clarity for the regulated public that operates around ditches.

North Dakota also supports the Agencies' presumption of state jurisdiction, in the 2019 WOTUS Proposal, which states that "[i]f the evidence does not demonstrate that the ditch was located in a natural waterway, the agencies would consider the ditch non-jurisdictional under this proposed rule." 84 Fed. Reg. at 4181. This approach is respectful of primary state jurisdictions, and will likely prevent considerable conflict and potential litigation.

North Dakota also supports the Agencies exclusion of upland drains as jurisdictional under the 2019 WOTUS Proposal as opposed to the previous assumption of authority over the "entire reach" if part of the drain is below the ordinary high-water mark of a tributary. *Id.* at 4179. The purpose of drains is normally to convey water to a natural water body, and this usually results in a small portion of the drain below the high-water mark of the natural water body at the confluence. Extending the jurisdiction to the "entire reach" was inappropriate as the upland portions of drains cannot be considered jurisdictional under any reading of *Rapanos*.

Finally, North Dakota also urges the Agencies to determine that a ditch can only be either a point source or a "water of the United States," but not both. This approach is supported by the text of the CWA. *See e.g.* 33 U.S.C. § 1312. It would therefore be inconsistent with the direction of the CWA to consider ditches both point sources and "waters of the United States."

F. Lakes and Ponds

The Agencies are proposing to include a new distinct jurisdictional category for lakes and ponds in the 2019 WOTUS Proposal. Lakes and ponds will be jurisdictional under the 2019 WOTUS Proposal if: they are a traditional navigable water, they contribute perennial or intermittent flow to a traditional navigable water, or they are flooded by a *per se* jurisdictional water in a typical year. 84 Fed. Reg. at 4814. The Agencies are soliciting comment on whether their proposal to establish a distinct jurisdictional category for lakes and ponds "provides additional clarity and regulatory certainty." *Id.* at 4184.

North Dakota supports the creation of a separate jurisdictional category for lakes and ponds in the 2019 WOTUS Proposal. Clearly defining when lakes and ponds will be considered jurisdictional provides clarity and certainty for regulators and the regulated public. It also makes clear that not every feature that might be considered a lake or a pond is necessarily jurisdictional. North Dakota further supports that lakes and ponds which do not contribute flow to a traditional

navigable water are not considered jurisdictional. This represents a great improvement over the 2015 WOTUS Rule, which left open federal incursions into state jurisdiction on isolated lakes and potholes, which are normally not connected to flowing waters, and are common on the landscape of glaciated regions in North Dakota. The 2019 WOTUS Proposal therefore remedies prior large federal incursions into farms and other private and state lands under in the 2015 WOTUS Rule. Additionally, the new jurisdictional category is more appropriate because in a non-stationary climate, gradations between lakes, ponds, and wetlands are often transitory and not appropriately a basis for federal jurisdiction. North Dakota, consistent with its other comments, also urges the Agencies to further narrow the jurisdictional category for lakes and ponds and to only consider lakes or ponds that contribute perennial, as opposed to intermittent, flow to a traditional navigable water jurisdictional.

The agencies are also soliciting comment on "whether a specific definition of lakes and ponds should be provided in the" final rule, "or whether any such definition is necessary." *Id.* North Dakota believes that additional definitional certainty should be codified in any final rule. For example, exclusions of unconnected lakes and ponds need to be either codified in a definition or explicitly included under "H. Waters and Features That Are Not Waters of the United States." *Id.* at 4190 – 95. Additionally, a specific definition can allow the Agencies to exclude water features that might be jurisdictional under a broader definition of these terms, but would not be appropriate for regulation under the jurisdictional limits of the Commerce Clause or the CWA. For example, North Dakota's Prairie Pothole water features may in very rare instances meet the definition of a lake or pond through intermittent connections to "waters of the United States" (although never perennial). Prairie Potholes would thus be a proper candidate for exclusion from the definition (or separately, for inclusion in the "Water Features that are Not Waters of the United States" jurisdictional category).

Finally, North Dakota believes that application of the "typical" climate standard in making jurisdictional determinations for lakes and ponds is appropriate, but the definitional range for the "typical" climate standard is overly expansive. A statistical range is, by definition, not typical. For a more in depth discussion of the issue, please see Section IV, part I, *infra.*

G. Wetlands

The Agencies are proposing to create a category of jurisdictional wetlands to include all wetlands adjacent to: traditional navigable waters, jurisdictional tributaries, jurisdictional ditches, jurisdictional lakes and ponds, and impoundments of otherwise jurisdictional waters. 84 Fed. Reg. at 4184. The Agencies propose to define the term adjacent wetlands to mean wetlands that abut or have a direct hydrologic surface connection to other "waters of the United States." *Id.* "Abut" is proposed to mean when "a wetland touches a water of the United States at either a point or side." *Id.* "Direct hydrologic surface connection" includes perennial or intermittent flow between a wetland or jurisdictional water (in either direction). *Id.*

The Agencies are soliciting comment on "their interpretations of *Riverside Bayview*, *SWANCC*, and the *Rapanos* opinions, including specifically the proposal to provide regulatory

certainty through categorical treatment of adjacent wetlands rather than on the case-by-case application of Justice Kennedy's significant nexus test. *Id.* at 4189. The Agencies are soliciting comment on their interpretation of adjacency, including whether a wetland should not be jurisdictional when upland features separate a wetland from a jurisdictional water even in the presence of a direct hydrological surface connection. *Id.* The Agencies are also soliciting comment on their definition for a direct hydrologic surface connection as including both perennial and intermittent surface connections. *Id.*

North Dakota supports the Agencies creating and defining a category of jurisdictional wetlands. North Dakota also supports the Agencies' exclusion of uplands and artificially separated wetlands from jurisdiction. This provision allows optimal management capabilities for state, industrial, and agricultural management.

North Dakota separately encourages the Agencies to revisit their definition of "direct hydrologic surface connection" and exclude intermittent flow from that definition. Instead the Agencies should require a more significant connection when a wetland lacks a continuous or perennial surface connection with a navigable water, consistent with Justice Kennedy's concurrence in *Rapanos.* Simply having an intermittent surface connection with a jurisdictional water in and of itself should not be sufficient to confer jurisdiction under Justice Kennedy's concurrence. Instead, the Agencies should develop criteria that will require a demonstration of a "chemical, physical, *and* biological" connection between a wetland and jurisdictional water before that wetland is considered jurisdictional. *See Rapanos,* 547 U.S. at 779-80 (Kennedy, concurring) (emphasis added); 33 U.S.C. § 1251(a). This will allow the Agencies to give effect to Justice Kennedys concurrence in the narrow context that was presented in *Rapanos.* This more narrowed requirement for a jurisdictional determination will also ensure that state water features will not be considered jurisdictional absent an actual relationship to navigable waters, and will thus uphold the cooperative federalism mandated by the CWA and protect state sovereignty.

H. Water Features that are Not Waters of the United States

The Agencies have also proposed eleven exclusions from the definition of "waters of the United States" in the 2019 WOTUS Proposal, including: any water not enumerated in paragraphs (a)(1) through (6) of the proposal; groundwater, including groundwater drained through subsurface drainage systems; ephemeral surface features and diffuse stormwater run-off; all ditches except those defined under the rule; prior converted cropland; artificially irrigated areas; artificial lakes and ponds; water filled depressions in uplands incidental to mining or construction activity; stormwater control features excavated or constructed in upland areas; wastewater recycling structures; and waste treatment systems. 84 Fed. Reg. at 4190.

The Agencies are soliciting "comment on all aspects of the proposed exclusions." *Id.* at 4195. North Dakota supports the proposed exclusions in the Agencies 2019 WOTUS Proposal. The types of waters identified as proposed exclusions are all waters that would traditionally fall under state jurisdiction, and should rightfully remain subject to state regulation under the cooperative federalism set forth in the CWA. North Dakota urges the Agencies to further adopt

the changes discussed in parts A-G, *supra*, to further limit the scope of waters not enumerated in paragraphs (a)(1) through (6) of the 2019 WOTUS Proposal, including basing jurisdictional definitions and determinations on Justice Scalia's plurality opinion in *Rapanos*.

North Dakota also believes that upland ditches and lakes and ponds should be added to this section for additional clarity in any final rule. The Agencies are already proposing to exclude these features as jurisdictional, and inclusion in this section provided bright-line guidance for regulators and the regulated public.

Additionally, North Dakota supports proposed exemptions including groundwater drained through "subsurface drainage systems" and "ephemeral surface features and diffuse stormwater run-off such as directional sheet flow over upland." 84 Fed. Reg. at 4191. The inclusion of shallow groundwater connections in the 2015 Rule inappropriately opened the door for federal jurisdictional intrusion into a water resource that is extremely remote from navigable waters, highly complex in its hydrology, and thus clearly should be under state jurisdiction. Its removal eliminates potential contentions and jurisdictional litigation, that would be financially costly for water users, states, and federal agencies. Its application would exclude any reasonable "bright lines" of jurisdiction - one of the main stated goals of the Agencies' rule.

North Dakota also supports exclusion of "artificial lakes and ponds constructed in upland, such as water storage reservoirs, farm and stock watering ponds, settling basins, and log cleaning ponds, as long as they are not subject to jurisdiction under either paragraph (a)(4) or (a)(5) of the proposed rule," and exclusion of wastewater treatment facilities. 84 Fed. Reg. at 4191. Exclusion of infiltration basins and groundwater recharge basins are particularly welcome and will allow for state and private optimization of advanced methods for water-use management. However, North Dakota requests clarification on these exclusions such as: where are Agencies proposing to regulate the impact from drained water; and where is the sampling point in relation to drained water? Furthermore, at what point does the drained water become jurisdictional – at the outlet? If so, the water in the drains is not truly excluded. Conversely, if the locus of jurisdiction and its effects are measured downstream in a jurisdictional tributary, this would not be problematic

North Dakota also urges the Agencies to further clarify the prior converted cropland exclusion. The exclusion of "prior converted cropland" with respect to jurisdictional wetlands must be assumed to apply only to prior converted (before Dec. 23, 1985) wetlands that would have satisfied the new criteria for jurisdictional wetlands (*i.e.* adjacent to or abutting a jurisdictional water body). This would mean that isolated wetlands in uplands would not be jurisdictional. If the 2019 WOTUS Proposal does not intend to exclude upland isolated wetlands as jurisdictional, it controverts that intention by implying that "all prior converted wetlands" may revert and become federally jurisdictional if not farmed. North Dakota therefore requests that the Agencies clarify the exclusions for prior converted cropland. This clarification also has implications for isolated lakes and ponds, which often fall within or transition to wetland definitions in a non-stationary climate.

I. Geospatial Datasets and Other Tests and Tools for Jurisdictional Determinations

The agencies have solicited "comment as to how they could establish an approach to authorize States, Tribes, and Federal agencies to establish geospatial datasets of 'waters of the United States,' as well as waters that the agencies propose to exclude, within their respective borders for approval by the agencies." 84 Fed. Reg. at 4155-56. The Agencies are also soliciting comments on tools or tests that will aid the Agencies and the regulated public during jurisdictional determinations for water features such as: traditionally navigable waters (84 Fed. Reg. at 4170), the presence of a tributary (*id.* at 4177), perennial or intermittent streams and the flow regime of a river or stream (*id.*), and indicators and tools that may be helpful in identifying wetlands (*id.* at 4189-90).

North Dakota believes that the Agencies definition and use of a "typical year" in the 2019 WOTUS Proposal (defined at 84 Fed. Reg. 4173) as a tool for jurisdictional determinations is too vague and over-expansive. The definition of a "typical year" as within the "range" of a moving 30-year precipitation record is over-expansive and inappropriate. By definition, a statistical "range" is not "typical." It includes outliers, which will bias the definition toward the high end. Even during a drought cycle, extremely wet years can occur. Use of the "range" thus negates the purpose of the 30-year moving average delimitation. North Dakota therefore suggests using a more appropriate statistical metric, that will eliminate the extremes such as: the span between the middle two quartiles; or, an 80 or 90-percent confidence interval on a log-Pearson for the 30-year moving average.

Finally, North Dakota generally supports the Agencies' diminished reliance on the Connectivity Report used to justify the 2015 WOTUS Rule, and applauds the Agencies' focus on a more bright-line jurisdictional test under the 2019 WOTUS Proposal.

VI. CONCLUSION

North Dakota urges the Agencies to move forward with the 2019 WOTUS Proposal, and to modify the proposal to conform to the requirements of the U.S. Constitution, the CWA, and U.S. Supreme Court precedent as set forth in these comments. The Agencies must explicitly adopt Justice Scalia's plurality opinion in *Rapanos,* and then apply the opinion in jurisdictional determinations for virtually all defined categories of waters under the proposal (*i.e.*, all but with respect to the isolated wetlands involved in *Raponos*). Otherwise, any final rule based on the 2019 WOTUS Proposal will be statutorily and constitutionally invalid as an improper expansion of federal authority infringing on North Dakota's sovereign right to regulate its own local land and water resources.

Sincerely,

s/ Wayne Stenehjem
Wayne Stenehjem

State of North Dakota
April 15, 2019
Comments on Proposed *Revised Definition of "Waters of the United States"*
Docket ID No. EPA-HQ-OW-2018-0149; FRO-99880-15-OW

Attorney General
State of North Dakota

April 15, 2019

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SUBMITTED VIA FEDERAL ERULEMAKING PORTAL

Re: Comments on Proposed Rule on "Revised Definition of 'Waters of the United States'" Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Secretary Esper,

The undersigned organizations thank you for this opportunity to comment on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) 2019 Proposed Rule on the "Revised Definition of 'Waters of the United States'" published in the Federal Register on February 14, 2019.

In North Dakota, farmers and landowners encounter regulatory restrictions on water management practices that require coordination with agencies implementing the Clean Water Act, the wetland conservation compliance provisions for farm program benefits and federal crop insurance participants under the Food Security Act of 1985,[1] property rights issues related to the federal governments ownership of waterfowl production area easements managed by the U.S. Fish and Wildlife Service,[2] and state regulations pertaining to the construction of surface[3] and subsurface water management systems.[4]

Property owners, small and large businesses, land improvement contractors, and farmers in North Dakota have long sought clarity from Congress, courts, and agencies on the scope of "navigable waters" subject to federal jurisdiction under the Clean Water Act (the Act). The agencies have provided mostly incomprehensible, complex guidance to the field on what constitutes WOTUS and the way in which jurisdiction is determined. Meanwhile, the agencies have largely ignored the plain language of the Act and confused court precedent to suit their own

[1] *See* 16 U.S.C. §§ 3801 et seq. (commonly known as "Swampbuster").
[2] National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, §§ 4 and 5, 80 Stat. 927 (codified at 17 U.S.C. §§ 668d-668ee, *as amended* Pub. L. No. 105-57).
[3] N.D.C.C. § 61-32-03.
[4] N.D.C.C. § 61-32-03.1.

desired outcomes. This concern is aggravated by the administrative penalties and civil and criminal enforcement authority granted to the agencies.[5] The threat of administrative compliance orders coupled with penalties that can total $75,000 or more per day instill fear in landowners, small businesses, and farmers and deter those individuals from exercising otherwise lawful property rights due to a lack of clarity in the regulation.

We are greatly concerned by the EPA and Army Corps' history of expanding the scope of jurisdiction originally authorized by Congress under the Clean Water Act. The agencies continually release rules and policies on what the agencies want the law to say, rather than what Congress intended. The EPA and the Army Corps are no exception.[6] The 2015 Rule represented a gross overreach of federal jurisdiction that posed a significant financial burden on the regulated community and "authorize[d] the Corps to function as a *de facto* regulator of immense stretches of intrastate land–an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board."[7] It represented twisted logic at its finest, used to gain back what court precedent had already curtailed.

In a purely theoretical sense, we agree that all water on the ground, in the ground, and in the air has a connection–school children understand this when taught about the water cycle. The significance of that connection to navigable waters within the legal jurisdiction of Congress under the Commerce Clause, however, is limited. Congress's use of the word "navigable" expresses that the Clean Water Act intends to distinguish between "waters of the United States" and "waters of the states."

Many commenters opposing the 2019 Proposed Rule will cite to the EPA's Science Advisory Board report on *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* as evidence that the 2019 Proposed Rule lacks a sound foundation in science; but the courts have been clear to the agencies and those commenters: "[The courts] ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."[8]

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[5] *See, e.g.*, 33 C.F.R. § 326.6 (providing for administrative penalties that include accrued per-day penalties for violations, which in some instances can total $75,000 per day of violation) & 33 C.F.R. § 326.6 (providing for civil or criminal enforcement).

[6] For example, in 2007 Representative Oberstar introduced the Clean Water Restoration Act of 2007 (H.R. 2421) to the Transportation and Infrastructure Committee, proposing to define "navigable waters" similar to the EPA and Army Corps rule produced in 2015. The proposed bill failed to find enough support to make it out of the Committee, arguably showing Congress's unwillingness to expand the Act's definition of WOTUS; nevertheless, the agency persisted to release the same definition by rule in 2015.

[7] *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006).

[8] *Rapanos*, 547 U.S. at 738. The prefatory comments to the 2019 Proposed Rule correctly recognize that there is a distinction between the science of connectivity of waters and the legal

If the agencies and commenters want the phrase "the waters of the United States" to expand to those waters the Supreme Court has clearly established as regulated traditionally by the states, the authority must be bestowed clearly and expressly by Congress, not by the courts and not by agency rule. We applaud the agencies for recognizing that the 2019 Proposed Rule is not a statement "conclusively determining which of the nation's waters warrant environmental protection; rather, the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities."[9]

The agencies' final rule defining WOTUS should be clear, concise, and objective. We believe the 2019 Proposed Rule is a step in the right direction of eliminating many of the time-consuming, subjective, and uncertain processes necessitated by interpreting the 2015 Rule.

Some of the improvements from previous agency guidance and the 2015 Rule that we support in the 2019 Proposed Rule include:

1. Elimination of the case-by-case application of Justice Kennedy's significant nexus test, which created a time-consuming, uncertain, cost-prohibitive, and unpredictable process of determining whether a water or area of occasionally wet land constituted WOTUS.

2. Elimination of ephemeral tributaries from the definition of WOTUS.

3. Elimination of interstate waters, including interstate wetlands, as an independent category of jurisdictional waters within the definition of WOTUS.

4. Elimination of the entire Prairie pothole region as potentially jurisdictional on a case-by-case basis under the similarly situated status assumptions.

5. Elimination of man-made, non-navigable ditches with less than intermittent flow that are not constructed in (or to relocate) a tributary or in an adjacent wetland.

While the 2019 Proposed Rule provides additional clarity to WOTUS, total clarity is still absent. We make the following comments and recommendations for consideration in issuance of the agencies' final 2019 WOTUS rule:

I. COMMENTS ON U.S. SUPREME COURT PRECEDENT

The 2019 Proposed Rule supplemental information invites comments on the EPA and Army Corps' interpretation of the *Rapanos* opinions.[10]

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distinction between Federal and State waters demanded by Commerce Clause, the Clean Water Act, and court precedent interpretations of each. *See* 84 Fed. Reg. 4,176.

[9] 84 Fed. Reg. 4,169

[10] 84 Fed. Reg. 4,177.

As an initial matter, we offer that the significant nexus standard articulated by a single justice, Justice Kennedy, in the *Rapanos* case is not a mandatory component of any future definition of "waters of the United States." In that case, not a single opinion was fully supported by the majority of Justices needed to establish clear legal precedent. In such circumstances, the holding of the Court is the "position taken by those Members who concurred in the judgments on the narrowest grounds."[11] Justice Kennedy's significant nexus standard fails to represent the narrowest grounds used to reach the holding in *Rapanos*.

A. PROPER READING OF *SWANCC*

The 2019 Proposed Rule's supplemental information invites comments on the proper reading of the U.S. Supreme Court case *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*).[12] In part, comments are invited on the proper reading of *SWANCC* in light of reasonable interpretations of the final 2015 Rule that claim as WOTUS the very nonnavigable, isolated, intrastate ponds the Supreme Court held in *SWANCC* were beyond the Clean Water Act's reach.[13]

In issuing its *SWANCC* decision, the Supreme Court provided important guidance which the EPA and Army Corps must consider in finalizing the 2019 Proposed Rule. The Court highlighted two important statutory texts of the Act:

1. 33 U.S.C. § 1251(b): "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."[14]

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[11] *Marks v. U.S.*, 430 U.S. 188, 193 (1977). We acknowledge that application of the "narrowest grounds doctrine" articulated in *Marks* has proven difficult as evidenced by numerous lower court decisions since *Marks* commenting on the challenge of applying the doctrine to definitively determine the appellate court's holding. Most of these cases state that plurality opinions, such as those in *Rapanos,* should be treated as persuasive (rather than controlling) authority, and the focus should be on the reasoning and analysis used in the opinion rather than the Court's ultimate holding. *See, e.g., Hoak v. Idaho*, 2013 WL 5410108, at *8, FN7 (D. Idaho Sept. 25, 2013) (noting the standard in the 9th Circuit of treating plurality opinions as persuasive, not binding and its instruction to district courts to focus on the reasoning and analysis used in support of a holding to determine whether the cases are clearly irreconcilable (citing *Lair v. Bullock*, 697 F.3d 1200, 1202 (9th Cir. 2012) & *Rodriguez v. AT & T Mobility Servs., LLC*, 2013 WL 4516757 (9th Cir. 2013))).
[12] 84 Fed. Reg. 4,165.
[13] 531 U.S. at 174.
[14] 531 U.S. at 166.

2. The inclusion of the term "navigable" defined as "waters of the United States."[15]

After highlighting these provisions in its analysis, the Court ultimately held that the Clean Water Act cannot extend to isolated bodies of water that are not adjacent to open water.[16] The Court explained that exerting jurisdiction over these types of waters would eviscerate any meaning behind the Act's use of the word "navigable."[17]

Although it appeared that *Riverside Bayview Homes* and *SWANCC* provided good, contrasting precedent on the outer boundaries of Clean Water Act jurisdiction, the limits of that precedent were tested in the *Rapanos* decision. Unfortunately, Justice Kennedy invited ambiguity and uncertainty into the true reach of the Act with his "significant nexus" test articulated in that opinion. After *Rapanos,* Justice Kennedy's concurring opinion in *U.S. Army Corps of Engineers v. Hawkes Co.* (2016) arguably hints at regret for the ambiguous interpretations his *Rapanos* opinion invited. Justice Kennedy remarked: "The [Clean Water] Act, especially without the [jurisdictional determination] procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[18]

B. SUMMARY

We support a reading of *Riverside Bayview Homes, SWANCC, Rapanos*, and other cases recognizing nonnavigable waters must be so close, or so potentially close, to other navigable waters that it is difficult to determine where the boundaries of the navigable water end and where the boundaries of the nonnavigable water begin. We believe that expanding Clean Water Act jurisdiction to waters that contradict the Act's use of the word "navigable" should come after debate and amendment by Congress, and not from the courts or agencies. We oppose any attempts to bootstrap jurisdiction over waters that are only adjacent to other nonnavigable waters that rely on their own adjacency in order to be considered WOTUS.

II. TRIBUTARIES OF TRADITIONAL NAVIGABLE WATERS

The 2019 Proposed Rule defines tributaries to mean a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year either directly or indirectly through other jurisdictional waters, such as other tributaries, impoundments, and adjacent wetlands or through water features identified in paragraph (b) of this proposal so long as those water features convey perennial or intermittent flow downstream."

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[15] 531 U.S. at 167.
[16] 531 U.S. at 168.
[17] 531 U.S. at 171-72.
[18] 136 S. Ct. 1807, 1817 (2016).

A. INTERMITTENT VS. EPHEMERAL FLOW

The inclusion of tributaries with intermittent flow into the definition of WOTUS creates a challenge to consistent, objective, and efficient implementation of the agencies' regulations. The 2019 Proposed Rule does not make clear the line at which an intermittent stream or flow becomes ephemeral and thus, no longer a WOTUS.

The 2019 Proposed Rule provides definitions for "perennial," "intermittent," and "ephemeral."[19]

- "Perennial" is defined "to mean surface water flowing continuously year-round during a typical year."[20]

- "Intermittent" is defined to mean "surface water flowing continuously during certain times of a typical year, not merely in direct response to precipitation, but when the groundwater table is elevated, for example, or when snowpack melts. Continuous surface flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained."[21]

- The term "snowpack" is defined as "layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in northern climes and mountainous regions)."[22]

- The term "ephemeral" in the proposal means "surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall."[23]

The 2019 Proposed Rule supplemental information states that the agencies declined to propose a specific duration (e.g., the number of days, weeks, or months) that constitutes continuous surface flow because the agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.[24] The remarks also invite comment on whether the definition of a "tributary" should be limited to perennial waters only.

We support limiting the definition of a "tributary" to perennial waters only. The 2019 Proposed Rule fails to provide clear guidance as to when flow is of a duration constituting only "ephemeral"

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[19] 84 Fed. Reg. 4,173.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

flow and when flow rises to the definition of "intermittent." The lack of clear guidance will result in a regulatory uncertainty and delay in decision-making by agency personnel on the field. In similar uncertain situations, agency personnel who are not confident in their decision-making authority choose to request additional information and studies to delay an ultimate and uncertain conclusion. This adds time and significant expense to a permit application which, ultimately, may be nonjurisdictional. Such situations have the negative adverse effect of encouraging the regulated community to avoid permitting altogether.

We understand and appreciate that the 2019 Proposed Rule identifies obvious examples under each scenario: intermittent flow being those cases in which flow is continuous every year for a season during which the groundwater table is elevated or in which the area's snowpack melts; and less than intermittent flow being those cases in which the flow is never continuous and is only flowing in direct response to precipitation. A majority of scenarios on the ground do not fit these bright-line examples.

The agency identifies the difficulty in discerning intermittency: "[T]he agencies believe the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions."[25] Perhaps rules discerning intermittency by geographic region are appropriate; however, it is paramount to establishing clarity, objectiveness, and public trust that such rules are adopted through notice-and-comment rulemaking procedures under the Administrative Procedures Act and that mere guidance or policy interpretations with avoid public participation, transparency, and judicial review are avoided. In the final 2019 WOTUS rule, we support and recommend a nationwide baseline such as the total number of days of continuous flow which a property owner may rely on as assurance that the flow is less than intermittent.

Recommendation: **We recommend the agencies eliminate tributaries with intermittent flow from the final 2019 Rule on WOTUS. Alternatively, we recommend revision to the proposed rule to establish that continuous flow for less than 90 days in a typical year is deemed in all cases to be less than intermittent and not WOTUS.**

B. "TYPICAL YEAR"

The 2019 Proposed Rule includes phrases such as "certain times of a typical year" and "typical year." The 2019 Proposed Rule provides the following definitions for each:

- The phrase "certain times of a typical year" is defined "to include extended periods of predictable, continuous, seasonal surface flow occurring in the same geographic feature year after year."

[25] *Id.*

- The phrase "typical year" is defined to mean "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area."

The supplemental information in the 2019 Proposed Rule suggests that to determine whether the year in question is a "typical year," the agencies presently use observed rainfall amount and compare it to National Oceanic and Atmospheric Administration (NOAA) tables to see if the rainfall falls within the 30th and 70th percentiles of a rolling 30-year average.

We are concerned with the use of the 30-year rolling average rather than a static 30-year average. The rolling average potentially changes the 30th and 70th percentile range used to determine "typical year," which suggests that a tributary determined not to be WOTUS by the agencies could in a later year be determined to be jurisdictional as the "typical year" dataset changes. Conversely, areas found to be WOTUS could later be determined non-WOTUS based on a shift in the average precipitation.

The undersigned organizations recently submitted comments to the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) on its interim rule on Highly Erodible Land and Wetland Conservation published in the Federal Register on December 7, 2018, Docket ID No. NRCS 2018-0010.[26] The interim rule invited comments on whether the determination of "normal conditions" as used in the wetland conservation compliance provisions of the Food Security Act of 1985, as amended (commonly known as "Swampbuster"), should rely on a rolling 30-year average or set, 30-year data set. In our comments to the NRCS's interim rule, we noted that planning water management activities around dynamic wetland systems that vary based on changing climate conditions can be challenging. In its supplemental information, however, NRCS noted that the forward adjustment of precipitation data to determine "normal circumstances" will result in unfair and inconsistent determinations. We agree.

We oppose the use of a rolling data set that would adjust the identification of WOTUS based on precipitation cycles that represent conditions different than those considered typical at the time the Clean Water Act was amended. A rolling data set may result in the same tributary being considered WOTUS in some years, and not WOTUS in other years.

In addition, we encourage the Army Corps and the EPA to be absolutely transparent with the data it relies on in making its determination of "typical year." Often, critical context and data about off-site tools, such as the dates on which aerial photography was taken, are not available. All information available about data used by the agencies to determine "typical year" should be made available in the decision-making process.

Recommendation: **We encourage the EPA and Army Corps to use a fixed precipitation data set when determining "typical years" that is representative of "typical" conditions at the time of the 1972 amendments to the Clean Water Act.**

[26] 83 Fed. Reg. 63,046.

We recommend the EPA and Army Corps improve transparency by making clear in the decision-making process and the agencies' record what data is used to determine whether a year under consideration is "typical."

C. EXCLUDED WATERS OR FEATURES THAT BREAK TRIBUTARY FLOW

The 2019 Proposed Rule supplemental information states that where excluded waters or features convey perennial or intermittent flow to a tributary downstream, the tributary remains a jurisdictional tributary upstream and downstream of the excluded feature.[27] Where those excluded waters or features do not convey perennial or intermittent flow, the jurisdictional status of the tributary is broken at the excluded water or feature.[28]

These remarks create some confusion by noting that "a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the bodies of water must be 'geographical features' (i.e., rivers and streams) that are 'relatively permanent' (i.e., perennial or intermittent) and that contribute perennial or intermittent flow to a traditional navigable water," but then later noting that the definition could, in some circumstances, assert jurisdiction "over bodies of water contributing 'the merest trickle' to a traditional navigable water."[29]

Most farmers and landowners applying this rule in the field would not consider a mere trickle of water as a geographical "river" or a "stream" in the ordinary sense, and thus would believe it is not WOTUS.

We support the 2019 Proposed Rule's remarks excluding from the definition of WOTUS those tributaries upstream from excluded waters or features unless those excluded waters or features convey perennial flow to a tributary or traditional navigable water. Those excluded waters and features should include man-made breaks that prevent the contribution of perennial flow to a downstream tributary. We also support excluding from the definition of WOTUS tributaries upstream of portions of the channel that exhibit less than perennial flow. We believe regulating adjacent wetlands, rivers, and streams upstream from the break in perennial flow stretches even the outermost limits of federal authority described in Justice Kennedy's significant nexus test.

We recognize and agree with the agency that the 2019 Proposed Rule creates a challenge for landowners in determining whether there is a jurisdictional break downstream of a feature on their property.[30] Therefore, we believe it is imperative that the agencies be required to provide clear and convincing evidence of the consistent, perennial flow path from the subject area of regulation to the downstream, traditional navigable water before claiming jurisdiction as WOTUS.

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[27] 84 Fed. Reg. 4,173.
[28] *Id.*
[29] 84 Fed. Reg. 4,175.
[30] 84 Fed. Reg. 4,177-4,178.

Recommendation: **We recommend the agencies revise the final rule to exclude from WOTUS tributaries upstream from excluded waters, features, or man-made breaks that do not convey perennial flow to a tributary downstream. We recommend the final rule obligate the agencies to establish by clear and convincing evidence the consistent, perennial flow path along all reaches of the tributary subject to WOTUS inclusion to the traditional navigable water downstream before asserting Clean Water Act jurisdiction.**

III. CERTAIN DITCHES

A ditch is a "discernible, confined, and discrete conveyance" of water.[31] The 2019 Proposed Rule reference to certain ditches being a WOTUS is a misnomer–a ditch itself is not water. The regulation should focus on the characteristics of the water in the ditch, rather than the ditch, to define WOTUS.

We support the exclusion from WOTUS of all water in ditches flowing less than perennially. In North Dakota and many other states, development of the agricultural economy depended on water management. Due to the nature of the landscape, very few surface or subsurface water management systems solely traverse upland. Many were built in wetlands, not always for the purpose of draining the wetland, but to allow for the efficient passage of water through the watershed. These ditches do not have perennial flow and should not be considered jurisdictional, especially if their inclusion will extend jurisdiction to a wetland adjacent to such ditches.

Further, we do not support lessening the flow standard to intermittent flow or anything less than perennial flow for any constructed ditch.

Recommendation: **We oppose the current definition of ditches in the 2019 Proposed Rule. We support revision of the definition to include as WOTUS only those waters in a ditch that are capable of navigation in interstate or foreign commerce or are part of the territorial seas, were constructed in a tributary, or otherwise satisfy the conditions of the tributary definition and either relocated or altered a tributary or were constructed in an adjacent wetland.**

We support adding a temporal component to exclude from the definition of WOTUS all ditches constructed prior to adoption of the 1972 Clean Water Act Amendments.

We oppose treating any ditch that meets the definition of WOTUS as a point source and support treating these two categories as mutually exclusive.

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[31] 33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . .").

III. CERTAIN LAKES AND PONDS

The recent flooding events in the Great Plains and Midwest highlight the clarity required in the agency's 2019 Proposed Rule regarding lakes or ponds flooded by a WOTUS in a typical year. The 2019 Proposed Rule includes as WOTUS "lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year."

"Typical year" is defined to mean "within the normal range of precipitation over a rolling thirty-year period for a particular geographic area." "Normal" has been represented in the 2019 Proposed Rule's supplemental information to mean anything within the 70th and 30th percentile. Despite the 2019 flooding in the Great Plains and Midwest, the remainder of the year's precipitation could result in a yearly average that still meets the agency's definition of "typical year."

The 2019 Proposed Rule could be interpreted to extend WOTUS jurisdiction to lakes or ponds that are flooded by other WOTUS even in a single, isolated and brief flood event that occurs in an otherwise typical year. Such events should not vest federal jurisdiction over lakes and ponds that otherwise would be considered isolated and excluded from Clean Water Act jurisdiction. In some circumstances, the lakes and ponds themselves are not "contributing to flow" to the WOTUS.

The analysis provided in the 2019 Proposed Rule's prefatory comments is inadequate on this point. The remarks state:

> A mere hydrologic connection between a nonnavigable, isolated, intrastate lake or pond and a jurisdictional water, however, may be insufficient to establish jurisdiction under the proposed rule. For instance, a lake or pond that may be connected to a 'water of the U.S.' by flooding, on average, once every 100 years would not be jurisdictional under this proposal. To be jurisdictional, a lake or pond that is otherwise physically separated from a 'water of the United States' would need to be flooded by a jurisdictional water *during a typical year;* ecological connections between physically separated lakes and ponds and otherwise jurisdictional waters cannot be used to assert jurisdiction according to this proposal.[32]

A lake or pond could be flooded once every 100 years "during a typical year" because "typical *year*" inherently means the *yearly* average precipitation. The agencies' analysis does not tie "typical" to the specific precipitation, snow melt, or other event that caused the flood.

A rare flood could occur in a year that, on average, is otherwise typical for the geographic region. A flash flood over an otherwise dry year may occur in a year that experienced, on average, "typical" precipitation. Given the inclusion as WOTUS of lakes and ponds that contribute

[32] 84 Fed. Reg. 4,183.

perennial or intermittent flow to a traditionally navigable water in a typical year either directly or indirectly through another WOTUS, we question whether the inclusion of lakes and ponds flooded by a water identified in paragraphs (a)(1) through (5) is necessary. In a theoretical sense, most lakes and ponds are capable of being flooded by a WOTUS in any given typical year.

Recommendation: **We recommend the agency exclude from WOTUS lakes and ponds that are flooded by a water identified in paragraphs (a)(1) through (5) in a typical year from the final WOTUS rule.**

The 2019 Proposed Rule's prefatory remarks note that "[p]onds are generally smaller in size than lakes but regional naming conventions vary."[33] Neither the supplemental information in the 2019 Proposed Rule, nor the proposed rule itself provide a definition of "pond." We assume the agencies' intent is to recognize a difference between "ponds" and "wetlands," since the agencies have included as WOTUS a separate category referred to as "adjacent wetlands." A close examination of the 2019 Proposed Rule's language for ponds and definition of "adjacent wetlands" is required to illustrate the confusion and need for a definition of a "pond."

Ponds: "[P]onds that contribute perennial or intermittent flow to a water identified in paragraph (a)(1) in a typical year either directly or indirectly through a water(s) identified in paragraphs (a)(2) through (6) of this section or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream . . . ."	**Adjacent Wetlands:** "[W]etlands that . . .in a typical year . . . touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section . . .[or have] a direct hydrologic surface connection via perennial or intermittent flow between a wetland and a paragraph(a)(1) through (5) water."
Ponds: "[P]onds that are flooded by a water identified in paragraphs (a)(1) through (5) of this section in a typical year."	**Adjacent Wetlands:** "[W]etlands that . . . in a typical year . . . have a direct hydrologic surface connection . . . as a result of inundation from a paragraph (a)(1) through (5) water to a wetland."

The rule as applied to "ponds" and "wetlands" is virtually identical.

Recommendation: **We recommend the agencies remove the category of "ponds" from the final rule as it appears "ponds" would already be regulated as "adjacent wetlands" in the same manner. Alternatively, we recommend the agencies clarify their intent of including "ponds" as a separate category from "adjacent wetlands" by providing a definition illustrating the difference between the two features.**

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[33] *Id.*

IV. WETLANDS ADJACENT TO OTHER JURISDICTIONAL WATERS

I. WETLAND DEFINITION

We support a unified approach by all federal agencies to each agencies' wetland delineations, determinations, and mitigation requirements.

The largest generator of distrust by property owners, farmers, and the regulated community is the failure of each federal agency to recognize and support each other's wetland determinations and mitigation requirements. In North Dakota, landowners and farmers deal frequently with the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) under the provisions of the Food Security Act of 1985, the U.S. Department of Interior's U.S. Fish and Wildlife Service under the National Wildlife Refuge System Administration and Duck Stump Acts on lands burdened by waterfowl production area easements, and the EPA and Army Corps under the Clean Water Act. While the laws administered by each agency are different, each with varying objectives, all agencies use or have used the *Corps of Engineers Wetlands Delineation Manual* of 1987.[34]

The lack of communication, understanding, and agreement between the federal agencies on wetland delineation determinations adds time, cost, and undue burdens to the permitting process of each project. In addition, it seems that in North Dakota the internal policy of our federal agencies is to "wait and see" what the other agencies do before issuing their own determinations or delineations, thus resulting in further delay while neither agency is willing to act first. Each agency then issues a different mitigation requirement which makes it difficult for proponents of water management projects to plan and keep projects on schedule.

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[34] Prior to 1986, no manual existed for government agency reference to delineate wetlands. In 1987, the Army Corps and in 1988, the EPA, released their own versions of delineation manuals, each relying on the presently used parameters of (1) hydrophytic vegetation; (2) hydric soils; and (3) sufficient periods of hydrology to establish wetland boundaries. After several years of field-testing, a 1989 revised manual was released and agreed to by all four federal agencies: the NRCS; the Corps; the EPA; and U.S. Fish and Wildlife Service. In 1991, public concerns that the 1989 manual resulted in over-delineation of wetlands led to review of the 1989 manual, with revisions proposed in August of 1991. In response to comments received during the public comment period, the EPA responded by withdrawing the proposed manual. In 1992, Congress appropriated funds to commission the National Academy of Science to study wetland delineation. Congress prohibited the Army Corps from using the 1989 manual during the interim study period. The Army Corps returned to use of the 1987 manual.

Projects are often delayed years by this process. A unified approach by all agencies of the federal government to wetland identification, delineation, and mitigation would decrease the burden on regulatory agencies, save administrative costs to the agencies and the regulated community, and help bring clarity and trust back to the administrative process.

Recommendation: **We recommend the agencies amend the definition of "wetlands" to include acceptance of wetland delineations conducted by the U.S. Department of Agriculture. We further encourage the EPA and the Army Corps to enter into a Memorandum of Agreement with the U.S. Department of Agriculture and the Department of Interior concerning delineation of wetlands for purposes of the Clean Water Act, Food Security Act, and management of waterfowl production area easements under the National Wildlife Refuge System Act.**

We are concerned with the agencies' definition of the term "abut" within the definition of "adjacent wetlands." The proposed definition of "abut" means "to touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section." The definition illustrates a fundamental lack of understanding how wetlands, especially in the prairie pothole region, somtimes change throughout the growing season.

Our assumption is that the agencies intend this definition to mean that the official, delineated wetland boundary must touch at least one point or side of a water identified in paragraphs (a)(1) through (5). Certainly, a wetland in any typical year may, at times and in response to precipitation, touch a water identified in paragraphs (a)(1) through (5) despite the separation between the wetland boundary and the WOTUS by upland. Our assumption is defensible because the hydrologic criteria for identifying wetlands requires there to be a continuous presence of inundation or saturation for 15 days in a normal year during the growing season. Waters within a wetland may exceed the delineated boundary for brief periods of time and creep into the adjacent upland portions of cropland; however, brief inundations for less than the continuous number of days established as the hydrologic criteria do not expand the boundary of what constitutes "wetland" and what constitutes "upland."

Recommendation: **We recommend the agencies amend the definition of "abut" in the final rule to clarify that "abut" means "the wetland's delineated boundary touches at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section."**

Our concerns stated above regarding the inclusion within WOTUS of lakes or ponds flooded by a WOTUS in a typical year are equally shared as a concern with the definition of "adjacent wetlands." The 2019 Proposed Rule includes as WOTUS "[w]etlands that . . . in a typical year . . . have a direct hydrologic surface connection . . . as a result of inundation from a paragraph (a)(1) through (5) water to a wetland."

Here again, our concern is that the 2019 Proposed Rule could be interpreted to extend WOTUS jurisdiction to wetlands that are flooded by other WOTUS even in a single, isolated, and brief flood event that occurs in an otherwise typical year. Such events should not vest federal jurisdiction over wetlands that otherwise would be considered isolated and excluded from Clean Water Act jurisdiction.

Given the inclusion as WOTUS of wetlands that "in a typical year . . . touch at least at one point or side of a water identified in paragraphs (a)(1) through (5) of this section . . .[or have] a direct hydrologic surface connection via perennial or intermittent flow between a wetland and a paragraph(a)(1) through (5) water," we question whether the inclusion of wetlands flooded by a water identified in paragraphs (a)(1) through (5) is necessary.

Recommendation: **We recommend the agencies exclude from WOTUS wetlands that have a direct hydrologic surface connection as a result of inundation from a paragraph (a)(1) through (5) water to a wetland.**

B. PRIOR-CONVERTED CROPLAND

We strongly support the alignment of the Clean Water Act's Section 404 program with the wetland conservation compliance provisions of the Food Security Act (Swampbuster) implemented by the U.S. Department of Agriculture. We strongly support the exclusion of prior-converted cropland, as defined and determined by the Natural Resources Conservation Service (NRCS), from the definition of WOTUS.

NRCS regulations define "prior-converted cropland" as "a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland."[35]

We strongly oppose the notion that prior-converted cropland loses its exempt status if wetland characteristics return due to lack of maintenance of the drainage manipulation. We encourage the EPA and Army Corps to adopt the "once prior-converted cropland, always prior-converted cropland" exemption employed by the U.S. Department of Agriculture.

We encourage the EPA and Army Corps to clarify that prior-converted cropland which presently meets wetland criteria is only considered "abandoned" and potentially subject to inclusion within the definition of WOTUS if the area or field in which the prior-converted cropland is contained is no longer used for the production of an agricultural commodity, aquaculture, grasses, legumes,

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[35] 7 C.F.R. § 12.2, *wetland determination*(8). The hydrologic criteria for "farmed wetland" are found at 7 C.F.R. § 12.2, *wetland determination*(4). The hydrologic criteria were recently revised by the NRCS under an interim rule published in the Federal Register on December 7, 2018. 83 Fed. Reg. 63,046. The undersigned organizations submitted comments to the NRCS opposing the lesser hydrologic criteria employed pothole wetlands and opposing the use of a single observance of inundation as evidence that hydrologic criteria are met.

or pasture. Whether the prior-converted cropland itself has been used for production of an agricultural commodity should not be relevant. We believe this is the standard sought in the 2005 joint memorandum to the field issued by USDA and the Army, but not clearly articulated in the 2019 Proposed Rule and prefatory remarks.

Recommendation: **We recommend the agencies adopt, in all circumstances, prior-converted cropland determinations issued by the Natural Resources Conservation Service. We also recommend the agencies adopt the U.S. Department of Agriculture's "once prior-converted cropland, always prior-converted cropland." Alternatively, we recommend the agencies clarify that prior-converted cropland which presently expresses wetland characteristics is not abandoned as long as the area, meaning the field in which the prior-converted cropland is located, has not been abandoned for agricultural purposes.**

Finally, the 2019 WOTUS Rule states with absolute clarity that a wetland with, at best, only a subsurface hydrological connection to other WOTUS would not be deemed a jurisdictional wetland. Wetlands are not navigable waters. Wetlands are regulated by a complex group of other local, state, and federal laws. In North Dakota: (1) surface drainage of statewide significance; (2) wetland conservation compliance provisions of the Food Security Act. We support the agencies' clarification in the 2019 Proposed Rule.

V. GROUNDWATER

We oppose the modification to the 2015 Rule that brings surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in intermittent or perennial streams, within the definition of WOTUS.

The 2015 Rule excluded groundwater from the definition of WOTUS under Part 328 2.(b)(5) with or without expressing itself on the surface. The 2019 Proposed Rule excludes groundwater under Part 328 as well, however, it adds commentary stating that groundwater is not excluded from the definition of WOTUS if the groundwater expresses itself on the surface or "emerges on the surface and becomes baseflow in intermittent or perennial streams." The commentary is not stated in either the 2015 Rule or the 2019 Proposed Rule. The commentary is absent from the 2015 Rule commentary, but has been added to the 2019 Proposed Rule, lessening the clarity and predictability over the federal governments treatment of water discharged for subsurface water management systems.

Recommendation: **We recommend clarifying in the 2019 Final Rule commentary that all groundwater remains excluded from the definition of WOTUS, regardless of whether the groundwater emerges on the surface and becomes baseflow in intermittent or perennial streams.**

VI. IMPROVING CLEAN WATER ACT IMPLEMENTATION

The 2019 Proposed Rule sets out only to define "waters of the United States." It does not, and was not intended to, discuss types of "discharges" that are exempt or not exempt from those jurisdictional waters. However, we encourage the agencies, through further rulemaking and analysis, to evaluate the significance of the impact different types of discharges have on the integrity of the waters of the Unites States.

For example, under Section 404(e) of the Clean Water Act, the Army Corps is vested with authority to issue general permits authorizing activities in WOTUS that have minimal individual and cumulative adverse environmental effects on the integrity of navigable waters. Unfortunately, Nation Wide Permits can be eliminated within the Army Corps District by adoption of Regional General Permits, which can be more restrictive than Nation Wide Permits based on the unique characteristics deemed important to the District. The current threshold to authorize District level regulation is extremely low. We encourage and support heightened scrutiny on the regulatory procedure that permits Army Corps districts to depart from the Nation Wide Permitting rules.

VII. CONCLUSION

Farmers, small and large business owners, land improvement contractors, and the regulated community have watched in astonishment as the EPA and Army Corps fumbled through implementation of the definition of "waters of the United States." We submit these comments as a call for better regulatory predictability and efficiency from the EPA and Army Corps. The 2019 Proposed Rule must allow for better assessment of when projects will or will not be subject to regulation and permitting under the Clean Water Act. The proposed rule makes steps toward that goal, but fails in totality. These comments above represent a perspective that applies a practical approach to federal jurisdiction under the Clean Water Act.

We encourage the EPA and the Army Corps to work cooperatively with local and state stakeholders to achieve the agencies' goals of practical, consistent, objective, and clear application of these regulations. The U.S. Supreme Court has twice stated that the EPA and the Army Corps must find meaning in Congress's use of the word "navigable." A review of the bills proposed by Congress since the Clean Water Act's enactment shows that there is not congressional support for an expansion of the phrase "waters of the United States." Section 101(b) of the Clean Water Act states Congress's policy is to preserve the primary responsibility and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to exercise of the Administrator's authority under the Clean Water Act." We believe North Dakota is well-equipped to take on this requirement.

We strongly encourage you to take our recommendations under consideration in your final publication of the proposed rule.

Sincerely,

North Dakota Corn Growers Association
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Blake Inman, President
701-240-8748
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cc: The Honorable Kevin Cramer, U.S. Senator
The Honorable John Hoeven, U.S. Senator
The Honorable Kelly Armstrong, U.S. Congressman

Senator CRAMER. With that, I look forward to the questions.

Senator BARRASSO. Thank you very much.

Senator Inhofe, you have something you wanted to place in the record as well.

Senator INHOFE. Yes, I have something, unanimous consent to put something in the record. You know, I have learned just now that farmers in North Dakota and the farmers in Oklahoma are about the same. The Obama rule, back when I was Chairman of this Committee, was not one of the concerns of farmers and ranchers; it was the concern, No. 1. No. 1 concern. And it goes beyond farmers and ranchers, so I do want to put this into the record. This is from the Oklahoma chapter of the Golf Course Superintendents Association, very supportive of what the President is trying to do.

Senator BARRASSO. Without objection.

[The referenced information follows:]

Oklahoma Chapter
GCSAA
GOLF COURSE SUPERINTENDENTS ASSOCIATION OF AMERICA

The Honorable James Inhofe (R-OK)
Senate Environment and Public Works Committee
406 Dirksen Senate Office Building
Washington, D.C. 20510

June 12, 2019

Dear Senator Inhofe:

On behalf of the Oklahoma Golf Course Superintendents Association, please accept this letter to the Senate Environment and Public Works Committee as it reviews the ongoing efforts to rewrite the 2015 Clean Water Rule, more commonly known as the "Waters of the United States Rule" or "WOTUS".

Oklahoma GCSA, an affiliated chapter of the Golf Course Superintendents Association of America, supports the efforts to replace WOTUS with a rule that better defines those waters subject to federal jurisdiction under the Clean Water Act. WOTUS so poorly defines such water features as tributaries and wetlands that, if left unchanged, it would result in an expensive, unpredictable, and unnecessary permitting process for golf courses in Oklahoma as well across the country. Golf supports a rule that protects the principles of cooperative federalism with the Clean Water Act, while recognizing the role that responsible parties, including golf course superintendents, play as land managers and environmental stewards.

Of the 150 acres on an average golf course, 11 acres are comprised of streams, ponds, lakes, and/or wetlands. Additionally, golf course landscapes are designed to manage surface water runoff from neighboring properties such as residential and commercial areas. These waters sometimes enter our properties in a degraded state, but thanks to sediment filtration provided by healthy turfgrass and native grasses as well as the science-based agronomic and environmental best management practices our superintendents utilize, water quality testing consistently shows these waters to be cleaner exiting our courses than entering.

We are proud of our stewardship efforts. However, to continue these proactive conservation practices, we must also have clear rules. 94% of golf facilities are classified as small businesses and many operate on slim margins. However, golf faces the same legal requirements – and burdens – under the Clean Water Act, as other industries for its activities on, over, or near "Waters of the United States". Basic projects vital to golf course operations – such as planting trees, installing drainage, and fixing stream alignments – can trigger the hiring of environmental scientists, ecologists, and engineers to do environmental assessments, assist with permitting, and help with mitigation efforts. In other words, the financial impact of these actions can be very substantial.

That's why it is so important to clarify jurisdictional waters while respecting the balance of cooperative federalism under the Clean Water Act. The lack of clarity in WOTUS would have

significantly harmed golf courses trying to do the right thing. We appreciate the efforts in the Administration and Congress to produce a better rule.

In closing, proactive management of these resources helps to minimize excessive federal regulation while supporting state and local efforts. By properly managing water on our properties, the golf industry will continue to provide environmental, economic, health, and charitable benefits to our communities and watersheds.

Sincerely,

Larry Taylor
Board President of the OKGCSA

Senator BARRASSO. Senator Duckworth, who is the Ranking Member of the Committee, has an unavoidable conflict. She won't be able to be here. We will include her statement, as well, in the record, and I know that she is going to be monitoring the Committee and the activities today.

[The prepared statement of Senator Duckworth was not received at time of print.]

Senator BARRASSO. Senator Cramer, could I ask you to introduce Commissioner Goehring before he makes his statement?

Senator CRAMER. I would be honored to.

I have known Doug for a long time. He and I have been on the campaign trail together. We have been in lots of policy discussions together.

He is a farmer, first and foremost. He is a producer of food for a hungry world. He does it, of course, extremely well, along with his sons, his family. It is a family business like it is in most places in this country. He has been the Commissioner of Agriculture for an awfully long time.

Doug, I don't even remember how many years it has been.

He is also Vice Chair of the national organization, very active on the national scene, if you will, on agricultural policy.

A very good friend. Above everything else, Doug is a personal friend, faithful brother, and I am grateful for his testimony today and his service to our State.

Senator BARRASSO. Thank you, Senator Cramer.

I am going to take the privilege also of introducing Todd Fornstrom, who is here and has served as the President of the Wyoming Farm Bureau Federation since November 2016. He was elected to serve on the Board of Directors of the American Farm Bureau Federation in January of this year.

He owns and operates a farm with his father and his two brothers on the Fornstrom feedlot near Pine Bluffs, Wyoming. His farm consists of irrigated corn, wheat, alfalfa, dry beans, and a cattle and sheep feedlot as well.

He also runs a trucking business, custom harvest business, and runs premium hay products and alfalfa pellet mills.

He is a very busy man in our State. Over the years, Todd and his wife Laura have held many leadership roles at the county level, the district level, the State level. He is also a local school board member, so I assure you that this hearing today will be no more challenging than a local school board meeting.

Also want to congratulate your son, who has just finished his first year at West Point. I know he is getting ready to have 2 weeks off, and I know you are looking forward to having him home.

I want to thank you for everything you do for the people of Wyoming and for being here today.

Senator CARPER. Can I ask a question of Richard Elias? Thank you. I think you are two majority witnesses, one minority witness.

Are you from Arizona?

Mr. ELIAS. Yes.

Senator CARPER. And are you from a county that is spelled P-I-M-A and pronounced Pima?

Mr. ELIAS. Pardon me, sir?

Senator CARPER. Are you from a county that is spelled P-I-M-A and is pronounced Pima?

Mr. ELIAS. Pima County.

Senator CARPER. Where is it?

Mr. ELIAS. It is in southern Arizona. We have about 100 miles of border with the nation of Mexico. It is a large county geographically, bigger than six States in the United States; have about a million residents.

Senator CARPER. Any States represented here? Probably one or two. And you are a supervisor there.

Mr. ELIAS. I am a county supervisor there, and I am currently the Chair of the Board, and I have been on the Board of Supervisors for 16 years.

Senator CARPER. All right; good. We are delighted you are here. Thanks for coming.

Senator BARRASSO. And you pronounce it Alias?

Mr. ELIAS. Alias, yes.

Senator BARRASSO. Alias. All right, well, thank you very much, Mr. Chairman, for being with us today as well.

I would like to remind all of the witnesses that your full written testimony is going to be part of the official hearing record. Please keep your statements to 5 minutes so that we will have time for questions.

Commissioner Goehring, please proceed.

STATEMENT OF DOUG C. GOEHRING, COMMISSIONER, NORTH DAKOTA DEPARTMENT OF AGRICULTURE

Mr. GOEHRING. Good morning, Chairman Barrasso, Minority Ranking Member Carper, Subcommittee Chairman Cramer, and Minority Ranking Member Duckworth, who could not join us today, and members of the Committee. Thank you.

Thank you for the opportunity to present to you today about waters of the United States regulations and their impact on States and on our agricultural producers.

My name, for the record, is Doug Goehring, North Dakota Agriculture Commissioner.

Our more than 26,000 farmers and ranchers own, operate, and manage almost 90 percent of the land, or nearly 40 million acres in North Dakota. Agriculture is our State's largest industry. It accounts for 25 percent of our total economy. Although only 2 percent of our population are farmers and ranchers, it supports 24 percent of our State's work force.

Now, comparatively, that is higher than nationally, which is approximately 19 percent of the Nation's work force is supported by agriculture.

As you can see, we have a map up here. This relates back to the State and as I get into prairie potholes.

Under the longstanding traditional navigable water definition, there were 5,100 miles of jurisdictional waters in our State. The 2015 rule would have expanded that Federal jurisdiction to 85,604 miles in North Dakota.

North Dakota is one of five States in the prairie pothole region, and the 2015 rule would have asserted jurisdiction over a wide array of dry land features, isolated features, and vaguely defined

other waters. It almost would have encompassed the entire prairie pothole region in our State.

It conceivably placed every river, creek, stream, and vast amounts of adjacent lands in our State under Federal jurisdiction. North Dakota would have witnessed the takings of approximately 80 percent of our State.

I am greatly concerned about the 2015 rule as it attempted to infringe and encroach upon the sovereignty of our States. The most fundamental management practice in agriculture is effective water management. It is either to retain, conserve, or convey. An overly rigid one size fits all Federal regulatory scheme is not reasonable, it is not workable, and it is not appropriate.

Unlike the 2015 rule, the 2019 rule was crafted with input from the States. We advocated for a new rule not for partisan reasons, but because the previous rule creates uncertainty for producers, it conflicts with State jurisdiction, and regulates large tracts of land where no rivers or streams exist.

Overall, we are seeking a new rule that will allow farmers and ranchers to visually see what is and is not jurisdictional without forcing them to hire a consultant. We need to craft a rule that adheres to the text and the legal precedent of the Clean Water Act and gives farmers and ranchers clear lines to operate within. As such, I support further changes to the 2019 proposed rule that will clarify navigability, more clearly define tributaries, and improve clarity regarding ditches and wetlands.

In the 2019 proposed rule, I believe that the proposed definitions of perennial and intermittent are confusing, and to clarify these terms, I would encourage the Administration to consider the value of physical indicators and continuous surface water flow.

I agree with the intent to leave most ditches and artificial channels out of the Federal jurisdiction. Across this Nation, States, counties, and municipalities regulate water flow through ditches to conserve, to allocate, and maintain water quality.

I applaud the agency for providing a clear definition of upland, though. That ensures isolated wetlands are not jurisdictional.

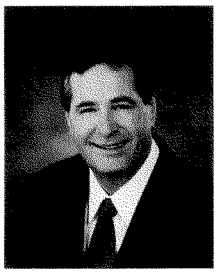
North Dakota is the lead plaintiff for a coalition of States with a preliminary injunction on the 2015 rule. It continues to have significant interest in the Waters of the U.S. rulemaking. In our State, through its laws, agencies already properly, sensibly, and consistently protect the waters of the State, both the surface and the subsurface.

States have intimate knowledge of their resources and are much better equipped to understand the specific and unique needs of our people and the industries.

Finally, I would like to say no one loves our land and our resources more than we do. We drink the water, we produce the food, and we raise our families on the land with the intent to pass it on to the next generation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Goehring follows:]



Doug Goehring
Agriculture Commissioner
North Dakota Department of Agriculture

Doug Goehring has been North Dakota Agriculture Commissioner since 2009.

Several new initiatives have been started under his leadership, including programs to combat hunger, protect pollinators and develop the dairy industry.

His department provides over 100 programs and services to the public, including: ensuring plant and animal health; issuing export certificates; providing grants for marketing, vegetable/fruit and crop development and research; and overseeing the regulation of fertilizers and pesticides, meat, milk, eggs, feed and pet food. Despite budget cuts and fewer staff, he has also supported the expansion of the department's responsibilities to include industrial hemp, and pipeline and wind reclamation and restoration.

Commissioner Goehring has been active in farm organizations, chambers of commerce and corporate boards for many years and is a member of numerous agriculture commodity organizations. He is current president of the Food Export Association of the Midwest and current vice-president of the National Association of State Departments of Agriculture (NASDA).

Commissioner Goehring has also held leadership positions on the Midwestern Association of State Departments of Agriculture Board, the United Soybean Board, the North Dakota Soybean Council, the North Dakota Grain Growers Association, the Nodak Mutual Insurance Co. Board, the American Agricultural Insurance Co. Board, the Menoken School Board and the Bismarck Mandan Chamber Agriculture Committee.

Beyond his responsibilities to North Dakota's agriculture industry and research, his portfolio as commissioner includes oil and gas, water, trade, business development, tax equalization, and infrastructure.

A third-generation farmer, Commissioner Goehring, along with his son, Dustin, operates a 2,600-acre, no-till farm near Menoken in south central North Dakota, where they raise corn, soybeans, spring wheat, winter wheat, sunflowers, and barley.

He and his wife, Annette, have six children and eight grandchildren. They attend Evangel Assembly of God in Bismarck.

Testimony of Doug Goehring
North Dakota Agriculture Commissioner

United States Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife
"A Review of Waters of the U.S. Regulations" Their Impact on States and the American People"

June 12, 2019

Good morning Chairman Barrasso, Minority Ranking Member Carper, Subcommittee Chairman Cramer, Minority Ranking Member Duckworth, and members of the committee. Thank you for the opportunity to present to you today about the Waters of the United States regulations and their impact on the states and those who care for and make a living off the land. My name is Doug Goehring, North Dakota Agriculture Commissioner.

North Dakota farmers and ranchers own, operate, and manage almost 90 percent of the land area in the state, and our more than 26,000 farms and ranches operate on nearly 40 million acres. The average farm or ranch operation in North Dakota is approximately 1,500 acres, and provides food and habitat for more than 90 percent of the wildlife in North Dakota. Agriculture is North Dakota's largest industry, accounting for 25 percent of the total economy. Although only two percent of the population in the state are farmers and ranchers, agriculture supports 24 percent of the state's workforce, which is comparatively higher than the national statistic where agriculture supports 19 percent of the workforce.

Under the previous definition of a traditionally navigable water (TNW), there were only 5,100 linear miles of jurisdictional TNWs in North Dakota. The 2015 Rule would have expanded federal authority to 85,604 linear miles in North Dakota.

It is important to recognize that North Dakota is one of five states in the prairie pothole region. By definition, prairie potholes are shallow wetlands that are the result of glacial activity.

Through the egregious overreach of the 2015 Waters of the United States Rule, federal jurisdiction would have been extended through dry land with the inclusion of a 4,000 foot buffer, to encompass the entire prairie pothole region. North Dakota would have witnessed a takings of approximately 80 percent in our state.

The prairie pothole region supports a vast ecosystem of both wildlife and livestock species. There are many acres of highly productive native prairie within this region that are important to ranchers as forage for their livestock. Managed grazing of this region is a critical piece in the success of the health of the entire ecosystem, and would have been greatly restricted under the 2015 Rule. Without proper management, the diversity of the prairie would see a detrimental loss of native plant species, as well as an increase in invasive species that thrive under nonuse conditions.

As Agriculture Commissioner, I am greatly concerned about the potential of the 2015 Waters of the United States Rule that conceivably places virtually every river, creek, stream, and vast amounts of adjacent lands under EPA jurisdiction. I remain troubled with the apparent attempt to infringe and encroach upon the individual sovereignty of the states. The most fundamental management practice in agriculture is effective water management – either to retain, conserve, or convey. An overly rigid one-size-fits-all federal intervention and regulatory oversight is not reasonable, not workable, and not appropriate.

Unlike the 2015 Rule, the 2019 Proposed Waters of the United States Rule was crafted with input from the regulated community. I welcome a final rule because the existing patchwork for states is confusing for state officials working between producers and the federal government. It also creates uncertainty for producers, as jurisdictions continue to shift with each new court decision. In North Dakota, we advocated for a new rule not for partisan reasons, but

because the previous rule had a regulatory expanse that conflicted with state jurisdiction and regulated large tracts of land where no rivers or streams exist. Farmers and ranchers would have been forced to hire a consultant to determine what was jurisdictional. Overall, I am seeking a new rule that will allow farmers and ranchers to visually see what is and is not jurisdictional. We need to craft a rule that adheres to the text and legal precedent of the Clean Water Act (CWA) and gives farmers and ranchers clear lines to determine when a federal permit is required.

The CWA is a strict liability statute that carries hefty civil fines as criminal penalties for persons who violate the Act's prohibitions. Civil penalties can equal up to $54,833 per day, per violation. To ensure that law abiding farmers and other landowners can understand and comply with the CWA, the Final Rule's definition of Waters of the United States must provide clarity and certainty. As such, I support further changes to the proposed rule that will: clarify navigability, more clearly define tributaries, and improve clarity regarding ditches and wetlands.

The 2015 Rule asserted jurisdiction over a wide array of dryland features, isolated features and vaguely defined "other waters." The rule used an ill-defined application of the "significant nexus" test, and allowed for regulation of waters that have no relation to navigable waters and waters that do not contribute flow to navigable waters. The proposed regulatory text would define traditionally navigable waters (TNWs) as "waters which are currently used, or which were used in the past or may be susceptible to *use in* interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." I would encourage the Administration to re-evaluate this definition of TNWs and ensure that *navigability* is included in the definition. I would also encourage EPA to revise the above text and make it clear that waters that are or were used for *transport* in interstate of foreign commerce qualify as TNWs. This difference, although small, will ensure that TNWs are waters that are not flowing

due to heavy rainfall or other weather events. Instead, it will narrow jurisdictional focus to waters that support commerce and are indeed navigable.

In the 2019 Proposed Rule, tributaries of TNWs are jurisdictional. The rule defines "perennial" as a "surface water flowing continuously year-round during a typical year," and "intermittent" is defined as "surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation." These definitions currently only concern flow regimes. To clarify these terms, I would encourage the Administration to consider the value of physical indicators, as well as continuous surface water flow.

In the 2015 rulemaking, "bed," "bank," and "ordinary highwater mark" were misused and did not address the amount of water flowing through these features when determining jurisdiction. Rather than regulating flow regimes and physical barriers as separate entities, I would request the Administration to consider both flow and physical indicators to determine the presence of a jurisdictional tributary. The sequential, two-step process recommends first, determining whether physical indicators exist. Then, determining whether the tributary meets necessary flow metrics. I support this approach as it creates clear, administrable lines for farmers and ranchers when trying to determine whether features on their land are jurisdictional.

I agree with the intent to leave most ditches and artificial channels out of federal jurisdiction. Across the nation, states, counties and municipalities regulate water flows through ditches to conserve, allocate and maintain water quality. The current proposed definition only confuses the existing regulatory scheme and needs to be adjusted. To the extent the agencies intend to assert jurisdiction over ditches that are constructed in tributaries, they should revise the "tributary" definition to clarify that the definition encompasses artificially created tributaries.

Under the Proposed Rule, "adjacent wetlands" would be jurisdictional, and the rule defines that term to mean "wetlands that abut or have a direct hydrologic surface connection to a jurisdictional water in a typical year." I applaud the agency for providing a definition of "upland," which means "any land area that under normal circumstances does not satisfy all three wetland delineation criteria and does not lie below the ordinary highwater mark." I support that wetlands that are physically separated from a Water of the United States and do not have a direct surface connection are not adjacent wetlands.

North Dakota, as the lead plaintiff for a coalition of states with a preliminary injunction on the 2015 rule, continues to have significant interest in the Waters of the United States rulemaking. The extensive involvement of North Dakota in both the litigation of the 2015 rule and recent rulemakings demonstrates the state is committed to maintaining regulatory control over the waters of the state. North Dakota, through its laws and agencies, already properly, sensibly, and consistently protects the waters of the state, both the surface and subsurface water.

I want to assure you that these rulemakings are not taking place in a vacuum, and the resulting regulatory structure needs to reflect this. States have intimate knowledge of their available resources, the needs of their people and industries, and are much better equipped to understand the specific and unique needs that do not fit a one-size-fits-all federal regulatory scheme.

No one loves our land and resources more than we do! We drink the water, produce the food and raise our families on the land, with the intent to pass it on to the next generation. Thank you Mr. Chairman and I'd be happy to answer any questions.

Senate Committee on Environment and Public Works And Subcommittee on Fisheries, Water, and Wildlife
Hearing entitled, *"A Review of Waters of the U.S. Regulations: Their Impact on States and the American People"*
June 12, 2019
Questions for the Record for Commissioner Goehring

Ranking Member Carper:

1. Do you doubt the accuracy of the administration's data showing that, under the Clean Water Act's permitting program for dredged and fill material, agriculture accounts for approximately 2% of the permitted stream impacts and less than 1% of permitted wetland impacts in any given year (see Table IV-2 on pages 96-97 of the Economic Analysis for the proposed redefinition rule)?

    a. If so, what is your basis for questioning those statistics?
    b. If not, do you think that even that very small percentage of activities that need permits is inappropriate and a total exemption is warranted?

Answer: While I do not doubt the accuracy of the statistics presented in Table IV-2 of the Economic Analysis for the proposed redefinition rule, the Clean Water Act encompasses much more than dredged and fill material. It is inaccurate to take one small piece of the rule to interpret the impact to agriculture.

2. The Trump WOTUS proposal fails to define several critical terms. For example, it does not define how often a stream needs to flow to qualify in order to be covered by the Clean Water Act, and acknowledges that essential facts, like whether a stream is fed by groundwater or what a water body's "typical" flow is, are either difficult or potentially costly to determine. In short, these determinations won't be made by farmers in their fields, but rather by hired technical consultants. Do you think EPA might need to do more homework to define these terms before putting forward a final rule that will be that hard to interpret?

Answer: As stated in both my oral comments and written testimony, this Administration's proposed rule has been crafted with a great amount of input from the regulated community and we support this rule with several small suggestions for clarification. Overall, we are seeking a new rule that will allow farmers and ranchers to visually see what is and is not jurisdictional. We need to craft a rule that adheres to the text and legal precedent of the Clean Water Act (CWA) and gives farmers and ranchers clear lines to determine when a federal permit is required. The 2015 rule misused the "bed," "bank," and "ordinary highwater mark" as the sole indicators for jurisdiction. The 2018 proposed rule focuses on the flow regime as the sole indicator. Clarity in the rule can be achieved by taking a sequential, two-step process which determines if physical indicators exist and following with a determination of necessary flow metrics.

3. Several times during the hearing, you suggested that changing the definition of "waters of the United States" would not matter because the Clean Water Act would still apply to these waters.

    a. Because numerous pollution control and cleanup programs in the law only apply to waters that are defined to be "waters of the United States," what did you mean by this claim? Did you mean that other laws, such as state or local laws, might protect these bodies of water? If so, how many states and localities have such laws?
    b. Would you like to retract this claim?
    c. The 2015 Clean Water Rule has been implemented in many states for an extended period of time, such that there are hundreds of jurisdictional determinations, many of them involving numerous features. Are you aware of any analysis of those actual, real-world decisions to substantiate your claim that the 2015 Rule vastly expanded the bodies and types of waters the Clean Water Act protects, compared to the pre-Rule regime?

Answer: The Clean Water Act has the declared goal of restoring and maintaining the "chemical, physical, and biological integrity of the Nation's waters". Waters of the United States are defined as a means of delineating regulatory jurisdiction. The CWA explicitly states that it is the policy of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States" to implement the standards of the CWA. The issue with WOTUS is one of jurisdiction and whether regulatory authority rests with the state or federal agencies. We should not be regulating to the lowest common denominator. States that implement the standards of the CWA should not be subjected to an extension of federal jurisdiction of waters over which states have regulatory authority.

4. Your written testimony suggests that the 2015 Clean Water Rule would have changed the mileage of streams covered by the Clean Water Act from 5,100 linear miles to 85,604 linear miles in North Dakota.

    a. Is that your contention?
    b. If so, what evidence do you have that, before 2015, EPA and the Army Corps considered more than 81,000 miles of streams in North Dakota not to be "waters of the United States"?
    c. If so, how do you reconcile your contention with the agencies' pre-Clean Water Rule guidance providing that Clean Water Act coverage for non-relatively permanent tributaries, including ephemeral streams, would be evaluated on a case-by-case basis to determine whether they have a "significant nexus"?
    d. If so, how do you reconcile your contention with the agencies' data indicating that, applying the pre-Clean Water Rule regime, the Corps found 99.3% of streams presented for analysis to be jurisdictional (See 83 Fed. Reg. 32,227, 32,243 (July 12, 2018))?

Answer: The changes made in the 2015 rule captured ravines, dry ditches, ephemeral streams, and waters without a clear surface connection to a traditionally navigable water. Such an extension of jurisdiction followed streams back into watersheds that are at best remotely connected to TNW's with water flow that occurred rarely if at all. In North Dakota, this included vegetative land and, in some cases, land that is as much as eighty miles from a jurisdictional water. The expansion of jurisdiction in the 2015 rule captured dry land in the 4,000-foot buffer. Recently, the 4,000-foot buffer was deemed illegal in the courts.

The attempted codification of a "significant nexus" standard to determine connectivity to a jurisdictional water has been plagued by confusion and uncertainty. Under the 2015 rule, the network of ephemeral streams that would have been considered jurisdictional water would rarely, and only in extreme situations, have water in them. The 2018 proposed rule removes the need for a difficult to understand and apply standard by considering seasonal events such as snowpack as jurisdictional but not including events like significant rainfall and ephemeral stream features.

5. A recent analysis published in Marine and Freshwater Research estimated the global value of ecosystem services from wetlands to be about $47 trillion/year. For its new proposal, however, the administration failed to quantify numerous benefits associated with wetlands and lowballed others. If the best available data indicate that the economic benefits of protecting wetlands under the Clean Water Act exceed the costs of complying with the law, would you favor retaining those protections?

Answer: As I stated in my oral and written testimony, North Dakota is one of five states in the prairie pothole region. The potholes are temporary, shallow depressions that vary greatly in size, shape, and the duration in which they hold water. Some potholes may only hold water for a matter of a few weeks in early spring, others hold water for several weeks before drying up, and still others may hold water for almost the entirety of the season. Swamp Buster protects these areas because the potholes serve a necessary purpose in the ecosystem. If you wish to modify a wetland in any way, you have to obtain a 404 permit from the Army Corps of Engineers. An overly rigid federal regulatory scheme is inappropriate. The state monitors and assesses ground and surface waters to ensure compliance with the Clean Water Act.

Senator Cramer:

6. Can you please talk about how waters are protected under the Clean Water Act by the federal government and the State of North Dakota? Can you provide some examples of how the state of North Dakota is given primacy to implement aspects of the Clean Water Act? Can you also discuss any other applicable state laws and federal laws that protect waters (e.g., the Safe Drinking Water Act)?

Answer: North Dakota, like a vast majority of the states, has been delegated authority to implement the most important sections of the Clean Water Act (CWA) through a primacy

agreement with the US Environmental Protection Agency (US EPA). It is vitally important to implement programs at the state level because the state understands the geography, topography, geology, environmental issues, and resources available as well as the needs of the regulated community better than a remotely stationed federal government. The state has adopted the major objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters which the state ensures through the adoption and implementation of key sections of the CWA.

Protection of all the state's waters is accomplished through implementation of federal laws and programs adopted by the state, as well as state laws enacted to protect all waters within the boundaries of the state of North Dakota. The following is a list of the federal laws adopted by the state with the corresponding state laws found in the North Dakota Century Code (NDCC) and rules found in the North Dakota Administrative Code (NDAC).

- CWA §301 (NDCC 61-28-01-09): It is unlawful for any person to discharge any pollutant into waters of the state without authorization under specific provisions of the CWA, including § 402 (NPDES) and § 404 (discharge of dredged or fill material). Waters of the state are defined as all water above or below the surface of the ground.

- CWA §302 (NDCC 61-28-04, NDAC 33.1-16-02.1): Standards of Water Quality for Waters of the State. The State has developed, state specific water quality standards to protect state identified beneficial uses.

- CWA §303: (NDCC 61-28): Identify and rank waters not meeting water quality standards. The State has identified waters not achieving standards of quality needed to support the state identified beneficial uses. This ranking is utilized to develop appropriate recovery plans designed for the state by the state.

- CWA §307 & §402 (NDCC 61-28-04, NDAC 33.1-16-01 Pollution discharge elimination systems, NDAC 33.1-06-01.1 Pretreatment systems, NDAC 33.1-06-03.1 Animal feeding operations): State developed, implemented and enforces rules, regulations, and compliance requirements for lagoons, feedlots, and water treatment facilities.

- CWA §308 (NDCC 61-28): Authority to inspect facilities and records.

- CWA §401 (NDCC 61-28-01-09): Authority to condition any federal permit to ensure that state laws are supported. Without the Section 401 authority North Dakota would not be able address state specific water quality concerns that would not necessarily be addressed in federal regulatory actions or permits. Example: With 401 authority another state would permit actions in North Dakota and not necessarily to the benefit of North Dakota.

- CWA §319 (NDCC 61-28-01-09): A large multi-faceted program designed to improve the quality of North Dakota water is the state's 319 program. This program receives federal grant dollars to support a wide range of activities including technical assistance, education, training, demonstration projects and watershed projects to address nonpoint source pollution. In

North Dakota a majority of the 319 program activities address agricultural operation improvements which reduce their collective impacts on water quality.

In addition to the CWA, North Dakota has also adopted the development and implementation authority of the Safe Drinking Water Act (SDWA) through and agreement with the US EPA. State regulation for the SDWA can be found in NDCC 61-28.1.

Senator BARRASSO. Well, thank you very much for your testimony. We are grateful you are here.

Mr. Fornstrom.

STATEMENT OF TODD FORNSTROM, PRESIDENT, WYOMING FARM BUREAU FEDERATION

Mr. FORNSTROM. Chairman Barrasso, Chairman Cramer, Ranking Member Carper, I am Todd Fornstrom, President of the Wyoming Farm Bureau. I farm on a farm outside of Pine Bluffs, Wyoming, with my father and two brothers and our families. We maintain a diversified farm that produces corn, wheat, alfalfa, dry beans, as well as a cattle and a sheep feedlot.

Our area is unique. We sit at 5,000 feet, and we get between 12 and 14 inches of rain, so it is arid. It is basically a desert, but we use groundwater.

My wife and I, Laura, have four kids, a set of twins that are going to be seniors in high school; we have a senior in college that is going to be out in the world next year, and like Chairman Barrasso mentioned, I have a son at West Point. I also am a member of the American Farm Bureau Board of Directors.

I appreciate the opportunity to appear before this Committee on behalf of the Wyoming Farm Bureau and the American Farm Bureau, and also would like to thank the Committee members for the important role this Committee plays in protecting the Nation's water resources and its critical infrastructure.

On a personal level, I am deeply protective of this water that we talk about. I have raised my children and my brother's families on a well that we farm around every day, so it is not something we talk lightly where we come from.

The Farm Bureau cannot overstate the importance of a clear rule that farmers and ranchers can understand without needing armies of consultants and lawyers. We believe the proposed rule is an important step in bringing the WOTUS definition back in line with what Congress intended to be the scope of the Federal jurisdiction under the Clean Water Act.

The proposed rule gives meaning to the word "navigable" and recognizes that the essential policy underpinning the Clean Water Act is to preserve the State's traditional and primary authority over land and water use.

Congress also intended for the Federal Government to work hand in hand with States, which is why the Act deals with illegal dumping and water pollution in a bunch of different ways that do not rely on treating every wet spot in the landscape as waters of the U.S.

The proposal would not weaken the many existing Federal, State, and local laws that protect our resources and wildlife. Nor does it limit the ability of the State and local entities to protect the sources of drinking water.

I want to draw your attention to one protection in particular. Within our State of Wyoming, my operation with its two feedlots is required to get a permit that is administered by the State. This permit did require us to make structural changes to our operation somewhere in the range of $350,000. It was expensive, and it was not anything that we do on normal farming days.

As part of the program, the State has conducted yearly random inspections on our farm. They are doing a good job. Wyoming's ability to effectively and thoroughly protect water resources within the State through its own regulatory regime is exactly what Congress intended to preserve through the Clean Water Act, and nothing in the new proposed rule changes that.

Many people have spoken out against the rule, have gone out of their way to mischaracterize the scope and impact that is proposed by this rule. In reality, this proposal provides much needed clarity in definition and throughout the whole. It also maintains protections for clean water while preserving States' traditional authority over the local land and water use. Finally, it reflects legal and policy decisions informed by science.

But there are still a few things that we could improve on. We feel there could be more clarity in key terms that are relevant to several jurisdictional categories of water, such as intermittent. We also feel that the agency should eliminate ditches as a standalone category of jurisdictional waters. Finally, the agencies could make it more clear in the definition of wetlands that a wetland must satisfy all three of the Corps' delineation criteria.

I appreciate the opportunity to provide this testimony and look forward to your questions. Remember, the goal of everybody in this room is clean water and clear rules.

Thank you.

[The prepared statement of Mr. Fornstrom follows:]



Todd Fornstrom
President
Wyoming Farm Bureau Federation

Being a part of a grassroots federation to make a difference for Wyoming's farmers and ranchers drives Wyoming Farm Bureau Federation (WyFB) President Todd Fornstrom. Fornstrom was elected to his first term as WyFB President in November 2016. He was also elected to serve on the American Farm Bureau Federation Board of Directors in January 2019.

His involvement in Farm Bureau began in 1994. While still in college, Fornstrom would attend Farm Bureau meetings with his mother. Fornstrom has always appreciated the opportunity to make a difference by uniting voices and advocating for farmers and ranchers through the grassroots process of Farm Bureau.

Throughout the years, Fornstrom and his wife Laura have held many leadership roles at the county, district and state levels. They have both served as president of the Laramie County Farm Bureau and they have both held state committee leadership positions; Todd as state chair of the WyFB General Issues Committee and Laura as state vice chair of the WyFB Young Farmer and Rancher (YF&R) Committee. Todd also served as the WyFB Vice President for three years. They are former Wyoming Farm Bureau YF&R Committee members and also WyFB YF&R Achievement Award winners. They are passionate about the need to get involved and make a difference through leadership.

Todd works with his father and two brothers on the Fornstrom Feedlot near Pine Bluffs, Wyo. The diversified farm consists of irrigated corn, wheat, alfalfa, dry beans and a cattle and sheep feedlot. They also run a trucking business, custom harvest business and Todd is in a partnership and runs Premium Hay Products, an alfalfa pellet mill. Todd and Laura have four children; Taylen, Wyatt, Sydnie and Maddie.

Fornstrom graduated from the University of Wyoming in 1997. In addition to Farm Bureau, he also serves as a local school board member.

Whether it be a sporting event, a Farm Bureau meeting, farming or school board meeting, it is all about family to the Fornstroms. Being involved with Farm Bureau for them is about getting back to the basic values of life and being a part of the solution.

Statement of the American Farm Bureau Federation

Statement to the Senate Environment and Public Works (EPW) Committee and the EPW Subcommittee on Fisheries, Waters, and Wildlife regarding the hearing:

A Review of Waters of the U.S. Regulations: Their Impact on States and the American People

June 12, 2019

Submitted By:

Todd Fornstrom
President, Wyoming Farm Bureau Federation
On behalf of the American Farm Bureau Federation

Chairman Barrasso, Chairman Cramer and Ranking Member Carper and Ranking Duckworth I am Todd Fornstrom, President of the Wyoming Farm Bureau Federation. I farm with my father and two brothers on the Fornstrom Feedlot near Pine Bluffs, Wyoming, where we maintain a diversified farm that produces irrigated corn, wheat, alfalfa, and dry beans as well as operating a cattle and sheep feedlot. An interesting fact – our farm only gets about 12 to 14 inches of rainfall a year – and we do our best to make use of every drop. My wife Laura and I have four kids: two who are seniors in high school, one who attends the University of Wyoming, and one who attends the U.S. Military Academy at West Point. I also serve as a member of the Board of Directors for the American Farm Bureau Federation.

I appreciate the opportunity to appear before this committee and would like to thank the members for the important role this committee plays in protecting the nation's water resources and our critical infrastructure. Farm Bureau believes effective and sound environmental and public works policies are those that balance economic, social, and environmental outcomes. Such policies create opportunity for farmers to improve net farm income, enhance the nation's economic opportunities, and preserve property rights while enabling farmers and ranchers to produce an abundant and affordable supply of food, fiber and energy.

Farm Bureau members own and operate businesses that produce or contribute to the production of the row crops, livestock, poultry, and forest products, which provide safe and affordable food, fiber, and fuel to all Americans. Over the years, Farm Bureau has participated in numerous rulemaking proceedings related to the definition of WOTUS, and we have a keen interest in the definition of WOTUS and the administration of the Clean Water Act. Farm Bureau members deeply value protecting water resources because their farms and ranches are water-dependent enterprises. On a personal level, I am deeply protective of water quality because I raised my family drinking from a well on our farm. Simply put, farmers and ranchers need water, which is why their operations typically are located on lands where there is abundant rainfall or at least adequate water available for irrigation.

Farm Bureau also participates in a coalition that represents a large cross-section of the nation's construction, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors – all of which are vital to a thriving national

economy and provide much-needed jobs. While the testimony I am delivering today represents the views of Farm Bureau members, I am confident that coalition members are all committed to the protection and restoration of America's wetlands and waters and believe that a regulation that draws clear lines between federal and state authority and responsibility for controlling pollution of the nation's waters will help further those goals.

Farm Bureau cannot overstate the importance of a rule that draws clear lines of jurisdiction that farmers and ranchers can understand without needing to hire armies of consultants and lawyers. The CWA carries significant fines and penalties for persons who violate the Act's prohibitions. Historically, farmers and ranchers have chosen to forfeit full use and enjoyment of their land rather than go down the onerous and expensive path of seeking CWA 404 permits. The cost to obtain a general permit can exceed tens of thousands of dollars and individual permits can cost hundreds of thousands of dollars. Farmers and ranchers know these costs exceed the value of their land, which leads them to simply stay out of the regulatory quagmire by foregoing the use of their land without compensation.

For years, EPA's and the Corps' regulations and guidance documents have attempted to expand the WOTUS definition beyond its constitutional and statutory limits, and the Supreme Court has twice had to rein in the agencies' power grabs. We believe this proposed rule will bring an end to this regulatory creep. It is an important step in re-aligning the WOTUS definition with Congress' intent for the scope of federal jurisdiction under the Act. The proposed rule gives meaning to the term "navigable" and recognizes that a defining policy underpinning the CWA is to preserve the states' traditional and primary authority over land and water use. Congress took care to strike a careful balance between state and federal oversight authority in this area, while pursuing the important goal of restoring and maintaining the integrity of the nation's waters.

The proposal also protects our nation's water. The CWA requires the federal government to work hand-in-hand with states, because the federal government cannot and should not regulate every single wet feature in every community. By drawing clear lines between waters of the U.S. and waters of the state, the proposal strengthens the cooperative federalism Congress envisioned and that the Supreme Court has long recognized as fundamental to the Clean Water Act.

Importantly, the CWA provides a wide array of protections against illegal dumping and water pollution that do not rely on treating every feature on the landscape as a water of the U.S. and would not be affected by the new proposal. Nor would the proposal weaken the stringent protections of the Safe Drinking Water Act or other federal laws that protect water resources and wildlife, nor does it limit the ability of state and local entities to protect sources of drinking water. Simply put, this rule is not about *whether* water is protected. The rule respects Congress's intent as to *which level of government* bears that responsibility and *through which programs*.

Farm Bureau supports the proposed rule, because it strikes a balance between regulatory clarity and transparency on the one hand, and the need for robust environmental protection of waters and wetlands on the other. It better aligns with the CWA and Supreme Court precedent than did the 2015 rule, and it reflects an effort to preserve states' roles in regulating the waters and natural resources within their boundaries. It is grounded in science but also reflects a legal and policy decision on the appropriate scope of the agencies' regulation under the CWA. Many of the proposed rule's critics have mischaracterized the scope and impact of the proposed rule. In reality, the proposal:

Provides Much-Needed Clarity. The scope of the agencies' jurisdiction under the Act has, in previous years, been marked by uncertainty, ambiguity, and inconsistency. The agencies' sweeping assertion of jurisdiction under prior definitions encompassed features with little or no relationship to navigable waters, raising serious federalism concerns and creating confusion among the regulated community. In particular, the agencies relied upon case-by-case subjective assessments, with little to no predictability as to which waters are jurisdictional and which are not. If finalized, the agencies' proposed rule would cure these issues by drawing clear lines between jurisdictional and non-jurisdictional features. Rather than "rolling back" the scope of WOTUS regulation, the proposed rule adds an element of clarity and transparency by setting clear categories to guide jurisdictional determinations.

Maintains Protections for Clean Water While Preserving States' Traditional Authority Over Local Land and Water Use. Congress never intended for *all* water in the country to be subject to federal regulation as WOTUS. Instead, Congress recognized that some waters were to be regulated by the federal government under the CWA and remaining water features would be

addressed through other federal, state, and local means. Indeed, the CWA itself provides a comprehensive scheme of non-regulatory protections and programs that apply to all of the nation's waters, coupled with federal regulation of the discharge of pollutants to a subset of waters identified as "waters of the United States." Preservation of the states' roles under the cooperative federalism regime is a hallmark of the Act. Under this regime, waters, wetlands, and related features are subject to robust protections even where they would not be designated as WOTUS. Moreover, other non-CWA regulatory programs contribute to the protection of aquatic resources, such as the federal Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA) and the Farm Bill[1], as well as the numerous robust state and local laws and programs that protect waters and related ecosystems. The agencies' proposal to refine and clarify the WOTUS definition is only one component of a holistic regulatory framework for the protection of aquatic resources that currently exists under federal, state, and local laws.

For example, in my home state of Wyoming, my operations require a livestock operating permit administered by the state. This permit required me to make structural changes to manage water quality that cost in the range of $350,000. As part of the program, the state has conducted yearly random inspections of my farm. Wyoming's ability to efficiently and thoroughly protect water resources within the state through its own regulatory regime is exactly what Congress intended to preserve through the CWA.

Reflects Legal and Policy Decisions Informed by Science. As part of the rulemaking effort leading up to the 2015 Rule, EPA developed a report titled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (the "Connectivity Report"). Rather than abandoning this previous work, the agencies relied upon the Connectivity Report to inform the jurisdictional categories set forth in the proposed rule. Specifically, the agencies recognized one of the fundamental scientific principles detailed in the Connectivity Report—that hydrologic connectivity occurs along a gradient. Informed by the Connectivity Report's analysis of the connectivity gradient, the agencies determined that federal regulatory jurisdiction should be extended only to those features on the gradient that have the strongest influence on downstream waters. The agencies continue to recognize that science

[1] Wetlands, Farmers, Just Ducky February 8, 2019 (Insert Link to Market Intel)

informs, but does not dictate, where to draw the line between federal and state authority over water bodies.

In the proposed rule, the agencies have properly recognized that the CWA is not a license for the agencies to regulate every water body in the United States. Rather, as the proposed rule recognizes, Congress has set up a mix of regulatory and non-regulatory approaches for addressing water pollution. Some of those mechanisms rely on localities, some rely on the states, and some rely on federal entities such as the agencies. Each regulatory and non-regulatory mechanism operates within a carefully delineated sphere. "Navigable waters," for example, are subject to federal regulatory requirements under the CWA, but many other classes of the "nation's waters" are not. The proposed rule respects the unique roles of federal, state, and local entities in this country's overall regulatory scheme.

But there are still opportunities for the agencies to improve the proposed rule. For example:

- The agencies should interpret traditional navigable waters in accordance with the traditional two-part test for navigability articulated in *The Daniel Ball* and subsequent cases applying that test. We recommend that the agencies revise the regulatory text corresponding to this category to cover, in pertinent part, waters used "to transport interstate commerce" and not waters used "in interstate commerce."

- The agencies could clarify key terms that are relevant to several of the jurisdictional categories of water, such as "intermittent." The agencies define "intermittent" as "surface water flowing continuously during certain times of a typical year." 84 Fed. Reg. at 4,173. A more precise and therefore clearer definition would replace the phrase "certain times of a typical year" with a minimum duration of continuous surface flow—for example, 90 days.

- The agencies should eliminate ditches as a standalone category of jurisdictional waters. We agree with the agencies' proposal to assert jurisdiction over certain types of ditches, such as those that are man-altered tributaries. But it would be

better to do that by clarifying either the ditch exclusion or the "tributary" category, rather than by establishing a category of jurisdictional ditches, which may create the misimpression that the default status of ditches is that they are jurisdictional.

- The definition of "wetlands" could be improved if the agencies expressly clarify that a wetland must satisfy all three of the delineation criteria set out in the proposed rule.

Farm Bureau believes these and other recommendations—contained in our detailed comments —will help eliminate potential ambiguities in whatever final rule emerges from the rulemaking process. The resulting clarity will benefit the regulated parties, government entities, and courts tasked with following and administering the CWA, and benefit the nation's water quality.

We appreciate the opportunity to provide this testimony. Overall, we are very supportive of the proposed rule, and we believe the proposed definitions will go a long way in providing much needed clarity and certainty for farmers and ranchers.

Senate Committee on Environment and Public Works
And Subcommittee on Fisheries, Water, and Wildlife
Hearing entitled, *"A Review of Waters of the U.S. Regulations: Their Impact on States and the American People"*
June 12, 2019
Questions for the Record for Mr. Fornstrom

Chairman Barrasso:

1. Can you please discuss why the definition of Waters of the U.S. (WOTUS) is so important to America's farmers?

   Farming and ranching depend on water, which is why these activities usually occur on lands that could contain water, such as ditches, ponds, wetlands, and drainage features. But not all of these features should be subject to federal regulatory authority under the Clean Water Act as written; many are located miles away from the nearest truly "navigable" water. The more the definition of WOTUS strays from the sorts of water bodies Congress intended to regulate, the more routine farming and ranching activities that take place on farmlands and pastures could be deemed unlawful discharges, either by regulatory agencies or citizen plaintiffs. This exposes farmers and ranchers to a great deal of uncertainty, potentially burdensome permitting proceedings, eye-popping civil penalties, and even jail time.

2. During the hearing, Ranking Member Carper stated that, "Since the days of Republican President Richard Nixon, Congress and EPA have ensured that farmers engaged in normal farming activities are not covered or affected by Clean Water obligations." Do you agree with this statement?

   No. While it is true there are certain statutory exemptions that apply to farmers and ranchers, such as the Section 404(f) exemption for normal farming and ranching activities, regulators have interpreted exemptions narrowly. As a result, commonplace activities such as disking, planting different commodity crops or changing from grazing to crops, constructing stock ponds by impounding an ephemeral stream, and even plowing at relatively shallow depths have been found to be *beyond the scope* of the normal farming and ranching exemption and subject to enforcement actions. And I personally am aware of the problems Andy Johnson and John Duarte encountered with the U.S. Army Corps of Engineers. Andy Johnson built a stock watering pond that should have been exempted under the 404 (f) exemptions. John Duarte's Corps problem resulted from plowing land that he purchased from another farmer in order to plant wheat. The previous farmer contracted with USDA to put the farm into the Conservation Reserve Program (a USDA land idling program) which meant that the original farmer had documentation of a wheat base and a clear history of wheat production, but the

Corps would not recognize the land as agricultural because it had not been plowed for the 20 years it was in the USDA conservation program.
In addition, there is no statutory exemption for normal farming and ranching activities in Section 402 (National Pollutant Discharge Elimination System). As discussed above, the more the definition of WOTUS strays from the water bodies Congress intended to regulate, the more common agricultural activities are at risk of being deemed unlawful discharges.

3. During the hearing, Senator Merkley stated that in speaking with his constituents, "during … conversation about WOTUS the question I asked was does anyone have a specific example of where they have been impacted in a negative way by the existing rules. So far, the answer has been zero." Could you please provide examples in response to Senator Merkley's question?

   As discussed in response to the previous question, farmers and ranchers have had to defend against a variety of enforcement actions under existing rules. In addition, the Army Corps of Engineers has at times insisted that farmers and ranchers must obtain CWA permits for conservation practices such as constructing and maintaining farm ponds and grassed waterways, which complicates farmers' and ranchers' efforts to try to protect water resources.

Ranking Member Carper:

4. Do you doubt the accuracy of the administration's data showing that, under the Clean Water Act's permitting program for dredged and fill material, agriculture accounts for approximately 2% of the permitted stream impacts and less than 1% of permitted wetland impacts in any given year (see Table IV-2 on pages 96-97 of the Economic Analysis for the proposed redefinition rule)?

   a. If so, what is your basis for questioning those statistics?
   b. If not, do you think that even that very small percentage of activities that need permits is inappropriate and a total exemption is warranted?

   I have no basis to question the accuracy of that data. But as I testified previously, farmers and ranchers have often chosen to forgo full use of their land rather than having to go down the long and expensive path of applying for CWA permits, which can cost anywhere from tens of thousands to hundreds of thousands of dollars. If EPA and the Corps define WOTUS in a way that goes far beyond what Congress intended, which is what they did in the 2015 rule, the more water features on farmlands and pastures would need to be avoided, and the more difficult it would be for farmers and ranchers to operate economically.

5. The Trump WOTUS proposal fails to define critical terms like how often a stream needs to flow to qualify for coverage and acknowledges that essential facts like whether a stream is fed by groundwater or what the "typical" flow of a water body is are either difficult or potentially costly to determine. In short, these determinations won't be made by farmers in their fields, but rather by hired technical consultants. Do you think EPA might need to do more homework before putting forward a rule that will be that hard to interpret?

   The current proposal goes a long way in terms of providing more clarity and certainty for farmers and ranchers than previous rules, but there are still opportunities for some improvement, as my written testimony pointed out. The agencies specifically asked for comments on how to improve clarity of the regulatory requirements. Thus, farm organizations around the country, including Wyoming Farm Bureau, have provided recommendations for improvement in their comments for the agencies to consider, such as requiring a minimum number of days of consecutive flow (90 or more days).

6. In response to a question from Senator Carper, you referred to your facility and said, "I am actually regulated by the state, not WOTUS."

   a. Your feedlot has a state-issued permit, but it is a federally-enforceable Clean Water Act NPDES permit, correct?
   b. Why do you have a Clean Water Act permit if your farming operations do not affect a "water of the United States"?

   My feedlot has a Wyoming Pollutant Discharge Elimination System confined animal operation permit, and EPA does have direct enforcement authority. While we do not believe that our operations affect WOTUS, we took the conservative approach because regulators were concerned about potential impacts to a nearby water that might arguably be considered WOTUS. We decided that it was better to go ahead and seek permit coverage rather than having to significantly rework our operations or risk having to defend against an enforcement action.

7. A recent analysis published in Marine and Freshwater Research estimated the global value of ecosystem services from wetlands to be about $47 trillion/year. For its new proposal, however, the administration failed to quantify numerous benefits associated with wetlands and lowballed others. If the best available data indicate that the economic benefits of protecting wetlands under the Clean Water Act exceed the costs of complying with the law, would you favor retaining those protections?

   I am not familiar with that study, but as it is described, it appears to encompass all wetlands in the world. It is not limited to wetlands in the United States, much less those that Congress intended to be covered by the definition of WOTUS. I favor maintaining federal regulatory protections for those wetlands that Congress

intended to be WOTUS and entrusting the states to protect all other wetlands (and other water resources) that are within their borders. That is the cooperative federalism structure that Congress envisioned.

Senator Cramer:

8. Can you please talk about how waters are protected under the Clean Water Act by the federal government and the states? Can you also discuss any other applicable state laws and federal laws that protect waters (e.g., the Safe Drinking Water Act)?

   The CWA has the broad goal of protecting the nation's waters, which includes navigable waters (defined as WOTUS) as well as all other water resources, such as groundwater. Congress gave the federal government authority to regulate discharges to navigable waters through permitting programs, and it set up various other programs which call for coordination among various levels of government to protect the rest of our country's water resources. The federal government helps fund a variety of water protection efforts, and EPA has documented many success stories under the CWA's nonpoint source program. Beyond the CWA, there are other federal programs such as the Safe Drinking Water Act or the Department of Agriculture's conservation programs, as well as various state laws, that together protect waters.

Senator Merkley:

9. "Normal farming activities" have always been exempt under the Clean Water Act, and the 2015 WOTUS definition included additional exemptions for a number of water bodies specifically found on farms, such as puddles, ditches, artificial ponds for livestock watering, and certain irrigation systems. Why are these exemptions not sufficient for agricultural production? Please provide specific examples of how the 2015 WOTUS definition has unfairly impacted agricultural producers.

   While the Clean Water Act includes an exemption for normal farming and ranching activities, the exact scope of the exemption has been subject to interpretations over the years that have called into question a range of common activities including disking, planting different commodity crops or changing from grazing to crops, and constructing stock ponds. Farmers and ranchers have also been required to obtain CWA permits for conservation practices like grassed waterways and farm and stock ponds. Farmers and ranchers face significant uncertainty at the hands of regulatory agencies and citizen plaintiffs, which could expose them to expensive permitting requirements and even fines and imprisonment.

10. EPA has frequently said in the past that nonpoint source pollution from agriculture can harm water quality[1]. Under the new WOTUS definition, a significant number of waters, such as ephemeral streams and waters without a direct surface connection, would no longer be subject to Clean Water Act requirements. These types of waters still play a very important role to aquatic life and hydrological systems. Please describe how the agricultural sector will ensure that water quality does not adversely impact waters such as ephemeral streams and waters without a direct surface connection.

As discussed above, even if a water does not fall within the definition of WOTUS and therefore is not subject to certain federal regulatory requirements in the CWA, that does not mean it is not protected by the Act's non-regulatory programs. And there are other federal programs such as the USDA conservation programs, Section 319 of the Clean Water Act, and the Safe Drinking Water Act as well as state and local laws that work together to protect ephemeral streams, groundwater, wetlands, and other water features.

[1] https://19january2017snapshot.epa.gov/nps/what-nonpoint-source_.html

Senator BARRASSO. Well, thank you very much for being here. Thank you for your testimony. Sorry for the buzzes and whistles that are going off reflecting what is going on on the Senate floor. Thank you so much for your testimony and being with us today.

Now, Mr. Elias.

STATEMENT OF RICHARD ELIAS, SUPERVISOR, DISTRICT 5 OF THE PIMA COUNTY BOARD OF SUPERVISORS IN ARIZONA

Mr. ELIAS. Good morning, Chairman Barrasso, Ranking Member Carper, and Chairman Cramer. Thank you for inviting me here to provide this testimony today.

Pima County, in southern Arizona, with Tucson its county seat, has a deep and longstanding interest in protecting our waterways from pollution. As residents of the Southwest, we are keenly aware of the importance of clean water.

I am a seventh generation resident of Arizona and the arid desert Southwest. Groundwater contamination from surface discharges of the industrial solvent TCE and other toxins have ravaged the district I represent.

TCE reached groundwater used for homes and businesses in the early 1950s, but it was not discovered until 1981. Thousands who were impacted have died. Countless others have suffered painful and debilitating diseases linked to their exposure.

Many of those who suffered or died from TCE exposure were personal friends of mine. Those losses and that suffering still pain me deeply. We cannot allow that to happen again.

The Clean Water Act has served as a critical protection for our water supply because it has been applied since its 1972 enactment to the intermittent and ephemeral watercourses that dominate our area and into which TCE and other toxins were dumped. The proposed new definition of waters of the U.S. eliminates protections for intermittent and ephemeral streams.

We need to protect our residents, and we need to protect the habitat and wildlife corridors that provide nourishment and shelter for our unique Sonoran Desert creatures. In my homeland, much of this habitat and these wildlife corridors are intermittent or ephemeral waterways. They require legal protection.

What is now the city of Tucson was begun on the banks of the Santa Cruz River by indigenous inhabitants more than 4,000 years ago. Its water gave them life, water to drink, and water for food crops.

Groundwater pumping and use since the early years of the 20th century has dried up most of the ones verdant Santa Cruz. But it, and the numerous intermittent and ephemeral tributaries to it, remain vital parts of our lives and our heritage. They must be protected.

Water still flows in the Santa Cruz, downstream from wastewater treatment plants that serve our urban centers, and its quality, and that of the biosolids from the plants, are regulated under the Clean Water Act's existing regulatory scheme.

In order to meet Clean Water Act standards, we recently undertook a $650 million upgrade of our two largest wastewater treatment plants. Their now clean discharges into the Santa Cruz have

recreated important riparian habitat and restored an endangered native fish. We must not lose those wonderful benefits.

The treatment plants' biosolids are transported to nearby farms, where they serve as a soil amendment that increases the per-acre production of crops, so they have value in our arid region. We cannot afford to see them contaminated and no longer useful.

Livestock ranching, a livelihood of my relatives and ancestors, and once a significant economic factor in our region, remains an active part of our heritage. This industry relies on the very limited water that flows intermittently and seasonally in ribbons meandering through our area. When water flows, ranchers collect it in pools, known as stock ponds, for their animals. They require clean water.

This proposed EPA regulation would rely on States to protect water quality, but many States have limited their own ability to develop State rules to protect water quality. Two-thirds of the States, including Arizona, have laws requiring that State or local water quality rules be no more stringent than the Clean Water Act. Arizona has no State regulatory program addressing the quality of surface water or wetlands.

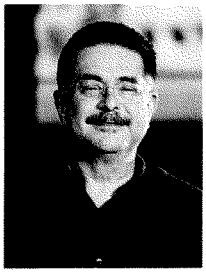
The proposed new rule would adversely affect the health and welfare of our community and the entire region. By removing protections for intermittent and ephemeral streams, it eliminates protections for virtually all of our watercourses, needlessly jeopardizing our drinking water, our watersheds, our agricultural producers, and numerous tribal nations.

Pima County residents deserve better. We strongly encourage this body to oppose implementation of this proposed rule.

I would also add that I have learned to forgive those folks and companies and the Air Force who poisoned the water in southern Arizona, but I have also learned that I should never forget what happened to those folks who are not here to voice their objections today.

Thank you very much for listening.

[The prepared statement of Mr. Elias follows:]



Richard Elías
Supervisor, District 5
Pima County Board of Supervisors in Arizona

Richard Elías is Chairman of Pima County Board of Supervisors and has represented District Five on the Board for 17 years. He has been a strong proponent of environmental protection and restoration during his tenure in office. He has led fights to strengthen and enforce the county's Sonoran Desert Conservation Plan, to preserve the rugged and saguaro-studded Painted Hills, to maintain full Clean Water Act protection for the Santa Cruz River and its tributaries, and to block destructive new open-pit mines in the county. A fifth-generation Tucsonan whose family roots run deep in Southern Arizona, Richard is a lifelong Democrat, a former union steward, and a University of Arizona graduate.

Senate Committee on Environment and Public Works
Testimony of Chairman Richard Elias, Pima County Board of Supervisors
June 12, 2019

Good morning, I am Richard Elias, Chairman of the Pima County Board of Supervisors, and I have served as a district Supervisor for 17 years. Thank you for inviting me to provide this testimony to you today. Pima County, in southern Arizona with Tucson its county seat, has a deep and long-standing interest in protecting our waterways from pollution. As residents of the Southwest, we are keenly aware of the critical importance of clean water.

I am a seventh-generation resident of the arid desert Southwest. Groundwater contamination from surface discharges of the industrial solvent TCE and other toxins has ravaged the district I represent.

TCE reached groundwater used for homes and businesses in the early 1950s, but was not discovered until 1981. Thousands who were impacted have died, countless others have suffered painful and debilitating diseases linked to their exposure.

Many of those who suffered or died from TCE exposure were personal friends of mine. Those losses and that suffering still pain me deeply. We cannot allow that to happen again.

The Clean Water Act has served as a critical protection for our water supply because it has been applied since its 1972 enactment to the intermittent and ephemeral watercourses that dominate our area and into which TCE and other toxins were dumped. The proposed new

definition of "Waters of the U.S." eliminates protections for intermittent and ephemeral streams.

We need to protect our residents and we also need to protect the habitat and wildlife corridors that provide nourishment and shelter for our unique Sonoran Desert creatures. In my homeland much of this habitat and these wildlife corridors are intermittent or ephemeral waterways. They require legal protection.

What is now the City of Tucson was begun on the banks of the Santa Cruz River by indigenous inhabitants more than 4,000 years ago. Its water gave them life – water to drink and water for food crops.

Groundwater pumping and use since the early years of the 20th Century has dried most of the once-verdant Santa Cruz. But it, and the numerous intermittent and ephemeral tributaries to it, remain vital parts of our lives and our heritage. They must be protected.

Water still flows in the Santa Cruz, downstream from wastewater treatment plants that serve our urban centers, and its quality, and that of the biosolids from the plants, are regulated under the Clean Water Act's existing regulatory scheme.

In order to meet Clean Water Act standards, we recently undertook a $650 million upgrade of our two largest wastewater treatment plants. Their now-clean discharges into the

Santa Cruz have re-created important riparian habitat and restored an endangered native fish. We must not lose these wonderful benefits.

The treatment plants' biosolids are transported to nearby farms, where they serve as a soil amendment that increases the per-acre production of crops, so they have value in our arid region. We cannot afford to see them contaminated and no longer useful.

Livestock ranching, a livelihood of my ancestors and once a significant economic factor in our region, remains an active part of our heritage. This industry relies on the very limited water that flows intermittently and seasonally in ribbons meandering through our area. When water flows ranchers collect it in pools, known as stock tanks, for their animals. They require clean water.

With this proposal EPA would rely on states to protect water quality. But many states have limited their own ability to develop state rules to protect water quality. Two thirds of the states, including Arizona, have laws requiring that state or local water quality rules be "no more stringent than" the Clean Water Act. Arizona has no state regulatory program addressing the quality of surface water or wetlands.

This proposed new rule would adversely affect the health and welfare of our community and the entire region. By removing protections for intermittent and ephemeral streams, it eliminates protections for virtually all of our watercourses, needlessly jeopardizing our drinking

water, our watersheds, our agricultural producers, and numerous tribal nations. Pima County residents deserve better. We strongly encourage this body to oppose implementation of this proposed rule.

Senate Committee on Environment and Public Works
And Subcommittee on Fisheries, Water, and Wildlife
Hearing entitled, *"A Review of Waters of the U.S. Regulations: Their Impact on States and the American People"*
June 12, 2019
Questions for the Record for Mr. Elias

Ranking Member Carper:

1. Do you think Arizona has the necessary legal capacity and financial resources to protect important wetlands and streams if the federal government is no longer able to do so?

   Answer: Arizona government lacks the necessary legal framework and financial resources to protect important wetlands and streams. Arizona recently examined the number of unregulated lakes, rivers, wetlands and other water bodies that it believes are no longer regulated under the Clean Water Act due either to "isolation" or "lack of significant nexus" to navigable streams. These include 50 fishing lakes, endangered species habitats such as Quitobaquito Pond in Organ Pipe Cactus National Monument, and perennial streams that supply drinking water such as Grant Creek, and well as enormous closed basins such as the Willcox Playa. While Arizona has the authority to regulate pollutants emitted to these "waters of the state," it never has done so.

   In anticipation of WOTUS changes, Arizona Governor Doug Ducey indicated in 2017 he "welcomes the need to protect non-WOTUS state surface water bodies," but he has not allowed the state's water-quality agency to address the gap during the state's review of water-quality standards.

   Arizona government has never demonstrated the will to protect important wetlands and streams. Despite the great values of Arizona's wetlands and streams to our people, the recreation and tourism economy, and to wildlife, this state has failed to enact protective legislation. The state denies ownership of its navigable streambeds. It refuses to limit groundwater extraction even where there is ample scientific information to indicate it depletes streamflow. It restricts activities of its own Arizona Game and Fish Department. The state Legislature has made it clear it will not tolerate any encroachment of its authorities by other authorities, such as counties, cities and towns, concerned about important issues such as rivers, pollutants, or wildlife.

Senator Merkley:

2. A number of public health organizations, including the American Public Health Association, issued a statement in opposition to the Trump Administration's proposed WOTUS definition. Water pollution of waters that will no longer be subject to Clean Water Act requirements poses risks to rural areas and vulnerable communities, especially those that depend on surface water for their drinking water supplies. What are the implications for drinking water systems in rural areas should the proposed WOTUS definition be adopted?

Answer: The proposed WOTUS definition will speed the abandonment of the national, technology-based framework for regulating pollutant discharges that is already being weakened. If the definition is approved as written, it will take years, if not decades, to fill the voids left by the Clean Water Act with a set of new approaches that will vary greatly according to the discretion of separate state and tribal jurisdictions. During this time, drinking water supplies will be especially vulnerable, particularly those that cross multiple jurisdictions. The Safe Drinking Water standards must still be met by water providers, but there will be even fewer tools to protect water supplies from upstream contamination. Water providers will have to rely more on lawsuits to address harms that occur, rather than preventive measures imposed via the "pollutant discharge elimination system" permits issued under the Clean Water Act. And a significant portion of rural Arizonans get potable water from their own wells or community well fields that can be, and have been contaminated by pollution from surface waterways percolating down.

States and tribes will no longer be required to detect and respond to stream pollution, and they will not have to meet the same minimum standards. The Clean Water Act's requirements for public notice of new permits and citizen participation in the state's rule-making will also go away. In some states, rural areas may be disadvantaged in terms of having their voices heard over industries that may be important to the state or tribal governments, or in terms of even knowing that their water supply is being degraded by the state's issuance of changes to existing permits or issuance of new permits.

3. If ephemeral streams, wetlands without surface connections, and other bodies of water are no longer regulated, what are some of the other public health concerns of this proposed definition?

   Answer: The "hydrologic break" concept is one of the most troubling aspects of the proposed WOTUS rule. It removes the Clean Water Act's protections when berms, dam operations or ephemeral stream segments allegedly "isolate" a tributary stream or wetland from a navigable water. An assertion that pollutants are not transported through ephemeral stream reaches downstream to lakes and flowing streams ignores science and the lived experience of many Arizonans. It also ignores underground movements of water that can and have transported pollutants from impoundments to other water supplies.

   The monitoring of streams and the federal funding for the monitoring and reporting that is required under the Clean Water Act would end. Without detection, best management practices, monitoring, and regulatory compliance, more pollution events will occur, and the time elapsed between when the pollution occurs and when it is detected will increase. The public health effects of not detecting and responding to streams impaired by pollution mean that exposure times could be lengthened, and remedies will be more difficult, contentious and time-consuming. Overall, it will be more difficult to hold polluters accountable.

4. There was recently a harmful algal bloom scare in Oregon, which impacted a drinking water source. Is there any concern that having fewer requirements in the agricultural

sector will impact drinking water sources? Will fewer requirements in other industrial sectors?

I share your concern. Algal blooms are a growing concern in Arizona as well, along the Colorado River and in lakes elsewhere. Even under the Clean Water Act, agricultural and industrial discharges that are not considered "point" discharges are poorly regulated, especially when you consider the volumes of pollutants involved. In Arizona, the programs for stream monitoring and public reporting, Total Maximum Daily Load plans, regulation of point and non-point discharges, and enforcement are entirely reliant on the Clean Water Act. The WOTUS rule now under consideration would eliminate the requirements for these for the vast majority of our streams and ephemeral waterways.

Water providers in Arizona already are shutting down wells to address a growing class of "emerging contaminants." An example is PFAS (per- and polyfluoroalkyl substances), chemicals that have been used since the 1950s in industry and consumer products such as non-stick cookware, water-repellent clothing, stain-resistant fabrics and carpets, some cosmetics, some firefighting foams, and products that resist grease, water, and oil, PFAS can migrate into the soil and water. Most PFAS do not breakdown, so they remain in the environment. More than 30 U.S. communities are affected by this contaminant in our water, including Tucson and Marana in Pima County.

Many of these chemicals pose health risks but there are no standards even under the Clean Water Act or Safe Drinking Water Act. This lack of standards gives a false sense of security to the public. They think that if a water source meets standards, it's safe. The fact is that it could have unregulated contaminants that injure their health.

5. Federal water protections are especially important for the West, particularly in areas with a drier climate. Streams that are periodically dry throughout the year still remain very important to local aquatic habitats. Approximately half of the waters in Oregon are categorized as intermittent. In a state where the local economies are very dependent on clean water and sustained fish populations, I am very concerned that the proposed definition will irreparably harm the fishing and recreation industries in Oregon. Please explain how the proposed WOTUS definition could impact these industries, and the potential impacts on local economies.

   Answer: As discussed in item #3 above, if a dam operation or groundwater pumping causes a tributary stream to dry up before it reaches a navigable stream, the fish habitats upstream will be removed from the protection of the Clean Water Act no matter how valuable or extensive.

   In Arizona and most other Western states, all surface water quality standards, regulations limiting pollutant discharge to streams, enforcement capabilities, monitoring and detection of pollutants, and reporting to the public would end. Ensuing water contamination would impact fish and other aquatic species. The outdoor recreation industries of fishing, boating and swimming would be negatively impacted.

Senator BARRASSO. Thank you very much for your testimony.

I have a letter that I am going to introduce to the record. The Arizona Governor has already indicated his support for a new waters of the U.S. definition and his willingness to change the State law if needed. He sent a letter to the EPA outlining all of this, and I ask unanimous consent to enter this letter into the record.

[The referenced information follows:]

STATE OF ARIZONA
DOUGLAS A. DUCEY
GOVERNOR
OFFICE OF THE GOVERNOR
EXECUTIVE OFFICE

June 16, 2017

Scott Pruitt, Administrator
Environmental Protection Agency
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: State of Arizona Input on Proposed Revision to the Definition of "Waters of the United States" Final Rule, 80 Fed. Rg. 37,052

Dear Administrator Pruitt,

This letter is in response to your May 2017 request for input on the forthcoming proposal to revise the definition of waters of the United States (WOTUS) Final Rule, 80 Fed. Rg. 37,054 (June 29, 2015) and how states might respond to reduced federal jurisdiction under the Clean Water Act (CWA). I want to thank you for soliciting input before rule changes are drafted by US EPA.

In formulating our comments, we solicited input from our customers and stakeholders and several key principles emerged: protectiveness and consistency with the initial Congressional intent; a need for clarity; and a need for flexibility to allow implementation across the nation's wide range of ecological and hydrologic realities. Recommended elements of the rule to attain these key principles are described below.

Protectiveness and Consistency with Congressional Intent

It is Arizona's view that the original intent of Congress was not to use the Clean Water Act as a blanket regulation to cover all waters. Federal jurisdiction may extend beyond navigable waters to particular non-navigable water bodies and wetlands, but only in cases where water features affect navigable waters and are identifiable based on clear, objective characteristics.

Clarity

The Executive Order on reviewing the WOTUS rule directs both EPA and the Department of the Army to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's opinion in Rapanos v. United States, 547 U.S. 715 (2006). Two of the main tenets of this opinion are that WOTUS must be "relatively permanent waters", and that wetlands must have a "continuous surface connection" to a relatively permanent water to be considered a WOTUS.

Arizona believes that relatively permanent waters in Arizona include perennial and seasonal waters. Seasonal waters include any waters that flow at any time during the year as a result of factors other than storm flow. Seasonal waters that flow only as a result of storm events would not be included. Similarly, wetlands would only be considered a WOTUS if they have a continuous connection to a WOTUS, and the connection is at least seasonal.

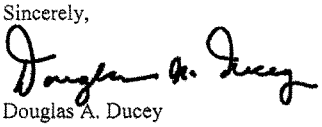
Flexibility and State Regulation

The revised rule should also clearly identify that states have authority to determine waters regulated under the CWA within non-tribal state boundaries. Determinations of cross-state, tribal, and international waters should continue to be made by the Department of the Army with input from affected states or tribes.

In regard to a reduced scope of federal regulation under the CWA, Arizona recognizes and welcomes the need to protect non-WOTUS state surface waters. Changes to the federal rule will require us to evaluate how to protect waters that no longer fall under the CWA. For example, man-made lakes that are not connected to a WOTUS that are used for recreation and could pose human health risks.

The State of Arizona appreciates EPA's emphasis on cooperative federalism, and looks forward to continued discussions with EPA and the Department of the Army as they evaluate rule amendments. Ongoing cooperation between states and federal agencies will ensure that the final rule provides needed clarity to allow for focused, defensible and protective implementation of CWA programs.

Sincerely,



Douglas A. Ducey
Governor
State of Arizona

cc: Douglas E. Lamont, P.E.
Senior Official Performing the Duties of the Assistant Secretary of the Army (Civil Works)

Senator BARRASSO. Senator Carper.

Senator CARPER. I have a unanimous consent as well, this from another Governor, Governor of the Commonwealth of Virginia, a letter to enter into the record, and I would ask that it be, a letter from Matt Strickler, Secretary of Natural Resources from the Commonwealth of Virginia. I would like to submit it to the record. The letter makes clear that many States—not just Virginia, but many States—do not support a retreat from the protection and certainty provided by the 2015 Clean Water Rule.

Thank you.

Senator BARRASSO. Without objection, that is also introduced.

[The referenced information follows:]

COMMONWEALTH of VIRGINIA

Office of the Governor

Matthew J. Strickler
Secretary of Natural Resources

June 12, 2019

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

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

RE: Waters of the United States Regulations: Their Impact on States and the American People

Dear Chairman Barrasso and Ranking Member Carper:

Water quality is important to Virginians. From the Clinch River in Southwest Virginia to the Chesapeake Bay, water quality impacts our health, our economy and our way of life. As such, the Commonwealth is dedicated to maintaining and improving water quality and opposes any weakening of the Clean Water Act. As the Committee on Environment and Public Works holds a hearing to review waters of the United States regulations, the Commonwealth of Virginia offers these comments.

The Clean Water Act (CWA) is a bedrock law that works to ensure fishable, swimmable waterways in the United States. Protecting wetlands and streams, key parts of a hydrologic system that filter out pollutants before they can reach larger receiving waters, is essential to fulfilling the purpose of the CWA. Virginia supports the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters" (Clean Water Act, §101(a)). Virginia also supports the definition of Waters of the United States as articulated in the 2015 Obama Administration Guidance. This commonsense reading of the law clarifies that wetlands, intermittent streams and other key hydrologic features are protected by the CWA.

The EPA's current proposal to roll back the 2015 definition would limit the jurisdictional coverage of the CWA and remove pollution protections from drinking water sources for 200

million Americans, including the drinking water for three of every four Virginians[1]. It would also limit protections for more than 55,000 miles of streams that flow into Virginia's rivers, lakes, and coastal waters[2]. Finally, hundreds of thousands of acres of wetlands in Virginia that provide flood protection, filter pollution, and provide essential wildlife habitat could be at risk.

Virginia also works in partnership with Delaware, the District of Columbia, Maryland, Pennsylvania, New York, Virginia, and West Virginia to protect and restore the Chesapeake Bay, as required by the Chesapeake Bay Agreement and the Baywide Total Maximum Daily Load (TMDL) requirements. Our collective pollution reduction efforts are working. The Bay's health is improving. Yet multi-state pollution reduction efforts are only as strong as their weakest link. Reducing CWA protections upstream will make the Bay dirtier and move us farther away from reaching our shared Bay restoration goals.

For these reasons, Virginia opposes the EPA's proposed rollback to the 2015 Waters of the United States definition. Such an action would negatively impact our state efforts to safeguard water quality, and slow or impair the multi-state effort to protect the Chesapeake Bay.

Virginia's watersheds also cross state boundaries, and we rely on federal protections to ensure our neighboring states maintain water quality and do not negatively impact our natural resources. We understand the important balance of federal and state roles in water protection, and believe the 2015 rule strikes that balance. We urge the EPA and the U.S. Congress to do all they can to ensure a strong Clean Water Act that gives states all the tools they need to deliver clean rivers, lakes, streams and bays for their citizens.

Sincerely,



Matthew J. Strickler

Cc: Members of the Senate Committee on Environment and Public Works

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[1] *Calculations from EPA Safe Drinking Water Information System (SDWIS). 2017. Accessed at https://ofmpub.epa.gov/apex/sfdw/f?p=108:1. NO AND U.S. Census Bureau (USCB). 2017. National and State Population Estimates. Accessed at https://www.census.gov/newsroom/press-kits/2017/estimates-demographics.html

[2] *U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule. p53-54, 220. Accessed at https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

Senator BARRASSO. Due to some scheduling conflicts, I am going to defer my opening line of questions and defer my time to Senator Ernst.

Senator ERNST. Thank you very much, Mr. Chair. I appreciate the flexibility.

As Senator Barrasso had mentioned in his opening statement, back in 2015 I was proud to introduce legislation that would have nullified the Obama administration's flawed WOTUS rule. This was a rule that gave the Federal Government authority to regulate 97 percent of the land in Iowa, and it posed serious challenges for farmers, for our ranchers, and numerous other stakeholders, and I can truly say this is one of those issues where people that don't normally collaborate together came together in opposition to this far reaching rule.

Unfortunately, after passing both the House and Senate with bipartisan support—bipartisan support—my legislation was vetoed by President Obama.

Getting this rule off the books has been one of my top priorities, and I am encouraged by the Trump administration's proposed rule, which provides much needed predictability and certainty by establishing clear and reasonable definitions of what qualifies as an actual water of the United States.

While the 2015 rule recognized ditches broadly as a water of the U.S., what I would like to do is go ahead—we will talk about ditches, but I do want to ask Mr. Goehring—the rule recognized ditches broadly as waters of the U.S. The proposed rule only defines certain ditches as waters of the U.S. Though this can be seen as an improvement upon the 2015 rule, do you believe that the EPA and the Corps should provide additional clarification as to what ditches qualify as waters of the U.S.?

Mr. GOEHRING. Mr. Chairman and Senator Ernst, yes, I believe they need to expand that definition, clarify it, because in many cases ditches are an artificial feature, generally moved to convey water, and many municipalities and States which have authority over the waters of the State already are going to make sure that they adhere to the Clean Water Act and that water is appropriated, allocated, conserved, and retained properly.

Senator ERNST. Very good. I appreciate that perspective.

So, ditches is one of those issues that we need to overcome. Another area is, like was described earlier, standing water, maybe perhaps in a field or so.

Mr. Fornstrom, under the proposed rule, intermittent water features are jurisdictional and are defined as surface water flowing continuously during certain times of a typical year. In your testimony, you recommend including a minimum duration of continuous flow for a feature to be considered intermittent. What regulatory challenges or confusion would this change that you have recommended help prevent?

Mr. FORNSTROM. Thank you, Senator Ernst. The intermittent issue that we have is we would appreciate a 90-day minimum on a regulation to clarify. We have rainfalls in Wyoming that will start the runoff, and sometimes that coincides with snowpack, a true intermittent. So it would change and clarify the rule so we would know. We are not lawyers; we are farmers.

Senator ERNST. Right. Right. Do you think there would be challenges with trying to enforce the regulation as it is proposed right now, because folks don't know necessarily what the definition is?

Mr. FORNSTROM. Yes. The idea that not knowing what the rule actually is makes it hard to actually follow the rule. We want to follow the law. That is what we want to do.

Senator ERNST. Exactly. No, I appreciate that very much.

I do have some time remaining, Chairman. I will yield back. Thank you very much.

Senator BARRASSO. Thank you so much, Senator Ernst.

Senator Carper.

Senator CARPER. Again, our thanks to each of you.

Todd, I think the Chairman mentioned and you mentioned your son is at West Point, is that right? What year?

Mr. FORNSTROM. Yes, he is.

Senator CARPER. What year?

Mr. FORNSTROM. He just finished his plebe year.

Senator CARPER. Oh, that is great. How is he doing?

Mr. FORNSTROM. He is doing well.

Senator CARPER. One of the joys of my life is nominating people to attend the military, our service academies, including West Point. I am a retired Navy captain. We have great service academies.

Yesterday, our congressional delegation from Delaware, all three of us, hosted a reception at the Capitol for our nominees who have been admitted to West Point, to the Naval Academy, Air Force Academy, and Merchant Marine Academy; and their parents came as well, grandparents. It was a big family event. We are close to Delaware, so a lot of people can come, and made a day of it.

I said to the folks, as they were gathered yesterday, that these young people who are going to our service academies are so impressive, just so impressive. I told them all that they had picked the right parents. Usually, when kids turn out that well, it is because their parents had something to do with it, so thanks to you and your wife for raising your son to that commitment to service. Navy salutes Army.

Mr. FORNSTROM. Thank you.

Senator CARPER. You bet.

A question, if I could, for you, Mr. Fornstrom, and also for Mr. Goehring. As you know, may farms have streams running through them, and I am sure that yours do, too. I would ask you to put yourself in the shoes of a farm located downstream of a metal plating company at which the ephemeral stream next to the plant was no longer a water of the U.S. under the proposed Trump WOTUS definition. Direct discharge of heavy metals and PFAS chemicals would now be permissible into that stream, which would flow into the farm with the snow melt and after heavy rainstorms.

Here is my question: Do you think that most farmers have an alternative to using the water on their property if the water quality was so bad they could not use it to water livestock or irrigate crops? And do you think that solution is easier or more complicated and expensive than requiring those discharges to be permitted and thus controlled? Please. Two-part question.

Mr. FORNSTROM. Thank you. You may have to remind me of all the parts.

[Laughter.]

Senator CARPER. I will restate the first question. Do you think most farmers have an alternative to using the water on their property if the water quality was so bad they could not use it to water livestock or irrigate crops? That was the first part.

Mr. FORNSTROM. Thank you. First of all, that is the assumption that the State is not regulating that water, rather than WOTUS. In Wyoming, the State would most likely be all over whatever regulation you wanted. I am actually regulated by the State, not WOTUS. Water is very important to farmers, so they would do what they can with what they have, and that is what they always do.

Senator CARPER. Second half of my question is do you think that solution is easier or more complicated and expensive than requiring those discharges to be permitted and thus controlled?

Mr. FORNSTROM. I wouldn't be able to answer that.

Senator CARPER. That is fine. That is fine.

Mr. FORNSTROM. I apologize.

Senator CARPER. Mr. Goehring, would you take a shot at those two questions, please?

Mr. GOEHRING. Yes. Thank you, Senator Carper. First of all, probably the two things on the table would be the Clean Water Act and traditional navigable waters definition and how we get there. The Clean Water Act is the law of the land; it has to be adhered to. There is a difference between the State, who understands their resources, understands the system, and their ability to regulate and oversee that, versus the Federal Government. As a regulator myself, and a farmer, I get those challenges, and I understand the resources. In the situation where all States have to monitor and have to adhere to the Clean Water Act, they would be out there doing something with respect to anything that is coming into that system and into that watershed, just as we would do. I would suspect that they would either start to mitigate, but they would probably prevent any livestock from actually using that water until they find a way in which to address the issue.

With respect to how that is going to happen, I couldn't tell you because I don't have intimate knowledge of what that may look like, but I know in my State how we would manage it.

Senator CARPER. Thanks.

Mr. GOEHRING. And I am sorry, Senator Carper, about the second question?

Senator CARPER. That is OK. I need to go to Mr. Elias, if I could.

The Trump administration claims it cannot estimate the extent of water bodies that its proposal would exclude and therefore cannot estimate the increased harm to waterways or the economic impact on recreation, on drinking water, treatment costs, on flooding damage, public health, and other things. My question of you, Mr. Elias, is as a county official, do you think it is responsible leadership to make decisions without any meaningful idea about what the effects of those decisions could be or would be?

Mr. ELIAS. As a county official, I think that would be a very bad decision to make. The complex system of tributaries and waterways in southern Arizona and the arid desert Southwest makes water go all over the place underground in our aquifers.

In January, the Air Force Base, Davis-Monthan Air Force Base there in Pima County, was found that they had released some PFAs into the stormwater drains. Those toxins ended up in a small community named Marana 30 miles away. Without knowing how they got there, without knowing which waterways they entered, it becomes impossible to do that, so protecting small ditches, protecting arroyos, protecting the small tributaries is critical for us, too. Those discharges, just this past week, of the same material at the Air National Guard, same situation; we don't know where those PFAs are going to end up. So, in my mind, in my area, in my homeland, that is a very dangerous precedent to set.

Senator CARPER. I understand.

What I would just say in closing is for us to keep in mind, Mr. Goehring and Mr. Fornstrom, keep in mind the many States that cannot regulate waters more stringently than the EPA does. As you know, there are a number of States that cannot.

All right, thanks very much.

Senator BARRASSO. Thank you, Senator Carper.

I would like to introduce into the record a letter received from the Pima Natural Resource Conservation District. They commented in support of the proposed 2019 WOTUS rule.

The Conservation District has stated that it supports the current proposed WOTUS rule because it restores property rights to private landowners and to the Arizona State Lands Department, and it provides those parties necessary regulatory relief from Federal Government overreach without sacrificing protection of genuinely navigable waters.

[The referenced information follows:]

Pima Natural Resource Conservation District
NRCS Plant Materials Center
3241 N. Romero Road
Tucson, AZ 85705

April 14, 2019

U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket,
Mail Code 28221T, 1200 Pennsylvania Avenue NW,
Washington, DC 20460

Re: Revised Definition of Waters of the United States; Docket ID No. EPA-HQ-OW-2018-0149

Dear EPA and Department of the Army,

The Pima Natural Resources Conservation District (PNRCD), located in eastern Pima County, Arizona, promotes soil and water conservation through sound agricultural practices on local rangelands and farmlands. The PNRCD is convinced that the 2015 Waters of the U.S. (WOTUS) rule is an unjustifiable over-reach by the Environmental Protection Agency (EPA) and the Department of the Army. It is unsupportable by either the Clean Water Act or the U.S. Constitution's grant of authority to the federal government over genuinely navigable waters.

The PNRCD supports the current proposed WOTUS rule because it restores property rights to private land holders and to the Arizona State Land Department, and provides those parties necessary regulatory relief from federal government overreach without sacrificing protection of genuinely navigable waters. The PNRCD concludes that, except for the Colorado River on the western boundary of the State of Arizona, no navigable rivers exist in southern Arizona.

Accordingly, no navigable stream exists in Pima County, nor does any water in Pima County have any nexus to the navigable Colorado River. Since it is impossible to safely travel in any boat for any useful distance on the mostly dry Santa Cruz River, the PNRCD recognizes the Santa Cruz River as a non-navigable, intermittent stream.

Most importantly, the Santa Cruz River spreads out and disappears underground, both on the south end of Tucson and again in Santa Cruz Flats in Pinal County (north of Pima County), more than 100 miles from the Colorado River. More specifically:

1. As an example of one of the larger washes (drainage courses) in our area of responsibility, the Altar Wash in the Altar Valley in Pima County is an ephemeral wash. It rarely has water, except during, or right after, exceptionally strong nearby summer convective rainstorms. This rarely wet drainage ends, spreading out into the desert approximately 70 miles south of the ephemeral Gila River. No channel connects the Altar Wash to the next, distant feature: the generally dry Santa Cruz River.

2. The Santa Cruz River vanishes as a geographical feature as it spreads out in the Arizona desert 68 miles distant from the next identifiable river: the usually dry Gila River. The Santa Cruz, has surface water in some portions of its entire length due to the dumping of sewer water into its bed by the cities of Nogales and Tucson. However, even during rare flood periods, all water spreads out and soaks into the ground about 68 miles from the bed of the generally dry Gila River. Numerous early Spanish explorers and missionaries documented that the Santa Cruz River flowed intermittently and disappeared underground near the San Xavier mission on the south end of Tucson, even when running at full flow. (Julio L. Betancourt, 1990, "Tucson's Santa Cruz River and the Arroyo Legacy, pp. 42-44, University of Arizona Geosciences Ph.D. dissertation)
3. The Gila River bed extends west of the Town of Gila Bend another hundred or so miles across even drier, low elevation, low rainfall desert toward the California border until its bed connects with the first flowing river—the Colorado.
4. The Colorado River obtains virtually all of its perennial water from sources far north of the Gila, including Rocky Mountain streams in states north of Arizona. It is, of course, the "nearest" and only truly year-round navigable river in southern Arizona. The Colorado is located 250 dry desert miles from the ephemeral Altar Wash in the PNRCD jurisdiction.

Please see Figure 1 on the following page, which illustrates the vast, and, for all practical navigational purposes, hydrologically disconnected, expanse of space between the Altar Wash Drainage basin and the Colorado River. It would be an unsupportable assertion of authority for the EPA and Corps to claim that the entire Santa Cruz Drainage basin, liberally covered with small dry washes, has a navigable or even seasonally regular nexus with the Colorado River.

The 2015 rule uses terms such as "tributary" and "adjacent" which make it impossible for farmers and ranchers to know whether specific ditches, ephemeral drains or low areas on their land are "waters of the US." Consequently, the 2015 definitions are broad enough to give regulators and citizen plaintiffs sweeping authority to regulate land use, which they may exercise at will. Therefore, we need the clarity as set forth in the 2017 rule.

In conclusion, the Pima NRCD requests that the Altar Wash and the entire Santa Cruz River Drainage be excluded from the jurisdiction of the Corps of Engineers and the Environmental Protection Agency "Waters of the United States" (WOTUS) jurisdiction. The Altar Wash and the entire Santa Cruz Drainage Basin should be subject only to Pima County ordinances and regulations and/or to State of Arizona management.

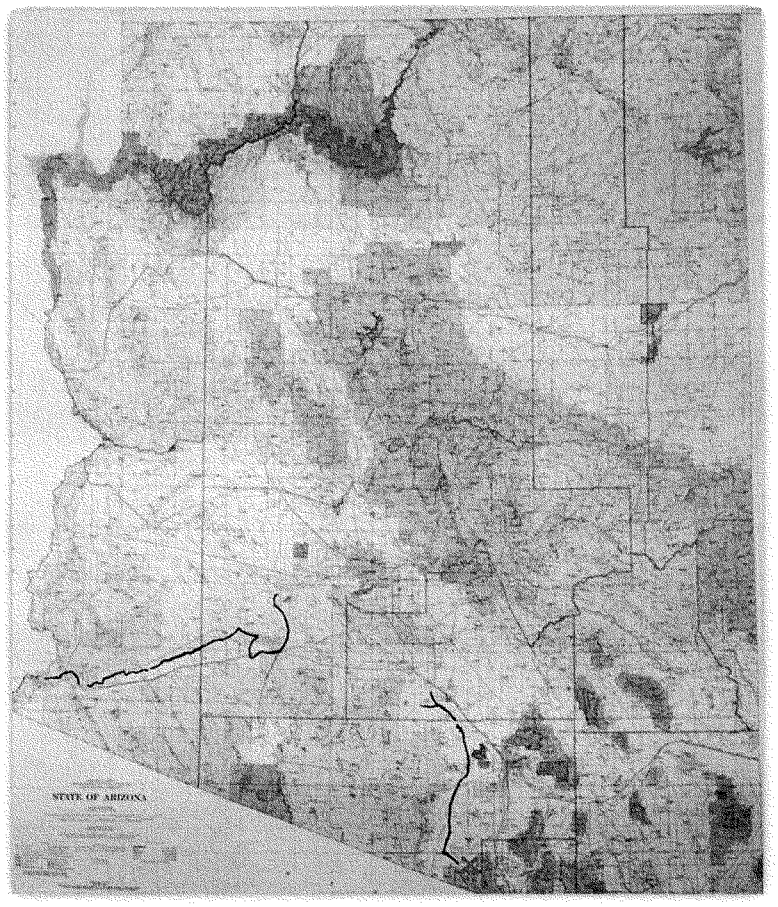
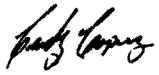


Figure 1. One of the origins of the Altar Wash in Pima County is represented at the red "X". The dark line leading north represents only a portion of the Santa Cruz Drainage basin. The dark line on the left represents the Gila River. Note: the dark lines represent old river beds, not flowing water. As you can see, these river beds

do not connect and therefore no nexus exists between the washes in the Altar Valley in Pima County and the navigable Colorado River, which constitutes the western border of Arizona along the left side of the map.

Sincerely,



Cindy Coping

Chair, Pima Natural Resource Conservation District

Senator BARRASSO. Senator Cramer.

Senator CARPER. Before we do, Mr. Chairman, could I just also ask unanimous consent to submit a letter from the Backcountry Hunters and Anglers that emphasizes that eliminating protection for 18 percent of America's streams and half of our remaining wetlands threatens big game in the Southwest in trout and salmon that need cold, clean waters, and the supporting heritage dependent on those and many other species and habitats threatened by the Trump WOTUS rule? I ask unanimous consent.

Senator BARRASSO. Without objection, both will be introduced.

[The referenced information follows:]

BACKCOUNTRY HUNTERS & ANGLERS

PO BOX 9257
MISSOULA, MT 59807
406-926-1908

June 11, 2019

The Honorable John Barrasso
Chairman
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Senate Environment and Public Works Committee
456 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Kevin Cramer
Chairman
Senate Environment and Public Works Subcommittee on Fisheries, Water and Wildlife
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tammy Duckworth
Ranking Member
Senate Environment and Public Works Subcommittee on Fisheries, Water and Wildlife
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso, Ranking Member Carper, Chairman Cramer and Ranking Member Duckworth:

As the fastest growing conservation organization representing hunters and anglers in North America, we strongly support the 2015 Waters of the United States (WOTUS) rule and its protections for our nation's most important waters.

The Trump administration's revised rule now eliminates Clean Water Act protections for ephemeral streams that only flow after rain or snow fall, threatens the future of intermittent streams with seasonal flow fluctuations and only protects adjacent wetlands with confirmed surface connectivity to jurisdictional waters such as large rivers, lakes and streams. Eliminating 18 percent of America's stream miles and 50 percent of our remaining wetlands would subject large rivers, lakes or oceans and streams to pollution, harming our clean drinking water and America's hunting and fishing heritage. The 2015 WOTUS definition, however, restored lost protections for these waters and maintains the integrity of the Clean Water Act, a law that has protected waters that hunters and anglers depend on for more than 45 years.

These waters are incredibly important to fish and wildlife and support species like big game in the arid southwest that rely on habitat around ephemeral and intermittent streams and trout and salmon that are sensitive to habitat changes and require cold clean waters. While riparian areas provide critical habitat to all big game species, wetlands like the Prairie Pothole Region are the lifeblood of America's duck factory. The incredible opportunities that waterfowl hunters currently have to pursue healthy populations of ducks and geese are directly linked to the fact that we've had meaningful conservation measures in place to sustain healthy wetlands and critical habitats like these.

During wet years, 70 percent of North American ducks are raised in the prairie pothole region, a landscape of wetlands that provide important flood storage and breeding habitat for pintails, mallards and blue-winged teal. Trout and salmon spawn in small streams and are incredibly important fisheries for recreational and commercial fishing and tribal interests. Furthermore, the outdoor recreation industry generates nearly $887 billion annually and supports 7.6 million jobs that rely on healthy waters.

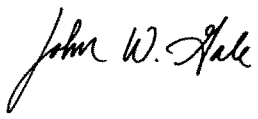
The U.S. is now seeing annual wetland losses occur again for the first time in decades since President George H.W. Bush acknowledged the damage caused by filling and draining wetlands by establishing a national no net loss policy for wetlands. With wetlands disappearing at alarming rates (combined losses equal the size of New York City's Central Park annually), this new rule will have irreparable consequences in addition to sullying the legacy left by other presidents including George W. Bush who made a commitment to actually adding 3 million acres of new wetlands.

The opening line of the Clean Water Act states, "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." We must adhere to the clear intent of Congress in passing the Act and respect its constitutional Commerce Clause authority to restore and manage our waters to ensure that the integrity of our public health and natural resources are not compromised. Decisions should always be guided by the best available science and it's incumbent upon us to utilize and deploy what we have while we promote continued research, analysis, and evaluation to increase our scientific understanding to better the health and cleanliness of our nation's waters.

Hunters and anglers know better than anyone that our streams and wetlands are inextricably linked to the health of fish, wildlife and their habitats in addition to ensuring that our outdoor traditions endure into the future. Under this proposal, however, our legacy of stewardship is undermined, and our sporting heritage is unnecessarily threatened.

Thank you for the opportunity to express our support for the 2015 Clean Water Rule.

Sincerely,



John W. Gale
Conservation Director
Backcountry Hunters & Anglers

Senator BARRASSO. Senator Inhofe, we will turn to you.

Senator INHOFE. Thank you, Mr. Chairman. First of all, I appreciate this hearing probably more than anybody else does, since I chaired this Committee during the last Administration.

I have been listening very carefully, and I have to tell you, as I said in a comment earlier, that this issue was not just one issue to our farmers and ranchers in Oklahoma; it was the issue. It is No. 1. I know that Mr. Fornstrom, you are with the American Farm Bureau, so I am sure you hear this from a lot of the others that are out there.

Real quickly, Mr. Fornstrom, the rule that we have, the Obama era WOTUS rule is not currently in effect in your State of Wyoming, but it is in my State of Oklahoma. Now, you broadly, in your opening statement, talked about some of the costs. Would you specifically talk about some of the costs associated with your situation as opposed to our situation or what we are going to have to be subjected to that you now are not because you are not under this regulation? What are the similar things that States would suffer from under the previous Administration's record? The costs.

Mr. FORNSTROM. The costs to the producer? The costs of consultants can be in the thousands, if not in the hundreds of thousands. That is not an excuse to have dirty water. We, as farmers, don't want dirty water. We are happy to do it, but if the cost is more than what we will get out of it, it is a business decision, and they will quit doing it if that is what it comes down to.

Senator INHOFE. Well, you know, there is this assumption that people who own the property are not going to be the best stewards of the property. We had an interesting experience with one of the people from the previous Administration coming out. In fact, I made this a requirement before his confirmation, to come out to Oklahoma on the Partnership program. You are both familiar with that Partnership program. And they came back with glowing reports that, yes, in fact, those property owners in my State of Oklahoma, and I suspect all around the country, are very much the most concerned people about their own properties; that is not just unique to Oklahoma.

Now, there is this assumption that liberals generally have, is that States are really not competent to get these things done and that they have to rely on the wisdom of the Federal Government to get it done. I would like to ask you, Commissioner Goehring, some of the things that the States are doing right now that we may not be aware of, that are actually being done, in your opinion, better than the Federal Government.

Mr. GOEHRING. Senator Inhofe, it is interesting that you would ask that because I am confused about all this discussion about the whole definition and reworking everything, revamping, trying to take control of large tracts of land where there are no rivers or no streams, and only ditches, and other problems, isolated water features.

States have a responsibility under the Clean Water Act. They have primacy. They have a cooperators agreement with EPA. They have to maintain and respect the law of the land, which is the Clean Water Act. So, to disregard it or say that States can't be any more strict because their legislators won't allow it, it is irrelevant.

You still have to maintain the law of the land. You still have to regulate; you still have to implement. And if the Federal Government has control of it, it doesn't mean that it is going to be any better regulated. In fact, you might be missing unique opportunities in which you are going to be addressing the unique situation of the watershed itself, and that is where the State has the intimate knowledge to go in and do the testing to mitigate issues, to have control without requiring a farmer or a rancher to go get a permit, to pay for a permit, to pay for a consultant to make sure that they are not doing something because it is perceived that way. The reality is the State is still there monitoring, regulating, and they understand the resource better.

Senator INHOFE. That is an excellent statement. Let's stop and look at what has happened since 1972. We have been very successful in the system that we have used and giving the States the powers of that regulation. Excellent response. Thank you.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Inhofe.

Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Mr. Chairman. Thank all of you for being here today.

I am afraid that the proposed Trump administration rule is really going to guarantee a lot more litigation in an area that has already been heavily litigated. I think all of you know the history of interpreting the waters of the United States, back and forth to the Supreme Court.

In the Rapanos case, Rapanos v. United States, you had a split decision; you had Justice Scalia joined by four Justices with a kind of narrow interpretation. Justice Kennedy, the fifth vote, making up the majority in that case, said that the intent behind the congressionally passed Clean Water Act included waters with a "significant nexus test."

I think what we are going to see now, unfortunately, is this is going to be tied up in the courts. So, it would have been much better, in my view, if the Administration had been more protective than the current rules proposed, because the U.S. Geological Society has estimated that this rule is going to remove Federal protections for 18 percent of stream and river miles and 51 percent of wetlands.

Now, I represent the State of Maryland. We are in the Chesapeake Bay area. Six States have their waters flowing into the Chesapeake Bay, plus the District of Columbia. So it is easy to say that one State or another is going to pass their own State laws to protect their waters, but when their waters are impacting people in another State, I can tell you that there is not as much focus on the need to do that, and that is exactly why we have a Federal Clean Water Act, and that is why we are so worried in Maryland about the impact of this law. Our Governor, who happens to be a Republican Governor, and his head of the Maryland Department of Environment have expressed grave concerns over the impact that these new proposals will have on the Chesapeake Bay and the Chesapeake Bay watershed.

Mr. Elias, if you could just elaborate a little bit more on the point you made, which is that waters that are intermittent from time to

time, by definition, that they in fact can have a very damaging and harmful impact on waters downstream if you get pollution into one of those water bodies, what impact it has downstream; and the issue of the wetlands. We have a lot of non-tidal wetlands in the Chesapeake Bay area, so there are times that there is no water there; but then there are times when they are filled with water, and they act as a filtration system for the Chesapeake Bay, they are like the lungs of the Bay. And if you essentially say that that is not covered anymore, you are going to expose the Bay to a lot of harm.

Now, I keep hearing the argument that States are going to backfill, but the reality is today on the books you have, as Mr. Elias pointed out, two-thirds of States, including Arizona, have State laws that prohibit the States from going any farther than the Federal Clean Water Act does.

Now, you can say when we scale this back, these States are going to change their laws to be more protective, but there is no guarantee of that, and there is certainly no guarantee that a State that is up-water, upstream, for example in the Bay, is going to do that.

Mr. Elias, if you could just comment further on what you foresee as the harm that could be done to these sort of downstream, downwater areas, and the notion that we all know, which is that a lot of water does travel, as you pointed out, underground, and the question is who is responsible when that water is contaminated, or who is responsible when that water is eliminated because somebody happens to fill up a wetland.

Mr. ELIAS. Thank you, Senator. I understand the unique situation in Maryland, and it mirrors Arizona in an odd sort of way. We certainly don't have as big a body of water as the Chesapeake Bay anywhere within the borders of Arizona, but what we have is a complex set of aquifers that are fed by the ephemeral rivers and streams that exist in Arizona and in Mexico. So, we had some shared infrastructure issues, similar to Maryland, and in fact, the aquifer that serves Pima County and Tucson stretches from more or less from Imuris in Sonora all the way to Casa Grande in Arizona. That is a distance of probably 150 miles as the crow flies, so this is a huge aquifer that serves many, many, many people with critical groundwater supplies.

The history of Arizona in terms of providing protection to these rivers and streams that seem to be dry all the time, or at least since the 20th century they have been dry, it doesn't bode well for us in southern Arizona and protecting the people who already have experienced, like I said, a terrible history related to all of this, so there is a specter of fear. There is also a specter of misunderstanding from the State. Arizona is a place of great differences geographically and geologically. The northern half of the State is very green and very mountainous; the southern half of the State, where I am from, resembles my skin; it is somewhat dry.

So, what I would say is it is a complex set of issues that shared infrastructure creates, and when we talk about an aquifer that is shared by a huge expanse of space in southern Arizona, all those minor tributaries become critical, especially in a place where we have significant mining and mineral exploration activities. That

has been the source of many discharges in our region for the last 200 years especially.

Senator BARRASSO. Thank you.

Senator Carper.

Senator CARPER. A couple of additional unanimous consent requests.

By the way, Senator Inhofe, I thought your point was very well taken. Thank you.

Mr. Chairman, I ask unanimous consent to submit a letter from Southern Environment Law Center into the hearing record demonstrating the dramatic effect the Trump WOTUS rollback will have on drinking water sources for well over half of the people living in Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia.

I would also ask unanimous consent to submit a letter from Earthjustice into the hearing record demonstrating the disproportionate impact the Trump rule would have on already disenfranchised communities across our country.

Two unanimous consent requests, please.

Senator BARRASSO. Without objection.

Senator CARPER. Thanks so much.

[The referenced information follows:]

Southern Environmental Law Center

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Washington, DC 20001-2109
202-828-8382
Fax 202-347-6041
SouthernEnvironment.org

June 12, 2019

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

The Honorable Tom Carper
Ranking Member, Committee on Environment and Public Works
United States Senate
456 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Kevin Cramer
Chairman, Subcommittee Fisheries, Water, and wildlife
United States Senate
400 Russell Senate Office Building
Washington, DC 20510

The Honorable Tammy Duckworth
Ranking Member, Subcommittee Fisheries, Water, and Wildlife
United States Senate
524 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso, Ranking Member Carper, Chairman Cramer, & Ranking Member Duckworth:

The Southern Environmental Law Center thanks the U.S. Senate Committee on Environment and Public Works and the Subcommittee on Fisheries, Water, and Wildlife for holding the hearing "A Review of Waters of the U.S. Regulations: Their Impact on States and the American People." We respectfully request to submit this letter and the attached factsheets to the record for the hearing. These factsheets outline what is at stake, including drinking water sources, in Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee if the administration finalizes its proposal to redefine "Waters of the United States."

The administration's proposal to redefine "waters of the United States" is the biggest rollback in clean water protections in the 47 years since the Clean Water Act became law. The proposal drastically restricts Clean Water Act jurisdiction over streams and wetlands which in turn puts our waters, economy, and communities at risk. The proposal threatens to strip protections for hundreds of thousands of miles of streams and millions of acres of wetlands in the Southeast alone. This puts at risk the drinking water sources for seven out of ten southerners. If the agencies go through with withdrawing Clean Water Act protections from smaller waterways such as intermittent streams (those that do not flow consistently throughout the year), those streams could be buried, destroyed, or polluted without a federal permit. These smaller streams connect to larger rivers, lakes, and coastal waters. Eliminating protections threatens

millions of stream miles in the contiguous United States, including at least 290,000 in the Southeast alone.

Southern streams, rivers, lakes, estuaries, and oceans are central to our region's history, culture, and economy. Compared to other regions in the United States, the South has more miles of streams and more acres of wetlands- giving us more to lose with the administration's proposed revised definition of "waters of the United States." Particularly alarming is the effect that this revised definition could have on drinking water sources. The percent of each state's population whose drinking water intake sources are at risk for unregulated pollution under the revised definition is jarring: 84% in Alabama, 69% in Georgia, 65% in North Carolina, 66% in South Carolina, 78% in Tennessee, and 77% in Virginia.

Drinking water contamination is dangerous to the health of our communities as well as our economy. Polluted drinking water is cripplingly expensive to clean up. For example, in North Carolina two water utilities are spending nearly $150 million, collectively, to clean up water polluted with toxic chemicals from an upstream manufacturing facility.[1] When drinking water does not get cleaned up- whether because municipalities cannot afford expensive treatment technologies, the best technologies cannot remove all of the pollutants, or because those affected by the pollution depend on private wells rather than public water supplies- people and the economy suffer. For example, in Milwaukee, Wisconsin, a disease outbreak caused by polluted runoff cost $96.2 million in medical costs and productivity losses.[2]

To be effective the Clean Water Act must be able to control pollution at its source: upstream in the small streams and wetlands that flow downstream into our major rivers, lakes, bays, and eventually make it out of our tap. It is unacceptable to put the drinking water sources for 32 million people in the South at risk. We respectfully request that the U.S. Senate Committee on Environment and Public Works and the Subcommittee on Fisheries, Water, and Wildlife recognize the adverse impacts the administration's revised definition of "waters of the United States" will have on our drinking water sources.

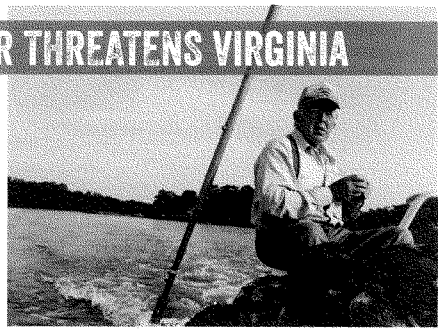
Sincerely,

Meghan M. Boian
Legislative Associate

[1] Tim Buckland, CFPUA: Filtering GenX can be done, but will cost customers, Wilmington Star News, (Aug. 15, 2018), www.starnewsonline.com/news/20180815/cfpua-filtering-genx-can-be-done-but-will-cost-customers; Johanna Ferebee, Brunswick's $100-million treatment plant will concentrate contaminants, discharge them back into Cape Fear River, Port City Daily (Cot. 12, 2018), https://portcitydaily.com/local-news/2018/10/12/brunswicks-100-million-treatment-plant-will-concentrate-contaminants-discharge-them-back-into-cape-fear-river/.

[2] U.S. EPA, The Importance of Water to the Economy 16 (2013), https://www.bafuture.org/sites/default/files/key-topics/attachments/Importance-of-water-synthesis-report.pdf.

ASSAULT ON CLEAN WATER THREATENS VIRGINIA



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten Virginia's local economies, communities, and way of life.

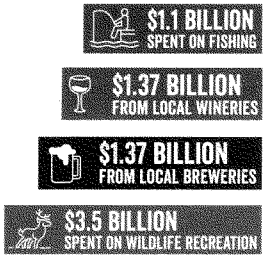
Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States.[2]

WHAT'S AT STAKE IN VIRGINIA?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least one in every four Virginians.[3]

CLEAN WATER IS BIG BUSINESS IN VIRGINIA



Under the proposal by the administration and supported by industrial polluters, more than 55 percent of Virginia's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]

At least thirty percent of Virginians get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal.[5]

More than 5,000 miles of streams that feed into Virginia's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR VIRGINIA

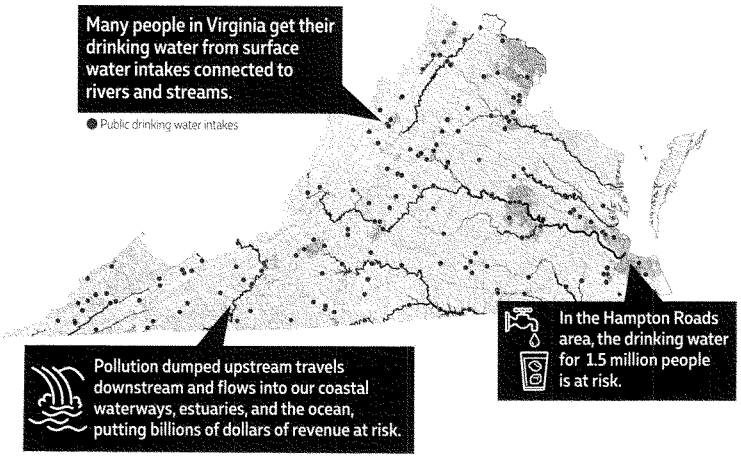
By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat, and supporting hunting and fishing.[7]

Protecting small streams and wetlands supports fish and wildlife and Virginia's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $3.5 billion was spent on wildlife recreation in Virginia, including $1.1 billion on fishing, and more than 3.3 million people participated in wildlife related recreational activities in Virginia.[8]



Virginia's thriving brewing and winery industries rely on clean water. Small Virginia breweries contribute more than $1.37 billion to our economy every year and support 10,260 jobs.[9] Similarly, wineries and vineyards contribute $1.37 billion, sustain 8,218 livelihoods and rank 1st in economic activity in the South.[10,11]

VIRGINIA'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Protected By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA, 2013. Water: Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-12.html. AND EPA, 2012. Water: Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html

[2] EPA. Water: Rivers and Streams – Streams. AND U.S. Fish and Wildlife Service (USFWS). 2009. Status and Trends of Wetlands in the Conterminous United States 2004 – 2009. Page 37. Accessed at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf

[3] EPA. Analysis of Surface Drinking Water.

[4] Calculated using EPA. Analysis of Surface Drinking Water. AND U.S. Census Bureau. 2010. Interactive Population Map. Accessed at https://www.census.gov/2010census/popmap/.

[5] EPA. Analysis of Surface Drinking Water.

[7] U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule. Page 53-54. Accessed at https://www.epa.gov/sites/production/files/2015-08/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[8] U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S Department of Commerce, U.S. Census Bureau. 2011. National Survey of Fishing, Hunting, and Wildlife Associated Recreation - Virginia. Pages 5-8. Accessed at https://www.census.gov/prod/2013pubs/fhw11-va.pdf.

[9] Brewers Association. 2016. Economic Impact by State. Accessed at https://www.brewersassociation.org/statistics/economic-impact-data/.

[10] Frank, Bimerman and Co. LLP. 2017. The Economic Impact of Wine and Wine Grapes of the State of Virginia. Accessed at https://s3.amazonaws.com/vawine-production/documents/docs/000/000/422/original/Virginia_2015_FI_Update_Final.pdf?1484704826.

[11] UT Boyd Center for Business and Economic Research. 2018. An Economic Report to the Governor of the State of Tennessee. Accessed at http://cber.haslam.utk.edu/eerg/eerg2018.pdf.

ASSAULT ON CLEAN WATER THREATENS NORTH CAROLINA



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten North Carolina's local economies, communities, and way of life.

Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States. [2]

WHAT'S AT STAKE IN NORTH CAROLINA?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least half of North Carolinians.[3]

CLEAN WATER IS BIG BUSINESS IN NORTH CAROLINA



Under the proposal by the administration and supported by industrial polluters, more than 55 percent of North Carolina's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]

At least fifty percent of North Carolinians get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal. [5]

More than 7,000 miles of streams that feed into North Carolina's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

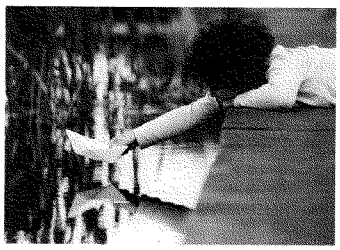
Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR NORTH CAROLINA

By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat and supporting hunting and fishing.[7]

Protecting small streams and wetlands supports fish and wildlife, and North Carolina's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $3.3 billion was spent on wildlife related recreation in North Carolina, including $1.5 billion on fishing, and more than 3.5 million people participated in wildlife-related recreational activities in North Carolina.[8] The National Oceanic and Atmospheric Administration reports that, in 2015, North Carolina had the 2nd highest participation of recreational saltwater anglers in the U.S. with 1.5 million anglers.[9]

North Carolina's coastal counties are reliant on clean water. Collectively, North Carolina's ocean economy contributes $2.1 billion to our state's value and supports 43,385 jobs annually. The seafood industry accounts for $188 million of that total value and supports 1,300 livelihoods. [10]

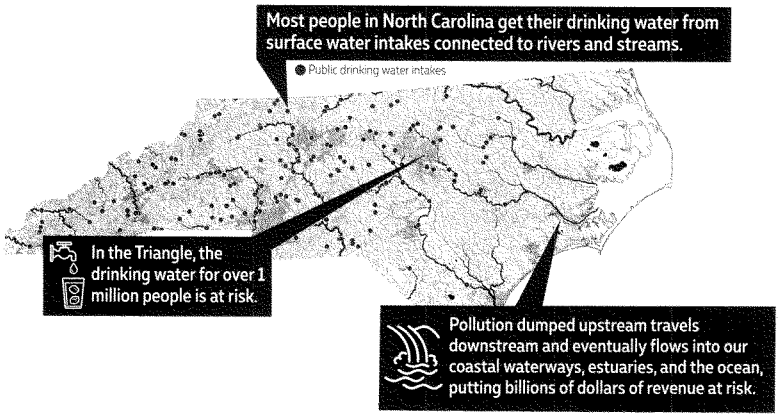


In 2015, over 42 million pounds of shellfish were brought to shore by commercial fishermen, generating $62,324,000 for North Carolina's economy. North Carolina had the highest commercial landings revenue and volume in the South Atlantic region with 66 million pounds of fish caught and $95 million in revenue. [11]

People visit North Carolina for our beautiful coast and Outer Banks, unique rivers and streams, waterfalls, and ample fishing opportunities. Each day, $5.4 million is generated in taxes from tourism in North Carolina.[12]

North Carolina's thriving brewing and winery industries rely on clean water. Small North Carolina breweries contribute more than $2 billion to our economy every year and support 12,470 jobs.[13] Similarly, the wine and grape industry adds $1.97 billion to our economy and sustains 10,296 livelihoods.[14]

NORTH CAROLINA'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA. 2013. Water: Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-12.html. AND EPA. 2013. Water: Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html.

[2] EPA. Water: Rivers and Streams – Streams. AND U.S. Fish and Wildlife Service (USFWS). 2009. Status and Trends of Wetlands in the Conterminous United States 2004 – 2009. Page 37. Accessed at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

[3] EPA. Analysis of Surface Drinking Water.

[4] Calculated using EPA. Analysis of Surface Drinking Water. AND U.S. Census Bureau. 2010. Interactive Population Map. Accessed at https://www.census.gov/2010census/popmap/.

[5] EPA. Analysis of Surface Drinking Water.

[6] U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule. Page 53-54. Accessed at https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[7] U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S Department of Commerce, U.S. Census Bureau. 2011. National Survey of Fishing, Hunting, and Wildlife Associated Recreation - North Carolina. Pages 5-8. Accessed at https://www.census.gov/prod/2013pubs/fhw11-nc.pdf.

[8] National Marine Fisheries Service (NMFS). 2015. Fisheries Economics of the United States. U.S. Dept. of Commerce, NOAA. Page 13. Accessed at https://repository.library.noaa.gov/view/noaa/16121.

[9] Jane Harrison, Amy Pickle, Tibor Vegh, and John Vardon. 2017. North Carolina's Ocean Economy. Duke University and Sea Grant North Carolina. Pages 8-12. Accessed at https://seagrant.ncsu.edu/ncseagrant_docs/products/2010s/NC_Ocean_Economy_White_Paper.pdf.

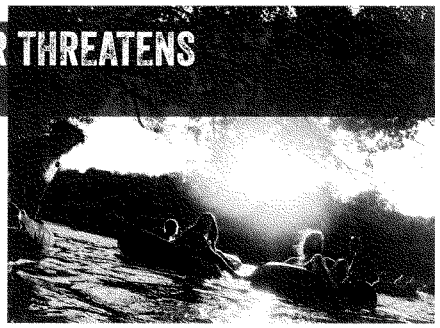
[10] NMFS. Fisheries Economics. Pages 132,150.

[11] TNS TravelsAmerica and U.S. Travel Association. 2017. Tourism Economic Fast Facts. Accessed at https://partners.visitnc.com/clientuploads/downloads/69272/file/2017-5-Economic-Impact-Fact-Sheet.pdf.

[12] Fruit Growers New. 2017. https://fruitgrowersnews.com/news/north-carolina-wine-grape-industry-approaches-2-billion/

[13] Brewers Association. 2016. Economic Impact by State. Accessed at https://www.brewersassociation.org/statistics/economic-impact-data/.

ASSAULT ON CLEAN WATER THREATENS SOUTH CAROLINA



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten South Carolina's local economies, communities, and way of life.

Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines,and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States.[2]

WHAT'S AT STAKE IN SOUTH CAROLINA?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least every four out of ten South Carolinians.[3]

CLEAN WATER IS BIG BUSINESS IN SOUTH CAROLINA

- $19.1 BILLION FROM TOURISM INDUSTRY
- $649 MILLION FROM LOCAL BREWERIES
- $686 MILLION SPENT ON FISHING
- $2 BILLION SPENT ON WILDLIFE RECREATION
- $14.7 MILLION FROM COMMERCIAL FISHERMEN
- $40.5 MILLION FROM SEAFOOD INDUSTRY

Under the proposal by the administration and supported by industrial polluters, more than 50 percent of South Carolina's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]

At least forty-two percent of South Carolinians get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal.[5]

More than 2,500 miles of streams that feed into South Carolina's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR SOUTH CAROLINA

By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat, and supporting hunting and fishing.[7]

Development in water-absorbing wetlands and flood prone areas were largely responsible for the $2 billion in damages from the 2015 flood inflicted on South Carolina. Stripping wetland protections will increase damage from floods in South Carolina.[8]

Protecting small streams and wetlands supports fish and wildlife and South Carolina's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $2.0 billion was spent on wildlife related recreation in South Carolina, including $686 million on fishing, and more than 1.7 million people participated in wildlife related recreational activities.[9]



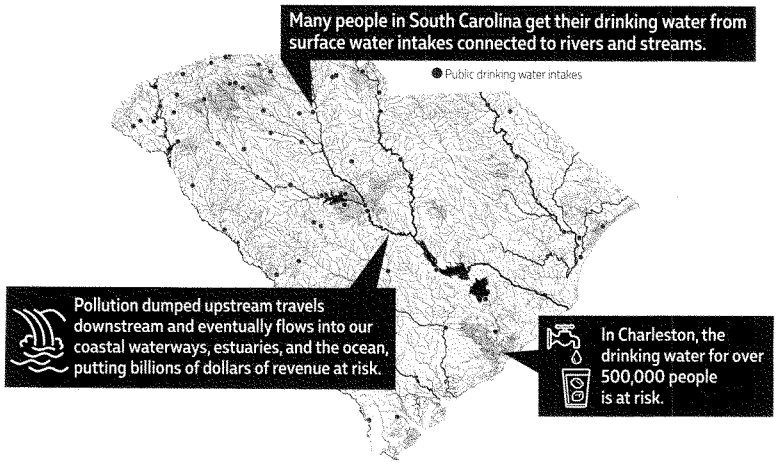
In 2015, over a million recreational anglers took 2.6 million trips in South Carolina. The recreational fishing industry supported 6,900 jobs and added $396,858,000 to our state's economy. [10]

South Carolina's seafood industry added $40.5 million to our state's economy in 2015, including 7.2 million pounds of shellfish brought to shore by commercial fishermen that generated $14.7 million. [11]

South Carolina's thriving brewing industry relies on clean water. Small South Carolina breweries contribute more than $649 million to our economy every year and support 4,042 jobs. [12]

Clean water is a way of life in South Carolina, from our mountain streams, to our rivers and lakes, down to our marshes and coast – and our $19.1 billion tourism industry is dependent on it. [13]

SOUTH CAROLINA'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at https://www.epa.gov/sites/production/files/2015-08/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA. 2013. Water, Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-17.html. AND EPA. 2013. Water, Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html.

[2] EPA. Water, Rivers and Streams – Streams. AND U.S. Fish and Wildlife Service (USFWS). 2009. Status and Trends of Wetlands in the Conterminous United States 2004 – 2009. Page 37. Accessed at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

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[8] Smith, Adam et al. 2018. U.S. Billion-Dollar Weather & Climate Disasters 1980–2018). NOAA. Accessed at https://www.ncdc.noaa.gov/billions/events.pdf.

[9] U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S Department of Commerce, U.S. Census Bureau. 2011 National Survey of Fishing, Hunting, and Wildlife Associated Recreation – South Carolina. Pages 5-8. Accessed at https://www.census.gov/prod/2012pubs/fhw11-sc.pdf.

[10] [11] National Marine Fisheries Service (NMFS). 2015. Fisheries Economics of the United States. U.S. Dept. of Commerce, NOAA. Pages 154-155. Accessed at https://repository.library.noaa.gov/view/noaa/16121.

[12] Brewers Association. 2016. Economic Impact by State. Accessed at https://www.brewersassociation.org/statistics/economic-impact-data/.

[13] South Carolina Department of Parks, Recreation & Tourism (SCPRT). 2017. Tourism is Now a $19.1 Billion Industry in South Carolina. Accessed at https://www.scprt.com/article/tourism-is-now-a-19-billion-industry-in-south-carolina.

ASSAULT ON CLEAN WATER THREATENS TENNESSEE



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten Tennessee's local economies, communities, and way of life.

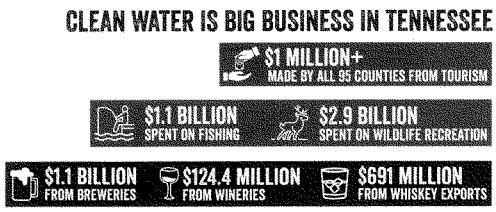
Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines, and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States. [2]

WHAT'S AT STAKE IN TENNESSEE?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least half of Tennesseans.[3]

Under the proposal by the administration and supported by industrial polluters, more than 55 percent of Tennessee's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]



At least fifty-six percent of Tennesseans get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal.[5]

More than 10,000 miles of streams that feed into Tennessee's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

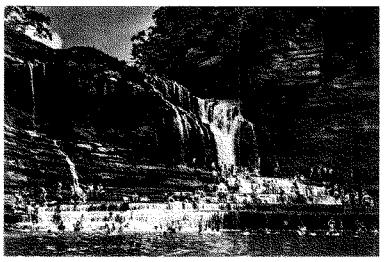
Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR TENNESSEE

By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat and supporting hunting and fishing. [7]

Protecting small streams and wetlands supports fish and wildlife, and Tennessee's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $2.9 billion was spent on wildlife recreation in Tennessee, including $1.1 billion on fishing, and more than 2.6 million people participated in wildlife related recreational activities in Tennessee.[8]

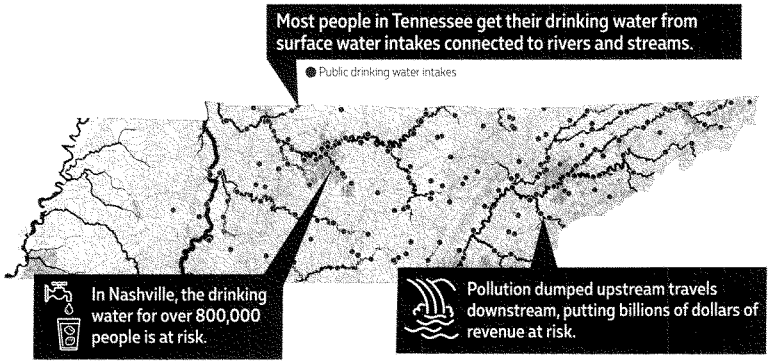
Tennessee's thriving breweries, wineries, and distilleries rely on clean water. Small Tennessee breweries contribute more than $1.1 billion to our economy every year and support 7,052 jobs.[9] Our winery industry is valued at $124.4 million and nearly half of the counties in Tennessee have at least one winery.[10] Our one-of-a-kind whiskey trail draws people from all over the world, and whiskey ranks as one of the state's top exports valued at $691 million.[11]



Tourism is Tennessee's No.2 industry. All 95 counties in Tennessee brought in more than $1 million from the economic impact of tourism in 2016.[12]

People come to Tennessee to visit the unique natural and historic attractions. Whether it's to visit one of our up-and-coming craft distilleries, whitewater raft in the Ocoee, or visit the Great Smoky Mountains – the places that draw people to Tennessee rely on clean water. The Great Smoky Mountains alone welcomes more than 9 million visitors annually that spent $818 million in the communities surrounding the park in 2011.[13]

TENNESSEE'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA. 2013. Water: Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-17.html. AND EPA. 2013. Water: Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html.

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[3] EPA. Analysis of Surface Drinking Water.

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[7] U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule. Page 53-54. Accessed at https://www.epa.gov/sites/production/files/2015-06/documents/508.final_clean_water_rule_economic_analysis_5-20-15.pdf.

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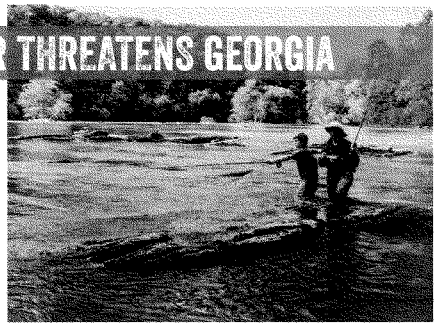
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[13] National Park Service (NPS). 2013. Great Smoky Mountains National Park Tourism Creates $818 million in Local Economic Benefit. Accessed at https://www.nps.gov/grsm/learn/news/tourism-local-benefits.htm.

ASSAULT ON CLEAN WATER THREATENS GEORGIA



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten Georgia's local economies, communities, and way of life.

Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States. [2]

WHAT'S AT STAKE IN GEORGIA?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least half of Georgians.[3]

Under the proposal by the administration and supported by industrial polluters, more than 55 percent of Georgia's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]



At least fifty-one percent of Georgians get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal.[5]

More than 5,500 miles of streams that feed into Georgia's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR GEORGIA

By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat, and supporting hunting and fishing.[7]

Protecting small streams and wetlands supports fish and wildlife and Georgia's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $4.6 billion was spent on wildlife recreation in Georgia, including $873 million on fishing, and more than 3.1 million people participated in wildlife related recreational activities in Georgia.[8]

Georgia tourism is reliant on clean water – people come from across the country to hike, bike, and paddle our rivers and trails. The Chattahoochee River National Recreational Area welcomed 2.7 million people in 2016, adding $166,687,300 in benefits to the local economy.[9]

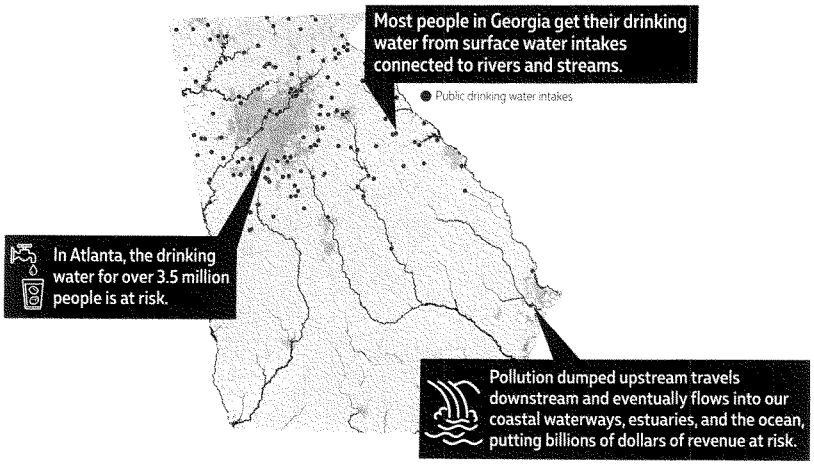


In Georgia, $11.3 billion is spent annually on canoeing, kayaking, and rafting.[10] A Georgian is more likely to participate in fishing than the average American, with 231,000 anglers taking a total of 590,000 recreational fishing trips in 2015.[11]

People come to Georgia for our mountains, coastline, and thriving cities – all which depend on clean water. The tourism industry is vital for the growth and prosperity of Georgia's economy, contributing a record-breaking $63.1 billion in 2017.[12]

Georgia's thriving brewing industry relies on clean water. Small Georgia breweries contribute more than $1.5 billion to our economy every year and support 10,895 jobs.[13]

GEORGIA'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA. 2013. Water, Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-17.html AND EPA. 2013. Water, Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html.

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[5] EPA. Analysis of Surface Drinking Water.

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[8] U.S. Department of the Interior, U.S. Fish and Wildlife Service, and U.S Department of Commerce, U.S. Census Bureau. 2011. National Survey of Fishing, Hunting, and Wildlife Associated Recreation - Georgia. Pages 5-8. Accessed at https://www.census.gov/prod/2013pubs/fhw11-ga.pdf.

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[11] The Outdoor Industry Association (OIA). 2017. The Outdoor Recreational Economy - Georgia. Accessed at https://outdoorindustry.org/wp-content/uploads/2017/07/OIA_RecEconState_GA.pdf. AND National Marine Fisheries Service (NMFS). 2015. Fisheries Economics of the United States. U.S. Dept. of Commerce, NOAA. Page 147. Accessed at https://repository.library.noaa.gov/view/noaa/15121.

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ASSAULT ON CLEAN WATER THREATENS ALABAMA



DESPITE THE FUNDAMENTAL NECESSITY OF CLEAN WATER, politicians in Washington are trying to dismantle the Clean Water Act, which has kept our nation's waters clean for nearly 50 years. This bedrock environmental safeguard is a central tool used by state and local governments to shield and protect clean water needed for healthy communities and families. Without it, polluted waters would threaten Alabama's local economies, communities, and way of life.

Allowing open dumping into upstream waters spells trouble for everyone downstream. Pollution dumped by industry flows from smaller streams into our rivers and lakes, across state lines and downriver, contaminating waters used by families and communities for drinking and recreation. The best way to protect clean water is to stop harmful pollution at its source, before it reaches our waterways.

The drinking water for nearly 20 million people in the South and 2 million miles of streams across the United States will be at risk if the administration's proposal becomes law.[1] The proposed rule would allow unlimited pollution dumping in a host of upstream waters, such as smaller streams, tributaries and millions of acres of wetlands. Estimates show this would eliminate safeguards for up to 60 percent of stream miles and end protections for most of the 110 million acres of wetlands in the contiguous United States.[2]

WHAT'S AT STAKE IN ALABAMA?

This plan would remove protections from drinking water sources for 117 million Americans. This includes the drinking water for at least half of Alabamians.[3]

CLEAN WATER IS BIG BUSINESS IN ALABAMA

- **$456 MILLION** SPENT ON FISHING
- **$615 MILLION** FROM LOCAL BREWERIES
- **$251 MILLION** FROM SEAFOOD INDUSTRY
- **$2.7 BILLION** SPENT ON WILDLIFE RECREATION

Under the proposal by the administration and supported by industrial polluters, more than 50 percent of Alabama's stream miles and millions of acres of wetlands nationwide will again be at risk from pollution and destruction.[4]

At least fifty-six percent of Alabamians get their drinking water from sources that rely on small streams that may lose critical Clean Water Act protections under the administration's proposal.[5]

More than 5,500 miles of streams that feed into Alabama's drinking water sources would be at risk for pollution if the Clean Water Act is rolled back as the administration plans.[6]

Thousands of acres of wetlands that provide flood protection, filter pollution, and provide essential wildlife habitat are at risk if the federal government moves forward with its plan.

ECONOMIC IMPACTS FOR ALABAMA

By EPA's own estimates, their proposed rule will put at risk at least $339 million and up to $572 million annually in benefits to Americans, including reducing flooding, filtering pollution, providing wildlife habitat, and supporting hunting and fishing.[7]

Protecting small streams and wetlands supports fish and wildlife, and Alabama's vibrant recreational industry. The U.S. Fish and Wildlife Service reports that in 2011 $2.7 billion was spent on wildlife recreation in Alabama, including $456 million on fishing, and more than 1.7 million people participated in wildlife related recreational activities in Alabama.[8] These small streams and wetlands also filter the water that flows into our largest rivers and lakes.

Alabamians are more likely to participate in fishing than the average American with over 831,000 anglers taking over 2,324,000 recreational fishing trips in 2015.[9],[10]

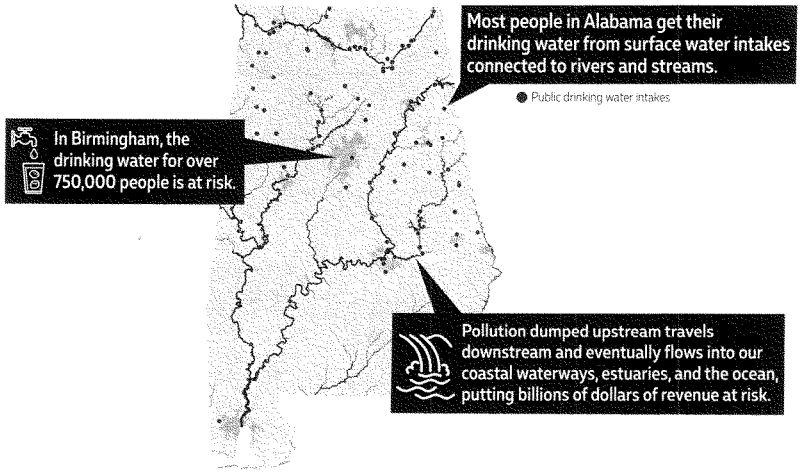
Alabama's seafood industry adds $251 million annually to the state's economy and supports 9,956 jobs.[11]



Teeming with plants and wildlife, Alabama's waterways are among the most diverse in the country. The number of aquatic species in Alabama is unrivaled, ranking 1st in the nation for the number of freshwater fish and freshwater turtles, with 332 species of fish and 27 species of turtles. [12]

Alabama's thriving brewing industry relies on clean water. Small Alabama breweries contribute more than $615 million to our economy every year and support 3,386 jobs. [13]

ALABAMA'S COMMUNITIES ARE INTERCONNECTED WITH WATERWAYS



For more information please visit **ProtectSouthernWater.org**

[1] U.S. Environmental Protection Agency (EPA). 2009. Analysis of the Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S. Accessed at: https://www.epa.gov/sites/production/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_results_state.pdf. Stream miles calculated using EPA. 2013. Water: Rivers and Streams. Accessed at https://archive.epa.gov/water/archive/web/html/index-12.html. AND EPA. 2012. Water: Rivers and Streams - Streams. Accessed at https://archive.epa.gov/water/archive/web/html/streams.html

[2] EPA. Water: Rivers and Streams – Streams. AND U.S. Fish and Wildlife Service (USFWS). 2009. Status and Trends of Wetlands in the Conterminous United States 2004 – 2009. Page 37. Accessed at https://www.fws.gov/wetlands/documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf

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[5] EPA. Analysis of Surface Drinking Water.

[6] U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule. Page 53-54. Accessed at https://www.epa.gov/sites/production/files/2015-06/documents/508.final_clean_water_rule_economic_analysis_5-20-15.pdf.

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[11] Byington, Pat. 2017. Who Knew? Alabama ranks first in biodiversity. How did that Happen?. BHAM NOW. Accessed at https://bhamnow.com/2017/10/30/knew-alabama-ranks-first-biodiversity/

[12] Brewers Association. 2016. Economic Impact by State. Accessed at https://www.brewersassociation.org/statistics/economic-impact-data/.

EARTHJUSTICE
Because the earth needs a good lawyer

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

June 12, 2019

The Honorable John Barrasso
Chairman
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Senate Environment and Public Works Committee
456 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Kevin Cramer
Chairman
Subcommittee on Fisheries, Water, and Wildlife
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tammy Duckworth
Ranking Member
Subcommittee on Fisheries, Water, and Wildlife
Senate Environment and Public Works Committee
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso, Ranking Member Carper, Chairman Cramer, and Ranking Member Duckworth,

On behalf of Earthjustice's millions of members and supporters, I write to you today in light of the Senate Environment and Public Works Committee's hearing entitled, "A Review of Waters of the US Regulations: Their Impact on States and the American People," to share our concerns regarding the disproportionate impacts the EPA and Army Corp's Revised Definition of "Waters of the United States" proposed rule, or the "Dirty Water Rule," would have on already disenfranchised communities across the country.

The Dirty Water Rule seeks to strip Clean Water Act protections from an overwhelming number of waterways across the country, including a large proportion of upstream waters and millions of acres of wetlands. These waterbodies play a vital role in feeding the drinking water sources for millions of people, naturally filtering pollution, as well as providing vital wildlife habitats and outdoor recreation opportunities.

As the title of the hearing suggests, the committee intends to review the "impacts on states and the American people" of the Waters of the U.S. regulations. It is therefore vital to point out the disproportionately high effects the Agency's recently proposed rule would have on low-income, tribal, and communities of color.

The Agencies own economic analysis admits that limiting Clean Water Act jurisdiction is expected to increase water pollution which will, among other things, lead to increased sedimentation and drinking

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water treatment costs.[1] Increased drinking water treatment costs disproportionately burdens low-income populations, communities of color, and indigenous people. According to the US Conference of Mayors, low-income households already pay higher water bills in relation to income.[2] There is also evidence that these burdens fall along racial lines, as one study found that a "higher reported cost of water and sewer was associated most strongly with minority racial status."[3] Adding a higher pollution load to these already strained systems will further add to the drinking water affordability crisis that many communities across the country are facing.

Further, while the Agencies acknowledge that drinking water treatment costs will rise as a result of the Dirty Water Rule and there is ample evidence that low-income and communities of color bear a disproportionate burden of these higher water treatment costs, the Agencies failed to conduct any meaningful analysis, to alert environmental justice communities of these likely effects, or to in any way address these anticipated disproportionate impacts, as is required by Executive Order 12,898.[4]

Beyond the environmental justice implications mentioned here, the Dirty Water Rule is also contrary to law, to science, and to the intent and purpose of the Clean Water Act. For more information regarding why the Agencies should withdraw this flawed proposal, see our comments submitted to the docket on behalf of the Sierra Club, National Association for the Advancement of Colored People (NAACP), Puget Soundkeeper Alliance, Idaho Conservation League, Pacific Coast Federation of Fishermens Associations, Institute for Fisheries Resources, Tucson Audubon Society, and Southeast Alaska Conservation Council.[5]

It is vital that the committee recognize the Dirty Water Rule for what it is: a threat to clean drinking water and the largest attack on the Clean Water Act since it was enacted in 1972.

Thank you for your consideration.

Sincerely,

Jenifer Collins
Legislative Representative
Earthjustice

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[1] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Economic Analysis for the Proposed Revised Definition of "Waters of the United States," at p.133 (Dec. 14, 2018), https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[2] The United States Conference of Mayors, *Growth in Local Government Spending on Public Water and Wastewater – But How Much Progress Can American Households Afford?* at p. 11 (April 2013), https://www.circleofblue.org/wp-content/uploads/2013/06/USMayors_Growth-in-Local-Government-Spending-on-Water-and-Wastewater.pdf.

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[4] 59 Fed. Reg. No. 32.

[5] Comments submitted to EPA-HQ-OW-2018-0149 at https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-4343.

Senator BARRASSO. Chairman Cramer.

Senator CRAMER. Thank you, Mr. Chairman.

Mr. Elias, I appreciated your illustration about the dry skin. It reminded me, coming from the semi-arid climate of North Dakota to Washington, DC, the one thing my wife often says in the summer is that this climate is good for your skin, but it is bad for your hair.

[Laughter.]

Senator CRAMER. So, we are adjusting.

There is another saying of mine that comes to mind as I listened to several of my colleagues ask questions, and that is I am fond of saying, Commissioner Goehring, to the Federal Government, please don't impose your mediocrity on our excellence. We are forever trying to dumb down to be more like the Federal Government, and I don't know why we would ever want to do that.

I want to ask you, Commissioner Goehring, a very simple and direct question regarding the pending litigation. Again, there is this other issue of the environmental discussion, but there is a legal issue here that we sometimes like to forget about, and it is the one that North Dakota is leading in Federal court.

Do you think it is imperative during the stay and during the rulemaking process that the litigation in North Dakota continues to go forward?

Mr. GOEHRING. Chairman Cramer, yes, absolutely.

Senator CRAMER. And why?

Mr. GOEHRING. Because of the patchwork of court decisions that exist for the multiple States out there. I believe there are 26 States that have some sort of stay, but it is all founded on different issues that have been brought forward within the courts. We need a final rule so that we can operate with some certainty.

Senator CRAMER. So whether that rule come from a final rule that is upheld or litigation, we need to get to some finality, and I would agree with you; I hope that that can continue.

With that in mind, and the blocking of the rule in North Dakota district court nearly 3 years ago, many critics, as we are hearing today of the new rule, have characterized the 2019 rule as a rollback of water regulations. I think it is important to remember there is not a rollback of something that has been deemed illegal. In fact, over the decades the Supreme Court continually kicks this thing back because it goes too far, and that is why there hasn't been a rule.

In your role as Commissioner, I know that you sit on lots of other commissions both in official or voting capacity, as well as ad hoc, and one of those commissions, of course, is the North Dakota Water Commission. Given all that we have just been talking about and the fact that there has been a stay for the last 3 years, the ultimate conclusion that we draw from some of our friends on the other side of this debate would be that those other 25, 26 States, the water quality must just be horrendous, given that the Obama rule hasn't been in place for the last 3 years.

Is it your experience as a member of the Water Commission in North Dakota that North Dakota's water is getting worse as a result of the rollback of the Obama rule?

Mr. GOEHRING. Senator Cramer, actually, that is probably what has been confusing for me in all of this discussion, is, as I have stated before, the Clean Water Act is in place; States have to adhere to it. Whether you choose to have more stringent laws and regulations in place is up to your State, but you still have to work within the confines of the Clean Water Act. Whether the Federal Government has it or not isn't going to mean you have any cleaner water, what it does mean is how do you mitigate and manage those resources, and that is really what it is about. And most States, the colleagues I work with, have a very good understanding of what is in their watersheds and how to deal with it. In fact, you can work with EPA to get extra funds to deal with some unique situations in your State also.

Our water quality has continued to improve in parts of our watershed, and there are places where we have—because of topography, because of nature, and because of the geology, some have impacted waters, and we continue to try to deal with nature to address those issues. Those are places where agriculture doesn't even exist, where, quite frankly, it is more residents and residential properties and lake homes that have provided more problems and impacts for us.

So I get a bit frustrated at times when we try to help and bring solutions to the table when sometimes they are pointing the finger at agriculture. It is not agriculture. In fact, I am proud of how much farmers and ranchers have contributed to the success of managing the resource in the United States. Since 1996, USDA, I believe, recorded 100 million tons of topsoil every year it saved from wind and water erosion because of conservation practices and systems that have been put in place, and because of new practices and technology in precision agriculture we are doing a much better job with managing the resource and protecting it.

Senator CRAMER. Thank you.

Senator CARPER. Would my colleague yield to me for just 15 seconds, if you don't mind?

Senator CRAMER. Sure.

Senator CARPER. I am glad to hear what you are saying about conservation and how we do good and do well at the same time through smart conservation practices. I would just have us keep in mind one of the things that concerns folks on our side, and maybe some on your side, is that the Clean Water Act will not apply—will not apply—to waters removed under the Trump WOTUS rule. Will not apply. That is one of the reasons we are concerned.

Senator CRAMER. I yield back. Thank you.

Senator BARRASSO. Senator Braun.

Senator BRAUN. Thank you, Chairman. For me, this is a dear subject because I am actively involved in forestry and farming on the weekends and still manage my tree farm and deal with about seven or eight different farmers, and I am avid outdoorsman. I am a member of the Nature Conservancy. So I have the whole swirl of what we are talking about here.

All I would like to say is that over the last 30 years—I remember when we couldn't fish out of our local river because, just like I was worried about it then, something needed to be done. We now can-

not only fish, we can eat the fish out of that river and feel safe about doing it.

I know what farming practices were like 30, 35 years ago, and it was before no till. It was before farmers didn't really realize the value of every grain of dirt on their farm, and now do, I think, almost anything they can do to make sure to preserve it. I don't want to backslide.

Then I get home about a month ago and was at one of our local restaurants and had three different farmers come up to me. They let me finish my meal and then they wanted to talk about WOTUS, and I said, well, you know, I know a lot about it. You know, I have been involved in farming. I knew the three farmers personally.

What had happened with them, and the question that I am eventually going to get to is how the current rules, the variability between States in terms of enforcement, but they, in the history of the EPA and up until a year ago, never had a conservation officer run them down over their 160 acres because they saw them out there doing ditch maintenance in ditches that generally don't have water in them other than just maybe a month or 2 out of the year.

And then I found out that it was not the Corps; it was not the EPA; it was, in our case, IDEM, Indiana Department of Environmental Management, and the Department of Natural Resources that were in overdrive even in the context where I think there is a sense of a little bit of movement back to where farmers and States are being recognized as having as vested an interest as the Federal Government or the EPA would in their own well being and the health of their farms.

I was surprised that after I had that discussion, I encouraged the State rep and senator to have a few meetings. Two hundred-fifty farmers showed up from a county that is not large. That told me that it was important. They felt that it was the State that was maybe more actively enforcing than what the Corps of Engineers and the EPA representative figured that needed to be done. So, they had that whole ball of confusion.

Start with Doug and Todd, if you want to weigh in. Tell me what is happening in your States. And are we just caught in this crossfire of people so confused that don't know what the degree of enforcement ought to be? Comment on that, please.

Mr. GOEHRING. Senator Braun, you are very much correct in that farmers and ranchers are confused about who they need to run to, what permit are they going to have to purchase, and how are they going to have to address some perceived issue or potential issue on their farm. States are very aggressive, maybe not all States, and I am sure they operate at different levels of activity depending on how much they are intimate with that resource or issues made about it.

We have done a lot of work in our State to make sure that where we have drainage ditches that they are maintained properly, that they have the right amount of slope to them, that the vegetation exists, and also access to that, because any surface water coming in, you do need to monitor that. We do monitor it. Between the Department of Environmental Quality and the Ag Department in my State, we do monitor surface water for certain things, and we make sure that we adhere to the Clean Water Act. Even if it is waters

of the State that we are managing, the Clean Water Act is still applicable.

And if I could address something earlier that Senator Van Hollen had said, he is absolutely right about the benefits of wetlands; they do filter, and they do work. That is why, under Swampbuster, you can't just drain a wetland. And I think we have to keep everything in mind and think about the holistic approach that is already in place and the laws that are there. We just have to be careful that we don't put more burden on those farmers and ranchers and those that are operating and managing and producing out there on the land.

Senator BRAUN. Past my time.

Could Todd come in on that quickly?

Senator BARRASSO. Mr. Fornstrom.

Mr. FORNSTROM. The thing that always comes to mind when we talk about regulations like this is the idea that farmers are trying to do the least amount they can to pass a regulation, and that is maddening to me. Farmers and ranchers have been here since the dawn of time in this country, and they will be here 'til the end; and they have to live there, and they work on that land, and they are there to make money.

They are there to live there. They are going to pass it down to their grandkids, and they got it from their grandparents. The idea that they want to pollute and rape and pillage is crazy. I have no idea where that comes from. If it has been done in the past, it is in the past. What we have done now is we improve. The way that we farm now is like you said, way better than it used to be. Our organic material, our irrigation maintenance, our GPS driven tractors, they have done nothing but improve the soils, the land, and the water.

Senator BRAUN. Thank you very much.

Mr. FORNSTROM. Thank you.

Senator BARRASSO. Senator Cardin.

Senator CARDIN. Let me thank all of our witnesses.

I certainly want to underscore that the success of the Chesapeake Bay program in our region is because all of the stakeholders have bought into the responsibilities, including our farmers. The farmers in Delaware, the farmers in Maryland, the farmers in Virginia, the farmers in Pennsylvania, New York, West Virginia all understand the importance of clean water, and they are part of the process that we use in order to determine the responsibilities for clean water.

So I agree with—they want to do the right thing, but let's be also clear that the largest source of pollution going into the Chesapeake Bay is from farming operations. The largest increase in pollution is coming from runoff, but the largest single source is still from farming, so it is an issue.

And in regards to the importance of wetland—and I know that Senator Van Hollen talked about that—but recognize it is the intermediate and ephemeral waterways that are critically important to the preservation of wetlands. So, if we are not regulating waters that end up into the navigable waters of America, we are in danger of losing our wetlands, and that is very true with the definitions that have been debated here and what the experts tell me would

be the result of what this Administration is suggesting as the definition of waters of the U.S.

Now, the courts caused this issue more so than Congress, in my view. We have been in a state of confusion since the Supreme Court decisions and Federal court decisions, and there have been efforts made to try to get us back to where we were prior to the court decisions. There has been disagreement about that.

One thing is clear that I think everyone can agree upon: there is confusion that needs to be clarified. The lack of certainty is the worst situation for someone to be in, to know whether they can do something or can't do something. So we really have to figure out a way to get together and get a rule that makes sense. But I would urge us to recognize that the waters that we are talking about that are not the direct waters, but lead into the navigable waters, are critically important for clean water; they are critically important for our farmers; they are critically important for public health and drinking water, et cetera.

So, to just say that these are potholes, or we are trying to regulate that, I don't think advances the debate, so I would just urge us to recognize that we have to find a common sense way to deal with this, and to me, I am very much influenced by what the scientists tell us, what the experts tell us. We have a great model in the Chesapeake Bay program. It really has the confidence of all stakeholders, and I would urge that model be used as a way of trying to get us all together on this particular issue.

So, Mr. Chairman, I have been following this hearing. I appreciate the fact that we have a hearing, because I think it is important for this Committee to be actively engaged. I do recognize that all three branches of Government have weighed in on waters of the U.S., and that is part of the problem, but it is up to the Congress to make the final judgments here, and I would hope that we could perhaps use this Congress where we have a House controlled by Democrats, the Senate controlled by Republicans, as a way of listening to each other and coming up with the right solution. I don't believe the rule suggested by the President is going to be the right answer, and I would urge us to take a more active role.

Senator BARRASSO. Thank you, Senator Cardin.

Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman.

I also would like to talk a little bit about agriculture. The Obama administration's EPA stated their Waters of the U.S., the WOTUS rule, circumvented agriculture, claiming farmers and ranchers were protected from regulation by exempting them from 404 permits under 404(f) of the Clean Water Act. In truth, the permitting exemption for ordinary farming and ranching activities was meaningless.

Farmers were told that they would not be subject to the WOTUS rule unless they were performing a new farming activity; any continued farming would be exempted. However, Senate report conducted by this Committee found examples proving that this is not the case.

In 2015, the U.S. Army Corps of Engineers told a landowner that changing the use of a field from growing alfalfa to orchards would constitute a land use change that would allow Corps regulators to

pursue enforcement actions if plowing the field to plant trees involved a discharge to wetlands.

The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch, so they are not the same kind of farming and might not be considered a normal farming activity.

According to testimony presented to the EPW Committee, the 5-year western drought has forced some farmers to shift their operations from one agriculture commodity to another. However, according to the Corps, planting a different commodity crop is a change in use that eliminates the ordinary farming exemptions.

So these get into all of this stuff. And I agree with Senator Cardin; we have to come up with a common sense approach. But what we are dealing with now, you can imagine the frustration, and you know the frustration that farmers are feeling, Mr. Goehring, as they go through these processes dealing with the bureaucracy.

I guess the question is, Mr. Goehring, knowing what we know now, do you believe the Obama administration's WOTUS rule was good for agriculture?

Mr. GOEHRING. Senator Boozman, I had a great deal of concerns, and that is why I was very supportive of when we filed a lawsuit and asked for an injunction, a stay. The same things that you referred to were the same conversations we had with EPA about what constitutes a change in agricultural practices and what happens when we change crops. You are exactly right, everybody said we are going to deal with this case by case. The problem is you never had a consistent answer depending on who you talked to.

And if a producer all of a sudden wanted to go from raising sunflowers and row crops to cereal grains, or that was part of their rotation, or all of a sudden they put alfalfa in the mix because we do that for soil health, or pulse crops, the problem was it was perceived as a different farming practice, so all of a sudden it could be detrimental or perceived detrimental, and it was going to be harmful for those agriculture producers. A normal common practice would have constituted a permit or permission to actually farm and ranch in a responsible manner.

Senator BOOZMAN. And you would have cases that the rotation, as was done, because farmers do want to take care of their soil, not being allowed to do that or the bureaucracy involved in doing such, you would actually hurt the soil if you didn't do it. Would that be correct?

Mr. GOEHRING. That is absolutely correct. Even the incorporation of cover crops could be perceived as a different farming practice because you aren't managing them the same way that you would have managed a cereal grain or a row crop.

Senator BOOZMAN. It is sad that you get into all these Catch-22 situations, and the poor farmer is doing his best and trying to operate under the rules. And again, nobody cares more about—because it is their living—taking care of the soil and doing the best that they can to prevent things that disadvantage the quality of water. So thank you very much.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Boozman.

Senator Merkley.

Senator MERKLEY. Thank you very much.

Oregon is an agricultural State that has a huge diversity of what it grows; dryland wheat to every possible crop, the Willamette Valley to orchards. I go around the State, and I do a townhall in every county every year; so we have 36 counties, the vast majority of which are agricultural counties, and during this conversation about WOTUS the question I asked was does anyone have a specific example of where they have been impacted in a negative way by the existing rules. So far, the answer has been zero.

So I found the whole conversation, the emotional intensity of it, very interesting because no one in Oregon could point to a single obstruction. And that led to a conversation about all the exemptions that are in the existing law; upland soil and water conservation practices, agricultural stormwater discharges exemption, return flows from irrigated agricultural exemption, construction and maintenance of farm or stock ponds or irrigation ditches, management of drainage ditches, construction or maintenance of farm, forests, and temporary mining roads.

My farmers said, you know, we are worried; we are being told by the national that we have something to fear because somehow something might happen to us, but not one example over these years of this conversation. So, it is an interesting insight on perhaps how there has been a determination to elaborate on a set of fears in kind of a political context, fears that certainly in my State, with an incredible diversity of both irrigated and non-irrigated land, haven't manifested themselves.

So I just wanted to make that point and continue to extend the invitation to all of my farmers, because it has been years now that I have been extending this invitation to point to an actual challenge that they have encountered.

Now, we change crops all the time in Oregon. Our Willamette Valley, you can grow anything. We grow flowers for export; we grow grass seed. We grow everything you can imagine. We have the largest production of hazelnuts, we have pears, we have apples, we have cherries. We grow it all. People swap crops all the time, and that is why I find the conversation that was just held quite interesting, because not a single example of an actual hurdle reached.

So, I am just going to conclude by saying that invitation still exists, because it is one thing to have actual obstacles, and then we can have a conversation about those actual obstacles. It is another to have a highly politicized debate that completely kind of misrepresents the real challenges in the agricultural world, and I fear that is where we have ended up, kind of a polarization that is so common in some many issues that we wrestle with. We need more problem solving; we need less polarization.

The people of Oregon care profoundly about the quality of their water. We have an incredible system of wetlands and streams and lakes. They care a lot about what comes into their—our water largely comes from surface water, our drinking water, so people really care about the quality of the water. But we don't have some big battle going on of the nature that is being suggested in this dialogue, in this conversation. We don't find any incompatibility be-

tween clean water for drinking or the health of our streams. We value our salmon; we value our fish, so I think Oregon is a case model in how you can have both good agricultural, strong agricultural practices and you can have very high water quality standards, so maybe I would invite anybody who wants to follow up with problems they are experiencing in their State to come join us for a conversation in Oregon.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much.

Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman.

Thank all of you for being here.

Before I begin, we have talked a lot about agriculture, but the WOTUS rule has had effect in other different arenas that I want to get into a little bit later, but one is I would like to ask unanimous consent to add to the record a letter on behalf of the West Virginia Golf Course Superintendents Association supporting a redefinition and clarification of this.

Senator BARRASSO. Without objection.

Senator CAPITO. Thank you very much.

[The referenced information follows:]

The Honorable Shelley Moore Capito (R-WV)
Senate Environment and Public Works Committee
172 Russell Senate Office Building
Washington, D.C. 20510

June 12, 2019

Dear Senator Capito:

On behalf of the West Virginia Golf Course Superintendents Association, please accept this letter to the Senate Environment and Public Works Committee as it reviews the ongoing efforts to rewrite the 2015 Clean Water Rule, more commonly known as the "Waters of the United States Rule" or "WOTUS."

West Virginia GCSA, a chapter of the Golf Course Superintendents Association of America, supports the efforts to replace WOTUS with a rule that better defines those waters subject to federal jurisdiction under the Clean Water Act. WOTUS so poorly defines such water features as tributaries and wetlands that, if unchanged, would result in an expensive, unpredictable, and unnecessary permitting process for golf courses in West Virginia and across the country. Golf supports a rule that protects the principles of cooperative federalism with the Clean Water Act, while recognizing the role that responsible parties, including golf course superintendents, play as land managers and environmental stewards.

Of the 150 acres on an average golf course, 11 acres are comprised of streams, ponds, lakes, and/or wetlands. Additionally, golf course landscapes are designed to manage surface water runoff from neighboring residential and commercial properties. These waters often enter our properties in a degraded state. However, water quality testing consistently shows these waters to be cleaner when exiting the golf courses. This is due to sediment filtration provided by healthy turfgrass and the science-based agronomic and environmental best management practices that our superintendents utilize.

We are proud of our stewardship efforts. To continue these proactive conservation practices, we must have clear rules. 94% of golf facilities are classified as small businesses and many operate on slim margins. However, golf faces the same legal requirements – and burdens – under the Clean Water Act, as other industries for its activities on, over, or near "Waters of the United States". Basic projects vital to golf course operations – such as planting trees, installing drainage, and fixing stream alignments – can trigger the hiring of environmental scientists, ecologists, and engineers for environmental assessments, permitting, and mitigation efforts. In other words, the financial impact of these actions can be substantial.

That is why it is so important to clarify jurisdictional waters while respecting the balance of cooperative federalism under the Clean Water Act. The lack of clarity in WOTUS would have significantly harmed golf courses trying to do the right thing while efficiently managing our business. We appreciate the efforts in the Administration and Congress to produce a better rule.

In closing, proactive management of these resources helps to minimize excessive federal regulation while supporting state and local efforts. By properly managing water on our properties, the golf industry will continue to provide environmental, economic, health, and charitable benefits to our communities and watersheds.

Sincerely,

Anthony Coppa, President
West Virginia GCSA

Nicholas Janovich, Golf Course Superintendent
Oglebay Resort, Wheeling, WV

Senator CAPITO. That might help my golf game, although I doubt it. Yes, good luck with that.

Commissioner Goehring, I know that this may not be in your bailiwick, but North Dakota and West Virginia have energy production. Certainly, you have the Bakken and we have Marcellus and Utica plays, and we are very excited about the energy production. I am just wondering, with the rapid acceleration of the discoveries there, much like what we have in our area, in the Marcellus Shale arena, what kind of impacts this WOTUS rule has on the energy production and the ability to continue the full exploration of our resources.

Mr. GOEHRING. Senator Capito, thank you. Actually, part of this is in my portfolio.

Senator CAPITO. Well, good.

Mr. GOEHRING. I have oil and gas production through the Industrial Commission that I serve on, so I am very well aware of energy in our State, both coal and oil and gas.

We have had concerns, or I should say the industry, energy industry has had concerns as to what does this mean with respect to how they access water, how they manage water, and how they will treat water, and they have actually expressed more concern making sure that the farmers and the ranchers in the area and the watershed itself is being managed properly and has proper oversight, because they fall under the jurisdiction of the Department of DEQ in our State and under the Industrial Commission or the Department of Mineral Resources. So, we have played that role of providing that oversight and that regulatory oversight and making sure that they manage properly.

They haven't expressed a whole lot on WOTUS, knowing that they already answer to us when we regulate them, and it is our job to make sure that we adhere to the Federal law and to the State laws that exist. So I haven't heard a whole lot of comments back from the energy industry on this issue other than they are concerned with how it is being managed throughout the entire watershed.

Senator CAPITO. OK, thank you.

The original Obama rule was called the Clean Water Rule, and this is being touted as President Trump rolling back the Clean Water Rule. Sounds terrible, doesn't it? So, I think if we talk about the politicization of where we are going here, I think we need to keep in mind that our goals are all basically the same; it is just how are we going to get there.

So, I am a bit confused on the wetlands conversation because I heard—Senator Cardin and I share the Chesapeake Bay watershed issues from a different perspective, being at the headwaters in West Virginia. He expressed concerns that wetlands would be influenced, disrupted, be able to be dismantled, et cetera, under this new rule. You said—just half an hour ago, probably 20 minutes ago—that this is a great filter for clean water and that it is a very protected region.

How do I square those two comments?

Mr. GOEHRING. Well, I think that is interesting because it goes back to a State managing their own resources. Wetlands may appear different in different areas. For example, if you have an

ephemeral stream that may be feeding a wetland, it may be a closed basin. It serves in the same way, in the same manner of filtering water that then ends up into subsurface water systems.

But when you are talking about—and I will use North Dakota because I know that a whole lot better. We have a lot of these shallow water depressions that exist from glacial activity, and it is through rain events or maybe even heavy snowfall during the winter, and it is a concentration of those waters that can be miles away from any intermediate stream or within the watershed it would be so difficult because there is no surface connection, which I find, at least in this new proposed rule, in the 2019 proposed rule, they talk about the intermittent streams as having seasonal flow, and that would be jurisdictional.

And I get that, and I haven't heard very many people actually argue on that, because it could be runoff from the mountains. But at least on some of the ditches and the ephemeral streams, if it is just a rain event, 6-inch rain event in the area, that would not be.

Now, that brings a lot of comfort and peace to a lot of agriculture producers because now they understand what is going to constitute or at least there is some predictability as to what is going to be considered jurisdictional.

Senator CAPITO. Right, and that goes back to also the point that I think Senator Cardin made quite well, the uncertainty.

And then when we look at what States is this working for, well, the vast majority of the States it is not even in effect, so you can't say that just because it is working in certain States, whatever the type of agriculture they might have or interactions, the remaining States—as you made a great point, we are all created different here, so it is going to have different impacts in different areas.

Thank you very much.

Senator BARRASSO. Thank you very much, Senator Capito.

Mr. Fornstrom, Section 404(f) of the Clean Water Act clearly states that farmers and ranchers should not need permits from the Corps for normal farming, for cultivating forestries, and for ranching activities. Should not need a permit. In the past, I believe the Corps has incorrectly interpreted the provision; the Corps has demanded that farmers and ranchers obtain permits under the Clean Water Act.

Beyond a new WOTUS rule, is more clarification needed to address this issue?

Mr. FORNSTROM. Thank you, Senator. Definitely more clear lines of knowing whether we are talking about ephemerals or whether we are talking about navigable water. All of those are necessary so farmers and ranchers can tell what they are dealing with. The Corps has misinterpreted some things, and I really wanted to challenge Senator Merkley and give him his first example, because in California we do have an example of it, of a crop change where a certain individual was fined in the millions, until they figured out that the CRP that it had been in for two terms, was farmed before and it was a misinterpretation by the Corps.

With that, it brings me to the idea that dealing with the Federal Government isn't like dealing with the States and isn't like dealing with the locals. Dealing with the Federal Government is intimidating, one; and for two, they don't understand the area like the

local people do, like the States do, and understand the prairie potholes in North Dakota that I have never heard of.

There is a lot of clarification that would be very helpful.

Senator BARRASSO. Well, we will make sure that Senator Merkley is aware of the example that you brought, and if you have others, we will make them also a part of the record. So I would ask anyone who has that information to get it to us, and we will include that as part of the permanent record of this hearing.

Mr. FORNSTROM. Thank you.

Senator BARRASSO. Thanks for that.

Commissioner Goehring, in the Clean Water Act, Congress clearly stated its intent. It says to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources.

Do you believe the new proposed WOTUS definition more faithfully implements this Clean Water Act and preserves States' primary authority over land and water?

Mr. GOEHRING. Senator Barrasso, I absolutely believe so. Simply stated, because it puts the accountability back where it needs to be. If we understand the resource, we already have the responsibility, we have primacy, and we have the cooperators' agreement with EPA. They hold us accountable for making sure that it is implemented and implemented properly.

Senator BARRASSO. Mr. Fornstrom, as you know, under previous versions of the Waters of the U.S. Rule, landowners have been forced to hire expensive consultants—you raised that in your statements—in order to determine if their land was jurisdictionally under the Clean Water Act, because you just can't tell how people are going to rule. Do you think it is fair for our farmers and ranchers to bear that level of regulatory burden?

Mr. FORNSTROM. I think our Constitution tells us that we should be able to read things simply and be able to tell for ourselves what we do and don't do.

Senator BARRASSO. You mentioned that you have a personal interest in protecting the water on your property. We heard about your son, who has now finished his first year at West Point. We heard about your family, the work that you do with your father, your brother. Can you please talk about just the everyday practices that farmers and ranchers use to responsibly manage the water on their land?

Mr. FORNSTROM. I would start with, whether it be conservation tillage, minimum till, no till, all of those things are utilized in different ways and different farms. We use low pressure water systems to save water, to help infiltration rates reduce. We use GPS. There are a lot of things that farmers do that not only helps their bottom line, but it is good for the soil, and what is good for the soil is good for the farmer.

Senator BARRASSO. Commissioner Goehring, anything you would like to add to that?

Mr. GOEHRING. I think it has been well said.

Senator BARRASSO. Thank you.

Senator Carper.

Senator CARPER. A couple more unanimous consent requests, Mr. Chairman, if I could. The first, I would ask unanimous consent to submit comments and an opinion piece from former members of the EPA Science Advisory Panel that reviewed the science report in the 2015 Clean Water Rule and find that the proposed Trump rule ignores or misrepresents the results of over 1,200 studies that form the foundation for that WOTUS rule. I ask unanimous consent.

Senator BARRASSO. Without objection.

[The referenced information follows:]

June 07, 2019

Dear Chairman Barrasso and Ranking Member Carper:

As members of the previous EPA Science Advisory Panel that reviewed both the Connectivity Report and the 2015 Clean Water Rule, we submitted comments in response to the proposed Rule "Revised Definition of 'Waters of the United States" (84 FR 4154; Docket ID No. EPA-HQ-OW-2018-0149), published in the Federal Register on February 14, 2019. We have provided an overview of those comments below, which – along with our full comment letter – we ask that you include as part of the record and joint hearing entitled, *"A Review of Waters of the U.S. Regulations: Their Impact on States and the American People."*

Sincerely,

Dr. Mažeika Sullivan
The Ohio State University, Columbus, Ohio

Dr. Mark Rains
University of South Florida, Tampa, Florida

Dr. Amanda Rodewald
Cornell University, Ithaca, New York

Dr. Mark Murphy
Hassayampa Associates, Tucson, Arizona

OVERVIEW OF COMMENTS

As members of the former SAB panel that reviewed the Connectivity Report and the subsequent 2015 CWR, we strongly oppose the proposed Rule. The justification for the proposed Rule ignores or misrepresents much of the Connectivity Report and subsequent SAB review, and draws incomplete or incorrect conclusions. Therefore, the proposed Rule is inconsistent with the best available and most current science. It relies on case law, rather than a solid scientific understanding of waterbody connectivity and the complexity of drainage network and watershed processes, and the key functions that streams and wetlands provide, from local to

watershed scales. Ephemeral streams, as well as non-floodplain wetlands would lose protection, and the proposed Rule opens the door for future loss of protections for intermittent streams. The impacts of the proposed Rule will be dire, with the likely loss of protections for millions of miles of streams and acres of wetlands in the conterminous U.S. *The net result is a rule that would have severe and long-lasting negative consequences for water protection, environmental conditions, and human well-being throughout the U.S.*

Here, we provide a summary of concerns assembled by some members of the former SAB panel, which are described in detail in our full comment letter:

- The 2015 CWR is based on an established science of waterbody connectivity supported by the Connectivity Report and buttressed by recent literature. The proposed Rule is not based on sound science, nor does it provide any comparable body of peer-reviewed science to support the proposed changes.
- The proposed Rule rests on physical, hydrologic connectivity, and ignores chemical and biological connectivity, which is in direct contrast with the intent of the CWA to protect chemical, physical, *and* biological integrity.
- The proposed Rule misinterprets recommendations made by the SAB, and fails to recognize that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters.
- The proposed Rule's grounding in structural connectivity is weak and its treatment of functional connectivity is non-existent.
- The proposed Rule ignores groundwater connectivity and fails to account for broad watershed processes and the cumulative, aggregate effects of waterbodies.
- Although the agencies (US Environmental Protection Agency [US EPA] and Department of the Army [Army]) state that the proposed Rule would establish jurisdiction under the CWA in a clearer and more understandable way, the proposed Rule is, in fact, unclear.
- The proposed Rule seems to leave open the possibility that human activities can lead to removal of protections for intermittent streams and additional wetlands.

As members of the previous SAB panel that reviewed the Connectivity Report and the 2015 CWR, we are intimately familiar with the science supporting the 2015 CWR and the critical role played by the CWA in protecting our Nation's waters. We strongly oppose the proposed Rule, which we find to be inconsistent with science, based upon flawed logic, and too ambiguous for decision-making.

Sincerely,

S. Mažeika P. Sullivan[1], Mark C. Rains[2], Amanda D. Rodewald[3,4], Genevieve Ali[5], Emma Rosi[6], Kurt D. Fausch[7], Jennifer L. Tank[8], Robert P. Brooks[9], Michael N. Gooseff[10], M. Siobhan Fennessy[11], Mark T. Murphy[12], Judy L. Meyer[13], J. David Allan[14]

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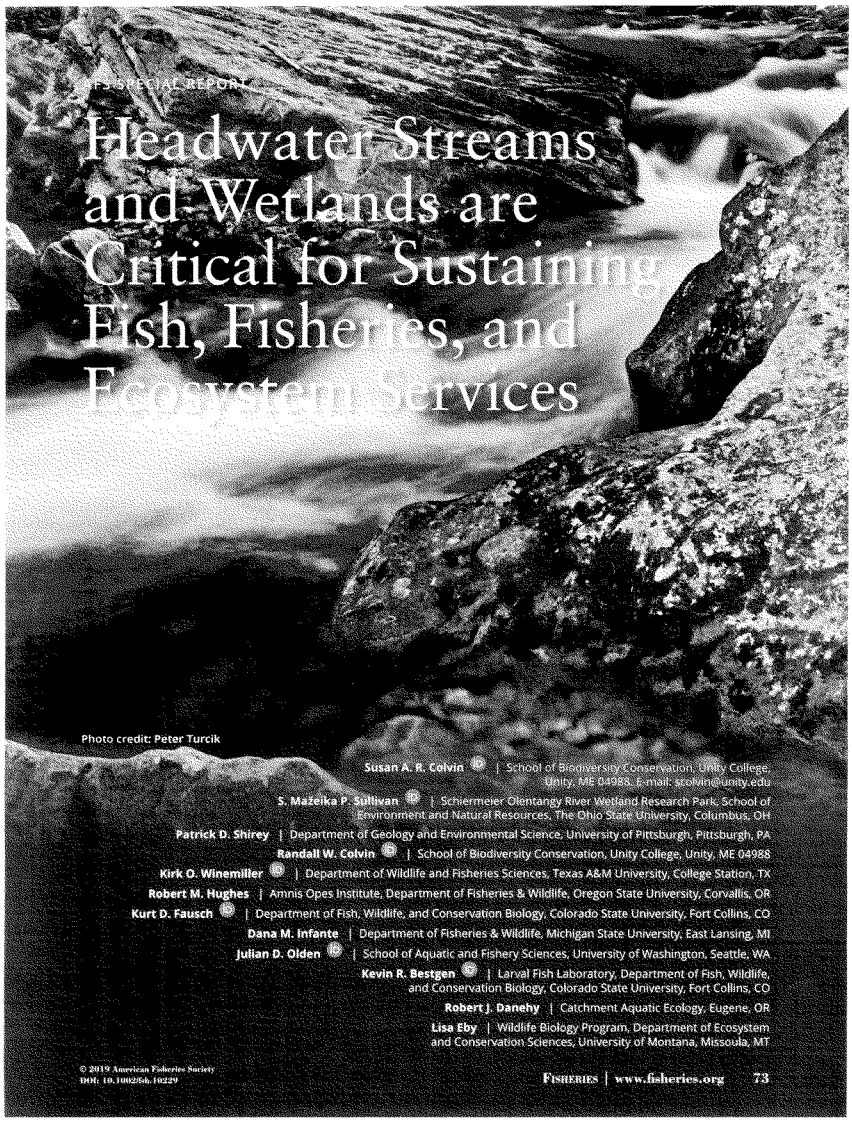
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Senator CARPER. And the second unanimous consent, if I could, I would ask unanimous consent to submit a special scientific report in the Fisheries journal that confirms the critical role of headwater streams in sustaining fisheries and ecosystem functions.

Senator BARRASSO. Without objection.

Senator CARPER. Thank you.

[The referenced information follows:]



FISHERIES SPECIAL REPORT

Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services

Photo credit: Peter Turcik

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Headwater streams and wetlands are integral components of watersheds that are critical for biodiversity, fisheries, ecosystem functions, natural resource-based economies, and human society and culture. These and other ecosystem services provided by intact and clean headwater streams and wetlands are critical for a sustainable future. Loss of legal protections for these vulnerable ecosystems would create a cascade of consequences, including reduced water quality, impaired ecosystem functioning, and loss of fish habitat for commercial and recreational fish species. Many fish species currently listed as threatened or endangered would face increased risks, and other taxa would become more vulnerable. In most regions of the USA, increased pollution and other impacts to headwaters would have negative economic consequences. Headwaters and the fishes they sustain have major cultural importance for many segments of U.S. society. Native peoples, in particular, have intimate relationships with fish and the streams that support them. Headwaters ecosystems and the natural, socio-cultural, and economic services they provide are already severely threatened, and would face even more loss under the Waters of the United States (WOTUS) rule recently proposed by the Trump administration.

INTRODUCTION

Headwaters are broadly defined as portions of a river basin that contribute to the development and maintenance of downstream navigable waters including rivers, lakes, and oceans (FEMAT 1993). Headwaters include wetlands outside of floodplains, small stream tributaries with permanent flow, tributaries with intermittent flow (e.g., periodic or seasonal flows supported by groundwater or precipitation), or tributaries or areas of the landscape with ephemeral flows (e.g., short-term flows that occur as a direct result of a rainfall event; USEPA 2013; USGS 2013). Headwater streams comprise the majority of river networks globally (Datry et al. 2014a); in the conterminous United States, headwater streams comprise 79% of river length, and they directly drain just over 70% of the land area (Figure 1). Along with wetlands, these ecosystems are essential for sustaining fish and fisheries in the USA (Nadeau and Rains 2007; Larned et al. 2010; Datry et al. 2014b). When headwaters are polluted, or headwater habitats are destroyed, fish, fisheries, and ecosystem services (i.e., benefits that humans gain from the natural environment and from normally functioning ecosystems) are compromised or completely lost.

With the U.S. Clean Water Act of 1972 (Federal Water Pollution Control Act), Congress recognized the importance of aquatic habitat and ecosystem connectivity in the stated objective of the Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." Biological integrity has been defined as "the capability of supporting and maintaining a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region" (Frey 1977; Karr and Dudley 1981). The Act provides authority for the federal government to protect navigable waterways from channelization, pollution, and other forms of impairment by making it unlawful to discharge dredged or fill material into "navigable waters" without a permit, 33 U. S. C. §§1311(a), 1342(a). This authority extends to wetlands that are not navigable but adjacent to navigable-in-fact waterways (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 1985). The authority does not extend to waters that lack a "significant nexus" to navigable waters (*Solid Waste Agency of Northern Cook County [SWANCC] v. Army Corps of Engineers*, 531 U. S. 159, 2001). However, federal jurisdiction over non-navigable and their adjacent waters remained unclear.

The 2006 Supreme Court decision *Rapanos v. United States* (547 U.S. 715, 2006) did little to resolve the confusion, with a split decision from the Court regarding the extent of federal jurisdiction. In writing for four justices, Justice Scalia defined "waters of the United States" as only those waters and wetlands that contain "a relatively permanent flow" or that possess "a continuous surface connection" to waters with relatively permanent flow. Scalia's definition excluded intermittent and ephemeral streams, and wetlands that lack a continuous surface connection to other jurisdictional waters (i.e., wetlands outside of floodplains). This definition differs from that posited by Justice Kennedy in an opinion concurring with the plurality judgment to remand the case for further proceedings but not agreeing with the reasoning of the four justices represented by Scalia. In contrast, Kennedy gave deference to Congressional intent to allow the agencies to regulate pollution (dredge and fill) of waters of the United States. Justice Kennedy ruled that wetlands outside of floodplains, and intermittent and ephemeral streams should be included as waters of the United States if they "significantly affect the physical, chemical, and biological integrity" of downstream navigable waters. Therefore, Kennedy's definition of waters of the United States includes headwaters that are not necessarily navigable but are nevertheless connected to some degree with navigable waters downstream.

Following an extensive scientific review of the literature on waterbody connectivity (USEPA 2015), which included a detailed review by a U.S. Environmental Protection Agency

Headwaters in a Nutshell

- Headwater streams comprise 79% of our nation's stream networks; wetlands outside of floodplains comprise 6.59 million ha in the conterminous USA.
- Headwater streams and wetlands strongly influence ecological functions and fisheries not only within headwater regions, but also in downstream rivers, lakes, and coastal areas.
- Headwater ecosystems provide habitat for many endemic and threatened fish species as well as species supporting economically important fisheries.
- Headwaters provide native fish species with refuge from invasive aquatic species and can provide threatened species with critical refuge habitat.
- Commercial and recreational fisheries, which are dependent on headwaters, are vital economic components of local and regional economies.
- Headwater streams and wetlands are culturally important for many segments of U.S. society, with particularly high significance for many native peoples.
- Estimates of headwaters at risk under a narrower rule are likely low, because many of the 33% of streams in the conterminous western USA mapped as perennial were found to be intermittent or ephemeral.
- Headwater ecosystem impairment, loss, or destruction is assured under the revised WOTUS rule proposed, and would have severe and long-lasting negative consequences for fisheries and environmental conditions throughout the USA.

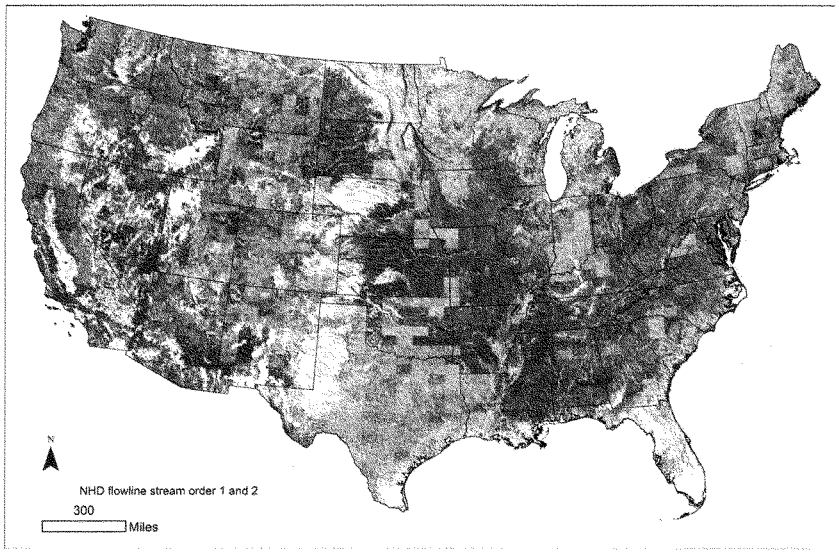


Figure 1. Map of 1st- and 2nd-order tributaries (a stream lacking a tributary and a stream with only first-order tributaries, respectively) comprising river networks of the conterminous United States as characterized by the 1:100,000 scale National Hydrography Dataset Plus Version 2 (NHDPlusV2; USEPA & USGS 2012). However, this is not a full accounting of all 1st- and 2nd-order headwater streams. Currently, it is not possible to comprehensively map all headwater streams because of the sheer number of headwater tributaries that comprise river networks, variability in tributary flow permanence, and the resolution and accuracy of available spatial data necessary to accurately map or model streams and other overland flows (Hughes and Omernik 1981). For example, note the differing stream densities that occur within different regions of the USA (e.g., Indiana versus the Central Plains) or even within states (e.g., varied densities throughout Oklahoma). The differences in density result from state-by-state differences in how streams are mapped or modeled. Despite these limitations, the NHDPlusV2 represents the most comprehensive coverage of tributaries and catchments available for the U.S., allowing us to assess their general prominence of headwaters in U.S. river networks.

(EPA) Science Advisory Board (SAB) of technical experts from the public ("SAB Review;" SAB, 2014 Letter to Gina McCarthy, Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence), the Obama administration issued the Waters of the Unites States (WOTUS) Rule in 2015 that clarified the jurisdiction of the Clean Water Act to include protections for intermittent and ephemeral headwater streams and hydrologically connected wetlands (i.e., with a permanent surface inflow or outflow and directly adjacent to navigable waters), with wetlands outside of the floodplains to be evaluated on a case-by-case basis. The American Fisheries Society (AFS) supports that rule and the science underpinning its development, as documented by review of more than 1,200 peer-reviewed scientific studies by technical experts to determine degrees of connectivity and their ecological consequences between navigable waters, wetlands, and headwater streams (USEPA 2015). On February 28, 2017, the Trump administration issued an executive order directing the EPA and the Department of the Army to review and rescind or revise the 2015 rule. The proposed "Recodification of Pre-Existing Rules" (U.S. Army Corps of Engineers, Department of Defense, USEPA 2018 Revised Definition of "Waters of the United States") establishes a narrower legal definition, implementing the pre-Obama era regulations that provided fewer protections for thousands of miles of headwater streams and millions of acres of wetlands outside of floodplains. Those wetlands are distributed across 6.59 million ha in the conterminous USA as, for example, playa lakes, prairie potholes, Carolina and Delmarva bays, pocosins, and vernal pools; they provide valuable habitat for fish and other organisms and are particularly vulnerable ecosystems (Tiner 2003; Lane and D'Amico 2016; Creed et al. 2017; Figure 2). We refer to headwater streams and wetlands outside of floodplains collectively as "headwaters." However, we also emphasize the inherent complexity of natural systems, and recognize and provide examples of waterbody types that provide similar functions as headwaters such as floodplain wetlands that lack a continuous hydrologic surface connection to a river, low-gradient streams that flow through floodplains, and sloughs and side-channels of navigable rivers.

Headwaters provide numerous services that are essential to ecosystems (Peterson et al. 2001; Meyer et al. 2003), including sustaining aquifers and supplying clean water for more than

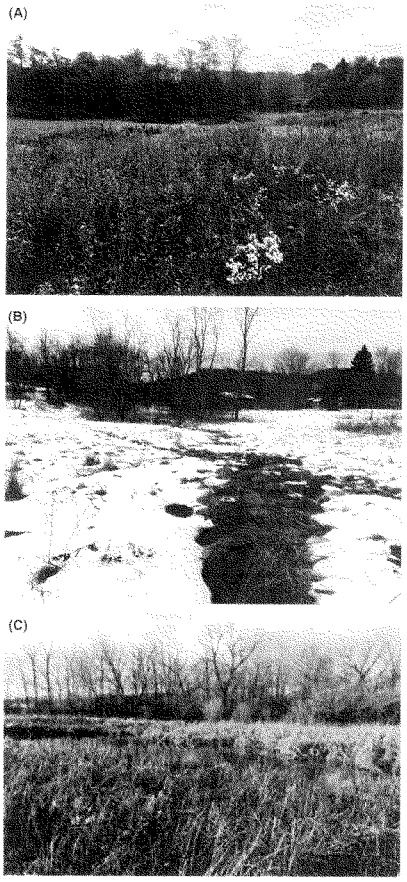


Figure 2. Wetlands outside of floodplains—such as the headwater/source wetland (A) in summer and (B) winter in Pennsylvania and the (C) prairie wetland in Ohio—would be particularly vulnerable to loss of protections. Photo credits: P. D. Shirey: A, B; S. M. P. Sullivan: C.

one-third of the U.S. population (USEPA 2009). At regional scales, headwaters are critical for sustaining aquatic biodiversity (Meyer et al. 2007; Clarke et al. 2008) and for providing vital spawning and rearing habitat for migratory fishes, including commercially fished species (Quinn 2005; Schindler et al. 2010; McClenachan et al. 2015). Headwaters provide dispersal corridors and habitat for fishes and other aquatic and semi-aquatic organisms (e.g., invertebrates, amphibians, and birds), including many endemic and rare species (Steward et al. 2012; Jaeger et al. 2014; Sullivan et al. 2015). Ephemeral headwater streams can support levels of aquatic invertebrate diversity and abundance comparable to, or greater than, those estimated for perennial headwaters, as well as taxa found nowhere else in the watershed (Dieterich and Anderson 2000; Progar and Moldenke 2002; Price et al. 2003).

Headwaters and their ecosystem services are tightly intertwined with the nation's cultural landscape (Boraas and Knott 2018) and are highly vulnerable to a host of human impacts (Creed et al. 2017). Climate change, channel modification, water diversion, and land development (e.g., urbanization, agriculture, mining, deforestation) impair and destroy headwaters by, for example, increasing erosion, sedimentation, and desiccation in both headwaters and downstream reaches of river networks (Walsh et al. 2005; Freeman et al. 2007; Perkin et al. 2017). Pollution of headwaters, including runoff of excess nutrients and other pollutants, degrades water quality affecting downstream ecosystems. Two striking U.S. examples are discharge effluent from mining (Woody et al. 2010; Daniel et al. 2015; Giam et al. 2018) and nutrient loading in the Mississippi River causing the Gulf of Mexico's "dead zone," a vast area of hypoxia that reduces biodiversity and commercial fisheries, with major economic and social costs (Rabalais et al. 1995; Rabotyagov et al. 2014). Similarly, polluted headwaters contribute to harmful algal blooms that result in toxic water, fish kills, domestic animal and human morbidity, and economic damage (Tango 2008; Zimmer 2014; Staletovich 2018). For wetlands outside of floodplains, global estimates indicate continued loss of >30% since 1970 (Dixon et al. 2016).

Discrepancies between actual and estimated stream length and type have long been recognized as problematic and may lead to increased ambiguity in applying a narrower WOTUS rule, especially over time. Headwater stream losses in many regions of the USA are underestimated because drainage networks have not been mapped at sufficiently fine spatial scales (Hughes and Omernik 1981; Meyer and Wallace 2001; Colson et al. 2008), thus posing serious risk to ecological and societal benefits (Creed et al. 2017). Stream type is also often misattributed or changes over time, for example, 207,770 km (33%) of the total length of stream networks in the conterminous western USA mapped as perennial was determined to be non-perennial or not a stream. The map error varied from 55% of stream length in the Southwest to 33% in the western Great Plains to 24% in the western mountains (Stoddard et al. 2005). Changes in estimates from perennial to intermittent or ephemeral streams is a result of mapping errors, climate change, and water withdrawals. Similarly, Perkin et al. (2017) determined a loss of 558 km (21%) of stream length from 1950 to 1980 in the Upper Kansas River Basin, presumably as a result of ground-water pumping accentuated by climate change. These investigators projected a cumulative loss of 844 km (32%) by 2060. In other words, highly vulnerable intermittent and ephemeral streams and rivers are increasingly replacing perennial streams and rivers.

Non-perennial streams and non-floodplain wetlands are integral components of aquatic ecosystems, especially when considered in the aggregate. As supported by the SAB Review (SAB, 2014 Letter to Gina McCarthy, Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence), connectivity between headwaters and downstream waterbodies reflects a gradient in the variability of the frequency, duration, magnitude, predictability, and consequences of physical, chemical, and biological connections. The SAB Review notes

BOX 1. LONGNOSE SUCKERS LINK TRIBUTARY STREAMS AND LAKES

Several fish species migrate from the Laurentian Great Lakes into headwater tributaries to spawn. During spring, Longnose Suckers *Catostomus catostomus* undergo massive spawning runs from Lake Michigan into tributary streams (Figure 3). Egg and larval survival to outmigration appears to be strongly influenced by spring flow and temperature, and this variability can influence stock dynamics (Childress et al. 2016). Egg mortality and excretion by migrating adult suckers contributes significant amounts of nitrogen and phosphorus to stream ecosystems. The millions of larval suckers that may be exported from a single stream to the lake provide a significant nutritional subsidy for a host of recreational fishes that include Walleye *Sander vitreus*, bass, and salmon (Childress and McIntyre 2015). Stream network connectivity has been reduced over large portions of Great Lakes drainage basins, with negative effects on Longnose Suckers, the ecosystem functions they support, and stocks of other fishes that migrate into tributaries for spawning.

that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters. The SAB Review also highlights the importance of the cumulative effects of streams and wetlands on downstream waters. These relationships also vary spatially and temporally as in some areas, such as arid regions, ephemeral streams comprise the majority of the stream network. Although they flow infrequently during an annual cycle, they are integral to the ecological function of their watersheds, which have evolved with this type of flow network (Meyer et al. 2003). In these and other systems, ephemeral streams and wetlands provide unique and essential habitat for species for which there is no known perennial equivalency (Falke et al. 2010, 2012; Medley and Shirey 2013; Hutson et al. 2018).

Because of the importance of headwaters, any rule that excludes their protection will have far reaching implications for fish, wildlife, and their habitats, as well as economies dependent on those ecosystems. Headwaters are key to the sustainability of fish stocks in both upstream and downstream waters. Threatened and endangered species will be harder to recover, and more species will be at risk of becoming imperiled. Simply put, loss of protections for headwaters would have grave consequences for fish and fisheries. Ultimately, communities across the USA would lose the economic, social, and cultural benefits derived from headwaters. In the following sections, we provide a brief overview of scientific evidence supporting the ecological, social, economic, and cultural importance of headwaters, and highlight some implications of returning to reduced federal protections.

HEADWATERS SUPPORT ECOSYSTEMS

Headwaters perform ecological functions (i.e., biological, geochemical, and physical processes that occur within an ecosystem) that are critical for ecosystem services throughout their drainage basins. Headwaters deliver water, sediments, and organic material to downstream waters; contribute to nutrient cycling and water quality; enhance flood protection and mitigation; and provide recreational opportunities (Gomi et al. 2002; Richardson and Danehy 2007; Hill et al. 2014; Cohen et al. 2016). Headwater ecosystems provide both habitat and food resources for fish and other aquatic and riparian organisms; in turn, fish in headwaters affect food-web dynamics and contribute to the functioning of headwater ecosystems (Richardson and Danehy 2007; Sullivan 2012; Hill et al. 2014). Ecosystem functions in headwaters also maintain aquatic and riparian biodiversity and the sustainability of fish stocks not only in headwater reaches, but also in larger downstream habitats. These and other functions of headwater streams make them economically vital, with recent estimates at $US15.7 trillion/year in ecosystem services for the conterminous USA and Hawai'i (Nadeau and Rains 2007). For wetlands outside of floodplains, ecosystem service estimates are $673 billion/year for the conterminous USA (Lane and D'Amico 2016).

Headwaters receive runoff and groundwater from watersheds and discharge to larger waterbodies downstream. In doing so, they transport sediment and organic material, including large wood from adjacent and upstream riparian systems that are essential for the ecological condition of downstream ecosystems (Gregory et al. 1991; Benda and Dunne 1997). Drifting organic matter (organisms and particulate organic matter) from headwaters provides food for fishes and invertebrates in downstream reaches (Gomi et al. 2002; Wipfli and Gregovich 2002; Wipfli and Baxter 2010). The provisioning of

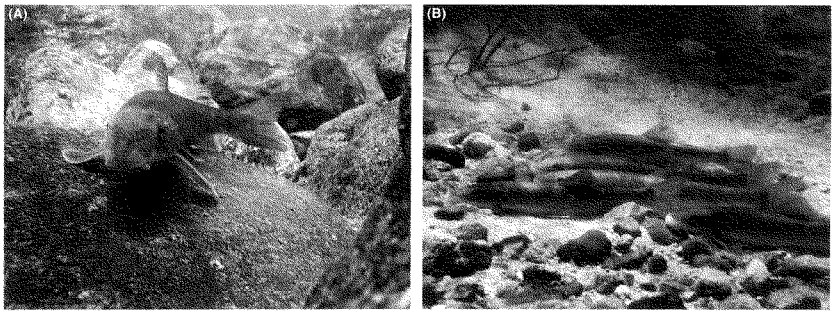


Figure 3. An individual Longnose Sucker (A), and an aggregation (B) similar to those that spawn en masse in tributaries of Lake Michigan. Photo credit: Jeremy Monroe, Freshwaters Illustrated.

large wood for habitat development is crucial for aquatic biota, including juvenile salmon and trout (Bilby and Ward 1991; Bilby et al. 2003; Herdrich et al. 2018). Changes in the large-wood recruitment regime resulting from timber harvests have depleted complexity in many mountain streams (Fausch and Young 2004) as well as in streams in other areas of the country (e.g., upper Midwest; Richards 1976; Wohl 2014). Removing wood from streams can also result in reduction of pools and overall habitat complexity as well as fewer and smaller individuals of both coldwater and warmwater fishes (Fausch and Northcote 1992; Dolloff and Warren 2003). Unpolluted headwaters are essential for maintenance of coldwater fish stocks, including Chinook Salmon *Oncorhynchus tshawytscha*, Coho Salmon *O. kisutch*, Steelhead *O. mykiss*, Cutthroat Trout *O. clarkii*, Bull Trout *Salvelinus confluentus*, Apache Trout *O. apache*, Gila Trout *O. gilae*, Golden Trout *O. aguabonita*, Redband Trout *O. mykiss*, Brook Trout *S. fontinalis*, Brown Trout *Salmo trutta*, and Atlantic Salmon *S. salar*.

When the natural flow regimes of headwater streams are altered, downstream water quality often is impaired. Headwaters mediate the intensity and frequency of downstream floods, and play a significant role in global carbon and nitrogen cycling (Gomi et al. 2002; Bernhardt et al. 2005; Lowe and Likens 2005; Marx et al. 2017). Discharge from headwaters also influences downstream fluxes of dissolved and particulate organic matter and nutrients (Alexander et al. 2007; Lassaletta et al. 2010). The cycling of nutrients—including rates of nitrogen uptake, storage, regeneration, and export—is a critical function of headwaters. For instance, Peterson et al. (2001) reported that the most rapid uptake and transformation of inorganic nitrogen can occur in the smallest streams of a catchment, particularly temporary streams, where tightly coupled water-streambed interactions facilitate in-stream retention of nitrogen. Most nitrogen flowing through a drainage network is estimated to come from headwater streams; in the northeastern USA, headwater tributaries can deliver up to 45% of the nitrogen load flowing downstream (Alexander et al. 2007). Additionally, transfer of nitrogen to the atmosphere occurs in headwater systems through denitrification (Mulholland et al. 2009). Hotspots of nutrient transformations are typically linked to physical and microbial processes in headwaters (e.g., McClain et al. 2003). Channel alterations, excess nutrients and sediments, and losses of flows in headwater streams deteriorate water quality (e.g., eutrophication and hypoxia) in downstream systems throughout the USA (Alexander et al. 2007; USEPA 2016a, 2016b; USEPA 2009). Further loss of headwater systems is expected to have major negative consequences for biogeochemical cycles at local to continental and global scales.

Important ecological functions and ecosystem services are provided even by ephemeral and intermittent headwaters (Steward et al. 2012). In arid and semi-arid regions, dry streambeds are "seed and egg banks" for aquatic biota, and when flowing, function as dispersal corridors and temporal ecotones linking wet and dry phases. During dry phases, ephemeral streams store organic material; when flowing, these streams are hotspots for nutrient cycling and other biogeochemical processes (Fisher et al. 1982; McClain et al. 2003). In some arid regions, up to 96% of streams contain little or no flow during much of the year; however, during monsoons they are critical for conveying runoff (Meyer et al. 2003). Permeable surficial geology and low slopes can reduce flood peaks in headwaters and extend the flow of cool water to downstream reaches, thereby expanding thermal refuges (Gomi et al. 2002). Cool headwaters provide important thermal refuges in regions especially susceptible to climate change, including the desert Southwest and intermountain western United States.

Although fish abundance and diversity generally are lower in headwater systems compared to downstream reaches (Schlosser 1987), species composition can be distinct from the rest of the network (Paller 1994). Further, headwaters often support ecological specialist as well as threatened taxa not found elsewhere within the river network (DeRolph et al. 2015; Liang et al. 2013; Lowe and Likens 2005; also see *The importance of headwaters for imperiled species*). Fish inhabiting wetlands located outside of floodplains may benefit from greater availability of food resources compared to habitats in other aquatic ecosystems (Snodgrass et al. 2001; Baber et al. 2002).

Fish contribute both directly and indirectly to headwater ecosystem processes (e.g., Hanson et al. 2005) that, in turn, affect biodiversity and productivity in the receiving river network (Meyer et al. 2007). Through their spawning and foraging activities, fish influence local biotic communities by modifying substrates (e.g., spawning salmonid redds; Montgomery et al. 1996; Moore et al. 2004) and resuspending detritus and other particulate organic matter into the water column (e.g., benthic feeding by the Ozark Minnow *Notropis nubilis*; Gelwick et al. 1997) where it drifts downstream to support populations of aquatic invertebrates. Furthermore, fish feeding and excretion increase availability of inorganic nutrients and stimulate aquatic primary productivity (McIntyre et al. 2008).

Fish are often the top predators in headwater food webs, and thereby exert top-down control of invertebrate assemblages and indirectly affect ecosystem functions such as aquatic primary and secondary production, the latter including emergent aquatic insects that export biomass from streams to terrestrial food webs (Nakano et al. 1999; Baxter et al. 2004). Fish also link aquatic and terrestrial ecosystems in other, more direct ways. During annual leaf-out periods, insectivorous fishes feed on arthropods that fall from riparian vegetation into streams (Wipfli 1997; Baxter et al. 2005). Fish also provide important nutritional subsidies for terrestrial consumers, such as the American dipper *Cinclus mexicanus*, North America's only aquatic songbird (e.g., Sullivan et al. 2015), and grizzly bear *Ursus arctos* (e.g., Matt and Suring 2018).

Many fish species occupy both headwater and downstream habitats during their life cycles (Fausch et al. 2002). For instance, most anadromous salmonids return to their natal streams after spending most of their lives in the ocean. In doing so, fish transport marine-derived nutrients to headwater streams (Zhang et al. 2003). Marine-derived nutrients from salmon carcasses have been shown to increase production of aquatic basal resources, macroinvertebrates, and resident fish stocks (Zhang et al. 2003; Janetski et al. 2009). Marine-derived nutrients are especially important for oligotrophic streams, which are predominant in the Pacific Northwest and Alaska where even small inputs of certain nutrients and sources of organic matter can significantly augment ecosystem productivity (Bilby et al. 1996). Moreover, fish in headwater streams are an important food source for terrestrial consumers, thereby transferring nutrients and energy from aquatic to terrestrial ecosystems. By linking nutrients, energy, and gene pools across space and time, fish migration has been characterized as a type of ecological "memory" of an ecosystem (Holling and Sanderson 1996). Headwaters, their receiving waters, and their functions already have been severely degraded by multiple human activities, including channel alteration, water diversion, and

land modification by agriculture, livestock grazing, mining, and urbanization (e.g., Hughes et al. 2010, 2014, 2016; Beschta et al. 2013). These land uses and others have eliminated countless headwater streams and wetlands that once served as natural primary, secondary, and tertiary nutrient, sediment, and contaminant treatment systems, thereby leading to untreated runoff from diffuse pollution sources (Karr and Schlosser 1978; Karr 1991; Gammon 2005; Woody et al. 2010; Hughes et al. 2014; Daniel et al. 2015). These stressors have caused biological and environmental degradation to over 70% of stream and river length in the conterminous USA (USEPA 2009; Crawford et al. 2016; USEPA 2016a, 2016b). Wetland loss—including but not limited to wetlands outside of floodplains—across the USA is staggering, with some Midwestern states (e.g., Illinois, Indiana, Ohio, Missouri) having lost >85% of wetland area since the 1780s (Dahl 1990). Given the vulnerability and many important ecosystem functions provided by headwaters, policies that would reduce protections are a serious concern.

HEADWATERS SUPPORT IMPERILED SPECIES

Habitat loss and pollution are the primary causes of extinction of aquatic biota (Miller et al. 1989; Dudgeon et al. 2006; Arthington et al. 2016), and emerging threats exacerbate population decline of rare or range-restricted species (Minckley and Deacon 1991; Reid and Mandrak 2008; Shirey et al. 2018). Many threatened desert fishes, such as pupfishes *Cyprinodon* spp., have geographic distributions limited entirely to one or more isolated spring-fed headwaters (Rogowski et al. 2006; Dzul et al. 2013; Figure 4) but many such isolated waters would likely not be protected under a narrower rule. In the 1950s and 1960s, groundwater pumping in Nevada destroyed springs and associated spring-fed wetlands, resulting in the extinction of Las Vegas Dace *Rhinichthys deaconi* and Ash Meadows Poolfish *Empetrichthys merriami*, and put other species at risk of extinction, including the Devils Hole Pupfish *Cyprinodon diabolis*. By highlighting the plight of the remaining imperiled desert fishes, fisheries professionals increased public awareness of the nexus between groundwater and surface water habitat (Deacon and Williams 1991). This awareness stimulated support for halting groundwater pumping in order to protect the remaining habitat and avert further extinctions, although new threats continue to emerge (Deacon et al. 2007). For instance, up to 31 rare and endangered fish species or subspecies that inhabit headwater streams or springs of Nevada, Utah, and California are threatened by proposed groundwater withdrawals in southern Nevada.

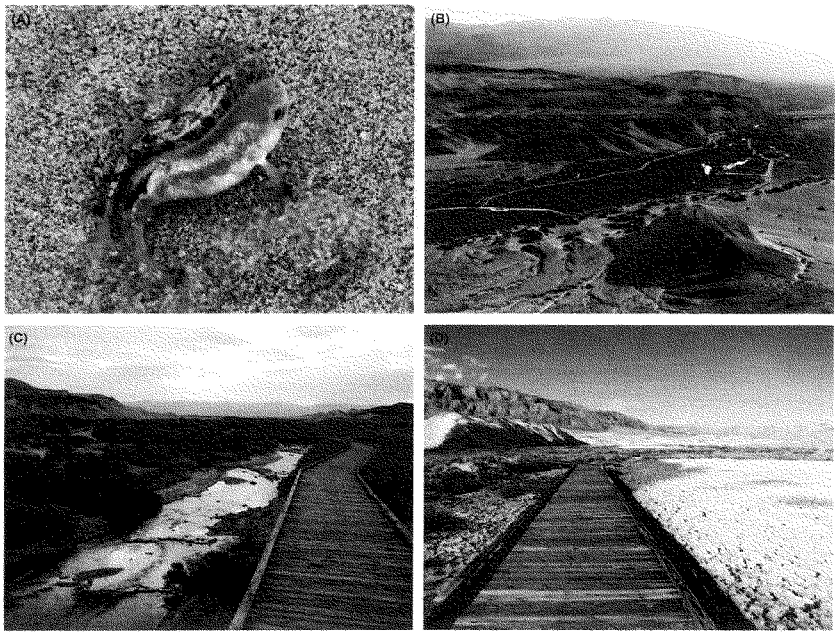


Figure 4. (A) Death Valley Pupfish *Cyprinodon salinus* spawn during spring flows in (B) Salt Creek, Death Valley National Park, California. (C) a boardwalk provides access to view the Death Valley Pupfish during winter and spring flows. (D) Salt Creek ceases to flow during the remainder of the year and Death Valley Pupfish take refuge in headwater pools. Photo Credit: A–C, National Park Service; D, Jessica Wilson, Creative Commons.

Again, the primary objective of the Clean Water Act (1972) is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. That objective includes species that have become imperiled and are listed as threatened or endangered federally under the Endangered Species Act or protected by states and other entities (Angermeier and Karr 1994). If headwater impairment threatens a federally listed species residing in navigable waters downstream, then that headwater clearly would merit protection under the Clean Water Act because it meets the "significant nexus" test (after SWANCC 2001), and this would be true whether flows are intermittent or ephemeral.

Cavefish habitat demonstrates the importance of the significant nexus perspective, because ephemeral or intermittent headwaters support habitat for imperiled species living in habitat farther downstream (Figure 5). Aquatic habitats of federally listed Ozark Cavefish *Amblyopsis rosae* (threatened) in Cave Springs Cave, Arkansas (Graening et al. 2010), and Alabama Cavefish *Speoplatyrhinus poulsoni* (endangered) in Key Cave, Alabama (USFWS 2017), are supplied water from streams that flow intermittently above and below the surface at intervals as well as seeps, sink holes, and fractures in karst formations. Headwater streams in this region are not navigable, but they are essential for cavefish habitat, and their discharge contributes to flows in the Illinois (Arkansas; Brown et al. 1998) and Tennessee (USFWS 2017) rivers. Therefore, pollution of a sinkhole impacts both cave habitat and navigable waters downstream. A narrower rule defining waters of the United States that excludes headwaters in karst terrain would allow cavefish habitat to be polluted or destroyed such as by filling of or discharging to sinkholes.

Whereas cavefish are restricted to habitats fed by headwaters, other fishes use headwater streams and wetlands that are intermittent or ephemeral during specific stages of

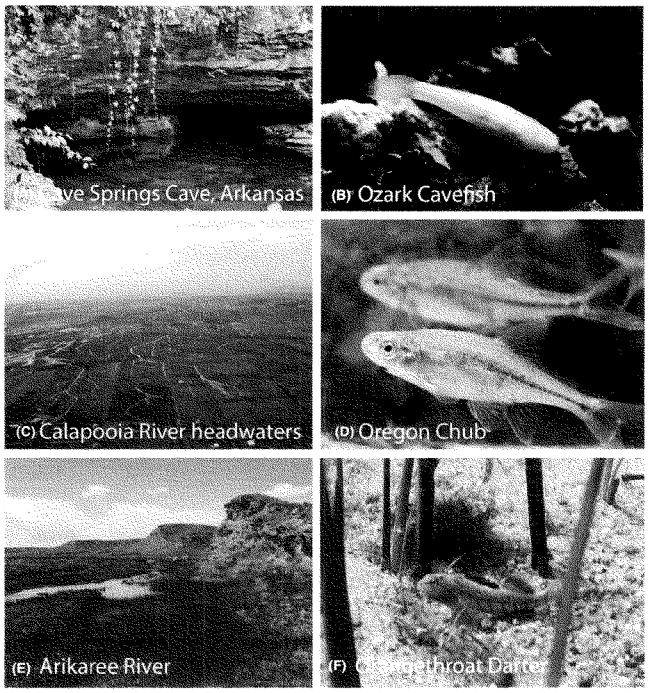


Figure 5. (A) Fed by headwaters in karst topography, Cave Springs Cave discharges groundwater to Osage Creek, a tributary to the navigable Illinois River. The Cave Springs Cave headwater (Photo Credit: Arkansas Natural Heritage Commission) provides habitat for (B) the federally threatened Ozark Cavefish *Amblyopsis rosae* (Photo Credit: Jim Rathert, Missouri Department of Conservation). (C) The Calapooia River's lowland tributaries provide habitat to several species including the first fish species to be delisted under the Endangered Species Act (Photo Credit: Randall Colvin), (D) the Oregon Chub *Oregonichthys crameri* (Photo Credit: USFWS). (E) The Arikaree River (Photo Credit: Jeff Falke) is an intermittent plains streams in eastern Colorado that supported 16 native fish species adapted to this harsh habitat, including (F) the Orangethroat Darter *Etheostoma spectabile* (Photo Credit: Jeremy Monroe, Freshwaters Illustrated) that is imperiled in Colorado.

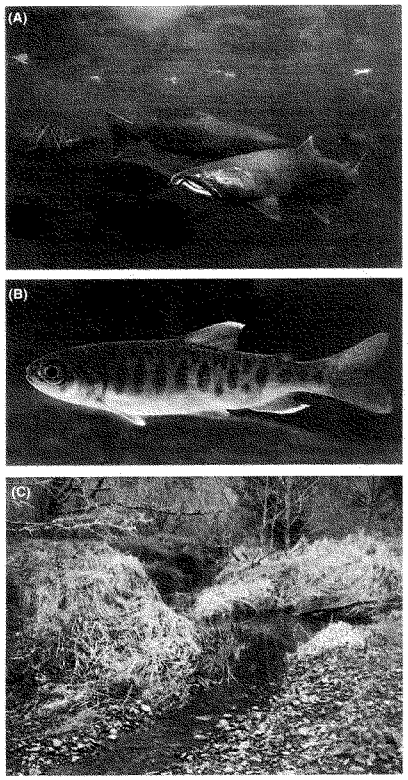


Figure 6. The Oregon Coast Coho Salmon (A; Jeremy Monroe, Freshwaters Illustrated) is an evolutionarily significant unit listed as threatened under the Endangered Species Act. Juvenile coho (B; Lance Campbell); of several life history types of this species use very small headwater habitats in coastal streams that are wet only in winter, including side-channels and backwaters that are dry during summer like Crowley Creek, Oregon in the Salmon River watershed (C; Trevan Cornwell).

their life cycles. Because they may be dry for much of the year, these headwaters might seem unimportant for fishes, and yet they can be essential for the persistence of certain stocks. Intermittent streams are important spawning and refuge habitats for imperiled salmon, trout, darters, minnows, suckers, and other fishes (Figures 5 and 6). Examples include federally listed Coho Salmon and Chinook Salmon, species with juveniles that occupy headwater tributaries and seasonal floodplain wetlands during winter. During the rest of the year, these habitats are either dry or so small that they are not considered suitable salmon habitat (Brown and Hartman 1988; Sommer et al. 2001; Jones et al. 2014; Katz et al. 2017; Woelfle-Erskine et al. 2017). Nonetheless, these intermittent habitats can play a critical role in recruitment. Coho Salmon smolts that inhabit pools in intermittent headwater streams in Oregon are larger than smolts from perennial streams in the same river basin (Wigington et al. 2006). Because larger smolts have higher ocean survival rates, the loss of these intermittent streams could be detrimental to salmon populations in coastal drainages.

Historically, western Oregon's upper Willamette River was bordered by a floodplain forest 2–9 km wide with multiple shaded waterways; winter floods markedly increased its floodplain stream network (Hughes et al. in press). During the past century, agriculture and channelization have altered or eliminated most intermittent water bodies in the valley. However, the remaining temporary streams and ditches still provide critical habitat for a wide diversity of native fish species, such as Cutthroat Trout, Rainbow Trout *O. mykiss*, endangered Chinook Salmon, and the endemic Oregon Chub *Oregonichthyes crameri*. These seasonal habitats provide flood refuge, rearing habitats, and separation from invasive alien fish species, all of which are essential for recovering and maintaining valuable sport and commercial fisheries and endangered species (Colvin et al. 2009; Hughes et al. in press; Figure 5). Collaborations with Willamette Valley landowners have been instrumental in improving Oregon Chub habitat and its delisting, and farmers are pleased to know that their winter-wet waterways offer important habitats for valued salmonids.

Headwater streams also are important for salmon in the eastern USA. In Maine, federally endangered Atlantic Salmon migrate up rivers and streams in early summer to take residence in deep pools with cool, well-oxygenated water prior to their ascent into tributaries for spawning during fall (Baum 1997; NMFS 2009). Atlantic Salmon eggs, larvae, and juveniles require clean gravel and cool, oxygenated water to ensure adequate growth and survival in headwaters until returning to marine habitat to mature (Danie et al. 1984; NMFS 2009). Recovery of Atlantic Salmon stocks may also require reestablishing populations of other diadromous species, such as Alewives *Alosa pseudoharengus*, that also depend on headwaters and that were important prey (Saunders et al. 2006). A narrower rule that excludes intermittent headwaters in the Pacific Northwest and New England would allow pollution and destruction of significant salmon habitat and further risk the extirpation of salmon.

Non-anadromous trout and charr also use headwaters as critical habitats, including for spawning and refuge from harsh conditions. Nearly half of the population of Rainbow Trout in a Sierra Nevada mountain stream spawned in an intermittent tributary that provided refuge from flood disturbance and nonnative Brook Trout (Erman and Hawthorne 1976). In their native range, Brook Trout are highly reliant on cool headwaters (Figure 7) and face declines in much of their native distribution due to impacts from dams, water diversion, channelization, and sedimentation (Curry et al. 1997; Etnier 1997; Hudy et al. 2008). Throughout the western United States, the many subspecies of native Cutthroat Trout persist primarily in small headwater streams above natural or created barriers that create refuges from nonnative species (Shepard et al. 2005; Roberts et al. 2013).

Many headwaters of the western Great Plains and dry valleys of the intermountain western United States are ephemeral, and yet are important habitats for fish during months when they have water (Figures 5 and 8). Several imperiled minnow species use ephemeral or intermittent backwaters in floodplain wetlands adjacent to stream channels for spawning and rearing (e.g., *Hybognathus* spp.; Falke et al. 2010, 2012; Medley

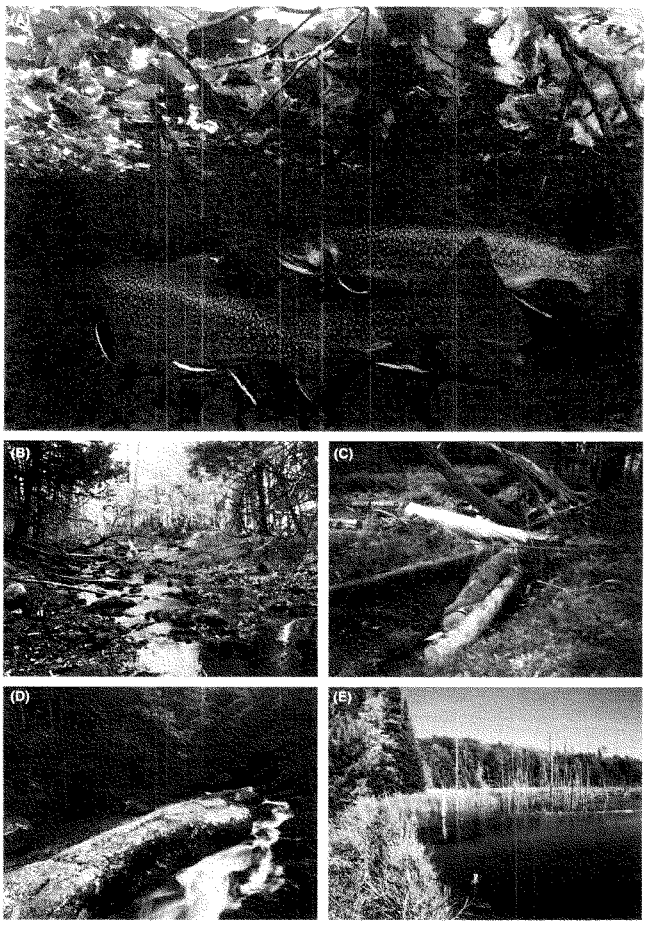


Figure 7. (A) Brook Trout *Salvelinus fontinalis* require cold, clear, and well-oxygenated water often found in headwater habitats. Examples of headwater streams inhabited by Brook Trout are shown for (B) a stream which becomes intermittent and composed of isolated pools in dry years in Maine (Photo Credit: Susan A.R. Colvin), (C) Michigan (Photo Credit: Patrick D. Shirey), and (D) an Appalachian headwater stream (Photo Credit: David Herasimtschuk, Freshwaters Illustrated). (E) an intermittent stream in Wisconsin impounded by beaver *Castor canadensis* creates diverse headwater habitat and provides ecosystem services of nutrient cycling and floodwater storage (Photo Credit: Patrick D. Shirey).

and Shirey 2013; Hutson et al. 2018). Many minnows, suckers, sunfishes, and darters in arid-land streams disperse between deep pools that retain water by exploiting ephemeral channels when flowing (Fausch and Bramblett 1991; Labbe and Fausch 2000). Though adjacent floodplain wetlands of navigable waters that are defined as wetlands are currently regulated under the Clean Water Act (*United States v. Riverside Bayview 1985*), if the protection of temporary headwaters were to be rescinded, significant amounts of this essential fish habitat would be at risk from changes in headwater source flows or pollution resulting from fill and contaminated discharges.

Headwaters sometimes provide the last refuge for species threatened by loss of habitat elsewhere in the watershed. Examples include the federally endangered Yellowcheek



Figure 8. (A) Cottonwood Creek is an intermittent tributary of the Gunnison River (Colorado River basin) in western Colorado that hosts large numbers of (B) Bluehead Sucker *Catostomus discobolus*, (C) Flannelmouth Sucker *C. latipinnis*, and (D) Roundtail Chub *Gila robusta* during spring spawning. Stream discharge varies widely based on snowfall, but these three imperiled species show considerable behavioral plasticity in timing their entry from the main river to this headwater tributary to take advantage of the seasonally available spawning habitat it provides. Fish enter the stream as soon as water depths permit, often in consecutive years. Spawning suckers of both species displayed tributary residency of more than 25 days in years when March or early April flows were adequate (E and F), and more than 10,000 individuals used the stream annually (Hooley-Underwood et al., in press). Adults and just-hatched larvae subsequently moved out of the stream (G), and by mid-June (H) flow ceased and the streambed dried completely. Intermittent tributaries like these are critical for sustaining populations of these three species, which are the subject of rangewide conservation efforts to prevent listing under the Endangered Species Act.

Darter *Etheostoma moorei* (endemic to the Boston Mountains of Arkansas; Robison and Buchanan 1988; Magoulick and Lynch 2015) and the federally threatened Leopard Darter *Percina pantherina* (endemic to a few headwater streams in the Ouachita Mountains of southeastern Oklahoma and southwestern Arkansas; Zale et al. 1994). The endangered Shortnose Sucker *Chasmistes brevirostris* and Lost River Sucker *Deltistes luxatus* depend on clean gravel in headwater tributaries or springs for spawning as well as adjacent wetlands and nearshore vegetation for juvenile rearing (USFWS 2012b). Wetlands that were replaced by pasture and cropland have contributed to the continued listing of these species. Thermal habitats unique to mountain headwater streams throughout the western Unites States are expected to provide important refuges for native species in the face of climate change, including many of conservation concern, such as Bull Trout and many subspecies of Cutthroat Trout (Wenger et al. 2011; Isaak et al. 2016). For the highly endemic Miller Lake Lamprey *Lampetra minima* and southeastern pygmy sunfishes *Elassoma* spp., headwaters provide refuge from thermal stress, extreme hydrological conditions, and exposure to invasive species (Hayes et al. 1998; Meyer et al. 2007).

Protecting headwater habitats is critical for the recovery and delisting of several endangered fishes. For instance, the recently delisted Modoc Sucker *Catostomus microps* is abundant in intermittent and low-flow headwater streams in northeastern California and southern Oregon (Moyle and Marciochi 1975). Delisting resulted from protecting headwater tributaries and wetlands on public and private lands from threats that included livestock grazing and stream channelization that eliminated refuge pools (Moyle and Marciochi 1975; USFWS 2015). By protecting headwaters, the United States can not only reduce the uncertainty and economic costs that come with an imperiled species being listed under the ESA, but also provide the foundation for successful recovery and delisting of species.

HEADWATERS SUPPORT RECREATIONAL AND COMMERCIAL FISHERIES

Inland and coastal fisheries resources have tremendous economic and social importance. In the USA, commercial and recreational fisheries contributed over $208 billion in economic impact and 1.62 million jobs in 2015 (NMFS 2015). Fishing is a major recreational activity in the USA, with nearly 12 million participants in 2011 and creating 439 thousand jobs and generating more than $63 billion across the United States in 2015 (USFWS 2012a, NMFS 2015). For instance, headwater tributaries in the western USA are visited annually by thousands of anglers for both catch-and-release as well as harvest fishing. Nationally, trout anglers spent $3.5 billion on their pursuits, supported over 100 thousand jobs, and had a $10 billion economic impact, including $1.3 billion in federal and state tax revenues in 2006 (USFWS 2014).

An important consideration for the protection of headwaters is to safeguard recreational and commercial fisheries from point and non-point sources of pollution. Removing those protections will perpetuate current sources of pollution and worsen future impacts to downstream fisheries. In many regions of the USA, past and current pollution continues to degrade fisheries. For example, in the western USA, legacy metal and acid-mine drainage into headwater systems continue to threaten recreational trout fisheries (Woody et al. 2010). In 2015, the Gold King Mine spilled approximately 3 million gallons of untreated acid mine drainage into a headwater stream, instantly changing the color and turbidity of the stream for 2 days, and closing a valuable trout fishery for the entire summer (Rodriguez-Freire et al. 2016). Climate change and the increased frequency of warmer and drier years is predicted to extirpate trout from nearly half their habitat throughout the interior western United States by the 2080s (Wenger et al. 2011), as well as fragment the remaining habitats and reduce trout population sizes and their connectivity (Williams et al. 2015; Isaak et al. 2016). Further erosion of protections for headwaters may reduce or end opportunities to catch trout in these waters and have huge impacts on recreational angling tourism.

Recreational fisheries and headwaters are tightly interconnected. Depending on the state and location, the daily economic value of trout angling was $50–157 per person (USFWS 2012a). For example, blue-ribbon trout streams in two Idaho and Wyoming river basins yielded $12 million and $29 million in county income and 341 and 851 jobs in 2004, respectively (Hughes 2015). The trout fishery in Colorado alone was valued at $1.3 billion in 2011 (Williams et al. 2015). Brook Trout fishing in northern Maine generated over $150 million in 2013 and anglers spent $200 per day on fishing logistics (Fleming 2016). In Pennsylvania, trout anglers spent $45 per day and generated $2 million annually for rural economies (MDNR 2018). North Carolina trout anglers generated $174 million in economic output (NCWRC 2013). Based on travel cost modeling, Georgian trout anglers spent $60–160 per trip, generating $70–200 million annually (Dorison 2012). Recent estimates of freshwater fishing contributions to U.S. Gross Domestic Product total $41.9 billion while providing 526.6 thousand jobs nationwide (Allen et al. 2018). Economic contributions from freshwater fishing is also increasing, growing 11% since 2011 (Allen et al. 2018). It is also critical economic growth when compared to other sectors, collectively the outdoor recreation economy grew 3.8% in 2016 while the overall economy grew 2.8% during the same time period (Allen et al. 2018).

The headwater systems that support these recreational fisheries are typically found at higher elevations, with critical physical habitat requirements (e.g., temperature, flow, and dissolved oxygen) for prized trout species. Species-specific habitat requirements are uniquely provided by these streams and driven by annual snow accumulation (and snowmelt). Recreational anglers avidly pursue several target fishes (Cutthroat Trout, Rainbow Trout, Bull Trout, Brook Trout, Brown Trout, and Arctic Grayling *Thymallus arcticus*) found in these higher-elevation streams. Although they represent a small proportion of recreational angling nationally, these stocks sustain a huge market for fly-fishing anglers from throughout the USA and other nations.

Trout are not the only prized fishery that depends on headwaters. The Alligator Gar *Atractosteus spatula*, one of the largest and most primitive fishes in North America, is a popular target for anglers and archers in the southeastern USA. This fishery has created a booming market for gar-fishing guides that charge $750 per day (Benning 2009). Alligator Gar stocks have declined throughout their native ranges, including apparent extirpations in many regions. During late spring and summer high flows, adult gar move from rivers into small floodplain tributaries (and ditches) to spawn in flooded ephemeral wetlands and fields containing submerged vegetation (Solomon et al. 2013; Kluender et al. 2016). Recruitment success of juvenile gar is correlated with large, long-duration

summer floods and spawning habitat availability (Buckmeier et al. 2017; Robertson et al. 2018). This connectivity allows for gar dispersal between rivers and ephemeral floodplain headwaters, which is critical for sustaining this species (Robertson et al. 2018).

Commercial fisheries are affected by headwaters both directly and indirectly. Among the most valuable commercial fisheries dependent on headwaters are the salmon fisheries of Alaska and the Pacific Northwest. From 2012 to 2015, salmon commercial and recreational fisheries were valued at $3.4 million in economic output and produced $1.2 million in wages and 27 thousand full-time jobs annually (Gislason et al. 2017). The world's most valuable wild salmon fishery in Bristol Bay, Alaska, where headwaters remain relatively pristine, generates $1.5 billion in annual economic activity and 20 thousand full-time jobs (BBNC 2017). As mentioned previously, spawning Pacific Salmon *Oncorhynchus* spp. import marine-derived nutrients into nutrient-poor headwaters, thereby augmenting production of basal resources in aquatic food webs. In the northeastern United States, a burgeoning commercial fishery has developed for juvenile American Eel *Anguilla rostrata* to supply Asian markets. American Eel catches in Maine were valued at more than $10 million annually from 2015 to 2017 (ASMFC 2017b), and the fishery provided well over $20 million in 2018 (Whittle 2018). Some estimates suggest American Eel stocks along the eastern coast of North America have declined dramatically in the last several decades (Busch et al. 1998). However, conclusions from recent assessments on stock status are variable, ranging from "threatened" and "endangered" to "not threatened or endangered" (Jessop and Lee 2016). More clearly, headwaters are important rearing habitats for American Eel, and stream restoration has been recommended as an important strategy for recovery where depleted (Machut et al. 2007).

Protections currently afforded to headwaters through the 2015 WOTUS rule help maintain and contribute to the stability of commercial and recreational fisheries and the rural economies that they support. In rural areas, nature tourism also contributes to sustainable economic growth where visitors spend recreational dollars to see rare fish up close (Figure 4). For example, the Ash Meadows National Wildlife Refuge is home to the highest concentration of endemic species in the USA and draws nearly 70 thousand visitors annually that contribute over $3 million to the local economy (unpublished data from Ash Meadows National Wildlife Refuge, Visitor Service Staff).

HEADWATERS ARE CULTURALLY SIGNIFICANT

Cultural values of headwaters and the downstream rivers they support are diverse, and clearly expressed in nature-based tourism, aesthetic values, recreational fishing, and other activities (Beier et al. 2017). Human–natural resource relationships have evolved in the context of intricate interactions among cultures, communities, and water (e.g., its quality, access, use, and associated resources) for both native and other peoples (Johnston 2013). Wild salmon, for example, hold central roles in the creation and migration narratives of native peoples, and continue to be present in prayers and visions in addition to diets (Stumpff 2001). Fly fishing for trout can be a religious, transformative experience for many. This pursuit strengthens ties with nature, shapes local-to-regional economies, and has a complex history with environmental stewardship (Hemingway 1973; Maclean 1976; Brown 2012, 2015). However, impairment of headwaters has strongly altered the interactions between people and nature, with the ecosystem services provided by rivers to society declining over time (Gilvear et al. 2013; Lynn et al. 2013; Marttila et al. 2016).

The spiritual and socio-cultural values of fish and healthy ecosystems—which are dependent on clean, free-flowing headwaters—are intangible and extend well beyond any economic measures (Boraas and Knott 2018). Pacific Salmon fisheries are a major source of subsistence and income for many native peoples in Alaska and the western USA (e.g., Boraas and Knott 2018). Salmon are also a traditional "first food," honored in many tribal traditions and strongly linked to cultural identities (e.g., CRITFC 2018; NPT 2018). For example, the Nimiipuu (Nez Perce) view salmon as economic and spiritual keystones, with the survival of the tribe and the salmon being interdependent (Colombi 2012).

Similar to Pacific Salmon, Bull Trout inhabiting western streams are culturally important to many groups, including the Confederated Salish and Kootenai Tribes. Bull Trout are part of the history, oral traditions, culture, and identity that are passed down among generations (CSKT 2011). The Confederated Tribes of western Montana credit the abundance of Bull Trout for preventing starvation during harsh winters (Laughlin and Gibson 2011). Even though Bull Trout are not currently harvested for subsistence and economic purposes, Rich Janssen, the natural resource manager for the Confederated Salish and Kootenai Tribes, highlights their interrelationship as follows: "It's part of who you are. It's part of your culture. It's part of your history. You don't want to lose who you are. You don't want to lose that connection" (Laughlin and Gibson 2011).

The importance of headwaters to indigenous cultures extends beyond the well-established examples from Alaska, the Pacific Northwest, and intermountain western USA. For instance, the Ash Meadows National Wildlife Refuge is also culturally important to the Timbisha Shoshone and Southern Paiute peoples because of its life-giving pools fed by headwater springs (Shirey et al. 2018). The Rio Grande and Colorado River flow from headwaters in the Rocky Mountains through traditional lands of the largest concentrations of indigenous peoples within the conterminous USA (Navajo, Apache, Pueblo, and others) and intersect the ranges of Apache Trout and Gila Trout. These headwater ecosystems and the services they provide are central to traditional place-based lifestyles of indigenous tribes (Johnston 2013). Eastern North Carolina Cherokee highly value headwater streams for their cultural significance (extending back thousands of years) as well as for fishery-based tourism (Balster 2018). For the Passamoquoddy of present-day Maine, water and fish are sacred and inextricably linked to their history, culture, traditional beliefs, lore, and spirituality (Bassett 2015). Caloric-rich Alewife and Blueback Herring *A. aestivalis* migrate from the ocean to spawn in the headwaters of the St. Croix River, Maine, where they were a key resource with cultural importance for the Passamoquoddy for thousands of years before European colonization and habitat impairment from pollution, dams, overfishing, and stocking of alien species. In 2013, in cooperation with the Bureau of Indian Affairs, U.S. Fish and Wildlife Service, NOAA and others, the Passamoquoddy began restoring the St. Croix Watershed and returning these species to the ecosystem and the Passamoquoddy people. Traditional ecological knowledge provides an important line of evidence supporting protection and restoration of headwaters. For example, Maine Sea Grant and the National Marine Fisheries Service (NMFS) collaborated to document and disseminate harvesters' knowledge of

BOX 2. ALEWIVES IN MAINE

Alewives *Alosa pseudoharengus*, ascend freshwater rivers and tributaries in early summer to access lakes and headwater ponds where they spawn; in the fall, juvenile Alewives migrate from headwaters to the marine environment (Saunders et al. 2006; Figure 9). Alewife recovery resulting from dam removals and improved access has provided an additional food resource for endangered Atlantic Salmon and terrestrial piscivores, such as the bald eagle *Haliaeetus leucocephalus*. Restored Alewife stocks also have enhanced local economies by diversifiying fisheries, including creation of a major fishery for bait to supply the lobster fishery (Saunders et al. 2006; McClenachan et al. 2015). Lakes with restored alewife populations also have shown improvements in water quality and clarity because out-migrating juveniles remove phosphorus from these systems (McClenachan et al. 2015). Despite some recent population recoveries of Alewife in Maine, coastwide populations of river herring, including both Alewives and Blueback Herring *A. aestivalis*, are depleted and near historic lows (ASMFC 2017a).

Alewife, Blueback Herring, and American Eel, all of which are returning to headwater streams following recent dam removals (Hitt et al. 2012; Hogg et al. 2015). Similarly, the Yurok and Karuk people of the Klamath region in northern California, who have deep cultural and subsistence ties with Pacific Lamprey *L. tridentata*, provided important information that improved understanding of lamprey population crashes in the Klamath Basin (Lewis 2009).

The strong interrelationships between native peoples, fish, and fluvial systems also implicate environmental justice issues, particularly as related to chemical contaminants and traditional food systems that include fish (Kuhnlein and Chan 2000). Contaminants affect not only human health, but also broader issues of food security and social and cultural wellbeing (Jewett and Duffy 2007). Impairment of headwaters and water quality extends to many other groups as well, and can lead to greater environmental inequality (e.g., Elkind 2006). Moving forward, heightened respect for and recognition of the rights and values of culturally diverse peoples in the use of river systems, including headwaters and associated resources, warrants additional and thoughtful consideration when legislating and implementing protections (Johnston 2013).

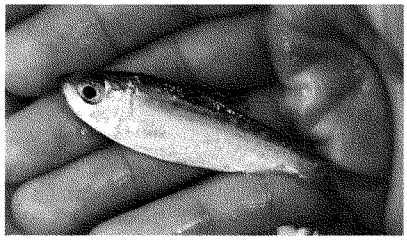


Figure 9. Juvenile Alewife *Alosa pseudoharengus* from Unity Pond, Maine. Photo Credit: Susan A. R. Colvin.

HEADWATERS NEED CONTINUED PROTECTION

The repeal and replacement of the 2015 Clean Water Rule would roll back Clean Water Act protections for a majority of the nation's streams and wetlands, including thousands of miles of headwater streams and millions of acres of wetlands that provide invaluable ecosystem services and habitat for many species of fish. The recently proposed rule, which excludes wetlands outside of floodplains (or those that lack a continuous surface connection to other jurisdictional waters), ephemeral streams, and likely some intermittent streams, would threaten fish and the headwater ecosystems on which they rely, result in severe economic losses, and cause irreparable cultural and social damage. To recap, some examples of headwaters that would not meet Scalia's definition and could lose protection under the new rule include the karst features, critically important to threatened and endangered cavefish (Figure 5); intermittent streams used by imperiled fish for spawning and early rearing (Figure 8); and intermittent side channels and floodplains that provide critical habitat for juvenile salmon (Figure 6). Justice Scalia's definition, which largely aligns with the proposed rule, ignored the intent of Congress in passing and updating the Clean Water Act, failed to give deference to the agencies that implement the law, and issued a decision not grounded in science. In contrast, Justice Kennedy's definition deferred to Congressional intent and federal agency experts and relied on the available scientific evidence. The science of waterbody connectivity has advanced markedly in the time since the *Rapanos* case, and the 2015 Clean Water Rule was based on the demonstrated importance of physical, chemical, and biological connections of headwaters to the ecological condition of navigable waters and their biota (Leibowitz et al. 2018).

Headwaters are critically important for many ecosystem functions, including sustaining fish stocks, with influences extending from small tributary streams and wetlands to navigable waterbodies downstream. The recently proposed rule offers protection only to a narrower subset of headwaters and will have far-reaching implications for fish, wildlife, and humans that depend on freshwater ecosystems. Species already at risk of extinction would be more difficult to recover, and it is highly likely that many fishes and other aquatic taxa would face greater imperilment. It is clear that communities across the USA would lose significant economic, spiritual, and socio-cultural benefits that are derived from headwaters under the proposed rule. Therefore, we recommend that the EPA follow the approach in its National Aquatic Resource Surveys and conduct a formal ecological and economic risk assessment to quantify the potential effects of changing the current WOTUS rule.

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AUTHORS' CONTRIBUTIONS

S.A.R.C. and S.M.P.S. conceived the original structure of the manuscript. S.A.R.C. served as overall lead author and

led the writing of the Introduction. S.M.P.S led the Ecosystem Function and Cultural Significance sections. P.D.S. led the Endangered Species section, with contributions from K.D.F. R.W.C. led the section on Commercial and Recreational Fishing. These authors wrote the manuscript with contributions from all authors. R.M.H., K.O.W., and K.D.F. provided important editorial suggestions.

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Senator CARPER. One of the things I like to do in the hearings that we have that have a diverse panel is to see where there is some consensus, where we agree. Not so much where we disagree, but where we agree. I think we all agree we want clean water. We want clean water. We want our families to drink clean water. Whether we happen to be in an urban area, suburban area, or rural area, I think we all agree on that. We want to use some common sense. We always want to use some common sense. We want to encourage sound conservation practices.

We have great examples of farms in Delaware where years ago people started adopting conservation practices and their fellow farmers almost laughed at them. But when those conservation projects turned out to provide the enriched soil and just a better environment in which to grow crops, they are not laughing anymore; they are embracing those practices themselves.

I think we want to provide greater certainty and predictability. My understanding is when the Obama administration worked on the Waters of the U.S. rule, their goal was to provide clarity and certainty.

I remember hosting a town hall meeting not in a building in southern Delaware, but on a farm. We had farmers, and we had people who came, who helped actually draft pieces of the rule that has been questioned by a number of States and at least a couple of courts.

But I think we all want greater clarity in this regard, and there is a strong effort by the people who crafted the rule that is under fire to provide that kind of clarity. I think we do want that clarity, and the question is do we get the clarity that is wanted and needed under that rule or the proposed rule that is before us from this Administration. Those are some of the areas where we might agree, instead of just disagreeing.

I do have a question, and we will start with Mr. Elias. Do you want to dispute, do you want to refute what I just said earlier about areas of agreement, or maybe a couple others that you think that are worth noting? Where do we agree?

Mr. ELIAS. Could you repeat that? I am sorry, I am a little hard of hearing, and I didn't quite catch that.

Senator CARPER. It was a long question. I ran through about five or six examples of where I think we are in agreement, and I wanted to ask you do you agree with that. Do I have the right points, or are there some others that I should have mentioned as well?

Mr. ELIAS. I think you are right, there is a lot of common ground, and I think we all want to recognize that a proper regulation would take a look at those ephemeral streams and those waterways that seemingly——

Senator CARPER. Most people who might be listening or watching this will hear the word ephemeral and not have any idea what we are talking about. It is in my statements and so forth. My understanding of ephemeral means there would be a stream that flows maybe only when we have snowmelts or when we have really heavy rainstorms. Is that a fair description?

Mr. ELIAS. Yes, that is a fair definition. Typically, when a big event happens, then those waterways are filled with water and are actually recognized as traditional navigable waterways before the

Clean Water Rule of 2015 and since then, again. That was an issue that was contemplated in 1972, when the Clean Water Act was first passed, rivers and streams that run when there are big events.

So, yes, I think we recognize that they need to be protected. I think the question is how and who, and to what level. And I think the thing that is important for us to recognize for somebody like me, who comes from the arid Southwest, is the history that we have of people and communities that have had their faith damaged by discharges into those types of streams and rivers.

So we need to have some kind of clarity that we are going to be offered the same protections that everyone in the United States is going to be offered as well, and I think that is a good common ground that we all share, because we all don't want to face the kind of things that have happened in the district I represent. I can assure you that it is not a wonderful thing. I hate to bring the subject up today, but I would be severely remiss if we didn't because it is a common ground we share.

Everybody this morning has said we want clean water. The question is, how do we go about getting that, and to what level are we willing to protect areas that seem to be dry and not active, when the truth is a really complicated set of science behind it.

Senator CARPER. Thank you.

Mr. Fornstrom, same issue, if you would, please.

Mr. FORNSTROM. Of course, clean water. You won't sustain life without it. We, in Wyoming, an arid climate also, have the same issues. Our issue with the new rule isn't the idea that we don't want clean water; the idea is that we want to know what is and what isn't in the rule, simply.

Senator CARPER. All right.

Mr. Goehring.

Mr. GOEHRING. Thank you, Senator Carper. Very much agree, we need common sense, and I think we really do have consensus that everybody wants clean water. And I think hearing all those that are involved and engaged in this conversation is a first step in the right direction; and second, going back to those that are owning, operating, and managing that land, and respecting their opinion and expertise will take us a long way down that road.

Senator CARPER. Thanks.

Mr. Chairman, I want to come back to something I raised earlier, if the rule proposed by this Administration were enacted, the question of whether or not waters in a number of States would lose completely the protection of the Clean Water Act. That is something that I raised earlier, and it was kind of left on the table, but I want to come back to that again.

Christophe Tulou, sitting behind me, he used to run the Department of Natural Resources and Environmental Control for Delaware when I was Governor, and we worked a lot on ag issues, as you might imagine. But he gave me a sentence that says the Clean Water Act will not apply to waters removed under the Trump WOTUS rule.

Think about that. The Clean Water Act will not apply to waters removed under the Trump WOTUS rule. If that is true, and I think it is, that has to be of concern really to all of us.

The other thing, if you have a place where waters are coming out of springs, and then they may disappear under the ground for miles, tens of miles, even 100 miles, and then come back up to the surface again, or maybe we are drawing our drinking water from those aquifers, what do we do about those?

I used to think if you don't see the water, if you don't see it going in a river or stream or whatever, then it is not water, it is not a waterway. Well, as it turns out, there are a lot of waterways under the ground for miles in my State, and probably your States, too, that we need to protect.

Anybody want to respond to that?

Mr. GOEHRING. Senator Carper, maybe that is why I have been confused in this conversation. You would have to void the Clean Water Act. It does not matter. The Clean Water Act is the law of the land, and either the State or the Federal Government is going to implement it. So when I hear that comment, I am confused why someone has misinformed or stated that to all of you, that the Clean Water Act will not be applicable if it is not on jurisdictional waters, because subsurface and surface water has to be managed and operated by someone; it is either the State or the Federal Government.

So the State has a primary responsibility, every State does, and the Federal Government has the responsibility in those traditional navigable waters, or at least what I would say would be the definition that has existed for many years, for interstate and foreign commerce. Those are the waters that we have always recognized, and they have the primary responsibility there.

When we get into any of those tributaries where I would probably have to say the tributaries still constitute traditional navigable waters. Then, when we get up into the rest of the watershed, the State still has the responsibility for the groundwater and for any of the surface water. So maybe I am confused, and I apologize for that, but the Clean Water Act is going to hold someone responsible for that oversight.

Senator CARPER. Mr. Chairman, this is something I want us to drill down on and find out if indeed it is true that the Clean Water Act will not apply to waters removed under the Trump WOTUS rule. We need to know that, and we need to know that with certainty.

Mr. Elias, do you have anything on that?

Mr. ELIAS. Yes, I would like to add to that.

Senator CARPER. Sorry to go on so long.

Mr. ELIAS. Excuse me?

Senator CARPER. I apologized to the Chairman for going on so long.

Thank you for being patient with us.

Mr. ELIAS. Thank you. The reality is, once more, that people who live in Tucson, especially on the west and south side, as I said earlier, their faith has been shaken, and we look to the Federal Government for their expertise because our State does not have a good history in protecting the environment and protecting the waterways of the State of Arizona. That is an ugly legacy to discuss, but it is a reality that we have to face, and I think the fears that people have are perfectly legitimate.

Senator CARPER. Mr. Chairman, I have one last unanimous consent request, and that is to submit a letter from the National Congress of American Indians into the hearing record emphasizing our unique relationships with and our obligation to Tribal Nations, particularly as it relates to safeguarding tribal waters and water dependent resources.

Our thanks to each of you for being here today and helping to inform our conversation and our understanding.

Thank you.

Senator BARRASSO. Without objection.

[The referenced information follows:]

NATIONAL CONGRESS OF AMERICAN INDIANS

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Chickasaw Nation

FIRST VICE-PRESIDENT
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Sault Ste. Marie Tribe of Chippewa Indians of Michigan

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April 15, 2019

The Honorable Andrew Wheeler
Administrator
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The Honorable R.D. James
Assistant Secretary of the Army of Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108

Re: NCAI Comments in Response to Docket ID No. EPA-HQ-OW-2018-0149 – Proposed Revised Definition of "Waters of the United States"

Dear Administrator Wheeler and Assistant Secretary James:

On behalf of the National Congress of American Indians (NCAI), the oldest and largest national organization made up of American Indian and Alaska Native tribal nations and their citizens, I write to oppose finalization of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corp of Engineers' (ACE) proposed rule revising the definition for the "Waters of the United States" under the Clean Water Act (CWA) (Revised Rule) and request that the comment period be extended 200 days. As discussed in detail below, extending the comment period is appropriate to allow for meaningful tribal consultation to address the substance of our comments herein.

Background and Overview

Water is vital to provide a sustainable homeland for tribal nations – and its quality is a critical concern for the health, security, welfare, self-governance, and existence of tribal nations on and off-reservation. Rivers, lakes, ponds, streams, and wetlands supply and cleanse drinking water; provide essential habitat and ecosystem services for fish and wildlife; enable physical flood protections for communities; and are vital to tribal spiritual and cultural practices.

The CWA, as the primary federal statute that regulates protection of the nation's water, recognizes the manifold[1] importance of water quality. It specifically prohibits "the discharge of any pollutant by any person," except in express circumstances.[2] A "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source," and the statutory term "navigable waters," in turn, means "the waters of the United States" (WOTUS).[3]

While WOTUS is undefined, the courts and agencies – most recently under the 2015 Clean Water Rule – have traditionally interpreted this term broadly in accordance with the CWA's goal of preventing, reducing, and eliminating pollution in order to

[1] 33 U.S. Code §1251(a)(2) (referencing fish, shellfish, wildlife, and recreation).
[2] Id. at §1311(a).
[3] Id. At §1362(12); §1362(7).

"restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4]

The Revised Rule departs from this precedent, contravening the CWA's express recognition of the interconnectivity of water resources by narrowing the scope of protected waters. As explained below, this drastic change would unduly affect tribal nations and raise jurisdictional issues related to fulfillment of the federal trust responsibility, treaty compliance, and violations of reserved rights.

A. The United States Has a Duty to Safeguard Tribal Waters and Water-Dependent Resources

Federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, history, treaties, statutes, and court decisions.

i. The Federal Government Has Fiduciary Obligations Towards Tribal Nations

The Constitution grants Congress plenary and exclusive authority to legislate on tribal affairs.[5] Supreme Court case law has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States and that have retained inherent sovereignty over their lands and people since time immemorial.[6] Tribal nations' status has been described as domestic nations within a nation, and they are beneficiaries of a fiduciary relationship with the federal government.[7]

Unless expressly authorized by Congress, states have no jurisdiction over tribal matters. In exchange for ceding certain tribal resources, the United States obligated itself to act as a trustee for tribal rights, land and water resources, and assets. In fulfillment of this tribal trust relationship, the United States "charged itself with moral obligations of the highest responsibility and trust" toward tribal nations.[8] The EPA and ACE, as federal agencies, are obligated to fulfill this legally enforceable trust responsibility.

In recognition of the federal trust responsibility, Executive Order 13175 and agency policies require the EPA and ACE to engage in full and meaningful consultation regarding actions that may impact tribal nations.[9] Further, both EPA and ACE policy mandates consideration of tribal treaty rights in agency decision-making. Thus, "if a treaty reserves to tribes a right to fish in the water body, then

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[4] Id at §1251(a).
[5] *U.S. v. Lara*, 541 U.S. 193, 200 (2004)(explaining that "[t]his Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that [plenary and exclusive] power.").
[6] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[7] *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831).
[8] *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).
[9] "ACE Tribal Consultation Policy and Related Documents" https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf; "1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations" https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf; "EPA Policy on Consultation and Coordination with Indian Tribes" https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed."[10]

In addition to the trust responsibility, Executive Order 12898 mandates that federal agencies and EPA policy address the environmental justice impact of their actions. The EPA's implementing policy provides that tribal communities should have meaningful involvement in "the administrative review process, and any analysis conducted to evaluate environmental justice issues."[11]

1. Treaty Rights Could be Violated By Water Quality Degradation

Treaties between tribal nations and the United States establish contractual obligations and regulate political relations between sovereigns. The Supreme Court has held that treaties were "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted."[12] Under the Constitution, treaties, like statutes, are the "supreme law of the land."[13] Federal agencies are thus obligated to comply with treaties and to protect tribal resources pursuant to their trustee responsibilities.[14]

Treaties frequently include hunting, gathering, and fishing rights on and off-reservation and the Supreme Court has held that tribal nations possess aboriginal water rights that are necessary to exercise these reserved protections.[15] Use of a water dependent treaty right, such as a fishing right, or a hunting and gathering right, or other subsistence right, is integrally connected to water quality. Degradation of water quality which interferes or constructively prevents the exercise of such a treaty right may be subject to legal action for a treaty violation and breach of the federal government's fiduciary responsibilities.

2. Federally Reserved Rights May be Impaired by Diminished Water Quality

Indian federally reserved water rights exist when a reservation has been created whether by treaty, executive order, or through statute and can cover groundwater and perennial, ephemeral, and intermittent surface waters.[16] The priority date and quantity for these rights are affected by the purposes of the reservation, its date, and method of creation. Reserved water rights are protectable even when unquantified.[17]

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[10] "EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights" https://www.epa.gov/sites/production/files/201602/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf

[11] "Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples" https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf.

[12] *U.S. v. Winans*, 198 U.S. 371, 378 (1905).

[13] U.S. Const. art. VI, cl. 2.

[14] *Umatilla v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *N.W. Sea Foods, Inc. v. U.S. Army Corp of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Wash. v. Wash. State Comm. Passenger Fishing Vessel Assn*, 443 U.S. 658 (1979); *Menominee v. U.S.*, 391 U.S. 404 (1968).

[15] *Winans*, 198 U.S. 371 (holding that tribal water rights were necessarily and impliedly reserved by tribal nations in order to give effect to their treaty rights); *Wash. v. U.S.*, 138 S. Ct. 1832 (2018) (fishing rights include prevention of off-reservation degradation of salmon habitat); *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Baley v. U.S.*, 134 Fed.Cl. 619 (2017).

[16] *Winters v. United States*, 207 U.S. 564, 577 (1908); *Adair*, 723 F.2d at 1414.

[17] *Winters*, 207 U.S. 564 (affirming injunction restraining appellants from diverting water away from Fort Belknap Indian Reservation based on the unquantified tribal reserved rights); *Kittitas Reclamation Dist. v. Sunnyside Valley Irr.*

While water rights are typically focused on quantity, degradation of water quality can impact the exercise of a federally reserved water right. In an Arizona case concerning a decades-old decree apportioning the Gila River, a federal court found that the San Carlos Apache Tribe had a right to natural flows from the Gila River because return flows were inferior due to degraded water.[18]

As shown below, the Revised Rule will reduce federal baseline protections for waterways affecting tribal communities. As a result, a company would not require a permit to discharge fracking waste into an ephemeral stream on forest service land that feeds into, or otherwise supplies water for domestic or agricultural use by downstream tribal nations. In such case, the domestic or agricultural use of a federally reserved water right would be obstructed and a tribal nation could have a legal cause of action for the resulting harm. Despite the likelihood of these harms, the Revised Rule contains no evaluation of the proposal's impact on fulfillment of the agencies' federal trust responsibilities and its intersection with legally enforceable federally reserved rights.

3. Tribal nations will be forced to protect their rights in biased state venues

In general, NCAI opposes any resulting delegation to states over important water resource regulations. The Revised Rule, as advertised, would leave states and tribal nations "free to manage [their waters] under their independent authorities."[19] However, tribal nations and states are often at odds on how best to manage shared resources, such as water. The broad sweeping reduction in federal protections for water features, such as wetlands, ephemeral streams, and other hydrologically connected resources will require tribal nations to seek protections under state laws that often do not adequately consider tribal interests.

Further, the federal government maintains a fiduciary duty to tribal nations to preserve and protect tribal lands, natural resources, and historic, sacred and cultural sites. These duties are enshrined in the Constitution, federal statutes, executive orders, treaties, Supreme Court precedents, and other law. State governments do not have this duty to tribal nations and, even if well-intentioned, do not have local statutes and regulations in place that are commensurate with federal statutes and regulations to provide strong protections for tribal interests. Put simply, the fiduciary duties owed tribal nations necessitate serious discussion and consideration of how tribal interests can be protected under any Revised Rule, but with particular attention to regions where tribal nations and states have historically fought over water resources.

B. Meaningful Consultation Should Occur on the Revised Rule and the Comment Period Should be Extended

i. Meaningful Consultation Has Not Occurred on the Revised Rule

Despite the significant ramifications of the Revised Rule, the EPA and ACE have not conducted meaningful consultation with tribal nations on its content, which was just released on February 14,

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Dist., 763 F.2d 1032, 1034–35 (9th Cir. 1985) (affirming district court's order requiring that water be released from a reservoir in order to preserve nests of salmon eggs based on unquantified tribal fishing rights); *Baley*, 134 Fed.Cl. 619.

[18] *U.S. v. Gila Valley Irrigation Dist.*, (Gila III), 920 F. Supp. 1444 (D. Ariz. 1996).

[19] 84 Fed. Reg. 4154.

2019. To date, some individual consultations and just four half-day discussions have occurred in Kansas City, Albuquerque, Seattle, and Atlanta on the Revised Rule.

The agencies largely claim to have satisfied their consultation obligations by having communicated with tribal nations about the *possibility* of revising the 2015 Clean Water Rule in a two-step process. The agencies' own summary of these "consultations" document that tribal nations expressed a series of substantive and procedural concerns, the latter of which relate to the non-disclosure of the proposed rule and the lack of scientific data on the impacts of reducing WOTUS coverage.[20]

The omission of such critical information is the antithesis of full and meaning consultation as required by the agencies' consultation policies. Further, agency policies require that they consult with tribal nations *before* taking action or implementing decisions that may impact them. Here, the agencies have not adequately consulted with tribal nations on the Revised Rule as documented by the neglect of Regions 9, 8, 5, 3, 2, and 1 after the release of the Revised Rule. In accordance with agency policy, full and meaningful consultation should occur with tribal nations prior to issuance of the final rule. Further, because full consultation has not occurred on the Revised Rule, NCAI's comment letter hereby incorporates by reference all tribal concerns that were raised in Step 1[21] and Step 2[22] of the proposed WOTUS revision process and requests that they be incorporated into the Revised Rule record and adequately addressed before issuance of a final rule.

ii. The 60-Day Comment Period Does Not Provide an Opportunity for Meaningful and Informed Public Comment

The comment period on the proposed Revised Rule should be extended to 200 days to enable meaningful consultation and careful analysis by affected tribal nations and communities. The 2015 Clean Water Rule received more than one million comments during its 200-day comment period and reflects the significant effect that re-defining WOTUS jurisdiction has on communities.

Further, an extension of the comment period is especially merited because of the non-disclosure of scientific data showing the impact of the Revised Rule on affected watersheds. A 60-day comment period is insufficient to allow for a thorough analysis of the proposed rule. Relatedly, tribal hearings should be held to gather input on this proposed rule which – as presently proposed – would have disparate impacts on tribal nations that rely on waters slated to lose jurisdictional protections. Lastly, the comment period should be extended, because as explained below, it is unclear whether it satisfies the requirement that the public have an opportunity for "meaningful and informed" comment on federal rulemaking.

C. The Proposed Rule Will Degrade The Water Quality of Tribal Communities

The Revised Rule would make the following subject to CWA protection: (1) Traditional Navigable Waters (TNWs), (2) some tributaries of TNWs, (3) some drainage channels ("ditches"), (4) lakes and

[20] "Summary Report of Tribal Consultation and Engagement for the Proposed Rule: Revised Definition of 'Waters of the United States' Proposed Rule." https://www.epa.gov/wotus-rule/tribal-consultation.
[21] Federal Register Docket: EPA-HQ-OW-2017-0203.
[22] Federal Register Docket: EPA-HQ-OW-2018-0149.

ponds that flow perennially or intermittently into categories (1) – (5); (5) impoundments of the above, and (6) wetlands directly adjacent to the above.[23]

Excluded from protection under the Revised Rule are: (1) all waters not expressly identified above; (2) groundwater, including water that is hydrologically interconnected with surface water; (3) ephemeral streams that flow after precipitation; and (4) non-navigable interstate waters.

i. Non-Disclosures of Environmental Effects May Violate the APA, NEPA, and ESA

Presently, the agencies have claimed that they lack adequate data to assess the impact of the Revised Rule on the nation's waterways.[24] The rushing of this rulemaking, without adequate scientific review, may constitute arbitrary and capricious conduct in violation of the Administrative Procedures Act (APA).[25] Relatedly, the scarcity of data raises APA concerns as the public lacks information necessary for submission of meaningful and informed comments.[26]

Moreover, the inadequate scientific review may violate the National Environmental Protection Act (NEPA) and the Endangered Species Act (ESA). NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[27] While the CWA exempts the EPA from types of NEPA compliance, the ACE has no similar exemptions.[28]

The ESA requires federal agencies to engage in consultation with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (the Services), as appropriate, to ensure that rulemaking does not jeopardize an endangered or threatened species or reduce critical habitats.[29]

As shown below, EPA's prior analysis illustrates that a reduction in WOTUS coverage would significantly affect human-, fish-, and wildlife-dependent waters, which would require the preparation of an EIS and an ESA consultation. Despite this impact, ACE did not complete an EIS and the Revised Rule contains no reference to NEPA and does not even explain whether a baseline Environmental Assessment was performed.[30] Likewise, neither the EPA nor the ACE engaged in an ESA consultation. It is unclear how the agencies can credibly assert they lack data to evaluate the impact of the Revised Rule but simultaneously determine their proposed action would have no significant effect on the human environment or endangered species.

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[23] 84 Fed. Reg. 4154.
[24] Id.
[25] *Motor Vehicle Mfrs. Ass'n of U.S., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (holding that [a]n agency's view . . . may change. . . . But an agency changing its course must supply a reasoned analysis.").
[26] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1981) ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."), cert. denied, 495 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir.) (proposed rule must provide sufficient information to permit informed "adversarial critique"), cert. denied, 434 U.S. 829 (1977).
[27] 42 U.S.C. § 4332(C).
[28] 33 U.S.C. § 1372(c)(1).
[29] 16 U.S.C. § 1536(a)(2).
[30] 84 Fed. Reg. 4154.

ii. Existing Data Shows the Revised Rule Will Reduce Environmental Protections for Watersheds

The agencies' assertions that they lack scientific data to assess the environmental impact of the Revised Rule is contradicted by their prior analysis. Agency records show that at least 18 percent of stream miles and 51 percent of wetlands nationwide would lose CWA protections if a narrower definition is adopted.

Similarly, agency data shows that within the arid West, an estimated 35 percent of streams will lose federal protection.[31] Likewise, the EPA's prior data shows that the drinking water of more than 117 million Americans could be imperiled because they receive water from public systems that draw supply from headwater, seasonal, or rain-dependent streams that are slated to lose jurisdictional coverage.[32]

Most waters flowing through or adjacent to tribal lands originates elsewhere and may be a mixture of ephemeral waters that hydrologically interconnect to perennial water. The reduction in federal protection for streams, wetlands, and ephemeral waters will significantly impact tribal communities. Wetlands are essential to a healthy watershed and provide pollution filtration, groundwater recharge, flood protection, and vital ecosystem services for fish and wildlife. Similarly, protection of upstream headwaters, particularly those supplied by ephemeral streams is a critical source of drinking water for downstream communities, provides needed water for agricultural uses, and provides critical habitat for fish and wildlife. Further, the Revised Rule's requirement that intermittent streams continuously flow during certain periods of a year may result in some intermittent waters being reclassified as non-protected ephemeral streams. To this point, such streams are even more vital in the arid West, home to many large land-based tribal nations, where drought impacts are more severe and where ephemeral streams are a critical component of the local water cycle. These identified impacts, based on prior agency data, illustrate that degradation of tribal waters will result from the Revised Rule to the detriment of tribal drinking water, agricultural water, cultural resources, and other tribal water-dependent resources such as fish and wildlife.

iii. The Revised Rule Harms Tribal Regulation of Water Resources

Tribal water resources are disproportionately impacted by the removal of a baseline standard for the nation's waters because tribal lands are more likely to abut other federal lands. The Revised Rule ignores this fact and instead cursorily states, as noted earlier, that waters will not lose environmental protection under the proposal because "States and Tribes are free to manage [their waters] under their independent authorities."[33] This sentence oversimplifies a jurisdictionally complex regulatory structure and does not address tribal treatment as a state authority under Section 518 of the CWA.

Tribal nations are authorized to receive a "treatment as a state" designation to implement sections of the CWA on their trust lands only for waters that constitute WOTUS. Tribal standards can go above

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[31] "GIS Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S." https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent; "Breakdown of Flow Regimes in NHD Streams Nationwide" https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf
https://www.eenews.net/assets/2018/12/11/document_gw_05.pdf

[32] Id.

[33] 84 Fed. Reg. at 4169.

the federal baseline standard, but TAS cannot convey federal jurisdiction where it has otherwise been excluded. The process for receiving this designation and running a CWA program is administratively costly. While only a few tribal nations have implemented TAS for water quality standards, the EPA acknowledges that "at the present, no tribes administer the section 402 or 404 programs."[34]

Presently all tribal nations rely on the EPA to ensure compliance with applicable tribal or federal water quality standards prior to the issuance of a 402 or 404 permit. Narrowing the WOTUS definition cedes important jurisdictional coverage to states because the EPA can only approve a TAS designation for waters defined as WOTUS. Thus, fewer permits will be issued for pollutant discharges resulting in increased pollution to waterways and impairment and violation of tribal water quality standards because of the Revised Rule.

A tribal nation exercising its inherent sovereignty to regulate its waters could not substitute for the extensive protections and inter-governmental operating structure provided by TAS. Further, the extent to which a tribal nation can exercise its inherent regulatory authority to prevent off-reservation harm is jurisdictionally unclear. If the Revised Rule is implemented, a company could lawfully discharge mining waste into a previously protected isolated wetland that filters tribal drinking water without the need for federal approval. A tribal nation would be left with no clear legal recourse to protect its water resources since it would be required to assert jurisdiction over a non-tribal entity for off-reservation conduct that violates a tribal standard, but under a state law framework that has historically worked against tribal interests.

D. Conclusion

For the aforementioned reasons, NCAI cannot support the Revised Rule in its current form. All available data shows that the Revised Rule will overburden tribal nations and likely violate the federal trust responsibility, treaties, and impair the exercise of reserved water and water dependent rights. Accordingly, NCAI requests that any definitional change to WOTUS include a comprehensive evaluation of EPA and ACE's federal trust responsibility, impacts to treaty rights, reserved rights, and other trust resources including those of Alaska Native tribes and Alaska Native villages; and evaluate cumulative impacts to tribal jurisdiction, economies, tribal government(s) and environmental resources. Further, NCAI requests that prior to the issuance of a final rule, full and meaningful tribal consultation occur on the Revised Rule and that the comment period be extended 200 days to accomplish this requirement.

In closing, we thank you for your time and consideration, and please feel free to contact Fatima Abbas, NCAI Policy Counsel, at fabbas@ncai.org or (202) 466-7767, if you have any questions.

Sincerely,

Jefferson Keel
NCAI President

[34] 84 Fed. Reg. at 4157.

Senator CARPER. I would just say, Mr. Chairman, there is a lot of agreement here. There is clearly some disagreement, and we need to try to figure this out. I appreciate this hearing.

Senator BARRASSO. Thank you.

Senator Cramer.

Senator CRAMER. Thank you, Mr. Chairman.

Thanks to all of you for the irrevocable gift of your time and your expertise.

I might want to hone in just on something you said, Mr. Elias, in responding to Senator Carper's question about the things we agree on, because I think you hit the nail on the head when you said we agree on these things; the question remains who is it that we look to for protection. You just articulated why you feel people at least in your area and your county are looking to the Federal Government for help given, evidently, a shortcoming in the State level.

That frightens me because, like I said, there are very few people in North Dakota that ever look to the Federal Government for help or expertise on particularly our natural resources. But we are not all the same; it is 50 different experiences, 51 or 52, depending on who all you include.

Commissioner Goehring, you have talked a couple times, and quite articulately, about what I think is the real discussion of the day. In fact, I am intrigued by the letter from the Congress of American Indians because sovereignty is a desire for all of us, as States, as Tribes. Sovereignty implying that we govern ourselves under the larger umbrella. We don't yield that to the Federal Government. And yet, at the same time, when there is a shortcoming, then we look to the Federal Government.

The issue of primacy, I want to hone in on that because we haven't spent a lot of time talking about that. You have tried to, and I think particularly under Clean Water Act issues, but there are lots of areas. I was a regulator for 10 years in North Dakota, overseeing environmental and particularly environmental regulation in the energy area, and one of the portfolios I carried was the coal portfolio.

So SMCRA laws, which are Surface Mining Control and Reclamation Act, which oversees the reclamation of mining, was under my jurisdiction, but it was Federal laws that we enforced. And that State primacy, that cooperative federalism model works very well when you have the unique understanding and intelligence of the local area under the umbrella of Federal oversight and a relationship with the Federal Government that is mutually respectful, so, regular audits, reporting.

I just think this idea that somehow we are going to trust gun toting Federal agents or the Corps of Engineers, a military body, basically, or at least under the Department of Defense, we have had more problems, whether it is Swampbuster—Swampbuster is better because USDA tends to be more farmer oriented, but whether it is Swampbuster or WPAs, wildlife protection areas, under the Fish and Wildlife Service, which is more concerning to me; gosh, the closer enforcement can be to the people that you are enforcing, I can't think of many examples where it would be worse than turning it all over to the Federal Government.

So, I would like to see us get back to your point. We all agree on these goals. What is the right mix of enforcement so that people can have a sense of confidence, clarity, and frankly, better oversight.

The other thing, one of you brought it up, and I don't remember which one, but there actually—I think it was maybe you, Mr. Fornstrom, that brought up the issue of—I call it perverse incentives, that you can actually have an incentive, a well intentioned goal that is actually perverted when you are punished for your good deed, that it costs more money not to comply than it does to comply, so, consequently, you give up.

I think we have to be very careful about that, too. I like natural incentives that cause, again, the best enforcement and really the best management at the closest level.

With that, if anyone wants to comment on that, you are welcome to for the next minute and 39 seconds, but I just wanted to make that point and just, again, thank all of you for your expertise and your concern for this issue, and all of you for this very good dialogue.

With that, I would either allow anybody to answer or yield back.

Senator BARRASSO. Mr. Fornstrom.

Mr. FORNSTROM. I agree, and thank you. One of the biggest things we want to put forth is the clarity in the rules, and then knowing who is going to enforce those rules. We prefer the local. But we would like to know, by looking at it, what it is and where it is at, and it is that simple. It is not rolling anything back; it is wanting to know who we are supposed to find.

Senator BARRASSO. Well, I want to thank all of you for being here.

Senator Cramer has used the word clarity. Mr. Fornstrom, you used the word clarity. I think you ended your testimony earlier saying what we all want is clean water and clear rules, which focuses on the clarity, and that may be the headline coming out of this meeting today—clean water, clear rules.

So, thank you all. Now, you subjected yourself to 11 Senators asking questions. Others who had unavoidable scheduling conflicts may want to put questions in for the record. We ask that you respond to those, so the hearing record is going to remain open for 2 more weeks.

But I really want to thank all of you for being here. It was a tremendous hearing. Thank the members who have also attended. Obviously, you have 11 Senators that come and ask questions; a couple of others came and had to leave before they were able to ask their own questions, but may submit them, but I think it was, I think, a quite fruitful discussion.

Thank you.

This hearing is adjourned.

[Whereupon, at 12:02 p.m. the Committee was adjourned.]

[Additional material submitted for the record follows:]

UNITED STATES SENATE REPORT

From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land:

A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act



United States Senate Committee on Environment and Public Works

Majority Staff

Released:

September 20, 2016

Executive Summary

Case studies presented to the Senate Environment and Public Works Committee demonstrate that the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) new regulation defining "waters of the United States" (WOTUS), promulgated on June 29, 2015, will codify many of the most extreme overreaches of federal authority asserted by these agencies.

Although the new regulation is currently stayed, pending the outcome of litigation challenging the rule, these case studies demonstrate that assurances given by EPA and the Corps regarding the scope of the WOTUS rule and its exemptions to the positions taken by these agencies in jurisdictional determinations and in litigation are factually false.

The following conclusions can be drawn from these case studies:

- EPA and the Corps have and will continue to advance very broad claims of jurisdiction based on discretionary authority to define their own jurisdiction.
- The WOTUS rule would codify the agencies' broadest theories of jurisdiction, which Justice Kennedy recently called "ominous."
- Landowners will not be able to rely on current statutory exemptions or the new regulatory exemptions because the agencies have narrowed the exemptions in practice and simply regulate under another name. For example, if activity takes place on land that is wet:
    - plowing to shallow depths is not exempt when the Corps calls the soil between furrows "mini mountain ranges," "uplands," and "dry land;"
    - discing is regulated even though it is a type of plowing;
    - changing from one agricultural commodity constitutes a new use that eliminates the exemption; and
    - puddles, tire ruts, sheet flow, and standing water all can be renamed "disturbed wetlands" and regulated.
- If Congress does not act, the newly won ability to challenge Corps jurisdictional determinations and claim exemptions will be moot because the WOTUS rule establishes jurisdiction by rule that will extend to all the activities described in the case studies.

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INTRODUCTION

This report examines claims made by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding their jurisdiction over land and water under the Clean Water Act (CWA) under both the currently applicable regulations and the new WOTUS rule.

In 1972, with the enactment of amendments to the Federal Water Pollution Control Act (Clean Water Act or CWA), Congress gave the Administrator of the Environmental Protection Agency (EPA) and the Secretary of the Army (acting through the Chief of the Corps of Engineers) (Corps) the authority to regulate the discharge of pollutants (EPA) or the discharge of dredged or fill material (Corps and EPA) into navigable waters, which Congress defined as "waters of the United States."[1] EPA and the Corps have promulgated several regulatory definitions of "waters of the United States." Water bodies that are "waters of the United States" are subject to the multiple regulatory requirements under the CWA including permitting and reporting, enforcement, mitigation, and citizen suits.

Despite the fact that there has been no statutory change in the definition of "navigable waters" or "waters of the United States" since 1972, the history of the jurisdictional scope of the CWA has been a series of attempts to expand jurisdiction that were blocked by either Congressional or judicial action.[2] As discussed in Appendix A, below, challenges to expansions of authority have reached the Supreme Court three times. With the June 29, 2015, promulgation of a new regulation defining "waters of the United States" (WOTUS) this issue will likely reach the Supreme Court once again, unless EPA and the Corps withdraw the new rule, either voluntarily or at the direction of the courts or Congress.

[1] CWA section 502(7); 33 U.S.C. 1362(7).
[2] A history of the evolution of the definition of waters of the United States and agency, Congressional, and judicial actions is found in Appendix A.

I. WOTUS Rule: Reactions, Rebuttals, and Reality

On April 21, 2014 the EPA and Army Corps jointly published a proposed rule to change the regulatory definition of "waters of the United States" (WOTUS).[3] According to the agencies, the goal of the WOTUS rule is two-fold: (1) to make it easier for EPA and the Corps to assert jurisdiction over water and wetlands after 2006 when the Supreme Court called into question whether the agencies could regulate tributaries and their adjacent wetlands without evidence of a connection to water that is navigable in fact,[4] and (2) to reassert jurisdiction over the isolated water and wetlands that have not been regulated since 2001, when the Supreme Court struck down the "Migratory Bird Rule" under which EPA and the Corps claimed the ability to regulate based on use of water by migratory birds and endangered species.[5,6]

Since 2006, the agencies have continued to claim jurisdiction over vast areas of land and water by claiming on a case-by-case basis that these areas have a "significant nexus" to navigable water. Rather than simply "clarify" the scope of CWA jurisdiction, the new WOTUS rule would codify the overreaching federal control that the agencies claim today by codifying their assumption that most water and wetlands have a significant nexus to navigable water.

The proposed rule raised significant concerns among states, local governments, the Small Business Administration Office of Advocacy, farmers, homebuilders and landowners generally.[7]

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[3] 79 Fed. Reg. 22,188 (Apr. 21, 2014).

[4] *Rapanos v. United States,* 547 U.S. 715 (2006) (*Rapanos*).

[5] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001).

[6] On May 20, 2009, CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar sent a letter to Senator Boxer urging Congress to amend the CWA to extend jurisdiction to the broadest extent of Commerce Clause authority, because in *SWANCC* and *Rapanos* the Supreme Court held that the scope of waters protected by the Clean Water Act was narrower than the scope claimed by the agencies, and put a "time consuming and expensive" burden on federal agencies trying to control private property. When that legislative effort failed, the agencies pivoted and pursued the same goals through administrative action. The letter is available at http://www.epw.senate.gov/public/_cache/files/2ff603de-0013-4ae2-a7b6-5178603e0826/jackson-et-al-letter-to-boxer.pdf

[7] Thirty-two states filed comments opposing the rule, as did the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Regional Councils, the National Association of County Engineers, the American Public Works Association, the National Association of Flood and Storm Water Management Agencies, the National Association of State Departments of Agriculture, and even the Chief Counsel for the Small Business Administration Office of Advocacy. The American Farm Bureau Federation, the National Association of Homebuilders and many state affiliates of both organizations also opposed the rule. *See* comments

As regulated entities began to criticize the rule, EPA unleashed an unprecedented grass roots media campaign parts of which the Government Accountability Office found to constitute illegal propaganda and lobbying.[8]

For example, after the American Farm Bureau Federation communicated its concerns about the rule to the public and its members,[9] in July 2014, EPA posted a response called "Ditch the Myth."[10] This response and numerous "FAQs," blogs and other advocacy pieces claim that puddles, water-filled areas on crop fields, and erosional features never have been regulated and will not be regulated under the new WOTUS rule. However, as demonstrated in the case studies discussed below, EPA, the Corps, and the Department of Justice already claim the authority to regulate these features, simply by calling them something else. By asserting broad jurisdiction, and failing to clearly define critical terms used in exemptions, such as "puddle" or "dry land" or "erosion features," the final rule would give the federal government the discretion to claim jurisdiction over an exempt feature by simply referring to a "puddle" as "water" or "wetlands" or referring to an "erosion feature" as a "tributary." As discussed below, the Corps and EPA are already employing this tactic.

In its media blitz and in testimony before Congress, EPA simultaneously denied the validity of substantive concerns with the WOTUS rule and made promises to make changes in the final rule to address those concerns.[11] For example, EPA claims that existing exemptions, including

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filed in EPA Docket No. EPA-HQ-OW-2011-0880, available at www.regulations.gov According to Secretary Darcy, of the approximately 20,567 unique comments on the rule, 60% of the comments opposed the rule and 39% supported the rule and 1% was neutral. Letter dated May 14, 2015, from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to Senator Mike Rounds, available at http://www.epw.senate.gov/public/_cache/files/72e386d7-9727-48fe-b88e-26fd79900e4f/rounds---darcy-response-regarding-the-joint-agency-rulemaking.pdf .

[8] U.S. Government Accountability Office, Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions, Dec. 14, 2015, available at: http://www.gao.gov/assets/680/674163.pdf

[9] *See* American Farm Bureau Federation's "Ditch the Rule" http://ditchtherule.fb.org/

[10] *See* EPA's "Ditch the Myth": https://www.epa.gov/sites/production/files/2014-07/documents/ditch_the_myth_wotus.pdf *See also* various EPA twitter messages including https://twitter.com/EPA/status/492306785538412544/photo/1 ("Know the Facts: Proposed Rule to Protect Clean Water, Puddles are not regulated").

[11] *See* Hearing before the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure, entitled, "Impacts of the Proposed Waters of the United States Rule on State and Local Governments," Feb. 4, 2015, hearing available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=20A76AF6-BD8C-CA44-B93E-C585D88A1E90

exemptions for farming, remain unaffected.[12] However, as discussed below, EPA, the Corps, and the Department of Justice take a very narrow view of these exemptions. In addition, by making it easier to assert federal jurisdiction, the WOTUS rule allows EPA and the Corps to control more farm, ranch, and silviculture lands. In fact, the final WOTUS rule codifies both expansive federal jurisdiction and agency discretion to define the outer reaches of that jurisdiction, despite assurances to the contrary by the political leadership of EPA and the Corps.

The differences between EPA's assurances and the practices that are codified in the final WOTUS rule are stark. For example, on February 4, 2015, Administrator McCarthy told Congress that use of water by a bird or animal is "not sufficient as a sole reason for jurisdiction."[13] Despite the EPA Administrator's testimony, the WOTUS rule allows EPA and the Corps to use a *single function,* such as use of water as habitat for a bird or animal, to establish a "significant nexus" that allegedly creates jurisdiction.[14] That is essentially a return to the "Migratory Bird Rule" the Supreme Court disallowed in 2001.[15]

In response to questions for the record from the February 2015 hearing, Secretary Darcy told Congress: "The Corps has never interpreted groundwater to be a jurisdictional water *or a hydrologic connection* because the Clean Water Act (CWA) does not provide such authority."[16] As noted in case studies below, the Corps has already begun to claim that movement of water through a groundwater aquifer is a hydrologic connection that expands the Corps' jurisdiction.[17] Directly contradicting Secretary Darcy's statement to Congress that the Clean Water Act provides no such authority, the WOTUS rule would codify this practice.[18]

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[12] *See supra* note 11, written testimony of Administrator McCarthy ("I want to emphasize that farmers, ranchers, and foresters who are conducting the activities covered by the exemptions (activities such as plowing, tilling, planting, harvesting, building and maintaining roads, ponds and ditches, and many other activities in waters on their lands), can continue these practices after the new rule without the need for approval from the Federal government.").

[13] *See supra* note 11.

[14] 33 C.F.R. 328.3(c)(5)(ix).

[15] *SWANCC,* 531 U.S. 159 (2001).

[16] *See* June 2, 2015, response to Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (emphasis added), available at http://www.epw.senate.gov/public/_cache/files/bd664535-f1a2-4a60-a0ab-7c6112e91f50/darcy-senate-qfr-responses-on-wotus-hearing-02.04.2015.pdf .

[17] *See infra* notes 112 to 117 and accompanying text.

[18] 33 C.F.R. 328.3(c)(5)(vi). The Technical Support Document (TSD) accompanying the final rule makes it clear that the contribution of flow function listed in the rule includes contribution of flow through groundwater, including

On March 16, 2015, Administrator McCarthy told the National Farmers' Union that roadside ditches and irrigation ditches were of no interest to the agency.[19] However, the final rule continues to categorically include ditches and manmade canals in the definition of "tributary," even if for road drainage or for irrigation.[20] Even though the final rule includes an exclusion for certain ditches, EPA and the Corps can evade this exclusion simply by renaming a ditch as a regulated tributary or wetland.[21]

On April 6, 2015, Administrator McCarthy posted a blog on EPA's website that said: "We will respond to requests for a better description of what connections are important under the Clean Water Act and how agencies make that determination."[22] Similarly, in a May 26, 2015 letter EPA Administrator Gina McCarthy told Senator Bennet that "the rule would limit Clean Water Act jurisdiction only to those types of waters that have a significant effect on downstream traditional navigable waters – not just any hydrologic connection."[23] However, the final rule provides no guidance on what makes a connection significant enough to establish jurisdiction even though the Science Advisory Board panel that reviewed EPA's "Connectivity Report" recognized that not all connections are meaningful from a scientific perspective and in *Rapanos* Justice Kennedy recognized that not all connections are meaningful from legal perspective.[24]

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through an aquifer as well as a shallow subsurface connection. The TSD calls groundwater a "hydrologic flowpath." *See* TSD at 129, 132, 148. For example, the TSD discussion of vernal pools states that while they "typically lack permanent inflows from or outflows to streams and other water bodies," they can be "connected temporarily to such waters via surface or shallow subsurface flow (flow through) *or groundwater exchange (recharge).*" TSD, at 344 (emphasis added).

[19] Transcript of speech is available at: https://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/1a067fd006d60d4585257e0a005ed14e!OpenDocument ("We're not interested in the vast majority of ditches—roadside ditches, irrigation ditches—those were never covered.")

[20] 33 C.F.R. 328.3(c)(3).

[21] As discussed below, the Corps is already employing this tactic to evade the ordinary farming exclusions by claiming that plowing is not plowing under the ordinary farming exclusions when a plow creates furrows. *See infra* notes 42 to 49 and accompanying text.

[22] EPA Connect: The Official Blog of the EPA Leadership: https://blog.epa.gov/blog/2015/04/your-input-is-shaping-the-clean-water-rule/

[23] Letter dated May 26, 2015 from Administrator Gina McCarthy to Senator Bennet, available at http://www.epw.senate.gov/public/_cache/files/cc7270a2-a11d-4962-a90d-6b4dbe0c62d9/michael-bennet-wotus.pd.pdf .

[24] 33 C.F.R. 328.3(c)(5) (water has a significant nexus to navigable water when it significantly affects navigable water). *See* "SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence,*" dated October 17, 2014, at 9 ("Many of the public commenters remarked that the binary perspective in the Report implies that any connectivity must significantly affect the

The Administrator's April 6 blog also promised that the final rule would distinguish between tributaries that are regulated and erosion features that are not.[25] Instead, the final rule provides no meaningful definitions to provide that distinction. In fact, the final rule increases the confusion between the two terms by claiming that the agencies can use aerial photographs and remote sensing technology to identify tributaries and wetlands, without even conducting a site visit to confirm the presence of regulated features. As noted in case studies cited below, the Corps is already using this technology and has tried to claim jurisdiction over lichen-covered rocks based on aerial photographs.[26] Use of this technology to assert jurisdiction also will create significant risk for older cities and towns that built their sewer systems in 19th century streams.[27]

The Administrator's blog downplayed the reach of the final rule, claiming that: "The rule will protect wetlands that are situated next to protected waterways like rivers and lakes."[28] In reality, the final rule is far broader, allowing agencies to claim jurisdiction over wetlands and water that are distant from any navigable river or lake.[29] In addition, as noted in case studies discussed below, the Corps is already claiming jurisdiction over land that fails to meet the definition of a wetland.[30]

The Administrator also downplayed the rule's impact on ditches, claiming that: "We're limiting protection to ditches that function like tributaries and can carry pollution downstream—like

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biological, physical, or chemical integrity of downstream waters. This is not always the case."); *Rapanos,* 547 U.S. at 781-82 (Justice Kennedy, concurring) ("Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*").

[25] *See supra* note 22.

[26] *See infra* notes 75-80 and accompanying text.

[27] For a discussion of this issue s*ee* Senator James M. Inhofe, "Your Sewers and Streets Could be Wates of the United States," Municipal Water Leader, vol. 1, issue 3, Oct. 2015, at 24, available at http://www.waterstrategies.com/2015mwl-archive.html

[28] *See supra* note 22.

[29] In the *U.S. Corps of Engineers v. Hawkes Co.* case, discussed *infra* at notes 121-127 and accompanying text, navigable water was 120 miles away from the wetland the Corps claims is subject to federal jurisdiction. Under the WOTUS rule to be subject to the Corps' discretionary exercise of jurisdiction, water (including wetlands) need only be within 4,000 feet of regulated water, which includes ephemeral drainages that carry water only after rainfall. 33 C.F.R. 328.3(a)(8). This provides no limitation on federal authority in much of the United States. For example, mapping of ephemeral streams in Pennsylvania shows that 99 percent of the state is within 4,000 feet of water that would be regulated under the final rule. Maps available at: http://www.fb.org/newsroom/news_article/344/ (also includes maps for Missouri (99.7% of state), Montana (99% of state), New York (98% of state), Oklahoma (95% of state), Virginia (100%), and Wisconsin (92%)).

[30] *See infra* notes 81-117 and accompanying text.

those constructed out of streams."[31] However, the Corps currently asserts jurisdiction over many ditches, regardless of whether they can carry pollutants downstream and the final rule would codify that practice. For example, instead of providing clarity, the final rule simply replaces the ambiguous term "uplands" in the proposed rule exclusions with the equally ambiguous and undefined term "dry land," in the final rule exclusions. Given that the Corps takes the position that the tops of plowed furrows are "uplands,"[32] the Corps' ability to expand the meaning of the term "upland" creates significant uncertainty, particularly for water management features that were built long ago.[33] Further, the ditch exclusions and the definition of tributary are circular, so the exclusions in the final rule for some ditches provide no protection from the discretionary jurisdictional authority of EPA and the Corps.[34]

Finally, the Administrator claimed that: "We will protect clean water without getting in the way of farming and ranching. Normal agriculture practices like plowing, planting, and harvesting a field have always been exempt from Clean Water Act regulation; this rule won't change that at all."[35] As discussed in the case studies below, EPA, the Corps, and the Department of Justice currently take the position that plowing, disking, and changing crops all are regulated.[36] Undoubtedly attempts to regulate these agricultural practices will increase under the WOTUS rule as more land falls under federal control.

EPA also made further assurance to farmers. At the behest of Senator Angus King, Administrator McCarthy met with Maine farmers in November 2015 and, according to the Portland Press Herald, told them that agricultural operations are exempt and farmers could bring former farmland back into production under the agricultural exemptions.[37] As discussed in the case studies below, in litigation against farmers the United States takes the opposite position.

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[31] *See supra* note 22.
[32] *See infra* notes 42-49 and accompanying text.
[33] For a discussion of this issue as it applies to city sewers, see the article cited *supra* note 27.
[34] *Compare* 33 C.F.R. 328(b)(3)(excluding certain ditches if they are not tributaries) *with* 33 C.F.R. 328(c)(3) (defining tributary to include ditches if not excluded).
[35] *See supra* note 22.
[36] *See infra* notes 42-74 and accompanying text.
[37] *See* Portland Press Herald, "Head of EPA meets with Maine Farmers amid controversy over water quality rules, November 30, 2015, available at http://www.pressherald.com/2015/11/30/head-of-epa-meets-with-maine-farmers-amid-rules-controversy/

On June 29, 2015, EPA and the Corps published the final WOTUS Rule, with an effective date of August 28, 2015.[38]

On August 27, 2015, the U.S. District Court of the District of North Dakota, issued a preliminary injunction, applicable in the states that had filed suit in that court, finding the scope of jurisdiction under the WOTUS rule to be "exceptionally expansive" and holding that the plaintiffs have a "substantial likelihood of success" in their claim that the rule is unlawful.[39]

On October 9, 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the WOTUS rule, finding EPA and the Corps failed to provide notice of distance-based definitions in the final rule and failed to identify specific scientific support substantiating the reasonableness of the definitions they chose and holding that the petitioners therefore had a substantial possibility of success in their bid to overturn the rule.[40]

Even though two courts thus far have determined that the WOTUS rule is likely unlawful, EPA and the Corps have and are continuing to assert federal control over land and water based on theories that they are seeking to codify in the WOTUS rule. The breadth of these jurisdictional claims raise significant questions about how the agencies are currently implementing the CWA, as well as how they would implement it should the WOTUS rule go into effect.

The following case studies were presented to the Environment and Public Works (EPW) Committee in a hearing on May 24, 2016, and in response to questions for the record of that hearing.[41]

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[38] 80 Fed. Reg. 37,054 (June 29, 2015).

[39] Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction, *States of North Dakota, et al. (13 states) v. U.S. Environmental Protection Agency, et al*, Civ. No. 3:15-CV-59 (Aug. 27, 2015).

[40] Order of Stay, *In re: Environmental Protection Agency and Department of Defense Final Rule; Clean Water Rule Definition of Waters pf the United States, 80 Fed. Reg. 37,054 (June 29, 2015)*, Case No. 15-3799 and consolidated cases (18 petitioner states then; currently 32) (Oct. 9, 2015).

[41] *See* Hearing before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife entitled, "Erosion of Exemptions and Expansion of Federal Control –Implementation of the Definition of Waters of the United States." May 24, 2016, hearing transcript, testimony, and submissions for the record available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

II. Case Studies

A. Regulation of Farmland

1. Claim: Plowing is not exempt because plowed furrows are "small mountain ranges."[42]

In order to ensure that agricultural and horticultural practices are not unduly impacted by the CWA, Congress amended the Act in 1977 to prevent agencies from requiring permits for "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."[43] The exemption does not apply to activities involving "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."[44]

Implementing this statutory exemption, Corps regulations provide that: "Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." The Corps regulations also provide that: "The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land."[45]

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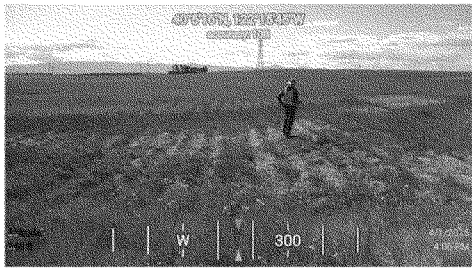
[42] *See generally* testimony of Damian Schiff, Pacific Legal Foundation, at 4, available at http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf

[43] CWA section 404(f)(1)(A); 33 U.S.C. § 1344(f)(1)(A). *See also* Appendix A.

[44] CWA section 404(f)(2); 33 U.S.C. 1344(f)(2). According to the Conference Report for the 1977 amendments to the Federal Water Pollution Control Act, enacting section 404(f), this "recapture clause" was intended to address activities that turn "*extensive areas of water into dry land* or impede circulation or reduce the reach or size of the *water body*." *See* Committee Print, A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act (95th Cong. 2d Sess.) (hereinafter 1977 Act Leg. Hist.) v. 3, at 474 (emphasis added). According to Senator Stafford, "The bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding *which are not discharges of dredged or fill material.* It should be noted, however, that permit will continue to be required for those farm, forestry, and mining activities that involve the discharge of dredged or fill material that [convert] water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees, other fills in wetlands or other waters." *Id.* at 485.

[45] 33 C.F.R. 323.4(a)(1)(iii)(D).

Despite both a statutory and regulatory exemption, the Corps now claims that ordinary plowing that "disturbed the native wetland plant seed bed and turned it over" created furrows that are "mini uplands," "dry land," and "small mountain ranges." According to the Corps, furrows tops are uplands and therefore plowing is not exempt because it converts wetlands to uplands:



"The furrow tops now serve as *small mountain ranges* (microtopographic high spots) that cross the swales and depressions in various directions." Expert Report at 139. Further: "These furrow tops now provide conditions that are not conducive to growth and development of wetland plant species. They are '*mini uplands*.'" Id.5 Thus, for the additional reason that Duarte's activities changed one or more wetland areas to *dry land*, they did not constitute "plowing" as defined in 33 C.F.R. § 323.4(a)(1)(iii)(D).[46,47]

Even if a farmer could somehow plow without moving dirt or creating furrows, the Corps further claims that if land used for row crops is subsequently used for grazing, and plowing is necessary to reinstate row crops, that activity is a "new" use that falls outside the exemption. As a result of these interpretations, most if not all plowing would be considered a discharge of a pollutant that requires a permit.[48]

These assertions would come as a surprise to the members of Congress who voted for the 1977 amendments to the Federal Water Pollution Control Act that included the ordinary farming

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[46] United States' Memorandum in Opposition to Duarte's Motion for Summary Judgment on the Counterclaim, *Duarte Nursery, Inc., v. U.S. Army Corps of Engineers,* U.S. Dist. Court, Eastern District of California, No. 2:13-cv-02095 (Nov. 6, 2015), at 14 (emphasis added). The United States did not claim that Duarte engaged in "deep-ripping;" it is not disputed that his plow was set to plow no deeper than 12 inches. Due to the variation of the land plowed furrows ranged in depth between 6 and 14 inches so the United States had to come up with the new theory articulated in this memorandum to assert jurisdiction.

[47] Photograph from U.S. Department of Justice, Expert Team Rebuttal Report, Duarte Nursery, Inc. et al. *US Army Corps of Engineers/United States v. Duarte Nursery, Inc. et al.*, No. 2:13-cv-02095, Document 244-4, filed Aug. 15, 2016.

[48] *See* Order, *Duarte Nursery v. U.S. Army Corps of Engineers,* E.D. CA, No. 2:13-cv-02095 (June 10, 2016) at 34-35 (agreeing with the position of the United States).

exemptions. During consideration of the 1977 amendments in the Senate, Senator Muskie emphasized that plowing is a normal farming activity that is exempt from permitting.[49]

2. Claim: Plowing is regulated when it is disking.[50]

In May 2014, a landowner in California received an investigation letter from the Corps informing him that disking performed by a tenant farmer on his land may have resulted in an unauthorized discharge into WOTUS and that regulators had opened a case against the landowner.[51] This letter came as a surprise to the landowner, who had been disking this particular site periodically over the past 15 years to sustain grazing conditions for his cattle, a practice he believed was "normal" until he received this notice. The Corps told the landowner's consultant that "all disking for *any* purpose and at *any* depth within any 'potential WOTUS' is a discharge into WOTUS *and* in the absence of a permit represents an unauthorized discharge and violation of the Clean Water Act."[52]

So, according to the Corps, plowing does not include disking, even though it is expressly included in the Corps' definition of plowing.[53] Ultimately, in this case the Corps told the landowner that he could disk the property if such activity was carried out in compliance with Conservation Practice Standard number 514, issued by the Natural Resources Conservation Service (NRCS), making an NRCS standard an additional condition of applicability for a section 404(f) exemption.[54]

With unfettered discretion to identify the scope of their own jurisdiction, the Corps can ignore its own regulations and add new conditions on statutory exemptions. In this case, the landowner,

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[49] *See* statement of Senator Muskie, August 4, 1977, 1977 Act Leg. Hist., v. 4, at 928.

[50] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

[51] *See* Case Study #8, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66.

[52] *Id.*

[53] 33 C.F.R. 323.4(a)(1)(iii)(D).

[54] This transformation of NRCS standards into regulatory requirements is one of the reasons the agriculture community objected so strongly to the now withdrawn "Interpretive Rule." *See* U.S. Environmental Protection Agency and U.S. Department of the Army Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(l)(A), Mar. 25, 2014.

who had been a farmer for many years prior to the Corps investigation, resolved to sell his property and discontinue farming, demonstrating the consequences of leaving regulatory definitions to the arbitrary interpretation of federal officials.

3. Claim: Construction of a stock pond is not exempt.[55]

Like plowing, construction and maintenance of farm or stock ponds or irrigation ditches are supposed to be exempt from CWA permitting.[56] This activity also is subject to "recapture" if it involves "a use to which it was not previously subject, where the flow or circulation of navigable waters maybe impaired or the reach of such waters be reduced."[57]

Despite the clear language exempting the construction of stock ponds, EPA brought an enforcement action against a Wyoming rancher who in 2012 impounded a stream that ran through his property to create a stock pond for his livestock. The pond includes a spillway so the same volume of water flowed out of the pond as flowed into it, precluding any impairment of the flow or reach of the stream.[58] The pond also created habitat. For this reason, EPA claimed that the pond was too aesthetic to be a stock pond, and fell outside the stock pond exemption.[59]

EPA's position would come as a surprise to the Senators that voted for the section 404(f) exemptions. According to the statement of the House conferees for the Conference Report on the 1977 amendment, the 404(f) exemptions codified the Corps' 1977 regulatory exemptions.[60] According to the Assistant Secretary of the Army, in testimony before Senate Public Works Committee, under the Corps' regulations a farmer could construct a stock pond in a tributary to capture spring snow melt for stock watering, as long as the pond did not exceed 5 acres in size and the pending legislation (that was adopted) would exclude all stock ponds regardless of size.[61]

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[55] *See generally* testimony of Damian Schiff, Pacific Legal Foundation, at 4-6, available at http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf

[56] CWA section 404(f)(1)(C); 33 U.S.C. § 1344(f)(1)(C).

[57] CWA section 404(f)(2); 33 U.S.C. 1344(f)(2).

[58] *See* Complaint, *Andy Johnson v. EPA*, D. WY, Civil Action No. 15-CV-147, filed Aug. 27, 2015.

[59] *See* Testimony of Damien Schiff, at 5, *supra* note 55.

[60] Statement submitted by the House majority and minority managers on December 15, 1977. 1977 Act Leg. Hist. v. 3, at 348.

[61] Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Hearings before the Committee on Public Works of the United States Senate, 94th Cong., 2d Sess., July 27 and 28, 1976, at 60, available at

Mr. Johnson recently settled his case favorably; he will not pay any penalties and will keep his pond.[62] However, EPA did not disavow its narrow interpretation of section 404(f) exemption for stock ponds, leaving other farmers, who may not have the resources to fight EPA in court, at risk.

4. Claim: Changing crops is a new use that brings farmland under regulation [63]

Despite repeated assurances that farmers are protected from regulation under section 404(f) of the CWA, the Corps continues to define those exemptions narrowly.

For example, in 2015, the Corps told a landowner that changing the use of a field from growing alfalfa to orchards would constitute a land use change and that Corps regulators could pursue an enforcement action against the landowner if they thought plowing the field to plant trees involved a discharge to wetlands. The Corps regulator informed the landowner that despite an extensive farming history, orchards were never planted on the ranch so they are not the same kind of farming and might not be considered a normal farming activity.[64]

According to testimony presented to the EPW Committee, the 5-year western drought has forced some farmers to shift their operations from one agricultural commodity to another. However, according to the Corps, planting a different commodity crop is a change in use that eliminates the ordinary farming exemption.[65]

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http://www.epw.senate.gov/public/_cache/files/7ce6eb89-dc88-47cf-b7ec-01823fb5b02e/sec404amend1972hrg.pdf

[62] Consent Decree, *Andy Johnson v. EPA*, D. WY, Civil Action No. 15-CV-147, filed Mar. 22, 2016.

[63] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

[64] *See* Case Study #7, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

[65] Gallaway attachment to Parrish testimony at 9-10, available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

This is a concern in Eastern states as well. For example, Maine farmers recently sought assurances from EPA Administrator McCarthy that they could bring fallow land back into agricultural production.[66]

This evisceration of the ordinary farming exemption is the "official" Corps policy. The Sacramento District website includes the following statement:

> "if a property has been used for cattle grazing, the exemption does not apply if future activities would involve planting crops for food; similarly, if the current use of a property is for growing corn, the exemption does not apply if future activities would involve conversion to an orchard or vineyards."[67]

5. Claim: Prior converted cropland is not exempt.*[68]*

Land that has been drained for farming prior to December 23, 1985, no longer meets the Corps' definition of a wetland and therefore is not a "water of the United States" under the CWA.[69] Despite this regulation clarifying the regulatory status of prior converted cropland, during the early 2000s, the Corps began to change the scope of this exemption through guidance. These guidance documents limited the exemption for prior converted cropland, allowing the Corps to regulate dry land because it was no longer used for agricultural activities.[70]

In 2010, a federal district court in Florida ruled that the prior converted cropland guidance in effect amended the Corps' rules and the Corps could not modify a regulation without going through notice and comment rulemaking.[71] Despite this holding, the Corps continues to enforce their new policy outside of Florida.

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[66] *See supra* note 37.
[67] http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/Section-404-Exemptions/
[68] *See generally* testimony of Damian Schiff, Pacific Legal Foundation, at 7, available at http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf
[69] 33 C.F.R. §328.3(a)(8); 58 Fed. Reg. 45008-01, at 45031 (Aug. 25, 1993).
[70] Memorandum from Stephen Stockton, Director of Civil Works, U.S. Army Corps of Engineers, for South Atlantic Division Commander (Apr. 30, 2009).
[71] *See New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

For example, in 2009, a company in Louisiana applied for a permit to utilize prior converted cropland as a solid waste landfill. The Corps relied on the guidance declared invalid by a Florida court to assert jurisdiction over the land. The Company responded by filing suit against the agency, but the Fifth Circuit dismissed the case holding that a landowner has no right to challenge a Corps jurisdictional determination.[72] The Supreme Court recently unanimously rejected that assertion in another case, so this litigation continues.[73]

The Corps' position on prior converted cropland undermines agricultural property values and further demonstrates that assurances about the applicability of agriculture exemptions from CWA regulation are hollow.

Indeed, with the expansion of federal jurisdiction under the WOTUS rule, more farmers will need to rely on the farming exemptions. However, as one court put it, the interpretation of those exemptions by EPA and the Corps constitute "a virtual administrative repeal."[74]

B. Regulation Based on Remote Sensing and Aerial Photographs

1. Claim: Rocks are wetlands and a tributary includes the 100-year floodplain.[75]

The preamble to the new WOTUS rule claims that EPA and the Corps can identify wetlands and tributaries based on remote sensing technology and aerial photographs.[76] Agency reliance on this technology in lieu of actual site visits is already a huge concern for farmers and other landowners.[77]

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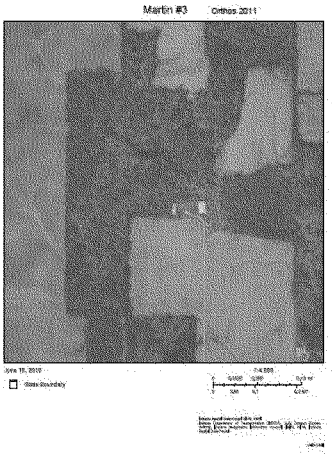
[72] *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014).
[73] *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016), slip op May 31, 2016 available at https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf .
[74] *See* Memorandum and Order, *United States v. County of Steams*, Civ. 3-89-616 (D. Minn. March 15, 1990), at 18.
[75] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .
[76] 80 Fed. Reg. at 37,076.
[77] *See* American Farm Bureau Federation, "Final Waters of the U.S. Rule: No, No, No! No Clarity, No Certainty, No Limits on Agency Power, available at https://www.ilfb.org/media/2356956/final-rule-no-no-no-condensed-

The fallacies created from reliance on Global Positioning Satellite (GPS) and Global Information System (GIS) images and aerial photography were demonstrated in a 2015 attempt by a farmer to obtain a jurisdictional determination in California, for the purpose of planning agricultural operations to avoid wetlands impacts.[78]

In this example, a consultant mapped all wetland features on the property that were substantiated using actual data. The Corps insisted that the consultant add additional features based on GIS images. As explained in the consultant's August 17, 2015, response to the Corps' demands, the areas that the Corps wanted mapped as jurisdictional features included the entire 100-year floodplain of tributaries as well as rock outcroppings with lichens and mosses and other "biotic crust" that looked like wetlands on an aerial photograph but lacked the three wetland parameters.

As a result of the Corps' inappropriate demands, the landowner gave up its planned farming operations.

2. Claim: Aerial photographs can see streams under a tree canopy.[79]



In 2014, a farmer in Indiana cleared trees from his property to expand his farming operation. The Corps claimed that this activity destroyed an ephemeral drainage that the Corps characterized as a regulated tributary of a "water of the United States." The Corps claimed jurisdiction based on a soil survey (although the Corps did not claim wetlands were present), Google Earth aerial photographs taken before the trees were cleared, and speculation that a drainage existed beneath the tree canopy.

The landowner submitted an affidavit from the person

version.pdf; *see also* Progressive Farmer, August 2015, WOTUS Woes, available at http://dtnpf-digital.com/article/WOTUS_Woes/2226926/266915/article.html

[78] *See* Case Study #9, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

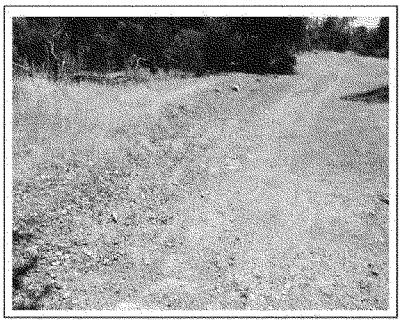
[79] *See* Testimony for the Record, Mr. Merlin Martin, Martin Farms (May 24, 2016), available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

who performed the clearing, affirming that no stream existed on the parcel cleared in 2014 and any marks on the ground were log skidder tracks from logging that took place in the early 2000's.

In this example, the Corps put the burden on the landowner to show that an ephemeral drainage, 118 miles from traditional navigable water and 1.5 miles from relatively permanent non-navigable water did *not* exist on the property before the trees were removed. The WOTUS rule would codify this overreach by allowing the Corps to infer the former existence of a stream, with no evidence of a bed bank and ordinary high water mark, relying instead on aerial photographs.[80]

C. Regulating Roads, Ditches, and Puddles

1. Claim: Tire ruts are wetlands.[81]



In 2007, the Corps required a landowner to obtain a permit for tire ruts along a dirt road even though the ruts, which collected rainwater, lacked both hydric soils and wetlands vegetation, and therefore did not meet the definition of a wetland.[82] To justify regulating a tire rut, the Corps surmised that use of the road prevented the growth of vegetation. In 2014, when the landowner was seeking approval of phase II of its project, the Corps again asserted jurisdiction over the road. Depressions made by cars collected standing water following a heavy rain. The Corps again called these wetlands.

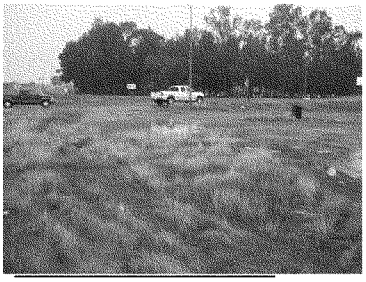
[80] 80 Fed. Reg. at 37,076.
[81] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .
[82] *See* Case Study #1, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

The same situation arose in 2013, when a different landowner sought approval of a delineation on property that included a dirt road. Again, the Corps called a man-made depression in the dirt road a wetland, despite the lack of wetland characteristics.[83]

The same situation arose in 2015, during a delineation in an urban setting.[84] The Corps claimed jurisdiction over tire ruts despite the fact that the tire ruts did not meet exhibit wetland features, as required under the 1987 Wetlands Delineation Manual.

The WOTUS rule would codify this practice because, under the new rule, the Corps no longer needs to show that land with standing water exhibits wetland characteristics before regulating it.[85] Further, the exclusion for upland ditches also would not apply to these tire ruts because the Corps did not call them ditches.[86] The Corps can undermine exemptions by simply calling the exempt feature by another name. There are few definitions in the WOTUS rule that would constrain the agencies' discretion, undermining the ability to rely on exemptions.

2. Claim: Puddles in parking lots are wetlands.[87]



EPA and the Corps claim that concern over regulation of puddles is based on "myth."[88] However, the agencies have not defined the term "puddle" and can therefore claim that a puddle is a regulated "wetland" (under current regulations) or "water" (under the new WOTUS rule).

[83] Case Study #3, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .
[84] See Case Study #6, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .
[85] 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water, broadly defined).
[86] 33 C.F.R. 328.3(b)(3) and (c) (excluding ditches, but failing to define the term so the Corps could regulate any ditch simply by calling it a disturbed wetland or adjacent water).
[87] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted for the record of that hearing, available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .
[88] *See* EPA, "Ditch the Myth," supra note 10.

In 2007, a landowner performed a wetlands delineation for its property and sought Corps approval. The Corps officials insisted that a manmade puddle in a gravel parking lot be identified as a wetland, even though no vegetation was present and therefore it did not meet the definition of a wetland.[89] The Corps assumed that but for disturbance by cars in the parking lot, the puddle would grow vegetation. However, but for disturbance by cars in the parking lot, the puddle would not exist.

As noted above, the practice of regulating puddles would be codified under the WOTUS rule because that rule expands jurisdiction to include "adjacent water" so the Corps will no longer be constrained by the 1987 Wetlands Delineation Manual; any adjacent water could be regulated whether or not wetlands characteristics are present. Further, without a definition of puddle, the Corps can call standing water, like the puddle in the gravel parking lot in this case study, regulated "adjacent water."[90]

3. Claim: Roads and roadside drainage are wetlands.[91]

During a wetlands delineation at a 3,000 acre ranch in 2015, the Corps again claimed jurisdiction over features that were neither open water nor wetlands.[92] In this delineation, the Corps claimed jurisdiction over dirt roads used to access gas wells and cattle feeding stations by claiming the roads were regulated wetlands, based on puddles and erosional features. The features that the Corps claimed they could regulate included small depressions in dirt and



[89] *See* Case Study #2, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

[90] 33 C.F.R. 328.3(a)(6) and (c)(1) (expanding the definition of WOTUS to include adjacent water, broadly defined, and failing to define puddles).

[91] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

[92] *See* Case Study #5, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

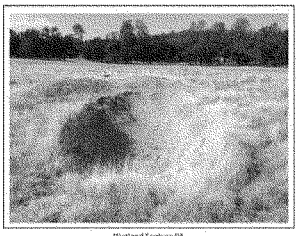


gravel roads that lacked wetlands vegetation, roadside drainages formed from erosion, roadside swales that lacked an ordinary high water mark, and the entire road itself if wetlands were present on each side, even though no vegetation was present on the road. None of these so-called wetlands have a hydrological connection to navigable water.

The WOTUS rule would codify these practices by regulating water, not wetlands, and by claiming jurisdiction based on distance from a navigable water, or a so-called "significant nexus," not a hydrological connection.[93]

4. Claim: Rainwater collected in a test pit or sheet flow is a water of the United States.[94]

"Test pits," are often dug on properties during a wetlands delineation to determine soil structure and identify wetland hydrology. These man-made pits may collect water after it rains. Sheet flow is the movement of water over the land when it rains.



Wetland Feature 08.

In 2013, the Corps demanded that a wetlands consultant identify rain collected in test pits as jurisdictional wetlands when carrying out a wetlands delineation even though the test pits did not meet the criteria for identifying wetlands under the Corps' 1987 delineation manual.[95] The Corps official also claimed jurisdiction over areas subject to sheet flow after recent heavy rain events.[96]

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[93] 33 C.F.R. 328.3(a)(6), (a)(8) and (c)(1) and (2) regulating adjacent waters and defining adjacent and neighboring based on distance; regulating all waters in the 100-year flood plain or within 4,000 feet of other water based on a significant nexus determination that need not include a hydrological connection.

[94] *See generally*, testimony of Don Parrish, American Farm Bureau Federation, and Jody Gallaway, Gallaway Enterprises, available at http://www.epw.senate.gov/public/_cache/files/f5c2ff4d-1dba-4170-b433-c674fe3327ca/parrish-testimony-for-the-record.pdf and case studies submitted following that hearing, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

[95] *See* Case Study #4, available at http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 .

[96] *Id.*

EPA claims that the WOTUS rule will not regulate "rainwater that falls on lawns, farm fields, or playgrounds."[97] Despite this claim, this case study demonstrates that the Corps is already asserting jurisdiction over rainwater. The WOTUS rule would codify this practice by allowing the Corps to assert jurisdiction over "adjacent water," or any water within 4,000 feet of any other water based on an alleged "significant nexus." That means that water in a test pit or on the land would no longer need to exhibit wetland characteristics to be regulated.[98]

D. Expanding the Definition of Wetlands

According to EPA, "[b]ecause the definition of wetland does not change under the rule, the agencies do not anticipate the rule will alter the current scope of CWA jurisdiction over wetlands underlain by permafrost."[99] It is true that the WOTUS rule does not change the definition of the term "wetland." The agencies had no need to do so, because the Corps has already expanded the meaning of that term, without going through notice and comment rulemaking.

1. Claim: Permafrost is an "adjacent wetland"[100]

The Schok family, owner of Tin Cup LLC, a small pipe fabrication and insulation company in North Pole, Alaska, wanted to expand the storage space for their business on their property. Their expansion plans were halted when the Corps claimed jurisdiction over their land on the basis that permafrost – permanently frozen water below the surface of the land – is a wetland that directly abuts a relatively permanent water and therefore is regulated under the Clean Water Act as an "adjacent" wetland.[101]

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[97] EPA, Facts About the Waters of the U.S. Proposal, available at https://www.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf

[98] 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water); 33 C.F.R. 328.3(a)(8)(authorizing jurisdiction over all water in a 100-year floodplain and all water 4,000 feet from other water, based on finding a significant nexus).

[99] 80 Fed. Reg. at 37,088.

[100] *See generally* testimony of Damian Schiff, Pacific Legal Foundation, at 2-3, available at http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf

[101] Administrative Appeal Decision, Clean Water Act, *Tin Cup, LLC,* File No. POA-2003-1422, Alaska District, Corps of Engineers, March 2, 2015.

Under Corps' regulations "wetlands" are "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."[102] In 1987, the Corps published guidance for Corps officials and the public to follow when determining what hydrology, vegetation, and soil (the three characteristics identified in the regulation) are needed before land can be considered a regulated wetland.[103] In 1989, the Corps tried to change its manual to regulate land that exhibits only two wetland characteristics, rather than the required three. Congress reacted by passing legislation that requires the Corps to identify wetlands based on the criteria set forth in its own 1987 manual.[104]

Undeterred, the Corps subverted Congress' mandate by issuing regional supplements to their Wetlands Delineation Manual, effectively changing the definition of wetlands around the country. One such supplement was issued in 2007 for Alaska,[105] which expanded the Corps' definition of the growing season, a critical component of the test for wetlands hydrology, from the Congressionally enforced "portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5°C)"[106] to a more lenient standard that reads: "vegetation green-up, growth, and maintenance as an indicator of biological activity occurring both above and below ground."[107] The growing season is generally defined as dates when soil 20 inches below the surface is above freezing. In North Pole, Alaska, the permafrost is never above freezing. Nevertheless, the Corps asserted jurisdiction even though the site did not exhibit wetlands hydrology.[108] In claiming jurisdiction over property based on subsurface permafrost, the Corps clams that its "Alaska Supplement" authorizes it to expand its jurisdiction beyond areas that meet the definition of wetlands at 33 C.F.R. 328.3.

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[102] 33 C.F.R. 328.3.
[103] Waterways Experiment Station, Corps of Engineers Wetlands Delineation Manual (Jan. 1987) (1987 Manual).
[104] Energy and Water Development Appropriations Act of 1993, Pub. L. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992).
[105] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region, ERDC/EL TR-07-24 (Sept. 2007) available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/erdc-el_tr-07-24.pdf
[106] *See* Wetlands Delineation Manual, *supra* note 103, at A5.
[107] Alaska Regional Supplement, *supra* note 105, at 48.
[108] *Id.* at 85 (wetlands vegetation is presumed to be present if water is present 12 inches or less from the surface for 14 or more consecutive days during the growing season).

The Corps' disregard of its own regulations and failure to use the Congressionally-mandated manual is another example of the agency's efforts to expand its regulatory reach – this time to regulate vast swaths of land throughout the State of Alaska.[109] The Schok family is fighting back, by filing suit in federal district court against the Corps.[110] However, not all landowners will have the ability to fight back.

The WOTUS rule would exacerbate the situation by codifying the Corps' claim that subsurface water creates jurisdiction and by removing the requirement that any wetlands characteristics be present.[111]

2. Claim: Groundwater interface below the land surface creates an "adjacent wetland"[112]

The ESG Company has been caught up in the evolution and expansion of the definition of waters of the United States for many years. ESG owns a parcel in the Commonwealth of Virginia and originally planned to build homes on 428 acres of the property. The property, which is surrounded by other development, includes non-tidal wetlands. After the 1985 Supreme Court *Riverside Bayview* case,[113] the Corps began asserting jurisdiction over non-tidal wetlands, whether or not they directly abutted a navigable water, by arguing that the wetlands were "adjacent." The Corps issued cease and desist orders to all persons planning to develop in non-tidal wetlands at that time, including an order to ESG.

About 253 acres of ESG's property meet the definition of a wetland under the Corps' 1987 delineation manual according to former Virginia Department of Environmental Quality official Ellen Gilinsky.[114] Dr. Gilinsky determined that ESG's proposed 428 acre development would

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[109] 80% of the state overlays permafrost.

[110] *Tin Cup, LLC v. United States Army Corps of Engineers,* No. 4:16-cv-00016-TMB (D. Alaska, complaint filed May 2, 2016).

[111] *See* 33 C.F.R. 328.3(c)(5)(vi) and the TSD referenced *supra* note 18 (authorizing regulation based on groundwater connections) and 33 C.F.R. 328.3(a)(6) (expanding the definition of WOTUS to include adjacent water, broadly defined).

[112] *See generally,* testimony of Valerie Wilkinson, CFO, ESG Companies, available at http://www.epw.senate.gov/public/_cache/files/0926ca53-4f05-4e52-a640-32bedc60509f/epw-valerie-wilkinson-testimony-5-20-16.pdf

[113] *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121(1985). This case is discussed *infra,* in Appendix A.

[114] Dr. Gilinsky is currently a Senior Policy Advisor in EPA's Office of Water.

impact about 144 acres of those wetlands. In 2003, the state issued a permit authorizing the development and requiring mitigation for the impacted acres. The Corps undertook its own delineation in 2007, claimed that Dr. Gilinsky's delineation was wrong, and found that ESG's plan would impact 181 acres, requiring re-noticing of the permit. In its delineation, the Corps relied on "ponding water and blackened leaves in designated areas" as primary indicators of hydrology.[115]

In 2008, the Corps denied ESG's request for a permit to build a smaller development on 305 acres. ESG appealed and the appeal was denied. ESG submitted a third proposal to build on only 54 acres. In 2012, while the permit application for this reduced development alternative was pending, the Corps' 2007 delineation expired. In the meantime, the Corps changed the rules of the game by issuing a new regional supplement to the 1987 Wetlands Delineation Manual that significantly expanded federal jurisdiction.[116] This new supplement ratified the Corps' use of secondary indicators of hydrology (*i.e.* blackened leaves) as if they were primary indicators, turning uplands into wetlands with no change on the ground or in law. Under this new supplement, the Corps claimed that all but 6 of the 54 acres that ESG is currently seeking to develop are wetlands.

Not all wetlands are subject to federal jurisdiction. However, by expanding the definition of the term "adjacent" the Corps has greatly expanded its jurisdiction beyond the *Riverside Bayview* test for determining when open water ends and dry land begins. In the case of the ESG property, the Corps is claiming jurisdiction over these so-called wetlands by claiming that they are "adjacent" to a navigable water through a subsurface connection. The property is not located within a flood plain, has no surface water inflow or surface connection to any other waters and, due to relatively impervious soils, does not provide significant groundwater recharge.

To assert jurisdiction in the face of these facts, the Corps is claiming that groundwater that interfaces with soil 12 inches below the surface (a "capillary fringe") creates a connection to surface water in some other location and that connection establishes federal jurisdiction. This so-called connection never reaches the surface of ESG's land and no water is moving from the

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[115] *See supra* note 112.

[116] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0). U.S. Army Corps of Engineers. November 2010.

surface of ESG's land to the groundwater at the property. Under this theory the mere presence of water in soil creates federal jurisdiction.

The new WOTUS rule would codify the Corps' theory that subsurface water creates a connection to navigable water.[117]

E. Ephemeral Drainage is Water of the United States[118]

The Smith family owns a 20 acre parcel in Santa Fe, New Mexico. An arroyo, a dry creek bed that holds water only immediately following a major storm, runs across the property. Prior owners used the arroyo as a dump. The Smiths cleared debris out of the arroyo, and in doing so smoothed the bed of the arroyo. This process did not introduce any foreign fill material to the area.[119]

The Corps issued a "Notice of Violation" to the Smiths, arguing that rain could move sediment or fertilizer from the arroyo to a creek and ultimately to the Rio Grande, located 25 miles away.

The Smiths sued the Corps in 2012, challenging the Corps' reliance on the possibility of the movement of pollutants with no data or support to assert jurisdiction, noting the similarity between the Corps' claims in their case and allegations of jurisdiction that were disapproved by the Supreme Court in *Rapanos*. Three months into the suit, the Corps dismissed their claim, conceding that the Smiths' arroyo was beyond its jurisdiction.

This case was a victory for the Smiths. However, if the WOTUS rule goes into effect the next land owner will not be so fortunate. Under the WOTUS rule, there is no need for the Corps to demonstrate the movement of any pollutants, or even water, from an ephemeral drainage to a navigable in fact water body. Instead, all the Corps needs to do is claim they can see a bed, bank and ordinary high water mark. That alone is sufficient to establish jurisdiction.[120]

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[117] *See supra* note 18.
[118] *See generally* testimony of Damian Schiff, Pacific Legal Foundation, at 6-7, available at http://www.epw.senate.gov/public/_cache/files/f4c0904d-1d38-468e-bde4-a52a7aa25e26/schiff-testimony.pdf
[119] *Id.*
[120] 33 C.F.R. 328.3(c)(3).

F. Ecological Functions, Not Impacts to Navigable Water, Create Jurisdiction

In a recent unanimous Supreme Court case, *Hawkes v. Corps of Engineers*, the Hawkes Company won the right to challenge a jurisdiction determination made by the Corps of Engineers.[121] The facts of this case provide another example of how the Corps is already implementing the WOTUS rule.

The owners of the Hawkes Company, located in Minnesota, purchased a plot of land in October 2010 for a planned peat mining operation. The owners applied for permits from the Corps and the Minnesota Department of Natural Resources. The Corps issued a jurisdictional determination that claimed the land in question met the criteria for a wetland with a "significant effect on the physical, chemical, or biological, integrity" of the Red River, 120 miles away.[122] In reaching this conclusion, the Corps cited the functions listed in the WOTUS rule, including the presence of standing water (showing the ability to hold water that allegedly would otherwise run off and reach the Red River); the possibility that snow melt and rainfall could leave the wetlands (showing contribution of flow); literature regarding the general use of the wetlands in Minnesota as habitat for amphibians, reptiles, mammals and birds, making the wetland "a valuable resource in the agricultural dominated landscape of western Minnesota" (showing use as habitat); and literature regarding the general ability of wetlands generally to store and transform nutrients.[123]

The *Hawkes* case provides further support for the testimony presented to the EPW Committee in May 2016 that the WOTUS rule would exacerbate existing overreach by EPA and the Corps.[124]

It also sends a warning to EPA and the Corps regarding the likely future of the WOTUS rule. The WOTUS rule relies on the "significant nexus" test articulated by Justice Kennedy in his

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[121] *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016), slip. op. May 31, 2016), available at https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf

[122] This is the new basis for jurisdiction asserted by EPA and the Corps in the WOTUS rule. 80 Fed. Reg. at 37,055-56.

[123] *See* Jurisdictional Determination, attached as Appendix C of Petition for Writ of Certiorari, *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, available at http://www.scotusblog.com/wp-content/uploads/2015/09/Hawkes-cert-petition.pdf These functions are listed at 33 C.F.R. 328.3(c)(5).

[124] Gallaway attachment to Parrish testimony available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

concurring opinion in *Rapanos.*[125] However, in a concurring opinion in *Hawkes*, Justice Kennedy expressed dismay over the breadth of jurisdiction claimed by the government, referring to the "Act's ominous reach" that "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[126] To Justice Kennedy, "based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern."[127]

CONCLUSION

The reach of federal authority claimed by EPA and the Corps is, in the words of Justice Kennedy, "ominous." That ominous authority would be codified in the WOTUS rule. As a result, if that rule goes into effect, the hard-won right to challenge Corps jurisdictional determinations will become meaningless. Under the rule, to regulate any water that is in a 100-year floodplain and within 1,500 feet of another regulated water, the Corps need only a measuring device and, to regulate any water within 4,000 feet of another water, the Corps need only make the same kind of vague allegations about water retention, water runoff and use as habitat that it used to justify control over the Hawkes property. With the categorical regulation of ephemeral drains as "tributaries" the Corps and EPA will find the "tributaries" almost anywhere gravity moves water downhill.

These facts, in combination with the evisceration of the statutory exemptions for ordinary farming and ranching activities, demand a response from Congress.

[125] *See, e.g.,* 80 Fed. Reg. at 37,056.
[126] *Army Corps of Engineers v. Hawkes Co., supra* note 121(Justice Kennedy concurring).
[127] *Id.*

Appendix A: Legislative and Regulatory History of the Clean Water Act

I. 1972 Amendments

The jurisdictional reach of the Clean Water Act was established in 1972. Among the amendments to the Federal Water Pollution Control Act adopted that year was a definition of "navigable waters" as follows: "The term ''navigable waters'' means the waters of the United States, including the territorial seas."[128]

In the Conference Report for the 1972 Amendments and in floor statements during consideration of the Conference Report the members made the following statement: "The conferees fully intend 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."[129]

A fuller explanation of Congressional intent was made by during floor consideration of the Conference Report in the Senate and in the House of Representatives.

On the Senate floor, Senator Muskie explained:

> *It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing high way over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today.* In such cases the commerce on such waters would have a substantial economic effect on interstate commerce."[130]

On the House floor Congressman Dingell explained:

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[128] CWA Section 502(7); 33 U.S.C. 1362(7). The term "navigable waters" alone appears in the Act 73 times. The term "navigable waters of the United States" appears in the Act 9 times. The term "waters of the United States" without the term "navigable" appears 5 times (not including the definition). Finally, the term "nation's waters" appears twice, once in the goal statement and once in section 508, pertaining to procurement.

[129] Conference Report to accompany S. 2770, S. Rept. 92-1236 (92nd Cong., 2d Sess.), at 144; Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 (93d Cong., 1st Sess.) (hereinafter 1972 Act Leg. Hist.) v. 1, at 327.

[130] 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist, v. 1, at 178. (Muskie statement) (emphasis added.)

> [T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. *It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability —derived from the Daniel Ball case (77 U.S. 557, 563) — to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.* [Citations omitted]
>
> The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power * * * To regulate commerce with Foreign Nations and among the several States * * *" (art. I, sec. 8, clause 3). Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on water ways, *there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation* —highways, rail roads, air traffic, radio and postal communication, waterways, et cetera. The *"gist of the Federal test" is the waterway's use "as a highway,"* not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).
>
> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries for *water quality* purposes.[131]

With this context, it is clear the broadest possible constitutional interpretation of the term "navigable waters" referred to in the Statement of Managers are navigable waters that are part of a "highway of commerce" even if they do not cross state lines. In adopting this definition, Congress repudiated narrower agency administrative interpretations that limited the term "navigable waters" to include only waterways that carry goods across state lines, excluding wholly intrastate navigable waters unless they connected to waters in other states.[132] As a result, the "broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes" of the term "waters of the United States" encompasses waters that "by uniting with other waters *or other systems of*

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[131] 118 Cong. Rec. 33756-57 (1972); 1972 Act Leg. Hist., v. 1, at 250 (Dingell statement) (emphasis added).

[132] U.S. EPA, Office of General Counsel, A Collection of Legal Opinions, Vol. 1, at 400 (General Counsel Opinion, "Definition of Navigable Waters," Dec. 9, 1971) (available at nepis.epa.gov) (only navigable waters that are connected to other states via waterways are jurisdictional); 33 Fed. Reg. at 18,692 (Corps of Engineers Regulations under the Rivers and Harbors Act of 1899 limiting jurisdiction to interstate navigable waters). On September 9, 1972, shortly before the enactment of the 1972 Amendments, the Corps revised its definition of "navigable waters of the United States" to include water bodies wholly within one state when they physically connect via water with a waterway generally acknowledged to be an avenue of interstate commerce, such as the ocean or one of the Great Lakes. 33 C.F.R. 209.260 (1972); 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972). Senator Muskie's and Congressman Dingell's floor statements make it clear that Congress intended to assert jurisdiction over navigable water with any transportation connection, not just a water connection.

transportation" are part of an interstate transportation system, as well as tributaries of such waters.[133]

II. EPA and Corps Implementation of the 1972 Amendments

Despite this legislative history, EPA decided to assert jurisdiction over any virtually water, whether or not the water was used as part of a highway of commerce. In 1973, EPA issued regulations for implementing section 402 that defined navigable waters as:

> (1) All navigable waters of the United States;
>
> (2) Tributaries of navigable waters of the United States;
>
> (3) Interstate waters:
>
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
>
> (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
>
> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.[134]

In contrast, in 1974, the Corps of Engineers issued regulations defining "waters of the United States" for the purpose of implementing section 404 of the Clean Water Act, as well as sections 9, 10, 11, 13 and 13 of the River and Harbor Act of 1899, that reaffirmed the Corps' view that its dredge and fill jurisdiction under section 404 is the same as its traditional jurisdiction under the Rivers and Harbors Act of 1899.[135]

There is contemporaneous evidence that the Corps' view of the scope of its jurisdiction under section 404 was consistent with Congressional intent. In its 1973 report to the President and Congress, the congressionally chartered National Water Commission identified jurisdiction over intrastate, non-navigable water as a *gap in* federal regulation.[136] The National Water Commission also recommended that *States* should protect from drainage and development *State-*

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[133] Muskie statement, *supra* note 130.

[134] 40 C.F.R. 125.1 (1973); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). EPA did not propose this definition. The definition in the proposed rule merely copied the statutory definition. 38 Fed. Reg. 1362 (Jan. 11, 1973).

[135] 33 C.F.R. 209.120, promulgated at 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) (referencing 33 C.F.R. 209.260 (1972), promulgated at 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972)).

[136] "Water Policies For The Future: Final Report to the President and to the Congress of the United States by the National Water Commission (June 1973), at 200-201.

owned wetlands that have primary value for waterfowl propagation or other wildlife purposes.[137] This recommendation would have been moot if such wetlands were regulated under the Clean Water Act.[138]

Environmental groups disagreed with the Corps' definition. The Natural Resources Defense Council and the National Wildlife Federation challenged the Corps' regulation in the District Court for the District of Columbia based on the concern that the Corps' definition of navigable waters did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high water mark. These groups also expressed concern about lakes, isolated wetlands, and potholes.[139] In a terse, 389-word order, the District Court held that the term "navigable waters" is not limited to the traditional tests of navigability and ordered the Corps to revoke its definition and publish a new definition "clearly recognizing the full regulatory mandate of the Water Act."[140] Although the plaintiffs clearly invited the court to opine on what constitutes that "full regulatory mandate," the court merely said that because Congress asserted "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" "[a]ccordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."

In response to this District Court decision, in 1975 the Corps issued interim regulations that defined the term "navigable waters" to include periodically inundated coastal wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and, like EPA's 1973 regulations, certain intrastate waters outside the "highway of commerce."[141] In a press release accompanying its proposed rule, the Corps noted that under the proposal "practically all lakes, streams, rivers, and wetlands in the United States" would be regulated and "[u]nder some of the proposed

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[137] *Id.* at 279.

[138] Further, as noted by the Supreme Court, there is no evidence that the Corps' 1974 interpretation of section 404 jurisdiction was incorrect. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 168 (2001).

[139] *See* the discussion of this litigation in the preamble to the Corps' 1977 regulations. 42 Fed. Reg. 37,123-124 (July 19, 1977).

[140] *Natural Resources Defense Council, Inc. v. Callaway,* 392 F. Supp. 685 (D.D.C. 1975).

[141] These were: intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized: (a) by interstate travelers for water-related recreational purposes; (b) for the removal of fish that are sold in interstate commerce; (c) for industrial purposes by industries in interstate commerce; or (d) in the production of agricultural commodities sold or transported in interstate commerce. 42 Fed. Reg. at 37,127.

regulations, Federal permits may be required for a rancher who wants to enlarge his stock pond or the farmer who wants to deepen and irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion."[142]

III. 1977 Amendments

The backlash was quick, with Congressional hearings and introduced bills.[143] Ultimately, Congress amended the Clean Water Act in 1977 to add section 404(f), to exempt certain activities from permits, including the activities outlined in the Corps' press release.[144]

Despite the backlash against the Corps' 1975 interim regulations, the Corps' final regulations, issued in 1977, went even further than EPA's 1973 regulations and included "other waters" such as isolated lakes and wetlands, intermittent streams, prairie potholes and any other waters the degradation or destruction of which "could affect interstate commerce."[145]

In 1977, the Supreme Court upheld the part of the Corps' 1975 regulations that asserted jurisdiction over wetlands above the high tide line and beyond the ordinary high water mark, finding that the inclusion of adjacent wetlands in the Corps' definition of "navigable waters" was a reasonable interpretation of the statute because:

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which *water ends and land begins*. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, *between open waters and dry land may lie s*hallows, marshes, mudflats, swamps, bogs--in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this *continuum* to find the limit of "waters" is far from obvious.[146]

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[142] Press release. May 6, 1975. Department of the Army, Office of the Chief of Engineers, reprinted in "Section 404 of the Federal Water Pollution Control Act Amendments of 1972," Hearings before the Committee on Public Works, United States Senate, 94th Cong., 2d Sess., July 27 and 28, 1976, Serial No. 94-H49, at 517-520 (Section 404 hearings), available at http://www.epw.senate.gov/public/_cache/files/7ce6eb89-dc88-47cf-b7ec-01823fb5b02e/sec404amend1972hrg.pdf

[143] Section 404 Hearings, *supra* note 142.

[144] *See* P.L. 95-216, sec. 67 (adding section 404(f) to the CWA).

[145] 33 C.F.R. 323.2(1977); 42 Fed. Reg. at 37,127, 37,144.

[146] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (emphasis added). The Court did not express any opinion regarding "the authority of the Corps to regulate discharges of fill material that are not adjacent to bodies of open water" citing 33 CFR 323.2(a)(2) and (3). 474 U.S. at 131 n.8.

The Court also found that Congress had "acquiesced in the Corps' definition of waters as including adjacent wetlands" because Congress did not amend the statute to overturn those regulations in the 1977 Amendments to the Federal Water Pollution Control Act.[147]

IV. SWANCC, RAPANOS, and the New WOTUS Rule

Emboldened, in 1986 the Corps went even further and in a preamble to a revision to its regulations the Corps claimed that it could presume jurisdiction under the Commerce Clause over intrastate 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; or
> c. Which are or would be used as habitat for endangered species; or
> d. Used to irrigate crops sold in interstate commerce.[148]

Under this theory, the Corps could claim jurisdiction over any isolated wetland, puddle, or pond based on its potential use by a migratory bird. As such, it became known as the "Glancing Goose" test.[149]

In 2001, the Supreme Court rejected that expansive interpretation of federal authority, expressly found that there is no evidence that Congress acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters," and declined to hold "that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."[150]

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[147] *Id.* at 138. The same regulations that Congress allegedly acquiesced to also exempted ponds smaller than 5 acres and streams with flow less than 5 cubic meters per second.
[148] 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
[149] *See* January 16, 2001 Wall Street Journal, available at http://www.wsj.com/articles/SB979603030985179200
[150] *SWANCC,* 531 U.S. at 171-72.

Despite this holding, the Corps and EPA continued to claim broad jurisdiction over isolated ponds and wetlands, by expanding their interpretation of what constitutes an adjacent wetland and what constitutes a tributary.[151]

At the same time their view of jurisdiction was expanding, the Corps and EPA, and the Department of Justice began narrowing their narrow view of the exemptions that Congress enacted in 1977.[152] Indeed, their view of the ordinary farming and ranching exemptions are so narrow that one judge called it "a virtual administrative repeal."[153]

Concern that the Corps was continuing to exceed its statutory authority reached the Supreme Court again in 2006. In that case, four members of the Court rejected the Corps' claim of jurisdiction over wetlands next to a ditch in Michigan based on its regulatory definition of "tributary,"[154] holding that there must be a relatively permanent hydrologic connection to navigable water before Clean Water Act jurisdiction could be invoked.[155] Justice Kennedy agreed that the Corps failed to demonstrate jurisdiction over the ditch in question, but articulated a different test. According to Justice Kennedy, a mere hydrologic connection may not be sufficient and instead there must be a "significant nexus" to navigable waters.[156]

At first, EPA and the Corps took the position that the *Rapanos* case severely limited their jurisdiction and asked Congress to amend the Clean Water Act to remove the term "navigable."[157] When Congress rejected legislation to carry out that request, the administration

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[151] *See* "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO Report, February 2004, available at: http://www.gao.gov/new.items/d04297.pdf.
[152] *See generally* Benjamin H. Grumbles, "Section 404(f) of the Clean Water Act: Trench Warfare over Maintenance of Agricultural Drainage Ditches," William Mitchell Law Review, Vol. 14, issue 4 (1991).
[153] *See* Memorandum and Order, United States v. County of Steams, Civ. 3-89-616 (D. Minn. March 15, 1990), at 18.
[154] The 1986 definition of WOTUS at issue in *Rapanos* did not define the term "tributary" but the Corps implemented it in the same way that they now are seeking to codify in the WOTUS rule. *Rapanos,* 547 U.S. at 781 ("As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as 'a line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' §328.3(e)") (Justice Kennedy, concurring).
[155] *Rapanos*, 547 U.S. at 733.
[156] *Id.* at 781-82 (finding the same standard that the WOTUS rule would codify to be overly broad).
[157] *See* May 20, 2009, letter from CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar to Senator Boxer.

pivoted and instead decided to reinterpret both the Clean Water Act, and Justice Kennedy's opinion, to claim even broader authority than it claimed in the 1986 "Glancing Goose" test.[158]

On June 29, 2015, EPA and the Corps published the final WOTUS Rule.[159] On October 9, 2015, the Sixth Circuit Court of Appeals stayed the implementation of the new rule, finding that there was a strong likelihood that it exceeded EPA's and the Corps' authority under the Clean Water Act.[160]

[158] EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011); Proposed WOTUS Rule, 79 Fed. Reg. 22,188 (Apr. 21, 2014).
[159] 80 Fed. Reg. 37,054 (June 29, 2015).
[160] Order of Stay, *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)*, Case No. 15-3799 and consolidated cases (18 petitioner states then; currently 32) (Oct. 9, 2015).

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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

September 27, 2017

The Honorable E. Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Douglas W. Lamont
Deputy Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310

Re: *EPA Docket No. EPA-HQ-OW-2017-0203, Definition of "Waters of the United States" – Recodification of Pre-existing rules*

Dear Administrator Pruitt and Deputy Assistant Secretary Lamont:

We commend you for your proposal to withdraw the deeply flawed "Waters of the United States" (WOTUS) rule that was promulgated by the prior administration in June 2015.[1]

Your proposal solicits comment as to whether it is desirable and appropriate to withdraw the 2015 WOTUS rule. 82 Fed. Reg. 34899, 34903 (July 27, 2017). Not only is it desirable and appropriate, the proposed action is necessary.

As you know, on August 27, 2015, Judge Erickson of the District of North Dakota, issued an injunction that prevented the WOTUS rule from going into effect in 13 states because the rulemaking record is "inexplicable, arbitrary, and devoid of a reasoned process." In October of 2015, the Sixth Circuit Court of Appeals issued a nationwide stay of the 2015 WOTUS rule.

Eighty-eight members of Congress filed an *amicus* brief on November 8, 2016, in support of state petitioners, and business and municipal petitioners, challenging the 2015 WOTUS rule. All 88 members of Congress concluded that the 2015 WOTUS rule exceeds the authority granted to the Environmental Protection Agency (EPA) and the Corps of Engineers (Corps) by Congress.[2] The 2015 WOTUS rule should be withdrawn because the rule exceeds the authority granted to these agencies by Congress.

[1] 80 Fed. Reg. 37,054 (Jun. 29, 2015).
[2] *See* Brief of Members of Congress as Amici Curiae in Support of State Petitioners and Business and Municipal Petitioners, 6th Cir. Case No. 15-3751, Nov. 8, 2016 (hereinafter Congressional Amicus Brief) (attached).

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Further, as demonstrated by memoranda prepared by the Corps of Engineers, as well as testimony received by the Committee on Environment and Public Works on April 26, 2017, at a hearing entitled "A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule," the 2015 WOTUS rule is not based on the experience and expertise of the Corps of Engineers, and cannot be justified by scientific studies.[3] Thus, the 2015 WOTUS rule is arbitrary and capricious and must be withdrawn on this basis as well.

We submit this comment letter and its attachments for your consideration.

The 2015 WOTUS Rule Is Contrary To Law

The 2015 WOTUS rule was based on the erroneous premise that federal jurisdiction over water is whatever the federal agency wants it to be to advance its latest policy objectives. The courts have been clear however that a federal agency may not exceed the statutory authority granted to it by Congress. Courts have made this point many times:

- *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000))("[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ... we typically greet its announcement with a measure of skepticism.").

- *Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (Scalia, J., plurality) ("This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose.").

- *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *id.* at 173 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.").

- *Rodriguez v. United States*, 480 U.S. 522, 525-266 (1987) ("But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.").

[3] See April 27, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 letter from General Peabody to Assistant Secretary of the Army Darcy; May 15, 2015 memorandum from Jennifer Moyer to General Peabody; April 24, 2015 memorandum from Lance Wood to General Peabody; April 24, 2015 Memorandum from Jennifer Moyer to General Peabody; April 26, 2017 Testimony of Dr. Michael Josselyn before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of MG John Peabody (ret.) before the Senate Committee on Environment and Public Works; April 26, 2017 Testimony of Misha Tseytlin before the Senate Committee on Environment and Public Works. (all attached).

- *Mexichem Fluor, Inc. v. Environmental Protection Agency*, D.C. Cir. Case no. 15-1348 (Aug. 8, 2017) ("The agency must have statutory authority for the regulations it wants to issue.").

- *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress.").

In the 2015 WOTUS rule, EPA and the Corps attempted to expand their authority to meet their policy preferences. However, in the Federal Water Pollution Control Act, Congress did not grant EPA and the Corps unlimited authority to define the extent of their own regulatory authority. Thus, it does not matter if EPA and the Corps concluded in 2015 that all water is connected, including isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water. Congress did not give the agencies the authority to regulate such water.

The limitations on federal jurisdiction under the Federal Water Pollution Control Act are apparent from the text of the statute as well as the contemporaneous debate over federal authority that provides context to both the 1972 and the 1977 amendments to the Federal Water Pollution Control Act.

The 1972 amendments to the Federal Water Pollution Control Act directly responded to concerns over the limits of both the permitting authority under the 1899 Rivers and Harbors Act and enforcement of water quality standards under the 1965 amendments to the Federal Water Pollution Control Act.[4] The 1972 amendments established a regulatory framework under which state-developed water quality standards were federally enforceable in intrastate navigable waters, as well as interstate navigable waters and their tributaries, and under which the states could take the lead in issuing permits applying effluent limitations for discharges into those waters.[5]

In support of the 2015 WOTUS rule, the previous administration, EPA and the Corps made the novel claim that federal jurisdiction over water is as broad as the objective of the Federal Water Pollution Control Act set forth in section 101(a) (stating that the objective of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"). 80 Fed. Reg. at 37,055-56. These agencies further reinterpreted the objective of the Act to expand the reference to "physical" integrity to encompass water supply and the reference to "biological" integrity to encompass wildlife habitat. This claim of authority conflicts with the Supreme Court's rulings in *Rodriguez*, and other cases cited above, as well as the language and structure of the statute and its legislative history.[6] The goal statement of the Federal Water Pollution Control Act does not address jurisdiction at all. It is nothing more than a statement of water *quality* goals for the water that is regulated.[7]

[4] *See* S. Rept. 92-414, 92nd Cong. 1st Sess. 70-71.
[5] *Id.* at 77.
[6] *See Congressional Amicus* Brief at 15-18.
[7] *See* Congressional *Amicus* Brief at 18 (citing the explanation of the Act's objective provided by Senator Muskie).

In 1965, Congress made water quality standards federally enforceable in interstate navigable waters only. The 1972 amendments expanded federal jurisdiction from interstate navigable waters and their tributaries to include intrastate navigable waters and their tributaries, if part of a highway of commerce that could include highways and railways, in addition to water transportation.[8]

In enacting this expansion, at no time did Congress consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, water that does not contribute pollutants to navigable water, or waters based solely on their use as wildlife habitat. In fact, the 1973 report issued by the congressionally-chartered National Water Commission *after* the enactment of the current definition of "waters of the United States," recommended that *states* protect state-owned wetlands used by waterfowl. None of the water experts who served on the Commission suggested that those wetlands were already regulated by the federal government.[9]

Consistent with the legislative history of the Act, the Commission described the jurisdictional expansion in the 1972 amendments as follows: "The water quality standards established in response to the 1965 Water Quality Act are retained as a floor under the new effluent limitations and are expanded to include *all navigable waters*."[10] The Commission further noted that permits for dredging and channel alteration issued by the Corps of Engineers Act "are required only when the waters are navigable in interstate or foreign commerce, and no application for a Corps permit need be filed for those activities in other inland waters."[11] As a result, the Commission made the following recommendation: "Since the States historically have been viewed as having regulatory jurisdiction over waters which are not navigable in interstate or foreign commerce, the Commission believes that the States should enact statutes which would provide adequate measures of protection to fish and wildlife values."[12] This contemporaneous interpretation of the 1972 amendments confirms that the objective of the Federal Water Pollution Act is to protect the quality of navigable water, not wildlife habitat generally, which is an important subject addressed in other federal and state legislation.

Nothing in *United States v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985) contradicts this interpretation. In that case the Supreme Court deferred to the Corps' determination that regulation of navigable water included regulation of adjacent wetlands because the agencies must make a determination of where open waters end and dry land begins. *Id.* at 132. In the fact pattern presented to the Court, the wetlands were an extension of the navigable water. That may be an "ecological" connection, but *Riverside Bayview* does not support an argument that any "ecological" connection to navigable water creates jurisdiction. If there was any doubt of that fact, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001) the Supreme Court put that doubt to rest. Use of water as

[8] *See* Congressional *Amicus* Brief at 5-6.
[9] *See* Congressional *Amicus* Brief at 8-9.
[10] *See* National Water Commission (June 1973), Water Policies For The Future: Final Report to the President and to the Congress of the United States at 87 (emphasis added) (attached).
[11] *Id.* at 201.
[12] *Id.* at 202.

wildlife habitat is not a basis for federal jurisdiction under the Federal Water Pollution Control Act. *Id.* at 172-173.

In expanding the jurisdiction of the Federal Water Pollution Control Act to include intrastate navigable water, Congress also did not consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, and water that does not contribute pollutants to navigable water, based on their effects on water supply. Congress made that very clear in 1977, when Congress added section 101(g) to the Federal Water Pollution Control Act.[13] This amendment responded to an attempt by federal agencies to use the Act to regulate surface flows and groundwater. According to the amendment's sponsor: "This 'State's jurisdiction' amendment reaffirms that it is the policy of Congress that this act is to be used for water *quality* purposes only." 123 Cong. Rec. 39, 211-12 (1977) (floor statement of Senator Wallop) (emphasis added).[14]

Despite the limited grant of federal authority in the Federal Water Pollution Control Act, the June 2015 WOTUS rule purports to regulate water based on its use by birds or mammals or insects, based on its use to control supplies of water through runoff storage, or based on its use to augment water supplies by movement through the ground or over the land. The statute does not give the agencies that authority. The Federal Water Pollution Control Act is and always was a water quality protection statute. The primary responsibilities and rights of States to "to plan the development and use . . . of land and water resources" are expressly preserved. 33 U.S.C. § 1251(b). Thus, the June 2015 WOTUS rule is contrary to law.

The 2015 WOTUS Rule Is Arbitrary and Capricious

The preamble to the 2015 WOTUS rule and the Technical Support Document for that rule repeat nearly *100 times* the claim that the rule is based on the agencies' expertise and/or experience. These documents also claim over *500 times* that the rule is based on "science" or relies on "science." The preamble to the final rule further states:

> This immersion in the science along with the practical expertise developed through case specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where "waters of the United States" end. 80 Fed. Reg. at 37,065.

The brief filed by the U.S. Department of Justice on January 13, 2017, defending the WOTUS rule, makes similar claims. The brief states *over 30 times* that the rule is based on agency experience and/or expertise and references the "science" or EPA's Science Report *over 150 times.*

These statements are not supported by the record.

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[13] "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 Act." 33 U.S.C. § 1251(g).

[14] *See* Congressional *Amicus* Brief at 21-22.

The Corps of Engineers is the agency that makes the vast majority of jurisdictional determinations that identify waters that are regulated under the Clean Water Act. However, according to memoranda sent by Major General John Peabody, former Deputy Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, to Assistant Secretary Darcy on April 24, 2015, and on May 15, 2015, EPA shut the Corps of Engineers out of the development of the WOTUS rule. These memoranda state that the WOTUS rule is *not* based on the experience and expertise of the Corps. For example, an attachment to General Peabody's May 15, 2015 memorandum stated:

> "The [Technical Support Document] emphasizes that the agencies undertook a very thorough analysis of the complex interactions between upstream waters and wetlands and the downstream rivers to reach the significant nexus conclusions underlying the provisions of the draft final rule... *[T]he Corps was not part of any type of analysis to reach the conclusions described; therefore, it is inaccurate to reflect that 'the agencies' did this work or that it is reflective of Corps experience or expertise."*[15]

Further, the 2015 WOTUS rule is not justified or supported by scientific findings. In May 2011, the prior administration issued a draft guidance that purported to delineate the extent of federal jurisdiction under the Federal Water Pollution Control Act. After receiving criticism for issuing a guidance instead of a rule, EPA developed a proposed rule to mirror the draft guidance and collected ecological studies to justify the conclusions *already made* in the draft guidance. In September 2013, the prior administration sent a draft proposed rule to OMB. At the same time, the prior administration issued a draft "Connectivity Study" that purported to justify the proposed rule.

The prior administration convened a panel of scientists to review their study. The panel unsurprisingly agreed that ecological studies show connections among all waters. However, the Connectivity Study does not demonstrate that all waters covered by the rule must be regulated to protect the quality of navigable water. In fact, most of the studies do not even mention navigable water.[16]

A panel member, Dr. Josselyn, raised concerns about the lack of scientific support for regulating ephemeral water in his preliminary comments on the Connectivity Study:

> "The Draft Report contains references that are focused on more perennial and intermittent flowing streams, but presents *very little information on the processes occurring within ephemeral streams.* Because these systems are often the focus of jurisdictional disputes, the specific case history discussion contained in the Draft Report on southwestern streams is very useful. A conclusion reached is that such systems are important to recharging local groundwater systems following surface flow events; however, *it is not clear how this would relate to downstream water quality."*[17]

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[15] May 15, 2015 memorandum from Jennifer Moyer to MG Peabody (attached). See also testimony of General Peabody before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

[16] *See* Congressional *Amicus* Brief at 22-23, 25, 29.

[17] *See* December 2, 2013 letter from Dr. Josselyn to Dr. Rodewald (attached). *See also* testimony of Dr. Josselyn before the Senate Environment and Public Works Committee on Apr. 26, 2017 (attached).

Corps legal counsel raised similar concerns about the lack of scientific support for the tributary definition in the WOTUS rule:

> "[T]he draft final rule asserts CWA jurisdiction by rule over every 'stream' in the United States, so long as that stream has an identifiable bed, bank, and OHWM. That assertion of jurisdiction over every stream bed has the effect of asserting CWA jurisdiction over many thousands of miles of dry washes and arroyos in the desert southwest, even though those ephemeral dry wastes, arroyos, etc. carry water infrequently and sometimes in small quantities if those features meet the definition of a tributary."[18]

The brief filed by states in the litigation challenging the rule explains the inadequacies of the scientific record:

> "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."
>
> "The mere existence of a hydrological connection—even a continuous one—is insufficient under Justice Kennedy's holding in Rapanos, 547 U.S. at 769, but that is all the Connectivity Study demonstrates."[19]

Accordingly, even if EPA and the Corps had the authority to expand federal control over land and water, which these agencies do not, the 2015 WOTUS rule lacks record support, is arbitrary and capricious, and should be withdrawn.

The 2015 WOTUS Rule Has Little Chance of Surviving Judicial Review

The indefensibility of the 2015 rule also is a justification for its withdrawal. In addition to the grounds stated by the courts staying the 2015 WOTUS rule, its notable that the Corps raised similar concerns before the final rule was issued, stating that the rule is "... not likely to survive judicial review in federal courts," and is "...inconsistent with SWANCC and Rapanos." The Corps further stated that, "This assertion of CWA jurisdiction over millions of acres of isolated waters...undermines the legal and scientific credibility of the rule" [20]

Given the indefensibility of the 2015 rule, it is preferable to withdraw that rule now, rather than wait for the judicial *vacatur*.

The Economic Impacts of the 2015 WOTUS Rule

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[18] April 24, 2015 Memorandum from Lance Wood to MF Peabody (emphasis in original) (attached).
[19] *See* Opening Brief of State Petitioners, 6th Cir. Case No. 15-3751, Nov. 1, 2016, at 55, 57 (attached). *See also* Tseytlin testimony, at 15.
[20] April 24, 2015 memorandum from Lance Wood to General Peabody, at 9-10.

In November 2015, four months after the final WOTUS rule was published, EPA added a review of 199 jurisdictional determinations to the WOTUS rule docket.[21] 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. The 2015 WOTUS rule however no longer requires a surface connection to navigable water to establish federal jurisdiction. Accordingly, some or all of the 47 negative jurisdictional determinations evaluated by EPA could become positive jurisdictional determinations under the 2015 WOTUS rule. If all of the 47 jurisdictional determinations were positive, it would represent 82 percent of the negative jurisdictional determinations reviewed. That is a substantial expansion of federal jurisdiction which would cause economic impacts that should be addressed.

Small Entity Impacts and Federalism

The proposed withdrawal alleges that the action will not have a significant impact on small entities, and does not have federalism implications. 82 Fed. Reg. at 34904. We strongly disagree. Withdrawing the 2015 WOTUS rule will lift a significant threat to small businesses and small governmental entities across the country. Withdrawing the 2015 WOTUS rule also acknowledges the existence of waters of the State that are not federally regulated, consistent with the intent of Congress.

Conclusion

In closing, we noted that the proposed withdrawal of the 2015 WOTUS rule is styled as a "Recodification of Pre-existing Rules." However, the agencies also disavow any intent to reconsider the pre-existing definition. 82 Fed. Reg. at 34903. Accordingly, we interpret the agencies' proposed rule to be a proposal to withdraw the 2015 WOTUS rule. While that withdrawal will result in the reinstatement of the pre-existing regulations, that is a ministerial task of updating the Code of Federal Regulations necessitated by the withdrawal, not a substantive proposal to adopt those regulations.

Having said that, we urge EPA and the Corps to develop a replacement WOTUS rule as soon as possible. The definition of waters of the United States has been the subject of many years of litigation, which could be brought to rest by a scientifically sound WOTUS rule that respects the intent of Congress.

Thank you for considering these comments and supporting documents as you develop your final rule to withdraw the 2015 WOTUS rule.

[21] See Analysis of Jurisdictional Determinations for Economic Analysis and rule, EPA-HQ-OW-2011-0880-20877 (attached).

Sincerely,

John Barrasso, M.D.
Chairman

Dan Sullivan
United States Senator

Shelley Moore Capito
United States Senator

John Boozman
United States Senator

Joni K. Ernst
United States Senator

Roger Wicker
United States Senator

Jerry Moran
United States Senator

James M. Inhofe
United States Senator

M. Michael Rounds
United States Senator

Richard C. Shelby
United States Senator

Deb Fischer
United States Senator

WYOMING STOCK GROWERS ASSOCIATION
Guardian of Wyoming's Cow Country since 1872

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Executive Vice President- Jim Magagna, *Cheyenne*
Young Producers Assembly- Will Hudson, *Sinclair*

April 11, 2019

Michael McDavit
Office of Water
U.S. Environmental Protection Agency
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2018-0149; Definition of "Waters of the United States"

Dear Mr. McDavit:

The Wyoming Stock Growers Association (WSGA) has represented the ranching community in our state for over 147 years. Our industry stood to be dramatically impacted by the 2015 Waters of the United States (WOTUS) Rule. For that reason, we joined with several other Wyoming entities in filing an amicus brief in the litigation brought by Wyoming and twelve other states challenging the 2015 WOTUS rule promulgated by the previous administration. In 2017 we filed comments in support of the current administration's decision to suspend the 2015 rule pending development of a new rule.

Today we write to offer our strong support to the proposed new WOTUS rule identified by the docket above. We commend you for moving in a direction that represents a clearer understanding of the realities of water bodies and the sues of water, in particular in the arid western states.

WSGA does have some concerns with the draft proposed rule. The broad definition of "intermittent waters" in the rule creates the risk that it will be applied to waters that have only very minimal and sporadic flows. WE suggest that a minimum typical number of days of annual flow be incorporated into this definition.

The well-intended effort to establish within the rule a separate categorization for "certain ditches" we believe creates unnecessary opportunities for conflict and misapplication. Ditches should only be subject to jurisdiction if the fully meet the criteria as otherwise established under the definitions in the proposed rule.

In addition to our brief comments submitted here, WSGA has reviewed, signed onto and fully supports the more detailed and technical comments submitted by the National Cattlemen's Beef Association (NCBA).

Thank you for your consideration of our comments on this critical issue.

Sincerely,

Jim Magagna

Jim Magagna
Executive Vice President

April 15, 2019

WER 10520.00d
Environmental Protection Agency
Revised Definitions of "Waters of the United States"
Docket EPA-HQ-OW-2018-0149

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460
To Whom It May Concern,

Thank you for the opportunity to review and comment on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). The following comments pertain to the State of Wyoming's review of the proposed revised definitions for Waters of the United States (WOTUS), consistent with the Presidential Executive Order signed on February 28, 2017 entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

The CWA is one of the most significant environmental laws in effect today. It was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" yet imparts that states have the "primary responsibilities and rights...to prevent, reduce and eliminate pollution...of land and water resources" (33 U.S.C. §1251(b)). States, no doubt, are in the best position to manage the water within their boundaries on account of on-the-ground knowledge of hydrologic and regulatory conditions.

For states to effectively fulfill cooperative federalism responsibilities under the CWA, it is incumbent upon the federal government to set a WOTUS framework that affords clarity of interpretation and balances state autonomy. The following encapsulates the State of Wyoming's recommendations under the proposed rule using the guiding principles of cooperative federalism. Also included as attachments are individual state agency comment letters. These comments should be considered in context specifically to each state agency's area of expertise.

1. *Improve clarity of WOTUS determinations*

When finalized, the new WOTUS framework should come as close as possible to providing an explicit list of determinations accompanied by geospatial maps in order provide clarity in the application of WOTUS jurisdictional water bodies. States already have maps of attainable uses and designated waters within their boundaries as part of CWA compliance. Since part of the legwork is already complete, EPA and USACE should rely upon these state efforts as the initial framework in order to provide sufficient clarity of jurisdictional determination for all stakeholders. Wyoming is prepared to work closely with EPA and USACE to supply the necessary data and information to support this effort.

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2. Augment the definition of "intermittent" waters

Wyoming supports the revocation of ephemeral waters that flow only in response to rain and other weather events. However, concern remains over the determination that would apply WOTUS jurisdiction to rivers and streams with yearly perennial or "intermittent" flow to downstream navigable waters. Wyoming's snowmelt-driven hydrologic systems include many dry draws that exhibit continuous but short-duration flows during spring runoff. Additionally, one could argue that all agricultural ditches are "intermittent" by nature especially because they seasonally convey water during the irrigation season.

To improve this matter, Wyoming requests a more straightforward explanation for what is meant by "intermittent" that should also include parameters pertaining to how an "intermittent" determination would be made (e.g. - flow volume in conjunction with duration). The attached state agency comments provide specific suggestions as to how to address this issue.

3. Clarify the intent and application of jurisdictional "certain ditches"

The current proposed revised definition of WOTUS properly narrows the scope for "certain ditches" to apply to "artificial channels used to convey water," ditches that are traditional navigable waters, and ditches constructed in a tributary or those that relocate or alter a tributary. Wyoming supports the complete revocation of the 2015 WOTUS jurisdictional rule that applied to "man-made features." However, the current proposed rule also applies jurisdiction to ditches when they "satisfy conditions of the tributary definition" or when they "relocate or alter" a tributary. These two aspects still have potential to create confusion concerning which ditches are, and are not, considered WOTUS.

For example, stream segments that are relocated or reconstructed as part of development or industrial activities could be deemed jurisdictional because they relocate or alter tributaries in order to convey water. As well, man agricultural ditches could also be argued to be jurisdictional by their inherent nature since they alter or relocate tributaries when conveying water. By these associations, there is too much ambiguity and more clarity is needed. Please refer to the attached State of Wyoming agency comment letters for recommendations as they apply to the application of WOTUS for "certain ditches."

4. Support for the proposed definition for "adjacent" wetlands

The 2015 WOTUS rule interpreted "adjacent" waters as jurisdictional WOTUS to which the State of Wyoming contested on account of its excessively broad application that included "bordering, contiguous or neighboring" waters. The new proposed rule amends the interpretation of "adjacent" as it applies to wetlands. It specifies that adjacent wetlands are jurisdictional when they physically touch other jurisdictional waters or have a surface water connection. Wyoming is supportive of this amended interpretation especially because it does not use location as a basis of jurisdictional determination.

5. Partner with states, local governments and tribes for data compilation

The State of Wyoming can provide a depth of resources to support the development of geospatial datasets for mapping jurisdictional waters. The state is in a position to facilitate collaboration with local governments, counties, conservation districts, and tribes to prepare datasets and maps. Wyoming will gladly assist EPA and USACE to identify and employ the best available tools and appropriate provisions for ongoing data and map maintenance.

6. Ensure continued financial assistance for CWA state programs

CWA funds are part and parcel to states' abilities to fulfill their obligations under delegated CWA programs. Changes to federal jurisdiction over the nation's waters under the proposed rule should not negatively impact existing or ongoing financial assistance granted to states to implement these programs. Wyoming requests commitment from the EPA to states that no reduction in existing financial assistance to states will occur directly or indirectly as a result of finalization, implementation or any future revisions to the proposed rule.

In closing, as currently proposed, the revised WOTUS rule makes strides toward setting a more appropriate, narrow scope for jurisdictional waters. Effective implementation of the revised rule will depend upon consultation and

coordination with states to facilitate a shared understanding of what is and is not classified as WOTUS. The people and communities who rely on CWA protections deserve consistency and predictability in its application. The State of Wyoming looks forward to collaborating with EPA and USACE as a final rule is promulgated.

Please feel free to reach out to Beth Callaway in this office for any questions: beth.callaway@wyo.gov or 307-777-8204. Thank you for your consideration.

Sincerely,

Mark Gordon

Governor

Encl.

CC: The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives
Troy Thompson, President, Wyoming County Commissioners Association
Todd Heward, President, Wyoming Association of Conservation Districts
Bridget Hill, Wyoming Attorney General

Department of Environmental Quality
To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.
Mark Gordon, Governor
Todd Parfitt, Director

April 15, 2019

United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

United States Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310

Submitted online via: http://www.regulations.gov

Re: Document ID No. EPA-HQ-OW-2018-0149; Revised Definition of "Waters of the United States"

To Whom It May Concern,

Please accept the following comments in response to the February 14, 2019 Federal Register notice that proposes a rule (2019 Draft Rule) to define the scope of waters federally regulated under the Clean Water Act (CWA). The Wyoming Department of Environmental Quality (WDEQ) is a co-regulator in implementing the CWA, in addition to administering state water quality requirements for "waters of the state" that extend beyond "waters of the United States" (WOTUS). The WDEQ has and will continue to advocate for a WOTUS definition that both recognizes the limits of federal authority over water quality and clearly establishes what is, and is not considered a WOTUS. As the United States Environmental Protection Agency and the United States Army Corps of Engineers, hereinafter referred to as the "agencies" recognize, these two elements are essential so that states can efficiently and with certainty implement state and federal water quality regulations.

The 2015 Waters of the United States rule failed to provide the necessary clarity and did not recognize the limits of federal authority over water quality established by the Clean Water Act and the Supreme Court. Consequently, the WDEQ supports the agencies efforts to revise the definition of WOTUS in accordance with the Presidential Executive Order for "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017). The WDEQ understands that this is the second of a two-step process intended to bring more clarity and consistency to the definition of WOTUS as directed by the Executive Order. WDEQ has provided extensive comments and recommendations throughout the repeal and revision process and looks forward to continued dialogue with the agencies as the rule revision process proceeds.

WDEQ appreciates and commends the agencies' efforts in consulting with states in developing the 2019 Draft Rule which is clearer and better recognizes the intent and limits of the CWA as informed by legislative history and Supreme Court precedent. For instance, there are several aspects of the 2019 Draft Rule and future agency directives stated in the preamble that WDEQ supports and which are consistent with our previous recommendations, not the least of which is a rule that is in better alignment with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). These supported elements include the removal of interstate waters as a category, exclusion of ephemeral waters, exclusion of groundwater, and the desire of the agencies, in collaboration with states, to develop geospatial maps of WOTUS. Moreover, we support the separate category of ditches and the definition of adjacent wetlands with minor revisions.

However, there are some elements of the 2019 Draft Rule that would benefit from revision in order to provide necessary clarity between federal and state jurisdiction and minimize potential federal overreach. Specifically, the agencies should revise the definitions of "lakes and ponds" and "intermittent waters". In addition, the WDEQ has several minor revision requests including: that the rule incorporate clear quantitative criteria into the definition of typical year that is in alignment with the national standard for climate normals; clarify lateral extents of jurisdiction; incorporate clear criteria regarding breaks in federal jurisdiction; and explicitly exclude isolated waters. We also recommend revocation and replacement of the 2008 Rapanos Guidance with a document tailored to the new rule. Lastly, we request the agencies elaborate on states' roles as co-regulators of water quality while also affirming their support for maintained or increased federal CWA funding to the states.

Aspects of the 2019 Draft Rule WDEQ Supports

Removal of the Interstate Waters Category

WDEQ supports the removal of interstate waters as a separate jurisdictional category. This category has contributed to long-standing confusion in the definition of WOTUS. The term 'interstate waters' is a relic of the original Water Pollution Control Act (WPCA) of 1948 which was subsequently replaced with the term 'navigable waters' when Congress enacted the 1972 CWA amendments, effectively replacing prior iterations of the statute. Thus, the scope of federal jurisdiction is constrained to 'navigable waters' – regardless of state political boundaries.

This linkage was implicitly recognized in *Rapanos* considering that 'interstate water' was not used as a defining criterion in concluding whether a water was WOTUS and jurisdictional under the CWA. Under the *Rapanos* plurality opinion, all waters, regardless of whether they cross state political boundaries, must have a direct hydrological connection and relatively permanent flow to navigable waters to be a WOTUS. Waters that do not meet these criteria should be regulated by states. The removal of this category from the 1986 and 2015 WOTUS rules helps eliminate uncertainty and is more consistent with Congressional intent and authority to not "exert anything more than its commerce power over navigation." Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159, 168 n.3 (2001). It is our opinion that most waters deemed jurisdictional under the interstate water category in past rules would likely remain jurisdictional under the 2019 Draft Rule by

satisfying the requirements of a direct hydrological connection and relatively permanent flow to a navigable water.

Exclusion of Ephemeral Features

WDEQ supports the agencies' categorical exclusion of ephemeral features in the 2019 Draft Rule which aligns with our past recommendations. This exclusion conforms to the plurality opinion in Rapanos that for a tributary to be considered a WOTUS, it must have relatively permanent flow and under normal circumstances, it must have water.

Without this exclusion, Wyoming would experience an unnecessary increase in the number of stream miles under federal jurisdiction by several orders of magnitude. Similarly, there would be a corresponding significant increase in 404 permits and associated state 401 certifications with expanded jurisdiction to ephemeral waters. This expanded jurisdiction would result in additional costs for permitting and compliance along with increased permitting delays. Expanding the reach of federal agencies into areas historically and more appropriately overseen by the states would result in resource redistribution that would adversely affect the ability of states to timely address critical water quality issues such as harmful cyanobacterial blooms (HABs) and nutrient pollution.

We therefore commend the agencies for excluding ephemeral waters as WOTUS to prevent these potential adverse public interest outcomes from becoming reality. This exclusion is important to further clarify what is and is not WOTUS and will minimize the need for jurisdictional determinations on ordinarily dry channels which only flow in response to single and infrequent precipitation events. Finally, this categorical exclusion adds necessary legal clarity that should eliminate future jurisdictional disputes and resource drains on the agencies and state regulators.

Exclusion of Groundwater

The WDEQ supports the agencies' explicit exclusion of groundwater in the 2019 Draft Rule. The plain language of the CWA affords federal protections for navigable waters and references groundwater only with respect to the issuance of grants to states for the purpose of groundwater protection activities as part of nonpoint source reductions. This separation of navigable waters and groundwater in the CWA indicates that Congress did not intend for the federal regulatory reach of the CWA to apply to the management and protection of groundwater. Recent lawsuits and inconsistencies in interpretation have occurred over the scope of the CWA with respect to groundwater and, therefore, an explicit exclusion gives certainty that the definition of WOTUS does not include groundwater.

Geospatial Mapping

The WDEQ supports the agencies' desire, in collaboration with states, to develop geospatial mapping tools that would facilitate the implementation of the 2019 Draft Rule and provide greater regulatory certainty. The exercise of mapping all WOTUS is a commendable and necessary task, though not without significant technical and procedural challenges (e.g., minimum data requirements, inconsistencies in the quality and quantity of geospatial data sets, process for updating maps). This effort will require robust

discussion and vetting of ideas among states and federal partners to adequately address the many challenges that lie ahead.

Though the challenges are real, the creation of a state-approved 'national standard' in WOTUS mapping is certainly feasible. To this end, the WDEQ recommends a phased approach to geospatial mapping to provide ample time to address challenges while also making progress toward the end goal. The first phase of this approach involves developing maps of traditional navigable waters. Merely mapping traditional navigable waters would be a large step forward and would have the dual function as an initial 'testing' platform to identify and evaluate the most efficient methods for reviewing, creating, standardizing, and finalizing geospatial datasets. Once traditional navigable waters have been successfully mapped, the agencies and states can move forward with mapping perennial tributaries to traditional navigable waters, followed by intermittent waters. This process does not diminish nor in any way detract from the intent and purpose of Sections 101(b) and 101(g) of the CWA. In fact, it recognizes and embraces cooperative federalism and the state-federal co-regulation of water quality.

Aspects of the 2019 Draft Rule WDEQ Supports with Minor Revisions

Creation of a Separate Ditch Category and Definition of Ditch

The WDEQ supports the agencies' development of a separate category of ditches in the 2019 Draft Rule that clearly delineates which ditches are WOTUS along with an explicit exclusion of all other ditches that do not meet the definition. This is an improvement over previous WOTUS rules by recognizing the need to distinguish the different types of ditches. That said, the proposed definition of ditch as "...an artificial channel used to convey water" is vague, particularly with respect to what constitutes an artificial channel and whether that feature qualifies as a ditch.

To illustrate the need for further clarity, consider a natural WOTUS stream where a segment of that stream was re-located or re-constructed through upland for residential/commercial development or as part of industrial activities. Clearly, the altered stream segment is artificial, though could not reasonably be considered a 'ditch' in common parlance. However, this altered stream segment could be arguably considered a 'ditch' and non-jurisdictional under the proposed definition in the 2019 Draft Rule because of the ambiguity of 'artificial channel'. It is our opinion that under such circumstances, the re-located/re-constructed stream segment should retain its WOTUS status.

To address this issue, the WDEQ recommends that the proposed definition of ditch in 33 CFR § 328.3 (c)(2) is re-cast to read: "Ditch. The term ditch means a man-made surface water conveyance constructed for the sole purpose of directing and delivering water from one point to another for purposes of road or field drainage; supplying water for irrigation, stockwater or municipal uses; or transporting goods and services."

Definition of Adjacent Wetlands

The WDEQ supports the agencies' categorical treatment of adjacent wetlands as WOTUS. This is an integral step in providing clarity and regulatory certainty in the 2019 Draft Rule. We also support the clarification that adjacent wetlands are those that physically abut or have a direct hydrologic connection to another WOTUS. This commonsense definition of adjacency falls in line with *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), where wetlands adjacent to or abutting navigable waters are WOTUS. The *Rapanos* plurality opinion further supports the inclusion of physically abutting in the definition as "wetlands are waters of the United States if they bear the 'significant nexus' of physical connection." 547 U.S. at 755.

However, additional clarity is needed in the proposed definition of adjacent wetlands under 33 § CFR 328.3 (c)(1). Specifically, the proposed definition of "adjacent wetland" should be revised to clarify that a direct hydrologic surface connection occurs as a result of inundation during a typical year from a paragraph (a)(1) through (5) water to a wetland. The addition of "during a typical year" is critical to clarify that non-abutting wetlands that are only inundated as a result low frequency, high magnitude flows (e.g., floods) do not meet the criterion of having a direct hydrologic connection to a navigable water and are therefore not WOTUS.

Aspects of the 2019 Draft Rule With Suggested Revisions

Lakes and Ponds Separated By Excluded Features Should Not be Jurisdictional

WDEQ supports the inclusion of a separate category for jurisdictional lakes and ponds, provided that the lakes and ponds have relatively permanent flow and a direct hydrologic surface connection to a navigable water. However, under the proposed definition, lakes and ponds would also be jurisdictional if they contribute perennial or intermittent flow through excluded non-jurisdictional features identified in 33 CFR § 328.3 (b) which includes groundwater, upland ditches, ephemeral features, prior converted cropland, and stormwater control features.

The WDEQ recommends that any references to the non-jurisdictional features in paragraph (b) be removed from the lakes and pond category since these excluded features should create a break in federal jurisdiction for the upstream lake or pond. The features in paragraph (b) and any lakes and ponds flowing into them are not WOTUS and are more appropriately managed by states. If the rule is not revised, excluded features such as groundwater, prior converted cropland or artificially irrigated areas that convey perennial or intermittent flow from a lake or pond to a jurisdictional water, could be arguably considered a WOTUS. A water cannot be an excluded feature and a WOTUS at the same time. This will lead to unnecessary confusion regarding their jurisdictional status and puts into question the very essence of the excluded features under paragraph (b).

Therefore, WDEQ recommends the following revision to 33 CFR § 328.3 (a)(4): delete "...or through water features identified in paragraph (b) of this section so long as those water features convey perennial or intermittent flow downstream...".

Definition of Intermittent Must Be Revised

A clear and unambiguous definition of "intermittent", consistent with the intent of the CWA and Supreme Court decisions, is critical in the WOTUS rule. The 2019 Draft Rule, however, does not provide a clear definition for waters that are "intermittent" and the referenced definition of "snowpack" is equally unclear. The ambiguous nature of these two terms introduces considerable uncertainty in the proposed rule regarding jurisdiction, will increase the number of jurisdictional determinations and could conceivably lead to an expansion of federal authority that does not comport with *Rapanos*.

The 2019 Draft Rule defines intermittent as "surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)". Snowpack is defined as "layers of snow that accumulate over extended periods of time in certain geographic regions and high altitudes (e.g., in the northern climes and mountainous regions)". Terms such as 'certain times', 'seasonally', and 'extended periods of time' are too subjective to be implemented consistently. Furthermore, the need to show an elevated groundwater table or adequate 'snowpack' would be burdensome to implement effectively and efficiently as part of a final rule, leading to a substantial increase in the number of site-specific jurisdictional determinations. In addition, because the broad definitions of "intermittent" and "snowpack" lack duration components, practically any stream that has a shallow layer of accumulated snow in its watershed that contributes flow to a WOTUS for a few days to weeks every year during spring melt, could be arguably considered jurisdictional under the 2019 Draft Rule. Taken at its broadest possible interpretation, the current definitions of 'intermittent' and 'snowpack' could effectively result in a categorical inclusion of all intermittent waters tributary to navigable waters as WOTUS.

Such a categorical inclusion of all intermittent waters in the 2019 Draft Rule, could conceivably expand federal jurisdiction to thousands of miles of currently non-jurisdictional intermittent streams in Wyoming and the 27 other states where the 1986 Rule and 2008 Rapanos Guidance are in effect. The 2008 Rapanos Guidance identifies that the agencies assert jurisdiction over "non-navigable tributaries...that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally (e.g., typically at least three months)" and that the agencies conduct site-specific jurisdictional determinations on "non-navigable tributaries that are not relatively permanent" (i.e., intermittent waters with continuous flows less than 3 months or ephemeral features) to determine whether they have a significant nexus with a navigable water. The 2019 Draft Rule represents a significant shift away from this practice and assumes that all intermittent waters, including those that have continuous flow for less three months, have a significant nexus to navigable waters and therefore are WOTUS.

To illustrate this possible expansion, the WDEQ roughly estimated that for Wyoming, the 2019 Draft Rule could result in upwards of a 175% increase in the miles of intermittent waters over what is considered jurisdictional under the 1986 rule and 2008 Rapanos Guidance.

By expanding jurisdiction beyond the 1986 Rule and the 2008 Rapanos Guidance, the 2019 Draft Rule is also inconsistent with both the plurality and concurring opinions in *Rapanos*. The position of the *Rapanos* plurality was that 'the waters of the United States' include only relatively permanent, standing

or flowing bodies of water...as opposed to ordinarily dry channels through which water occasionally or intermittently flows...or ephemeral flows of water." 547 U.S. at 732-733. The plurality also acknowledged that it would "not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Justice Kennedy's concurring opinion stated that "intermittent flow can constitute a stream...while it is flowing...[i]t follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." *Id.* at 770. Interestingly, nowhere in the *Rapanos* plurality nor the concurring opinion is the term 'seasonal river' tied directly to intermittent flow. *See id.* The plurality states that it's possible that a 'seasonal river' could qualify as a 'relatively permanent water' and through inference, a 'seasonal river' could equate to a water with intermittent flow. *Id.* at 732 n.5. The WDEQ understands that translating these opinions into a definitive rule is difficult. However, when considered together in a balanced perspective, they cannot be interpreted to mean all intermittent waters are 'seasonal rivers' and therefore are jurisdictional. A more reasonable and accurate conclusion that balances the merits of these collective opinions is that some (but not all) intermittent waters with seasonal flow may be WOTUS.

The anticipated federal expansion in many regions of the nation as a result of the ambiguous 'intermittent' and 'snowpack' terms combined with the high likelihood for increased site-specific jurisdictional determinations and the misinterpretation/non-conformance with the opinions from *Rapanos* leaves the 2019 Draft Rule extremely vulnerable to future litigation and will therefore not provide the regulatory certainty necessary to successfully implement state and federal water quality protections.

The clearest and most defensible solution to these issues, that aligns to both the plurality and concurring opinions in *Rapanos*, is to include a duration component of continuous flow for at least three consecutive months during a calendar year within the definition of 'intermittent'. The minimum three consecutive month continuous flow duration is recommended as it defines the length of a typical 'season' within a calendar year and aligns with long-standing agency practice per the 2008 Rapanos Guidance to which states have become accustomed. The flow duration component will provide the much needed quantification of "relatively permanent flow" that is necessary to establish a significant nexus with a navigable water and draw a clear line between jurisdictional intermittent waters and non-jurisdictional waters with impermanent flow (e.g., ephemeral features, intermittent waters with <3 consecutive months continuous flow).

Integration of a flow duration component would also allow the agencies to remove the ambiguous definition of 'snowpack' as well as the reference to an elevated groundwater table, resulting in further clarification to the rule. Furthermore, it is predicted that our recommended revision to the definition of 'intermittent' and removal of the term 'snowpack' would represent a low probability for an expansion of federal jurisdiction beyond the scope of the CWA from what currently exists in the 28 states where the 2015 Rule is enjoined.

Finally, the agencies, in collaboration with states, could develop a standardized process of identifying those intermittent waters that should be considered "tributaries" to navigable waters based on the consecutive three month continuous flow duration component using a 'regional' jurisdictional

determination approach. As part of this collaboration, state-federal partners should develop a standardized decision process to determine jurisdiction for intermittent waters that are 'on the cusp' based on the definition of 'intermittent'. Following public comment, these waters (along with the standardized processes) could be made available for the public and regulated community via geospatial maps and integrated as part of the national geospatial mapping exercise for all WOTUS that the agencies advocate in the preamble.

Additional Comments for Consideration

Incorporate Quantitative Criteria in the Definition for Typical Year that Aligns with National Standards

The term 'typical year' is commonly used throughout the 2019 Draft Rule and is defined as the "...normal range of precipitation over a rolling thirty-year period for a particular geographic area." The agencies, within the preamble, further interpret a year to be 'typical' when the observed rainfall from the previous three months falls within the 30th and 70th percentiles established by a 30-year rainfall average. It is further clarified in the preamble that this would generally not include times of drought and extreme floods.

Though the rationale behind using a 30-year rainfall average aligns with conventional analysis of climate data, the process by which this would be implemented by the agencies, as described in the preamble, represents an unnecessary and somewhat duplicative resource expense. Instead, we recommend the agencies use the 30-year precipitation normals developed by the National Oceanic and Atmospheric Administration (NOAA) that are for all intents and purposes the 'national standard' for climate normals. NOAA's 30-year climate normals are robust products that can be used at different geographic scales and are updated every ten years. We also recommend using the broader and more conventional interquartile range of 25th to 75th percentiles that better captures the 'typical' precipitation events while excluding periods of drought and extreme floods.

Clarify Lateral Extents of Jurisdiction

The 2019 Draft Rule describes the lateral limit for jurisdictional waters as either the water's ordinary high water mark (OHWM) or in the case of adjacent wetlands, where the land no longer satisfies all three wetland delineation criteria (hydrology, hydrophytic vegetation, hydric soils). While this is useful, this language is only found within the definitions of OHWM, upland and wetlands under paragraph (c) with no direct linkages to WOTUS waters identified in paragraph (a). WDEQ therefore recommends that the language in 33 CFR § 328.3 (a) explicitly reference the definitions in paragraph (c) to more clearly define the lateral extent of jurisdiction. Therefore the WDEQ recommends the following revision to 33 CFR § 328.3 (a) to read: "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) and definitions in paragraph (c) of this section, the term 'waters of the United States' means".

Revoke and Replace 2008 Rapanos Guidance

In response to the agencies' solicitation, WDEQ recommends revocation of the 2008 Rapanos Guidance following adoption of a revised WOTUS rule and that new guidance be developed that is specific to the new rule. While the WDEQ anticipates that the draft rule revised with our recommendations will result in notably fewer site-specific determinations, new guidance for conducting site-specific determinations will still be needed. New guidance will also assist agencies and stakeholders to create a "clean break" from the 1986 rule and avoid potential confusion that may occur by using guidance that was developed in association with previous rule language. We also recommend that this new guidance incorporate standard field methods for site-specific jurisdictional determinations to ensure consistency and repeatability in implementation of the rule. Finally, we recommend that the new guidance describe the standard process on how to determine whether a year is 'typical'.

Waters Upstream of Federal Jurisdiction Breaks Should Not Be Jurisdictional

The agencies requested comment on whether less than intermittent flow in a channel results in a break in jurisdiction of upstream perennial or intermittent waters. The WDEQ recommends that the rule explicitly state that federal jurisdiction is broken when segments of waters with less than intermittent flow or non-adjacent wetlands occur between a downstream WOTUS and an upstream perennial or intermittent water. It may be most appropriate to insert this explicit exclusion language under 33 CFR § 328.3 (b) of the proposed rule. This would be consistent with the plurality and concurring opinions in *Rapanos*, where a severing of federal jurisdiction occurs when an upstream perennial or intermittent water no longer has a continuous hydrologic surface connection of relatively permanent flow to a downstream WOTUS or the physical connection with a downstream WOTUS via adjacent wetlands is absent.

Isolated Waters Exclusion

As described in the preamble, isolated waters will be excluded from federal jurisdiction under the CWA. This is keeping with the intent of Congress when it enacted the CWA and adhering to *Rapanos* which reaffirmed the holding in *SWANCC* that physically isolated waters are not jurisdictional regardless of their proximity to a jurisdictional water. While WDEQ fully supports the agencies' exclusion of isolated waters as those not meeting the definitions of a WOTUS under paragraphs (a)(1) through (6) of the proposed rule, we request that isolated waters be identified as an explicit exclusion within paragraph (b) of the rule. Such clarity provides a more predictable regulatory framework.

State Protections and Funding

The preamble to the rule should include clear language that recognizes the states' role in determining how best to protect and manage its waters. The agencies should also affirm their support for adequate funding levels to states to ensure robust protection of the nation's water quality

Closing Statement

In closing, the WDEQ appreciates the agencies' efforts to develop a revised WOTUS definition that is more consistent with the *Rapanos* plurality and concurring opinions as well as the scope of federal jurisdiction Congress envisioned under the CWA. The 2019 Draft Rule represents a significant step forward toward more clearly defining what is and is not a WOTUS; however, there are some aspects of the 2019 Draft Rule, most notably the definition of intermittent waters that requires further consideration. With WDEQ's suggested revisions, the final WOTUS rule will support national water quality goals while also allowing states to fulfill their role as co-regulators of water quality. We look forward to continuing our partnership with you to develop a clear, definitive, and pragmatic rule that appropriately defines the role of the federal government and states in protecting the quality of all our nation's waters. If you have any questions or comments, please contact my staff David Waterstreet (david.waterstreet@wyo.gov, 307-777-6709) or Eric Hargett (eric.hargett@wyo.gov, 307-777-6701).

Sincerely,

Todd Parfitt, Director

TP/KF/DW/EGH/gt

cc: Kevin Frederick, Administrator, Water Quality Division, WDEQ
Beth Callaway, Governor's Office
Kelly Shaw and Erik Peterson, Attorney General's Office

State Engineer's Office

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April 15, 2019

David Ross
Assistant Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue NW (1101A)
Washington, DC 20460

R.D. James
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Submitted online via: http:/www.regulations.gov

Re: Revised Definition of "Waters of the United States," EPA-HQ-OW-2018-0149

Dear Administrator Ross and Assistant Secretary James,

The Wyoming State Engineer's Office (WSEO) appreciates the opportunity to comment on the proposed Revised Definition of "Waters of the United States" rulemaking. Wyoming holds title to water within its borders in a sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all are equally protected. Wyo. Const. art. 8 § 1; art. 1 § 31; *Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955); See also *Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (1900). Wyoming constitutional and statutory provisions charge the State Engineer and the State Board of Control with the supervision, appropriation, distribution, and diversion of surface and groundwater use within the state. Wyo. Const. art. 8 §§ 2, 5; See, e.g., Wyo. Stat. Ann. §§ 41-4-502 through -511. The need for the state to control the use of its limited and precious water resources compelled Wyoming's Constitutional declaration of water ownership, and its history of water law and water administration that has since developed.

Wyoming's Environmental Quality Act, under which Wyoming regulates water quality, further respects the diversion and use of water, as well as the State Engineer and State Board of Control's authority over those activities. "Nothing in this act shall be construed to supersede or abrogate any valid water right. It is recognized that diversion of water caused by the exercise of a valid water right is an allowable practice." Wyo. Stat. Ann. § 35-ll-302(c). "Nothing in this act: .. . Limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control .... " Wyo. Stat. Ann. § 35-11-1104(a)(iii).

The Clean Water Act ("CWA") provides that it is the "policy of Congress to recognize, preserve, and protect the primary responsibilities of States to . . . plan the development and use of land and water resources." 33 U.S.C. § 1251(b). Additionally, the CWA states: "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." 33 U.S.C. § 1251(g). As recognized by the CWA, Wyoming has an important, sovereign interest in protecting its ability to plan for the use of its limited water resources, and to allocate its waters for those uses according to state law.

The Wyoming Department of Environmental Quality (WDEQ) has coordinated and worked with the WSEO in preparing their detailed comments regarding the revised definition of "Water of the United States" and the WSEO supports them in whole. Of special importance to the water users of Wyoming when exercising their rights are clear definitions of jurisdictional waters, especially intermittent waterways and ditches. To that end, the idea of geospatial mapping tools would be extremely useful to our users and is supported enthusiastically by the WSEO.

The WSEO appreciates the agencies' efforts to reach out to the states as co-regulators in meaningful consultation, to listen to their concerns, acknowledge states' authorities over "waters of the state," and to work toward a rule that seeks to strike a balance between the importance of protecting the quality of the nation's waters and preserving the sovereignty of states over their land and water resources. The WSEO encourages the agencies to continue this outreach and consultation throughout the comment period and in the implementation of the rule.

Sincerely,

Rick Deuell

Rick Deuell P.E.
Deputy State Engineer

Cc: Beth Callaway, Governor's Office
Chris Brown, Attorney General's Office

Wyoming
DEPARTMENT OF Agriculture

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The Wyoming Department of Agriculture is dedicated to the promotion and enhancement of Wyoming's agriculture, natural resources and quality of life.

April 15, 2019

U.S. Environmental Protection Agency
EPA Docket Center, Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2018-0149; Definition of "Waters of the United States"

Mr. McDavit:

The Wyoming Department of Agriculture (WDA) wishes to submit the following comments which are specific to our mission of promoting and enhancing agriculture, natural resources and quality of life in Wyoming. We appreciate the opportunity to comment on the above-referenced docket for the revised definition of Waters of the United States. We also appreciate the agencies' engagement with the States through the implementation of the 2017 Executive Order "Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the 'Waters of the United States' Rule". The Executive Order, in our experience, illustrated a sincere commitment to cooperative federalism and also recognized the need to clarify, appropriately through formal rule-making, jurisdictional *Waters of the United States.*

We support the Proposed Rule as it affirms the wishes of Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" within their boundaries. Local control of decisions impacting water quality is essential. Wyoming's Environmental Quality Act (§ 35-11-101) grants the State the authority to regulate water quality for all surface and groundwater within the boundaries of the State. This means there are water quality standards for every drop of water in Wyoming. Lack of federal jurisdiction does not equal lack of protection. This proposed rule, therefore, finally contemplates whether federal agencies or local entities are better positioned to make decisions regarding how best to administer programs for smaller waterbodies.

WDA strongly supports any efforts of the agencies to collaborate with States, Tribes and other Federal agencies to develop geospatial datasets that would simply and conclusively identify "waters of the United States". We believe there is sufficient clarity of jurisdictional determination criteria, through this Proposed Rule, to allow the formulation of a geospatially-based tool to identify the appropriate waterbodies within Wyoming that should be considered *waters of the United States.* Wyoming has significant experience in these types of efforts to categorize water resources. The Wyoming Department of Environmental Quality, in collaboration with our States' Conservation Districts, recently undertook a very successful effort to develop and use a model fed by geospatial datasets to differentiate between waterbodies to be protected for primary contact recreation versus those waters to be protected for secondary contact recreation uses. The distinguishing characteristics separating primary and secondary contact recreation use designations are likely more obscure than those which would determine *waters of the United States.* WDA recommends the agencies institute a program for voluntary

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The Wyoming Department of Agriculture is dedicated to the promotion and enhancement of Wyoming's agriculture, natural resources and quality of life.

development of jurisdiction-determining models by States and Tribes for cooperative review and final approval by the agencies.

Federal-state interaction is common in categorizing waterbodies for any number of reasons. EPA reviews waterbody submissions of States for inclusion on the CWA 303(d) List of Impaired Waterbodies and routinely reviews Use Attainability Analyses conducted by States. These existing water quality administration tools are designed to assign attributes to waterbodies based on credible data for efficient and effective decision making. Every waterbody in Wyoming is categorized based on existing or potential uses for that water. These past experiences indicate CWA jurisdiction determinations are possible should be conducted collaboratively on a State-by-State basis. The creation of maps clearly indicating *waters of the United States* should be the ultimate goal of this effort.

In order to clearly identify *waters of the United States*, however, WDA requests better criteria for the definition of *intermittent*. In order to adhere to the philosophy of jurisdictional waters exhibiting relatively permanent flow, we recommend the phrase *three consecutive months of continuous flow during a calendar year* be utilized as qualifying criteria in place of *during certain times of a typical year*. Many dry draws in Wyoming exhibit continuous, but short-duration flows during spring run-off that would more appropriately be regulated locally.

WDA supports the premise offered by comments of the Wyoming County Commissioners Association and the Wyoming Association of Conservation Districts relating to jurisdictional ditches defined in the Proposed Rule. WDA also supports the agencies' proposal to exclude most ditches as *waters of the United States* but we are concerned that including *ditches constructed in a tributary or relocates or alters a tributary* will create ambiguity in determining jurisdiction. It could be inferred that all ditches inherently alter a tributary and would automatically be jurisdictional even if constructed in an upland setting common to agricultural operations. To remedy conflicting language in the proposed rule, we recommend striking the phrase *or relocates or alters a tributary* from the definition ditches constituting *waters of the United States*. WDA strongly recommends that upland ditches, agricultural ditches and storm water control ditches be exempt from federal jurisdiction.

Thank you for your commitment to partnering with State and local entities to bring regulatory certainty and efficiency to water quality improvement efforts across the country. Farmers and ranchers constitute a valuable source of information regarding the function of the watersheds in which they live and work and are impacted by decisions relating to management of natural resources. WDA believes that the Proposed Rule appropriately positions States to take the lead in improving water resources.

Sincerely,

Doug Miyamoto
Director, Wyoming Department of Agriculture

Cc: Governor Mark Gordon
Wyoming Congressional Delegates

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National Association of State Departments of Agriculture
Wyoming Department of Environmental Quality
Wyoming State Engineer's Office
Wyoming Water Development Office
Wyoming Game and Fish Department
Wyoming County Commissioners Association
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April 15, 2019

WER 10520.00d
Environmental Protection Agency
Revised Definitions of "Waters of the United States"
Docket EPA-HQ-OW-2018-0149

U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

To Whom it May Concern,

The staff of the Wyoming Game and Fish Department (Department) has reviewed the proposed Revised Definitions of "Waters of the United States". We offer the following comments for your consideration.

As a headwater state, Wyoming contains the origins of many of the great rivers of the United States. These rivers rise from the mountains, foothills, sagebrush steppes, and eastern plains to flow across the borders and become the Colorado River, Snake River, Missouri River and Platte River. While these larger rivers are undoubtedly considered Waters of the United States, it appears that some quantity of smaller tributaries and headwaters (especially ephemeral headwaters) that feed these rivers appear to not be covered under the proposed new rule.

From a scientific perspective, there is no doubt that tiny headwater seeps and springs are important for the proper ecological function of downstream rivers (Colvin et al. 2018). Wyoming contains a vast network of small headwater streams. Based on 1:24,000 High Resolution National Hydrography Dataset (NHD), Wyoming has approximately 34,000 miles of perennial streams, 197,000 miles of intermittent streams, and an uncertain number of ephemeral streams. Highest densities of intermittent streams occur in headwaters at high elevations although they can also be found at other elevations throughout the state (Paul Caffrey, WyGISC Personal Communication). Without further detailed Geographic Information Systems (GIS) analysis and modeling, it is unclear how many of those headwater streams would not be considered jurisdictional under the proposed new rule.

It appears the amount of unprotected stream miles and associated wetlands under the proposed rule is underestimated because of imprecise maps and associated NHD data layers. Many

headwaters show up on the maps as perennial but are actually ephemeral or intermittent. This mapping error has been estimated to range from 24% in the western mountains to 33% in the Great Plains (Stoddard et al. 2005). Therefore, there are many miles of streams and associated wetlands in Wyoming that may not qualify for Clean Water Act protection under the proposed rule.

Headwaters in Wyoming play a critical role in providing nutrients and cold water habitats for many downstream waters. The headwaters play an important role in maintaining Wyoming's fishery resources. Cutthroat trout and various native nongame fish species are dependent on these headwaters.

Native cutthroat trout in Wyoming include the Yellowstone cutthroat trout, the Colorado River cutthroat trout, and the Bonneville cutthroat trout. These native trout depend on cold, clean water habitats and can be found in the mountainous regions of north central, northwest, and western Wyoming. They are also found in southwest Wyoming in the Missouri River, Snake River, Green River, Bear River, and Little Snake River drainages.

Native cutthroat trout are a priority for the Department, and our conservation and management activities revolve around securing and expanding their populations. Cutthroat trout today exist at mid to high elevations in perennial foothill streams up to tiny, high mountain streams that may be intermittent or even ephemeral. It is vital to protect the water quality and quantity of the headwater springs and seeps and all the tributaries whether perennial or not.

The northern leatherside chub is recognized as a Species of Greatest Conservation Need under Wyoming's State Wildlife Action Plan (SWAP 2017). This fish species frequents intermittent streams in the Snake and Salt River drainages (SWAP 2017, Schultz and Cavali 2012). For example, Dry Fork is a seasonally dry tributary to the Smiths Fork River and harbors northern leatherside chub. This tributary and others like it would not meet the proposed definition of Waters of the United States.

The native fish community of the Green River basin in Wyoming is the most imperiled in the state (SWAP 2017). The basin is home to four of Wyoming's most sensitive fish species, the bluehead sucker, flannelmouth sucker, roundtail chub, and the federally endangered Kendall Warm Springs dace. Collectively referred to as the "Three Species", the bluehead sucker, flannelmouth sucker, and roundtail chub exist in Wyoming in a subset of drainages with intermittent and ephemeral tributaries. These waters provide periodic habitat during wetter periods. These waters would not meet the proposed definition of Waters of the United States.

Native fish communities on Wyoming's eastern plains are adapted to cycles of wet periods and droughts and expand and contract their distributions according to runoff characteristics. Many of these streams in the Platte River Basin and Northeastern Missouri River Basin in Wyoming are intermittent or ephemeral (SWAP 2017). While portions of the streams' mainstem channels (for

example, the Belle Fourche, Little Missouri River, Cheyenne River and the Niobrara River) would be considered Waters of the United States under the proposed rule, it appears that other portions and headwater tributaries would likely not. Species of Greatest Conservation Need in these watersheds include: brassy minnow, finescale dace, flathead chub, goldeye, Iowa darter, pearl dace, plains minnow, western silvery minnow, shovelnose sturgeon, sauger, bigmouth shiner, common shiner, hornyhead chub, orangethroat darter, northern plains killifish, plains topminnow, sturgeon chub, and suckermouth minnow.

In summary, the Department places high value on Cutthroat trout and various native nongame fish species and the smaller tributaries and headwaters they depend on. Wyoming values these essential waters and will provide sufficient protections. We ask the Environmental Protection Agency to work with us to fully understand the proposed definitions. In addition, GIS modeling and imagery analysis will also be necessary to clearly understand the extent of Wyoming waters excluded under the proposed definition of Waters of the United States.

Thank you for the opportunity to comment. If you have any questions or concerns please contact Angi Bruce, Deputy Director, at 307-777-4501.

Sincerely,

Scott G. Smith
Deputy Director

SS/pd/ml

cc: U.S. Fish and Wildlife Service
Chris Wichmann, Wyoming Department of Agriculture, Cheyenne
Paul Dey, Wyoming Game and Fish Department
Alan Osterland, Wyoming Game and Fish Department
Beth Callaway, Office of Governor Mark Gordon

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Peaks & Prairies Chapter GCSAA
Golf Course Superintendents Association of America

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The Honorable John Barrasso (R-WY), Chairman
Senate Environment and Public Works Committee
406 Dirksen Senate Office Building
Washington, D.C. 20510

June 8, 2019

Dear Senator Barrasso:

On behalf of the Peaks & Prairies Golf Course Superintendents Association, please accept this letter to the Senate Environment and Public Works Committee as it reviews the ongoing efforts to rewrite the 2015 Clean Water Rule, more commonly known as the "Waters of the United States Rule" or "WOTUS".

Peaks & Prairies GCSA, an affiliated chapter of the Golf Course Superintendents Association of America, supports the efforts to replace WOTUS with a rule that better defines those waters subject to federal jurisdiction under the Clean Water Act. WOTUS so poorly defines such water features as tributaries and wetlands that, if left unchanged, it would result in an expensive, unpredictable, and unnecessary permitting process for golf courses in Wyoming as well across the country. Golf supports a rule that protects the principles of cooperative federalism with the Clean Water Act, while recognizing the role that responsible parties, including golf course superintendents, play as land managers and environmental stewards.

Of the 150 acres on an average golf course, 11 acres are comprised of streams, ponds, lakes, and/or wetlands. Additionally, golf course landscapes are designed to manage surface water runoff from neighboring properties such as residential and commercial areas. These waters sometimes enter our properties in a degraded state, but thanks to sediment filtration provided by healthy turfgrass and native grasses as well as the science-based agronomic and environmental best management practices our superintendents utilize, water quality testing consistently shows these waters to be cleaner exiting our courses than entering.

We are proud of our stewardship efforts. However, to continue these proactive conservation practices, we must also have clear rules. 94% of golf facilities are classified as small businesses and many operate on slim margins. However, golf faces the same legal requirements – and burdens – under the Clean Water Act, as other industries for its activities on, over, or near "Waters of the United States". Basic projects vital to golf course operations – such as planting trees, installing drainage, and fixing stream alignments – can trigger the hiring of environmental scientists, ecologists, and engineers to do environmental assessments, assist with permitting, and help with mitigation efforts. In other words, the financial impact of these actions can be very substantial.

That's why it is so important to clarify jurisdictional waters while respecting the balance of cooperative federalism under the Clean Water Act. The lack of clarity in WOTUS would have significantly harmed golf courses trying to do the right thing. We appreciate the efforts in the Administration and Congress to produce a better rule.

In closing, proactive management of these resources helps to minimize excessive federal regulation while

supporting state and local efforts. By properly managing water on our properties, the golf industry will continue to provide environmental, economic, health, and charitable benefits to our communities and watersheds.

Sincerely,

Danny Renz

Danny Renz, President
Peaks & Prairies GCSA
Douglas Community Golf Course

National Association of Home Builders

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

June 10, 2019

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

Dear Chairman Barrasso:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I am writing to express our support for Chairman Barrasso and his commitment to creating a fair and balanced Waters of the United States (WOTUS) definition. We are pleased that the Environment and Public Works Committee is taking the time to hold a hearing on this very important issue.

Our nation's home builders construct neighborhoods, create jobs, strengthen economic growth, and help create thriving communities while maintaining, protecting, and enhancing our natural resources. Under the Clean Water Act (CWA), home builders must often obtain and comply with section 402 storm water and 404 wetland permits to complete their projects. What is most important to these compliance efforts is a permitting process that is consistent, predictable, timely, and focused on protecting true aquatic resources.

In 2015, the Environmental Protection Agency and the Army Corps (the agencies) finalized a regulation to redefine the scope of waters protected under the CWA. The agencies added new terms, definitions, and interpretations of federal authority over private property that are more subjective and provided the agencies with greater discretionary latitude to expand their regulatory authority. The 2015 rule fell well short of providing the clarity and certainty sought by the regulated community. It would increase federal regulatory power over private property, lead to increased litigation and permit requirements, and lengthy delays for any business trying to comply. It is so convoluted that even professional wetland consultants with decades of experience would struggle to determine what is jurisdictional. The federal government should be working to provide a practicable and transparent permitting system rather than expanding their authority over private property.

On December 11, 2018, the agencies proposed a new Clean Water rule which, if finalized, would put in place a WOTUS definition that more faithfully implements the CWA, draws clearer jurisdictional lines, and preserves states' authority over local land and water use.

Unlike the 2015 rule, the new proposal recognizes that waters which do not fall under the WOTUS definition are nevertheless protected by robust state and local laws, as well as numerous other federal statutes such as the Safe Drinking Water Act. The new proposal also adheres to key principles articulated by the Supreme Court regarding the limits of the CWA's reach while exerting federal jurisdiction over features with the strongest influence on major downstream waterbodies. This new proposal strikes a necessary balance between environmental protection and regulatory certainty and will give the public long overdue clarity.

We commend the committee for providing this opportunity to discuss such an important issue. We believe that this rule will go a long way towards improving the way we do business and making the homes we build more affordable. Thank you for giving consideration to our thoughts.

Sincerely,

James W. Tobin III

June 12, 2019

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

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

Dear Chairman Barrasso and Ranking Member Carper:

We, the undersigned Chambers of Commerce, appreciate the Committee holding the hearing, "A Review of Waters of the U.S. Regulations: Their Impact on States and the American People." We are committed to the protection and restoration of America's wetlands and waters, and the definition of "Waters of the United States" ("WOTUS") is critical to our membership, as many of our members engage in activities subject to the Clean Water Act's ("CWA") extensive permitting requirements.

The definition of WOTUS is a pivotal aspect of the ability of the U.S. Environmental Protection Agency and Army Corps of Engineers ("the Agencies") to administer and enforce the CWA. Unfortunately, uncertainty has long surrounded the scope of federal jurisdiction over WOTUS.

To quell that uncertainty, the Agencies revised the definition of WOTUS in 2015 in order to "ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient." That definition, however, strayed far from that goal and created a substantial amount of regulatory confusion for affected stakeholders. The courts recognized that confusion and have since stayed implementation of the 2015 rule in a number of states across the U.S., creating a distinct patchwork of enforcement.

The current Administration has made addressing that confusion and uncertainty a top priority. The Agencies have since undertaken a number of rulemakings to repeal the 2015 rule and recodify the preexisting regulations. Further, the Agencies recently proposed a revised definition of WOTUS that better defines the scope of federal jurisdiction over U.S. waters.

In April, we submitted the attached comment letters in support of this revised definition. The proposed revisions, if finalized, would provide the regulated and agricultural communities with the certainty and clarity they need to continue operations and invest in new operations that are subject to the CWA's requirements. Further, the proposed revisions would maintain protections for American waters while preserving the states' authority over local land and water use, enhance transparency, and reflect decisions that are appropriately informed by science.

Stakeholders in all sectors of the economy across the U.S. rely on this regulatory certainty and clarity to ensure that critical projects are completed in a timely fashion and that day-to-day business operations are not unduly hindered by regulatory uncertainties.

We look forward to working with you on this important matter.

Sincerely,

U.S. Chamber of Commerce
Arizona Chamber of Commerce & Industry
Colorado Chamber of Commerce
Georgia Chamber of Commerce
Kentucky Chamber of Commerce
Ohio Chamber of Commerce
Tennessee Chamber of Commerce & Industry
Wisconsin Manufacturers and Commerce

cc: Members of the Senate Committee on Environment and Public Works

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

April 15, 2019

VIA ELECTRONIC FILING

Mr. Michael McDavit
Oceans, Wetlands, and Communities Division, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Ms. Jennifer A. Moyer
Regulatory Community of Practice
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

Dear Mr. McDavit and Ms. Moyer:

The U.S. Chamber of Commerce submits these comments to the U.S. Environmental Protection Agency ("EPA") and Army Corps of Engineers ("the Corps") (collectively, "the Agencies") in support of the Agencies' proposal to revise the definition of "Waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act").[1] The definition of WOTUS is critical to the Chamber and its membership, as many of the Chamber's members engage in activities subject to the CWA's extensive permitting requirements. The Chamber and its members are committed to the protection and restoration of America's wetlands and waters and have been actively engaged in WOTUS rulemaking efforts.[2]

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[1] Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. prs. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

[2] *See, e.g.*, U.S. Chamber of Commerce, Comments on Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act (Nov. 12, 2014), *available at* https://www.uschamber.com/sites/default/files/11.12.14_multi_organization_comments_to_epa_and_usace_on_proposed_rule_definition_of_waters_of_the_united_states.pdf.

The Agencies' proposed revisions to the definition of WOTUS will provide stakeholders with much-needed regulatory certainty and accurately articulate the jurisdictional limits that Congress, as clarified by the Supreme Court, envisioned under the Act. Moreover, the proposed revisions provide stakeholders with the "bright lines" needed to identify jurisdictional waters, give meaning to the term "navigable," and preserve the states' authority over land and water use. The proposed revisions, once finalized, will empower citizens and businesses that represent our nation's communities to continue to protect their own water resources without the need to hire water and other subject matter experts to tell them how the CWA works.

I. Background

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to "recognize, preserve, and protect the responsibilities and rights of *States* to prevent, reduce, and eliminate pollution, [and to] plan the development and use...of land and water resources..."[1] Further, the statute provides that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[2] These cooperative federalism principles serve as the fundamental basis of the Act.

The definition of WOTUS is a pivotal aspect of the Agencies' ability to administer and enforce the CWA, as multiple sections of the Act depend on this key term to function correctly. For example, the definition of WOTUS can be found in CWA provisions covering the discharge of oil and hazardous substances, the administration of the national pollutant discharge elimination system (NPDES) permit program, and permitting for the discharges of dredge and fill material.[3]

To that end, uncertainty has long surrounded the scope of federal jurisdiction over WOTUS. The Agencies first issued separate definitions of WOTUS – EPA's definition was quite broad, while the Corps' definition was very narrow.[5] By the end of the 1980s, however, the Agencies had adopted the same definition of WOTUS, which included: waters used in the past or used currently for interstate commerce; all interstate waters, including interstate wetlands; each state's bodies of water — including lakes, rivers, streams, mudflats, playa lakes and ponds — that could affect interstate or foreign commerce; tributaries of waters of the United States; and the territorial sea.[7]

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[1] 33 U.S.C. §§ 1251(a)-(b).

[2] *Id.* at § 1251(g).

[3] *See* 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

[5] *Compare* National Pollutant Discharge Elimination System, 38 Fed. Reg 13,528 (May 22, 1973) *with* Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974).

[7] *Compare* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (amending 33 C.F.R. 328.3) *with* Final Rule: Clean Water Act Section 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20,764 (June 6, 1988) (amending 40 C.F.R. 232.2).

Federal courts have since examined the scope of federal jurisdiction under the Act in a variety of circumstances. Three seminal decisions – *United States v. Riverside Bayview Homes, Inc.*, *SWANCC v. U.S. Army Corps of Engineers*, and *Rapanos v. United States* – have limited the scope of federal authority in order to bring the definition of WOTUS in line with the CWA's objectives, and provide the necessary context for determining the appropriate jurisdictional limits under the Act.[8]

In *Riverside Bayview*, the Supreme Court addressed whether wetlands should be subject to federal regulation under the Act as WOTUS. In a unanimous opinion, the Court said that Congress intended that the definition of "navigable waters" as "Waters of the United States" was meant to "regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding" of the term.[9] The Court limited the Corps' jurisdiction over wetlands to those that "actually abut a navigable waterway."[10]

In *SWANCC*, the Supreme Court examined whether federal jurisdiction included isolated gravel ponds that served as habitats for migratory birds. The Court found that these ponds were "a far cry…from the 'navigable waters' and 'waters of the United States'" covered by the Act.[11] The Court reasoned that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made."[12]

Lastly, in *Rapanos*, the Supreme Court considered whether wetlands that are not adjacent to traditional "navigable waters" are "waters of the United States" under the Act. The Court failed to reach a majority opinion and instead developed two alternative tests to determine federal jurisdiction over "navigable waters." The difference between these tests has since contributed immensely to the ongoing uncertainty as to what truly constitutes WOTUS.

Justice Scalia, writing for the plurality, found that "'waters of the United States' only include relatively permanent, standing, or flowing bodies of waters," as well as wetlands with a "continuous surface connection to bodies that are 'waters of the United States' in their own right."[13] Further, he noted that "waters of the United States" do not include ephemeral streams and drainage ditches.[14]

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[8] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ("*Riverside*"); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*").

[9] 474 U.S. at 121.

[10] *Id.* at 132.

[11] 531 U.S. at 173.

[12] *Id.* at 172.

[13] 547 U.S. at 716.

[14] *Id.*

Justice Kennedy concurred, citing *SWANCC*, stating that a wetland or non-navigable waterbody falls within the scope of the CWA only if it has a "significant nexus" to a traditional navigable waterway.[15] He noted that "waters of the United States" exist where science shows that they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[16]

Following the *Rapanos* ruling, the Agencies released guidance in 2008 and 2011 to help quell continued regulatory confusion and further delineate the meaning of WOTUS.[17] After the second guidance document was released, a large number of stakeholders asked the Agencies to rescind it, and instead develop a rule that would better help them understand which waters are federally protected.

On June 29, 2015, the Agencies issued a revised definition of WOTUS that purported to "ensure protection of our nation's aquatic resources and make the process of identifying 'waters of the United States' less complicated and more efficient" (2015 Rule).[18] The 2015 Rule, however, strayed far from that goal and created a substantial amount of regulatory confusion for affected stakeholders.

Multiple states and stakeholder groups challenged the 2015 Rule in federal courts. Soon after it was finalized, the United States District Court for North Dakota issued a preliminary injunction on the 2015 Rule in 13 states.[19] The U.S. Court of Appeals for the Sixth Circuit subsequently issued a stay of the 2015 Rule nationwide.[20]

In the interim, the question of whether original jurisdiction over challenges to the 2015 Rule belongs in federal district courts or circuit courts arose. This issue made its way to the Supreme Court, and in *National Association of Manufacturers v. Department of Defense*, the Court ruled unanimously

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[15] *Id.* at 767.

[16] *Id.* at 780.

[17] *See* U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, CLEAN WATER ACT JURISDICTION FOLLOWING THE SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND *CARABELL V. UNITED STATES* (Dec. 2, 2008); U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, DRAFT GUIDANCE ON IDENTIFYING WATERS PROTECTED BY THE CLEAN WATER ACT (Apr. 27, 2011).

[18] Definition of "Waters of the United States" Under the Clean Water Act, 80 Fed. Reg. 37,054 (June 29, 2015).

[19] *States Dakota v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

[20] *In re: Clean Water Rule: Definition of "Waters of the United States." State of Ohio v. U.S. Army Corps of Engineers, et al.*, 803 F.3d 804 (Oct. 9, 2015).

that original jurisdiction over challenges to the definition of WOTUS belong in federal district courts.[21]

The nationwide stay to the 2015 Rule was lifted as a result of this ruling, and challenges to the 2015 Rule continued in forums across the country. The 2015 WOTUS rule is now being implemented in 22 states, the District of Columbia, and U.S. territories, while the regulations defining WOTUS that pre-dated the 2015 WOTUS rule are in effect in the 28 other states.[22] This split in enforcement across the country clearly illustrates the need for a definition of WOTUS that truly reflects the scope of federal authority under the CWA.

The current Administration has taken steps to address the regulatory uncertainty surrounding the scope of federal authority under the CWA. In March 2017, President Trump issued Executive Order 13778, which directed the Agencies to review and rescind or revise the Final Rule.[23] The Agencies subsequently announced that they would do so.[24] Then, over the course of 2017 and 2018, the Agencies issued a notice of proposed rulemaking, as well as a supplemental notice of proposed rulemaking, that would rescind the revised definition of WOTUS promulgated by the Agencies in 2015 and recodify the preexisting definition.[25] That rulemaking is ongoing.

The Agencies also began outreach to stakeholders in anticipation of revising the definition of WOTUS. The Agencies held a number of industry-specific listening sessions, and engaged in a robust federalism consultation with the states.[26] Moreover, the Agencies held a public hearing on the proposal in February 2019, and plan to hold two additional hearings with small businesses before the comment period closes.[27] The Chamber is extremely encouraged by the Agencies' proactive approach to consulting all interested stakeholders.

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[21] *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Jan. 22, 2018).

[22] *See* U.S. ENV'TL. PROT. AGENCY, *Definition of "Waters of the United States": Rule Status and Litigation Update* (last accessed Feb. 15, 2019), *available at* https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update.

[23] Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule, 82 Fed. Reg. 12,497 (Mar. 3, 2017).

[24] Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017).

[25] Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017); Definition of "Waters of the United States" – Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018).

[26] Definition of "Waters of the United States" – Schedule of Public Meetings, 82 Fed. Reg. 40,742 (Aug. 28, 2017).

[27] Revised Definition of "Waters of the United States," 84 Fed. Reg. 2,483 (Feb. 7, 2019).

The proposed revisions to the definition of WOTUS will provide the regulated and agricultural communities with the certainty and clarity they need to continue operations and invest in new operations that are subject to the Act's requirements. Moreover, the Agencies' proposal maintains protections for our nation's waters while preserving the states' authority over local land and water use, enhances transparency, and reflects decisions that are appropriately informed by science. The Chamber supports these revisions, as stakeholders in all sectors of the economy across the nation rely on this regulatory certainty and clarity to ensure that projects critical to our nation are completed in a timely fashion and that their day-to-day business operations are not unduly hindered by regulatory uncertainties.

II. Proposed Changes to the Definition of "Waters of the United States"

The Agencies' proposed revisions to the definition of WOTUS offer a level of regulatory certainty and clarity to stakeholders that the Agencies failed to provide for in the 2015 Rule. The Agencies propose six categories of waters that constitute WOTUS, and also propose eleven categories of waters that *do not* constitute WOTUS. The categories and exclusions included in the Agencies' proposal sensibly align the definition of WOTUS with the CWA and Supreme Court precedent.

However, it is important to note that the Agencies recognize the need for proper oversight during the implementation of the Agencies' proposed revisions. Field staff should rely on data that are appropriate for determining WOTUS, and it is the Agencies' responsibility to ensure that field staff refrain from using improper or outdated data. Moreover, it is imperative that the Agencies ensure that they retain the burden of proof for establishing jurisdiction for *all* categories of WOTUS.

a. Definitions and Categories

The Chamber generally supports the Agencies' proposal to include six separate categories of waters within the definition of WOTUS: traditional navigable waters and territorial seas, tributaries, certain ditches, certain lakes and ponds, impoundments, and adjacent wetlands. These six categories, with certain improvements, will clearly limit WOTUS to those waters that are *physically and meaningfully* connected to traditional navigable waters.

i. Traditional Navigable Waters and Territorial Seas

The Chamber generally supports the Agencies' decision to retain the regulatory text for traditional navigable waters (TNWs), although changes to the text should be made to clarify the scope of this category of WOTUS. The Chamber also supports the Agencies' decision to incorporate territorial seas into this category of waters in order to "streamline and simplify" the definition of WOTUS. The proposed regulatory text for this category of WOTUS reads, "Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or

foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide."[28]

The appropriate interpretation of TNWs is rooted in the concept of "navigability" laid out in the Rivers and Harbors Act (RHA) of 1899.[29] The RHA was enacted by Congress with the primary intent of prohibiting obstructions to navigation. Specifically, the RHA prohibits the discharge "refuse matter" of any kind "into any navigable water of the United States" or into any tributary thereof unless it has been authorized by the Corps.[30]

The Supreme Court clarified this test for navigability under the RHA in *The Daniel Ball v. United States*.[31] In *The Daniel Ball*, the Supreme Court addressed the question of whether a vessel operating on a body of water entirely contained only in one state was engaged in interstate commerce, and held that navigable waters are those that are (1) are navigable-in-fact, or capable of being such, and (2) form waterborne highways *used to transport* commercial good in interstate or foreign commerce.[32] Justice Kennedy later referenced this test in support of his plurality opinion in *Rapanos*.[33]

The Agencies proposal would solve the issue of an expansive interpretation of TNWs, if finalized, and help align the TNW category of WOTUS with the test articulated in *The Daniel Ball*. However, in order to further align the regulatory text with Congressional intent and Supreme Court precedent, the Agencies should clarify that TNWs must be *susceptible* to the transportation of goods, rather than merely being "used," in interstate commerce. Further the Agencies should withdraw all guidance documents related to prior rulemakings, or at a minimum, Appendix D of the *Rapanos* guidance. Withdrawing such guidance documents would allow stakeholders to operate in a clearer manner in future operations.

ii. Tributaries

The Chamber generally supports the Agencies' proposed regulatory text for the category of WOTUS considered tributaries, although it could be further improved to properly delineate the distinction between federal and state waters. The Agencies define tributary as, "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a

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[28] 84 Fed. Reg. at 4,203.

[29] *See* 33 U.S.C. § 403.

[30] *Id.* at § 407.

[31] *The Daniel Ball v. United States*, 77 U.S. 557 (1870).

[32] *Id.* at 563 (emphasis added).

[33] *Rapanos*, 547 U.S. at 742.

[TNW] in a typical year either directly or indirectly through [other jurisdictional waters] or through water features [expressly excluded] in paragraph b…so long as those water features convey perennial or intermittent flow downstream."[34] The Agencies also note those features that *would not* constitute a tributary under the proposal.[35]

The decision to limit the scope of the proposed definition of tributary to only those streams that contribute perennial or intermittent flow to a TNW reflects the CWA's cooperative federal principles and the appropriate balance of state and federal regulatory roles. Both the plurality[36] and concurring[37] opinions in *Rapanos* acknowledge that states should retain authority over features that are only periodically wet.

Further, the Agencies' Connectivity Report appropriately informs the proposed definition of tributary and would provide stakeholders with much-needed clarity and predictability for identifying tributaries, as the proposal shifts the focus of this category of WOTUS to the concepts of ephemeral,[38] intermittent,[39] and perennial flow[40] during a "typical year."[41] This Connectivity Report concludes that all waters are connected and that connectivity exists on a gradient, but did not draw the "bright lines" necessary to determine what is jurisdictional under the Act.[42] The Agencies noted that this report merely "informed" the Agencies' policy and legal decisions during the rulemaking process for the 2015 Rule, rather than dictate them.[43] As such, tributaries, under the 2015 Rule,

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[34] 84 Fed. Reg. at 4,204.

[35] These features include those that flow only in response to direct precipitation, including ephemeral flows, dry washes, arroyos, and similar features.

[36] *Rapanos*, 547 U.S. at 734 (the CWA only confers jurisdiction over "relatively permanent bodies of water").

[37] *Id.* at 781 (the definition of tributary is too broad if it "leaves wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes towards it.").

[38] 84 Fed. Reg. 2,402 ("The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation").

[39] *Id.* ("The term *intermittent* means surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation").

[40] *Id.* ("The term *perennial* means surface water flowing continuously year-round during a typical year").

[41] *Id.* ("The term *typical year* means within the normal range of precipitation over a rolling thirty-year period for a particular geographic area").

[42] *See* U.S. ENVTL. PROT. AGENCY, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015), *available at* https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414 (Final Report).

[43] 80 Fed. Reg. at 37,060.

were identified solely based on the presence of the physical indicators of a bed and banks, and an ordinary high watermark.[44] Such a determination broadly expanded the scope of WOTUS and the current proposal utilizes the Connectivity Report in a manner better suited to define the scope of federal jurisdiction under the Act.

The Agencies could better improve the definition of tributary and the scope of this category of WOTUS by taking the following actions:

1. Clarifying that "ephemeral" flows are *not* WOTUS, even if the flow could otherwise be characterized as any of the six categories of WOTUS;

2. Clarifying how the Agencies plan to and how stakeholders should evaluate and calculate a "typical year;"

3. Clarifying the difference between "ephemeral" and "intermittent" flow. The Agencies should also provide a bright line definition of "intermittent" flow to provide certainty to the definition and to avoid inadvertent expansion beyond true intermittent flows that have impacts on the TNWs. In certain instances it is difficult to distinguish between these two types of flow, and it would be inappropriate to rely on inaccurate data representations of such flows, including the National Hydrography Dataset and National Wetlands Inventory;[45] and

4. Providing stakeholders with an example of step-by-step analysis as to how the Agencies will determine if features are jurisdictional tributaries.

iii. Certain Ditches

The Chamber appreciates the Agencies' approach to address "ditches" within the scope of WOTUS. The Agencies propose to define ditch as "an artificial channel used to convey water." The Agencies' proposal identifies three situations in which a ditch would constitute a WOTUS: (1) the ditch is also a TNW; (2) the ditch is constructed in, or relocates or alters, a tributary *and* meets the tributary definition; or (3) the ditch is constructed in adjacent wetlands *and* meets the tributary definition.[46] All other ditches are expressly excluded from the definition of WOTUS.[47]

Ditches are common features and found in a variety of circumstances, so treating them as WOTUS would lead to a number of issues, including encroachment upon the cooperative federalism

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[44] *Id.* at 37,104.

[45] 84 Fed. Reg. 4,177, 4,200.

[46] *Id.* at 4,203-04.

[47] *Id.* at 4,204.

principles included the Act. If the Agencies choose to finalize this category, however, they should, at a minimum, clarify how they plan to delineate between an "artificial channel" that should be evaluated as a ditch and a "naturally occurring surface water channel" that should be evaluated as a tributary, as it may not be evident in every case.

Ditches are not traditionally "waters," so the Agencies may be better suited to address this feature in the exemptions to WOTUS, rather than the scope of categories included in the definition. If the Agencies choose to remove this category of WOTUS, they should add clarifying language excluding all ditches from WOTUS *unless* they convey perennial or intermittent flow to downstream TNW's *and* were constructed in a tributary, relocate or alter a tributary, or were constructed in an adjacent wetland. Moreover, the Agencies should also consider clarifying that ditches would be evaluated based on current, rather than historic uses, and elaborate on what information an applicant will need to provide to retain a permit.

iv. Certain Lakes and Ponds

The Chamber supports the addition of lakes and ponds to the scope of categories considered WOTUS. The Agencies' proposal includes lakes and ponds that are: (1) TNWs; (2) contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS or through an excluded feature that conveys perennial or intermittent flow downstream; or (3) flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year.[48]

The Agencies could make a number of improvements for this category. Generally speaking, the Agencies should clarify that this category applies to lakes and ponds that are *naturally* flooded, considering that other factors can contribute to flooding. For category 2, the Agencies should provide additional clarity as to what it means for a lake or pond to "contribute perennial or intermittent flow" to another water feature "in a typical year." As for category 3, the Agencies should elaborate as to how they plan to determine whether a lake or pond is "flooded by" other jurisdictional waters "in a typical year."

v. Impoundments

The Chamber appreciates the Agencies decision to retain impoundments of jurisdictional waters as a category of WOTUS in the proposal. Impoundments have historically been considered WOTUS since they do not change a water body's status and the proposal reflects that.[49] To that end, the term "impoundments" remains undefined in the proposal. Should the Agencies decide to retain this category in the final rule, they should provide a clear definition of the term that focuses on the water feature, rather than the impoundment itself, so that stakeholders receive proper notice as to the categories of WOTUS and the jurisdictional status of related features. In the alternative,

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[48] *Id.*

[49] *Id.* at 4,172.

the Agencies should remove this category, given that impoundments are essentially part of other jurisdictional waters.

vi. Adjacent Wetlands

The Chamber supports the Agencies' decision to include a category of WOTUS that includes all wetlands adjacent to another category of jurisdictional waters. The proposal continues to define wetlands as "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."[50] Adjacent, in this proposal, means to "abut or have a direct hydrologic surface connection to other WOTUS in a typical year" and "direct hydrologic surface connection" occurs "as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.[51]

The definition of adjacent wetlands brings the definition of WOTUS more in line with Supreme Court precedent, the CWA, and the Constitution. As clarified in *Rapanos*, a wetland may not be "adjacent to" a remote WOTUS based on a "mere hydrologic connection."[52] Rather, wetlands possess the necessary connection to TNWs when they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable" and when wetlands' effects on water quality are speculative and insubstantial, they fall outside of the zone fairly encompassed by the statutory term "navigable waters."[53] As such, the Agencies' approach to this category is proper as any isolated wetlands with only physically remote hydrologic connections to WOTUS would be excluded.

b. Interstate Waters

While not a category of waters proposed by the Agencies, it is worth noting the Chamber's support for the proposed removal of interstate waters, including interstate wetlands, as a category of WOTUS.[54] Interstate waters without any connection to TNWs would be more appropriately regulated by the States and the Tribes, as they have no legitimate relationship to jurisdictional waters, or do not meet a flow or permanence standard. Interstate waters that *are* navigable-in-fact or are otherwise another category of WOTUS would still be jurisdictional under the proposal.

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[50] *Id.* at 4,205.

[51] *Id.*

[52] *Rapanos*, 547 U.S. at 780.

[53] *Id.*

[54] 84 Fed. Reg. at 4,171.

c. Exclusions

The Chamber supports many of the longstanding and new exemptions provided for in the Agencies' proposal. As stated, the purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[55] Given that goal, the exemptions included in the Agencies' proposal aid in providing the much-needed clarity and certainty and "bright-lines" that stakeholders need to assess the reach of federal jurisdiction under the Act.

i. Features That are Not Identified as "Waters of the United States"

The Chamber supports the Agencies' addition of the exclusion that "waters or water features that are not identified in [the scope of WOTUS] are not considered WOTUS."[56] This is an important addition to the regulatory text and helps stakeholders identify jurisdictional waters much more clearly than in the past. However, language should be added to the exemption clarifying that any feature that meets the parameters of an exclusion are not WOTUS, even if they could otherwise fit into one of the categories proposed as WOTUS.

ii. Groundwater

The Chamber supports the Agencies' decision to retain the exclusion for "groundwater, including groundwater drained through subsurface drainage systems," as it reflects longstanding Agency practice informed by the Act, and case law.[57] The Agencies should, however, consider adding the language "diffuse or shallow subsurface flow" to the exclusion considering the significant confusion surround the difference between the two.

iii. Ephemeral Features and Diffuse Stormwater Run-Off

The Chamber supports the Agencies' proposal to exclude "ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland" from the scope of WOTUS.[58] In *Rapanos*, the plurality noted that the Act does not authorize a "Land is Waters" approach to federal jurisdiction and that the Corps had, at that point, "stretched the term of [WOTUS] beyond parody" by including "ephemeral streams," "wet meadows," and "directional sheet flow during storm events within the scope of WOTUS.[59] As such, it is appropriate to exclude these features in the proposal.

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[55] 33 U.S.C. § 1251(a).

[56] 84 Fed. Reg. at 4,204.

[57] *Id.*

[58] *Id.*

[59] *Rapanos*, 547 U.S. at 734.

iv. Ditches Not Identified in (a)(3)

As previously noted, ditches should be addressed in this exclusion, rather than as a category of WOTUS. This exclusion, as proposed, reads "ditches that are not identified in paragraph (a)(3) of this section."[60] This regulatory text should identify which ditches are excluded and remove the corresponding regulatory text referencing the jurisdictional ditches.

v. Prior Converted Cropland

The Chamber supports the Agencies' continued exclusion of prior converted cropland from the scope of WOTUS. The Agencies propose to define PCC as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible" and also recognize in the proposal designations of PCC made by the Secretary of Agriculture.[61] The Agencies also propose that a feature is no longer PCC under the Act if it is abandoned and has reverted to wetland.[62] The Agencies propose that abandonment occurs when the feature is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.[63]

This proposed exclusion comports with the Agencies' 1993 final rule codifying the PCC exclusion and the Chamber is encouraged by the Agencies' decision to incorporate abandonment principles into the exclusion that are in line with the 1993 rule.[64] However, the regulatory text should be modified so that the PCC exclusion is lost *only* when the land is abandoned within the meaning of the PCC definition *and* the area in question reverts to wetland.

vi. Artificially Irrigated Areas

The Chamber supports the Agencies' proposal to retain the exclusion for artificially irrigated areas that would otherwise revert to upland if irrigation ceases. Specifically, the Agencies proposal identifies this exclusion as "artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease."[65] The Chamber also supports the Agencies assertion that this exclusion only applies to the specific land being *directly* artificially irrigated and that not *all* waters within the watershed where irrigation occurs

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[60] 84 Fed. Reg. at 4,204.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Clean Water Act Regulatory Programs; Final Rule*, 58 Fed. Reg. 45,008 (Aug. 25, 1993).

[65] 84 Fed. Reg. at 4,204.

would be excluded.[66] The Agencies should also consider expanding this exclusion to include other agricultural activities such as aquaculture, the production of other crops and commodities, and livestock operations, as appropriate.

vii. Artificial Lakes and Ponds Constructed in Upland

The Chamber supports the Agencies' proposal to retain the exclusion for artificial lakes and ponds, which includes "Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified in paragraph (a)(4) (lakes and ponds) or (5) (impoundments)."[67] This exclusion would apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features, as well as conveyances created in upland that are physically connected to and are a part of the proposed excluded feature.[68]

The Chamber also supports the Agencies' decision to remove references to the "use" of the ponds, as these features often have a variety of uses that have beneficial purposes. Additionally, other programs under the Act may require these features, so removal is necessary to avoid duplicative and unnecessary regulation. The Agencies should, however, remove the regulatory text referencing the "lakes and ponds" and "impoundments" categories of WOTUS for additional clarity.

viii. Water-Filled Depressions Created in Upland Incidental to Mining or Construction Activity, and Pits Excavated in Upland for the Purpose of Obtaining Fill, Sand, or Gravel

The Chamber supports the Agencies' proposal to retain the exclusion for "water-filled depressions created in upland incidental to mining or construction activity, and pits excavated in upland for the purpose of obtaining fill, sand, or gravel."[69]

ix. Stormwater Control Features

The Chamber supports the continued exemption for stormwater control features, as this exemption is critical to federal, state and local infrastructure, although it could otherwise be

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[66] *Id.* at 4,194.

[67] *Id.* at 4,204.

[68] *Id.* at 4,194.

[69] *Id.* at 4,204.

improved. The Agencies propose that this exclusion would apply to "stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off."[70]

The Agencies should clarify that those features constructed in upland will be assessed based on current conditions rather than historic conditions. Additionally, the Agencies should explicitly exclude municipal separate storm sewer systems (MS4s) that are managed via state and local permits from this exclusion in order to avoid double regulation. MS4s and the component parts of these systems that channel runoff are already regulated as "point sources" under other CWA programs.[71]

x. Wastewater Recycling Structures Constructed in Uplands

The Chamber supports the Agencies' continued exclusion of wastewater recycling structures from the scope of WOTUS. This exclusion covers "wastewater recycling structures constructed in upland, such as detention, retention, and infiltration basis and ponds, and groundwater recharge basins."[72] This exclusion recognizes the importance of recycled water supplies in areas with limited water supplies, and the Chamber supports the Agencies' view that this exclusion reduces limits to water and is outside the scope of the Act. The Agencies, however, should include in this exclusion any components in WOTUS that are subject to related regulated requirements.

xi. Waste Treatment Systems

The Chamber supports the Agencies' continued exclusion of waste treatment systems (WTS) from the scope of WOTUS. The Agencies' proposal defines WTS as "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, store or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)."[73] This exclusion codifies existing practices and reflects the Agencies' longstanding practice in identifying WTS. Otherwise including WTS as WOTUS would render their intended purpose useless and impose additional burdens and costs on stakeholders without any corresponding environmental benefit.

III. Supporting Analyses

The Agencies include two supporting documents in the proposed revisions to the definition of WOTUS that analyze the potential impact that the proposed rule will have across all programs administered under the Act: (1) *Resources and Programmatic Assessment for the Proposed Revised Definition of*

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[70] *Id.*

[71] *See* 33 U.S.C. § 1342(p)(1).

[72] 84 Fed. Reg. at 4,204.

[73] *Id.* at 4,205.

"Waters of the United States" (the RPA);[74] and (2) *Economic Analysis for the Proposed Revised Definition of "Waters of the United States"* (the EA).[75] Both documents are a vast improvement upon the documents provided during the 2015 rulemaking, thoroughly address the potential impacts of the concerns, and accurately note that the foregone costs of the proposal *for* outweigh any foregone benefits it may have.

a. Resource and Programmatic Assessment

The Agencies compare the baseline of the 2015 Rule and an alternate baseline of pre-2015 practice with the proposed revisions to the definition of WOTUS in the RPA. While there are technical limitations to the dataset used in the RPA and acknowledged by the Agencies, the RPA provides a necessary analysis based on the research of current state laws and programs that oversee waters and identify relevant datasets to determine the scope of potential jurisdictional changes. The Chamber appreciates this robust analysis as it provides a comprehensive narrative as to the potential implications that the proposal will have on all relevant CWA programs, as well as state regulations.

b. Economic Analysis

The Agencies' EA in support of the proposal incorporates a two-stage analysis to make use of limited local and national level water resources information to assess the potential implications of the proposal. In Stage 1, the Agencies assess the potential impacts of moving from the 2015 Rule to the pre-2015 practice baseline. As for Stage 2, the Agencies analyze a series of qualitative analyses, three detailed case studies of moving from the pre-2015 practice to the 2018 proposal, and a national-level analysis of the proposed changes on the section 404 program.

Stage 1 offers a number of scenarios for stakeholders to consider. In comparing the most and least conservative estimates, the Agencies estimate the proposal would produce annual avoided costs ranging between $9 million to $15 million and $98 to $164 million, and annual forgone benefits ranging from approximately $3 million to between $33 to $38 million.[76] Stage 2 merely reflects the likely direction of the effects of the proposal due to data limitations.

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[74] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, RESOURCE AND PROGRAMMATIC ASSESSMENT FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (Dec. 14, 2018), *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotus_proposed_step_2_rpa_for_clearance_12-7-18_508s.pdf.

[75] U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS FOR THE PROPOSED REVISED DEFINITION OF "WATERS OF THE UNITED STATES" (Dec. 14, 2018), *available at* https://www.epa.gov/sites/production/files/2018-12/documents/wotusproposedrule_ea_final_2018-12-14.pdf.

[76] *Id.* at 82-3 (the most conservative scenario assumes the fewest number of States regulating newly non-jurisdictional waters and the least conservative scenario assumes the greatest number of States are already regulating newly non-jurisdictional waters).

The Chamber appreciates the complexity of assessing the economic impacts associated with the proposal, as well as the Agencies' efforts to account for the data limits. The EA offers an analysis that exceeds that of the EA supporting the 2015 Rule. The Agencies should revise the EA, however, to focus more on the foregone costs and benefits of the agencies' actions under the "no state response" scenario, instead of speculating as to what the states might do, as the foregone costs seem largely underestimated.

IV. Data Collection

Comprehensive data collection is a pivotal aspect of administering the CWA and making jurisdictional determinations. The Agencies should ensure that real-time data is metered, monitored, and collected on all water use, reuse, flow, quality, storage, and consumption. Moreover, the Agencies should develop the necessary geospatial mapping capability for the proposed categories and exclusions of WOTUS.

This data should be available in formats that are compatible with existing datasets, promote investment in water-use efficiency and water infrastructure, support innovation, and encourage the productive uses of water resources and the highest and best value uses of those resources. Data analysis, management and security of data are critical elements of any data collection program and must be prioritized in all data program developments.

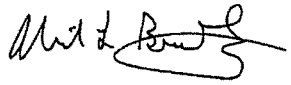
Resources, both financial and technical should be applied to develop and apply aquatic resource mapping, remote sensing technology, or satellite data collection to facilitate the implementation of this proposed definition of WOTUS and the overall management of the nation's water resources.

The Agencies should collaborate with like-minded individuals and organizations to prioritize the development of this shared data resource and to facilitate early achievement of a complete real-time data collection, analysis and management capability.

V. Conclusion

In sum, the Chamber supports the Agencies' proposed revisions to the definition of WOTUS and appreciates the opportunity to comment on this important matter. The Chamber looks forward to continue working with the Agencies on this issue.

Sincerely,



Neil L. Bradley

ARIZONA CHAMBER
OF COMMERCE & INDUSTRY

April 15, 2019

Submitted electronically via www.regulations.gov

Mr. Michael McDavit
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Ms. Jennifer A. Moyer
Regulatory Community of Practice (CECW-CO-R)
U.S. Army Corps of Engineers
441 G Street NW
Washington D.C. 20314

Re: Docket No. EPA-HQ-OW-2018-0149
Arizona Chamber of Commerce & Industry Comments on Proposed Rule Regarding Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019)

Dear Mr. McDavit and Ms. Moyer:

The Arizona Chamber of Commerce & Industry ("Chamber") appreciates this opportunity to comment on the proposed rule revising the definition of "waters of the United States" ("WOTUS") issued by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (together, "the agencies"), 84 Fed. Reg. 4154 (Feb. 14, 2019). The proposed WOTUS definition would replace that of the 2015 Clean Water Rule, currently effective in 22 states, and the prior regulatory definition, still applicable in 28 states. The Chamber supports the proposed rule and commends the agencies for correcting much of the federal overreach of the 2015 Clean Water Rule and of the prior regulatory regime, especially as applied to the dry land erosional features found throughout the arid southwest.

Since 1974, the Chamber has been the leading business advocate in the State of Arizona, with a diverse membership that employs 250,000 Arizonans in all business sectors from manufacturing to services and includes small, medium, and large employers. The Chamber is committed to advancing Arizona's competitive position in the global economy by advocating free-market policies that stimulate economic growth and prosperity for all Arizonans. Members of the Chamber include farmers, ranchers, homebuilders, miners and other businesses and industries that are subject to a variety of programs under the CWA based on the presence of WOTUS, including the permitting programs under Sections 402 and 404. As Arizona's business leaders and job creators, we believe that government should make it easier, not harder, to do business. To that end, it must regulate in a manner that respects the unique needs and geographical characteristics of the individual states. In 2014, the Chamber opposed the proposed Clean Water Rule for a variety of reasons, including because it would subject vast areas of desert land to CWA regulation for the first time and because it did not account for unique conditions in Arizona and other arid southwest states.

The Chamber supports the agencies' goal in the proposed rule to "ensure that the agencies are operating within the scope of the federal government's authority over navigable waters under the Clean Water Act," 84 Fed. Reg. at 4156, and believes that the proposed rule, if finalized, would go a long way toward achieving that goal. Following are specific comments on some key aspects of the proposed rule.

Support for Proposed Definition of "Tributary"

The proposed rule would define "tributary" as "a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water ("TNW") or territorial sea in a typical year either directly or indirectly through other jurisdictional waters." 89 Fed. Reg. The Chamber supports this definition, which is within the agencies' statutory authority, as interpreted by the Supreme Court, and avoids overregulation as applied in the arid southwest context. Both the 2015 Clean Water Rule and the prior regulatory regime relied primarily on the presence of an "ordinary high-water mark" and bed and banks to determine tributary jurisdictional status. The use of the ordinary high water mark concept to define what waters may be subject to jurisdiction is problematic as applied to arid landscapes and results in large areas of desert lands being regulated as "waters". What may be considered as an "ordinary" high water mark on ephemeral drainage features in the arid southwest may, in many instances, have been formed by a single storm event and does not relate in any way to where water may flow in the future. Thus, rather than being an indicator of ordinary conditions or potential flows—as is the case in more humid environments— the "ordinary" high water mark will result in a broad regulatory overreach when used to define "waters" in the arid southwest. By limiting jurisdictional tributaries to those that contribute perennial or intermittent flow to a TNW, and avoiding reliance on land-based features such as ordinary high-water mark, the proposed rule takes account of these unique geographical characteristics.

Equally significant, the proposed "tributary" definition is consistent with the plurality and concurring opinions in *Rapanos*. By contrast, the 2015 Clean Water Rule is based on, but exceeds the boundaries of, Justice Kennedy's concurring opinion. That rule relies on a predetermination of "significant nexus" to categorically regulate all tributaries, defined based on the presence of an ordinary high-water mark and bed and banks, regardless of whether they actually contribute any meaningful flow to a TNW. However, both *Rapanos* opinions recognized the importance of regular contribution of flow to a TNW for jurisdictional status. While the plurality opinion defined WOTUS primarily in terms of "relatively permanent, standing, or flowing waters," *id.* at 739, the concurrence also recognized that "quantity" and "regularity of flow" may be important considerations "in assessing [significant] nexus," *id.* at 786, contemplating that not all non-navigable waters would be WOTUS. In contrast to the 2015 rule's overbroad inclusion of all tributaries as WOTUS, the proposed rule stands firmly on common ground between the *Rapanos* opinions, refocusing the WOTUS definition on TNWs and bodies of water that contribute regular flow to them.

Support for Exclusion of Ephemeral Features

The Chamber strongly supports the proposed rule's exclusion of ephemeral features from the definition of WOTUS. Closely related to the redefinition of "tributary," the proposed rule makes explicit that ephemeral features are not WOTUS. This exclusion ensures that erosional characteristics, common in the arid southwest due to sparse vegetation, highly erodible soils, and infrequent but high intensity rain events, will not be taken as evidence of flow sufficient to support jurisdiction. Again, this exclusion is consistent with both *Rapanos* opinions. The plurality squarely rejected the idea of regulating "channels through which water flows . . . ephemerally," *Rapanos*, 547 U.S. at 739, stressing the "impingement" on the states' traditional authority over land and water use and the constitutional questions that such regulation would raise, *id.* at 738. Likewise under Justice Kennedy's significant nexus test, in the arid southwest, erosional characteristics cannot be substitute for evidence of a nexus, let alone a significant one, to a TNW, as the proposed rule recognizes. The proposed rule's exclusion of ephemeral features appropriately reins in the agencies' authority and ensures that desert lands will not be considered jurisdictional "waters" on the basis of the presence of erosional features or characteristics.

Support for Removal of Interstate Waters as a Jurisdictional Category

The proposed rule correctly recognizes that there is no basis in the CWA to regulate all waters that cross state boundaries regardless of navigability. 84 Fed. Reg. at 4171. As with the proposed rule's redefinition of "tributary" and exclusion of ephemeral features, the removal of interstate waters as a separate category of jurisdictional waters is an important step towards the restoration of the federal-state balance envisioned by Congress in enacting the CWA. The express language of the CWA makes clear that the Act's scope of jurisdiction is based on "navigable waters of the United States" and not simply "interstate waters." Additionally, *Rapanos* and *SWANCC* make clear that the term "navigable" has meaning. These cases also repudiate the notion that Congress intended to regulate waters under the CWA to the fullest extent of its Commerce Clause power, which appears to be the basis for the inclusion of all interstate waters as jurisdictional. The proposed rule's exclusion of interstate waters as categorically jurisdictional is thus consistent with the text of the statute and governing case law.

Support for Exclusion of Groundwater

The Chamber supports the proposed rule's exclusion of groundwater from the definition of WOTUS. This exclusion is consistent with the text of the CWA and with clear legislative intent to leave regulation of groundwater to individual states.

On behalf of Arizona's business community, we once again commend the agencies for the progress made in the proposed rule toward the restoration of legally and scientifically grounded federal regulation under the CWA, in particular the proposal's redefinition of tributary, exclusion of ephemeral features from WOTUS, removal of interstate waters as a jurisdictional category, and exclusion of groundwater. Thank you for the opportunity to comment.



Glenn Hamer
President and CEO

COLORADO CHAMBER
OF COMMERCE
For business. For Colorado. For tomorrow.

Water Docket Office
Docket ID No. EPA-HQ-OW-2018-0149
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW
Washington, DC 20460

April 15, 2019

Re: Docket ID No. EPA-HQ-OW-2018-0149

Step two: Review & Revise the Clean Water Act; Definitions for waters of the United States

The Colorado Chamber of Commerce and its Federal Policy Council submit the following comments in support of the Environmental Protection Agency (EPA)'s Proposed Revised Definitions for Waters of the United States (WoTUS) within the Clean Water Act (CWA). The Colorado Chamber appreciates this opportunity to comment, particularly in light of steps made by the EPA and the Army Corps of Engineers (collectively Agencies) to add regulatory clarity and definitions which reflect feedback and steps to remediate concerns raised by the Colorado Chamber in 2014. Specifically, the Colorado Chamber raised substantial concerns regarding a lack of business input to the 2015 rule, a lack of understanding by the Agencies for business best practices, as well as a lack of economic analysis as to the 2015 rule's effect in terms of compliance costs, implementation costs or lost economic opportunities.

As Colorado's Chamber of Commerce and the statewide voice of business, we believe the proposed new definitions within WoTUS create a substantially more straight-forward, commonsense and approachable definition for all stakeholders – not just what are to be jurisdictional waters, but quite helpfully, those water features that are to be specifically excluded. We believe the proposed definitions provide the clarity necessary for businesses to carry out long-term planning and we will provide several ideas from member companies where definitions could potentially benefit from additional clarity.

For businesses, farmers and ranchers, for those investing in our roads and building homes, and for our state's energy developers and manufacturers, we applaud the proposed definition's intent to simplify WoTUS. We support the Agencies' goal of ensuring an average person can comprehend the rule's intent and limits, without having to devote much-needed resources to expensive legal counsel, engineers, or duplicative permits and studies for every project undertaken. Our members often share that every dollar going toward regulation compliance is a dollar not spent on employees, research, product development, maintenance or equipment.



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While the intent of the 2015 rule was to protect our nation's surface waters and to seemingly add regulatory clarity, instead it massively increased the number of water features to be federally regulated and therefore the number of projects required to get a CWA 404 permit. This permit often costs job creators $300,000 and two-to-three years of time wasted waiting. At the same time, if a business failed to obtain a CWA permit, fines were more than $53,000 per day and included potential jail time. Despite the past intentions of the 2015 rule, the Colorado Chamber believes the new definitions as proposed create a similarly-focused mission, but do so by providing much-needed "bright line" clarifications and regulatory certainty and – most importantly – would create one national standard.

More to the point, previous definitions put forward and enacted in 2015 inappropriately and greatly expanded the authority of the Agencies, beyond the boundaries of the CWA, and without due consideration for Colorado's and the EPA's existing water protections. We believed then, and still believe now, that the 2015 rule would have had a substantial negative impact on the ability of businesses and manufacturers to operate, maintain and develop their facilities, not to mention expanding the permitting uncertainties mentioned above. By default, the uncertainty of compliance and permitting from the 2015 rule created instability for employers and employees – without recognition of existing federal and state water protections.

In Colorado, we value our innovative business spirit, stewardship of the land and our ability to turn ideas into benefits for the economy and our state – in short, we are proud to live and work here. It is with this understanding that we say the newly-proposed WoTUS definitions provide a path to remove unnecessary and duplicative permitting delays, costs, and roadblocks for manufacturers of all sizes and in virtually all sectors of the nation's economy, not just for Colorado.

Additionally, the Colorado Chamber applauds the Agencies' efforts to acknowledge, where appropriate, sound scientific work developed for the 2015 rule, while at the same time balancing regulations with the recognition that states understand local needs better than the federal government. Specifically, it makes sense for the EPA to regulate those water features most likely to influence downstream waters (as recognized in 2015), while leaving ditches and more ephemeral features to the purview of the states. Additionally, the removal of "other waters" and "significant nexus" definitions went a long way toward removing and repairing the legal ambiguity and costs of the 2015 rule.

The Colorado Chamber of Commerce further asks the Agencies to note that the goal of the proposed rule, protecting our nation's water, is in concert with the Colorado Chamber's mission and the values of our member companies. We champion a healthy business environment and that includes best practices and good stewardship of our water resources. Our four key objectives include:

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1. **Maintaining and improving the cost of doing business;** *(The proposed WoTUS definitions remove layers of burdensome and unnecessary costs, empowering conscientious business growth)*
2. **Advocating for a pro-business state government;** *(The proposed definitions acknowledge that not all waters should be treated the same; a true stakeholder process takes into consideration those businesses that already operate in a manner to protect and most efficiently use our resources)*
3. **Increasing the quantity of educated, skilled workers;** *(By giving states back the ability to regulate ephemeral waters, businesses are more able to free up capital resources – once dedicated to attaining counsel, federal permits, etc. -- to now invest in their workforce)*
4. **Strengthening Colorado's critical infrastructure (roads, water, telecommunications and energy)** – *(The proposed definition approaches water protection correctly, from a position that most states are working to balance growth, economic opportunities and conservation – and it is their right to do so)*

With the Colorado Chamber's mission in mind, we want to emphasize that Colorado's businesses not only value our environment, we value what our businesses add to the community, to the economy and to our way of life. In representing a broad range of businesses from food distributors to brewers, manufacturing to code-developers, local start-ups to companies with international footprints, we understand the importance and value of clean water, and welcome the Agencies' goal of providing greater clarity and certainty to this complex regulatory issue.

Where the 2015 WoTUS definitions created heavy-handed federal overreach, and at times individual property oversight, the Agencies' proposed definitions clearly demonstrate an effort to right-size water protections, reaffirm state water rights and recognize the right of states to maintain protections already in place.

Constructive Feedback:

- **Burden of Proof: We strongly support the Agencies carrying the burden of proof for jurisdictional designations.** We do however have technical and process questions for how designations would be reached by the Agencies, and members specifically raised concerns/opposition to the use of aerial photos for designation purposes. Additionally, questions were raised whether satellite images would be accurate enough to determine designation, and how often Agencies would review existing designations.



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- **Interstate Waters: We support removing "interstate waters" as automatically jurisdictional.** The proposed definition would mean an interstate water is only a jurisdictional WoTUS if it meets the "intermittent connection" criteria. An additional clarification could be that interstate waters are only jurisdictional as an (a)(1) water if it supports transportation of interstate commerce.

- **Ephemeral Features: We support excluding all ephemeral features as proposed.** We also support the exclusion of drought and extreme flooding years, as well as a 30-year rolling average for the definitions of "perennial" and "intermittent" waters. However, more clarification may be needed for "typical year," and "intermittent" definitions to eliminate potential ambiguity and therefore address fewer case-by-case jurisdiction designations.

    - **Typical Year Standard:** Connecting "typical year" to another definition may help strengthen the definition (i.e. For the (a)(2) category, "typical year" is tied to the "intermittent" definition). Additionally, explanatory language from the Agencies' preamble could be included in the proposed definition as the preamble outlines geographic area, range of precipitation, excludes outlier seasons and extreme drought or flooding, and describes "normal range" as between 30th to 70th percentile of three-month precipitation as measured by the National Oceanic Atmospheric Administration (NOAA).

    - **Intermittent:** The Agencies' preamble states an intention to regulate streams that flow as a result of elevated groundwater tables, or snowpack as intermittent tributaries. We suggest using language and qualifiers from the Agencies' preamble in proposed definitions to ensure the definition of "intermittent" cannot be taken as simply a suggestion.

- **Ordinary High Water Marks (OHWMs):** Our members support the OHWM concept, but only in the context of where jurisdiction has already been established. After a designation, OHWMs could then be used to determine lateral extent for a tributary. If a lake or pond is deemed jurisdictional, similar support of the OHWM could be inferred.

- **Potential Mapping Provision**: There are potential benefits of having such extensive mapping, but there are distinct concerns about how the maps would be maintained in the future to ensure accuracy and consistent application. We support the goal of making WoTUS approachable to all, so there are questions of whether the potential maps would be accurate enough for everyday landowners to rely on federal mapping of WoTUS designations, without seeking legal counsel, hydrology experts or other expert review.

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We look forward to continuing our work with the Agencies on this matter and would welcome the opportunity to put forward subject matter or on-the-ground experts, as needed. We urge the Agencies to continue listening to a wide audience for feedback on the proposed definitions. The Colorado Chamber of Commerce believes the rulemaking process is made stronger by stakeholders who can bring constructive, real-world and honest feedback to the table.

Thank you for your time.

Sincerely,

Leah Curtsinger
Federal Policy Director
Colorado Chamber of Commerce

GEORGIACHAMBER

April 15, 2019

Mr. Michael McDavit
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RE: **Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, proposed 2019); Docket No. EPA-HQ-OW-2018-0149**

Dear Mr. McDavit and Ms. Moyer

These comments, responding to the Environmental Protection Agency and U.S. Army Corps of Engineers ("Agencies") proposed rulemaking relating to defining the scope of waters federally regulated under the Clean Water Act (CWA), as published in the Federal Register on February 14, 2019 (84 FR 4,154), are submitted on behalf of the Georgia Chamber of Commerce ("Chamber").

For over 100 years, the Chamber has worked to keep, grow and create jobs to make Georgia a better state for business. Today, the Chamber represents over 40,000 members, who, in turn, employ in excess of 2,000,000 people across a diverse cross section of over 500 industry sectors.

At the outset, it is important to state that the Chamber fully supports the objective of the Clean Water Act:

> *"To restore and maintain the chemical, physical, and biological integrity of the Nation's waters."*

The Chamber also supports formal rulemaking processes that promulgate Rules in accordance with the Administrative Procedure Act.

The Chamber welcomes the opportunity to provide comments on the Agencies Waters of the United States (WOTUS) Rulemaking proposal. Further, the Chamber supports the Executive Order signed by President Trump on February 28, 2017, *"Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."* The Chamber agrees with the President's statement that: *"It is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution."*

The Chamber supports the underlying objective of the proposed 2019 WOTUS Rule to replace the existing 2015 WOTUS rule. The 2015 WOTUS rule was a damaging overreach by federal agencies that, if fully implemented in Georgia, threatened to encroach on private property rights, drive-up business costs, instill uncertainty into investment proposals and restrict the flexibility and timeliness of business operational decision-making.

It is time for clear WOTUS rules that, in a balanced manner: protect the Nation's water bodies and the environment, ensure clean and safe water supplies for communities, enhance farmers' ability to efficiently produce food, fiber and fuel and allows all industries to be able to operate with regulatory certainty, clarity and confidence.

The Chamber believes that, if adopted as presented, this proposed 2019 WOTUS rule will appropriately position the Agencies in compliance with the powers provided by Congress, align with U.S. Supreme Court rulings, respect cooperative federalism principles and, importantly, acknowledge and defer to the crucial role of the States in the management of their air, land and water resources.

The proposed 2019 WOTUS rule clearly articulates five (5) benefits:

i. adheres to the rule of law as passed by Congress;
ii. protects and respects states' rights;
iii. conforms with decisions made by the U.S. Supreme Court;
iv. provides clarity and 'bright-lines' to the regulated community and those individuals and industries who may, at some time in the future, come under the umbrella of the WOTUS rule; and
v. presents a commonsense approach to the management of the Nation's water resources.

Once finalized, the Agencies proposed revisions to the definition of WOTUS will provide stakeholders with much-needed regulatory certainty and accurately articulate the jurisdictional limits that Congress envisioned under the Act. The proposed revisions will empower citizens, businesses and our Nation's communities to continue to protect and utilize their own water resources without the need to hire water and other subject matter experts to tell them how, where and when the CWA works and what impact it may have on their communities, properties or areas of business operation.

Importantly, the proposed revisions will eliminate federal overreach so evident in the 2015 WOTUS rule and provide stakeholders with the 'bright lines' needed to confidently identify jurisdictional waters.

The Chamber and its members have, over the years, remained committed to working constructively with both federal and state regulators to deliver upon the objectives of the CWA. This has become more challenging in recent years as Agencies guidance, rulemaking and interpretations of U.S. Supreme Court decisions have added to the complexity of decision-making, reduced clarity and increased the cost of regulatory compliance.

Congress enacted the CWA in 1972 in order to *"restore and maintain the chemical, physical, and biological integrity of the Nation's waters"* and intended to *"recognize, preserve, and protect the responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources."* The Chamber supports these CWA objectives and welcomes this proposed 2019 WOTUS rule's adherence to these conditions.

The 2015 WOTUS Rule strayed far from the CWA's core focus and created a substantial amount of regulatory confusion for affected stakeholders. Agricultural activities were the most egregiously impacted by this rule and the uncertainty it imposed on normal and traditional farming operations.

Multiple states and stakeholder groups immediately challenged the 2015 Rule in federal courts. Soon after it was finalized, the United States District Court for North Dakota issued a preliminary injunction on the 2015 Rule in 13 states. The U.S. Court of Appeals for the Sixth Circuit subsequently issued a stay of the 2015 Rule nationwide.

Following a U.S. Supreme Court ruling, the 2015 WOTUS rule is now being implemented in 22 states, the District of Columbia, and U.S. territories, while the regulations defining WOTUS that pre-dated the 2015 WOTUS rule are in effect in the 28 other states.

This is a regulatory and compliance nightmare confronting business and industry and water resource managers that urgently needs to be resolved. This split in enforcement across the country clearly illustrates the pressing need for a definition of WOTUS that truly reflects the limited scope of federal authority under the CWA and instills regulatory confidence for all who are exposed to WOTUS rulemaking.

In addition to replacing the 2015 WOTUS rule, the Agencies must use this 2019 WOTUS rulemaking process to move past reliance on guidance documents, to use formal rulemaking to provide clarity and certainty to address the longstanding confusion regarding the scope of federal jurisdiction under the CWA and, to reinforce the importance of providing clear 'bright line' guidance to the regulated community.

The discipline of formal rulemaking rather than Agencies guidance is the Chamber's preferred regulatory pathway. Rulemaking provides greater regulatory certainty and is a more transparent and detailed approach to regulation. As it is more time consuming to amend rules, the regulated community can have greater confidence in the longevity of the rule in place and avoid kneejerk reactions to political, ideological or vested interest claims.

In 2012, in a concurring opinion, Justice Alito referred to the jurisdictional reach of the CWA as *"notoriously unclear"* and noted that the Court's decision provided only *"a modest measure of relief."* *See Sackett* v. *EPA*, 132 S. Ct. 1367, 1375 (2012). *"For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase 'waters of the United States'."*

As the Chief Justice observed in *U.S. Army Corps of Engineers* v. *Hawkes Co.*, *"[i]t is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does," "the reach and systemic consequences of the Clean Water Act remain a cause for concern" and "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation".*

These statements reflect the scope of Georgia's regulated community's concerns that the 2015 WOTUS rule contains poorly articulated definitions and regulatory overreach and further illustrates the imperative that the Agencies proposed 2019 WOTUS rulemaking proceed, quickly, to a successful conclusion.

The Agencies today are proposing to establish a regulation that would define "waters of the United States" in simple, understandable and implementable terms to reflect the ordinary meaning of the statutory term, as well as to adhere to Constitutional and statutory limitations, the text of the CWA, and case law and, to meet the needs of regulatory agencies and the regulated community.

The Chamber applauds this approach and views this 2019 WOTUS rulemaking as a major opportunity to rectify the short comings of past regulatory actions and finally deliver clarity and certainty to the regulated community.

The Agencies must use this rulemaking proposal to provide clarity around definitions, to reduce regulatory uncertainty and limit potential for future legal challenges. Agencies should adopt a regulatory certainty approach wherever possible.

Our federalist system is one of our Nation's strengths. Those closest to the situation are often best suited to address and resolve issues in an efficient and timely manner. Congress envisioned and the Chamber supports robust adherence to the role of the States in the management of the Nation's water resources and, a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The statute provides that federal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources. These cooperative federalism principles serve as the fundamental basis of the CWA and will ensure that, when finalized, this proposed 2019 WOTUS rule will provide opportunities for States to further refine and vary regulatory conditions to suit local circumstances.

Proposed Changes to the Definition of "Waters of the United States"

In its endeavor to define the phrase "waters of the United States", unlike prior interpretations of this critical phrase, the proposed 2019 WOTUS rule reflects appropriate jurisdictional restraint and a guiding interest in promulgating a definition of WOTUS that is both lawful and sustainable.

Importantly, the jurisdictional restraint reflected in the proposed 2019 WOTUS rule has also allowed the Agencies to craft a WOTUS definition that the Chamber believes is clearer, more consistent and will be more predictable than the 2015 WOTUS rule. Unlike the 2015 WOTUS rule, the proposed 2019 WOTUS rule sets forth clear jurisdictional boundaries that are identifiable through readily observable conditions and without the need for costly studies or subjective case-by-case analysis that undermine regulatory certainty and increase the costs of business development, operations and compliance.

The Chamber firmly believes that jurisdictional clarity will benefit and promote environmental protection, while also benefiting the regulated community. Clarity and certainty will enhance compliance and promote timely adherence to all appropriate regulations and provide clear parameters for early compliance actions.

A key element in getting the regulatory balance focused on the right issues was demonstrated by the Agencies willingness to undertake outreach to stakeholders in anticipation of revising the definition of WOTUS. The Agencies held a number of industry-specific listening sessions and engaged in a robust federalism consultation with the states. More stakeholder outreach is proposed and supported. In addition, the Agencies held a public hearing on the proposed 2019 WOTUS rule in February 2019.

The Chamber is extremely encouraged by the Agencies proactive approach to consulting all interested stakeholders and this is reflected in the structure of the proposed 2019 WOTUS rule.

The Agencies proposed revisions to the definition of WOTUS offer a level of regulatory certainty and clarity to stakeholders that were missing in the 2015 WOTUS rule. The Agencies propose six categories of waters that will constitute WOTUS and propose eleven categories of waters that do not constitute WOTUS. The categories and exclusions included in the Agencies proposal sensibly align the definition of WOTUS with the CWA and Supreme Court precedent.

In this proposed 2019 WOTUS rule, the Agencies are proposing to establish a regulation that would define 'waters of the United States' in simple, understandable and implementable terms to reflect the ordinary meaning of the statutory term, as well as to adhere to Constitutional and statutory limitations, the text of the CWA and case law, and to meet the needs of regulatory agencies and the regulated community. This is an unambiguously good outcome for Georgia's regulated community.

With respect to WOTUS definitions and exclusions, the Chamber offers the following comments, recommendations and observations.

WOTUS Definitions and Categories

The Chamber supports the Agencies proposal to include six separate categories of waters within the definition of WOTUS. A focus on these six categories, will clearly limit WOTUS to those waters that are physically connected to traditional navigable waters and eliminate the regulatory overreach that was a disturbing feature of the 2015 WOTUS rule.

- **Traditional navigable waters and territorial seas**
  The Chamber supports the Agencies decision to retain the existing regulatory text for traditional navigable waters (TNWs), as well as the decision to incorporate territorial seas into this category of waters. The proposed regulatory text for this category of WOTUS reads, "*Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide,*" is clear, concise and predictable.

- **Impoundments**
  As impoundments generally do not change a water body's status as a 'water of the United States,' the Chamber supports the Agencies decision to not make any changes to the impoundment category of "waters of the United States" that have historically been determined by the Agencies to be jurisdictional.

- **Tributaries**
  The Chamber supports the Agencies proposed definitions for the tributaries category of WOTUS. The Agencies define tributary as: "*a river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water in a typical year either directly or indirectly through other jurisdictional waters or through water features identified in paragraph (b)...so long as those water features convey perennial or intermittent flow downstream.*"

Equally important, the Agencies also note those features that would not constitute a tributary under the proposed rule. The decision to limit the scope of the proposed definition of tributary to only those streams that contribute perennial or intermittent flow to a TNW reflects the CWA's cooperative federal principles and the appropriate balance of state and federal regulatory roles.

Two issues that the Chamber believes require further clarification include:

i. Clarifying how the Agencies plan to and stakeholders should evaluate and calculate a *"typical year;"* and

ii. Clarifying the difference between *"perennial"* and *"intermittent"* flow.

- **Certain ditches**

The Chamber supports the Agencies approach to the delineation of *"ditches"* within the scope of WOTUS, as well as the Agencies proposal to define a ditch as *"an artificial channel used to convey water."*

Recognizing this definition, the Agencies proposed 2019 WOTUS rule identifies three situations in which a feature would constitute a ditch: (1) the ditch is also a TNW; (2) the ditch is constructed in, or relocates or alters, a tributary and meets the tributary definition; or (3) the ditch is constructed in adjacent wetlands and meets the tributary definition. All other ditches are expressly excluded from the definition of WOTUS.

Recalling that the treatment of ditches was one of the most contentious aspects of the 2015 WOTUS rule, the Chamber believes that narrowing the scope of ditches included in the proposed 2019 WOTUS definition, while also placing a greater emphasis on clarifying those ditches that are excluded from WOTUS will ease concerns in and the impact on the agricultural, mining and construction sectors.

The continued exclusion and exemption for both the construction and maintenance for irrigation ditches, which typically are constructed in upland but frequently must connect to a "water of the United States" to either capture or return flow is necessary and welcomed by the Chamber.

- **Certain lakes and ponds**

The Chamber supports the Agencies proposal to create a distinct category for lakes and ponds for inclusion in the scope of WOTUS. Because they are distinct water features the establishment of a separate category for lakes and ponds will provide greater clarity and predictability for the regulated community, rather than including these waters in the definition of *"tributaries"* or with adjacent wetlands.

The Agencies proposal includes lakes and ponds that are: (1) TNWs; (2) contribute perennial or intermittent flow to a TNW in a typical year either directly or indirectly through a WOTUS or through an excluded feature that conveys perennial or intermittent flow downstream; or (3) flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year. To provide further clarity, the Agencies should clarify that this category applies to lakes and ponds that are naturally flooded, considering that other factors can contribute to flooding. For categories 1 and 2, the Agencies should provide additional clarity as to what it means for a lake or pond to *"contribute perennial or intermittent flow"* to another water feature *"in a typical year."* As for category 3, the Agencies should elaborate as to how they plan to determine whether a lake or pond is *"flooded by"* other jurisdictional waters *"in a typical year."*

- **Adjacent wetlands.**
  The Chamber supports the Agencies decision to include a category of WOTUS that includes all wetlands adjacent to another category of jurisdictional waters. The proposal continues to define wetlands as *"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."*
  Adjacent, in this proposal, means to *"abut or have a direct hydrologic surface connection to other WOTUS in a typical year"* and *"direct hydrologic surface connection"* occurs *"as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water."*
  The definition of adjacent wetlands brings the definition of WOTUS more in line with Supreme Court precedent, the CWA, and the Constitution. As clarified in *Rapanos*, a wetland may not be *"adjacent to"* a remote WOTUS based on a *"mere hydrologic connection."* Rather, wetlands possess the necessary connection to TNWs when they *"significant affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable"* and when wetlands' effects on water quality are speculative and insubstantial, they fall outside of the zone fairly encompassed by the statutory term *"navigable waters."* As such, the Agencies approach to this category is proper, as any isolated wetlands with only physically remote hydrologic connections to WOTUS would be excluded.
  The Chamber also supports the Agencies determination that when wetlands are physically separated from jurisdictional waters by upland or by dikes, barriers, or similar structures and lack a direct hydrologic surface connection to jurisdictional waters, those wetlands are not adjacent.

Categories not included in WOTUS

The Chamber supports the Agencies clarification of the waters or water features that are not included in the scope of WOTUS and will not be considered WOTUS.

The Chamber believes that this category is critical, as it will overcome much of the consternation with the overreach of the 2015 WOTUS rule and, will provide much needed clarification and certainty to the regulated community, as well as farmers and other business and industries who undertake operations that are not currently encompassed by WOTUS definitions, rules and regulations.

While the Chamber recognizes that these proposed exclusions generally reflect the Agencies current practice, their inclusion in the proposed rule will further the goal of providing greater certainty and clarity over which waters are and are not regulated under the CWA.

Non-WOTUS waters and features

The Agencies proposed approach to comprehensively exclude all waters and features the Agencies do not intend to include as 'waters of the United States' will provide further regulatory clarity and instill confidence in the regulated community's ability to determine their exposure to resources and features included in WOTUS definitions.

- **Groundwater**

The Chamber supports the Agencies decision to reiterate the exclusion for "*groundwater, including groundwater drained through subsurface drainage systems,*" as it reflects longstanding Agency practice informed by the Act, and case law. The Agencies should, however, consider adding the language "*diffuse or shallow subsurface flow*" to the exclusion considering the significant confusion surround the difference between the two.

- **Ephemeral Features and Diffuse Stormwater Run-Off**

The Chamber supports the Agencies proposal to exclude "*ephemeral features and diffuse stormwater run-off, including directional sheet flow over upland*" from the scope of WOTUS. In *Rapanos*, the Court noted that the Act does not authorize a "*Land is Waters*" approach to federal jurisdiction and that the Corps had, at that point, "*stretched the term of [WOTUS] beyond parody*" by including "*ephemeral streams,*" "*wet meadows,*" and "*directional sheet flow during storm events*" within the scope of WOTUS. As such, it is appropriate to exclude these features in the proposal.

- **Ditches Not Identified in (a)(3)**

Recalling the Agencies proposal to define a ditch as "*an artificial channel used to convey water*" and the three specific circumstances under which a ditch would be included in the WOTUS definition, the Chamber supports all other farm and roadside ditches being excluded from WOTUS jurisdiction.

The treatment of ditches was one of the most contentious aspects of the 2015 WOTUS rule, the Chamber believes that narrowing the scope of ditches included in the WOTUS definition while also placing a greater emphasis on clarifying those ditches that are excluded from WOTUS will ease concerns in the agricultural, mining and construction sectors.

The continued exclusion and exemption for both the construction and maintenance of irrigation ditches, which typically are constructed in upland, but frequently must connect to a 'water of the United States' to either capture or return flow is necessary exemption and is welcomed by the Chamber.

- **Prior Converted Cropland**

The Chamber supports the Agencies continued exclusion of prior converted cropland from WOTUS and the scope of the Agencies definition of prior converted cropland and the circumstances that must be evident for this status to be extinguished.

The Agencies propose to define prior converted cropland as "*any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible*" and also recognize in the proposal, designations of prior converted cropland made by the Secretary of Agriculture. The Agencies also propose that a feature is no longer prior converted cropland under the CWA if it is abandoned and has reverts to wetland. The Agencies propose that abandonment occurs when the feature is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years.

This proposed exclusion comports with the Agencies 1993 final rule codifying the prior converted cropland exclusion and the Chamber supports the Agencies decision to incorporate abandonment principles into the exclusion. This proposed rule would also clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use and, therefore, maintains the prior converted cropland exclusion.

The Agencies believe and the Chamber agrees that this clarification is necessary to ensure that cropland enrolled in conservation programs administered by the U.S. Department of Agriculture's Natural Resources Conservation Service, or by State and local agencies, that prevent erosion or other natural resource degradation does not lose its prior converted cropland designation as a result of implementing conservation practices.

- **Artificially Irrigated Areas**

The Chamber supports the Agencies proposal to retain the exclusion for artificially irrigated areas that would otherwise revert to upland if irrigation ceases. Specifically, the Agencies proposal identifies this exclusion as *"artificially irrigated areas, including fields flooded for rice or cranberry growing, that would revert to upland should application of irrigation water to that area cease."* The Chamber also supports the Agencies assertion that this exclusion only applies to the specific land being directly artificially irrigated and that not all waters within the watershed where irrigation occurs would necessarily be excluded.

The Chamber supports the extension of the definition of 'artificially irrigated areas' to include other agricultural activities such as aquaculture, the production of other crops and commodities and livestock operations as appropriate.

- **Artificial Lakes and Ponds Constructed in Upland**

The Chamber supports the Agencies proposal to retain the exclusion for artificial lakes and ponds, which includes *"Artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds and log cleaning ponds) which are not identified in paragraph (a)(4) (lakes and ponds) or (5) (impoundments)."* This exclusion would apply to artificial lakes and ponds created as a result of impounding non-jurisdictional waters or features, as well as conveyances created in upland that are physically connected to and are a part of the proposed excluded feature.

It is clear, that under any analysis, these features created in uplands are in no way associated with WOTUS categories.

The Chamber also supports the Agencies decision to remove references to the *"use"* of the ponds, as these features often have a variety of uses that have beneficial purposes and that these uses may and do change over time. Additionally, other programs under the Act may require these features, so removal is necessary to avoid duplicative and unnecessary regulation.

- **Water-Filled Depressions Created in Upland Incidental to Mining or Construction Activity, and Pits Excavated in Upland for the Purpose of Obtaining Fill, Sand, or Gravel**

The Chamber supports the Agencies proposal to retain the exclusion for *"water-filled depressions created in upland incidental to mining or construction activity and pits excavated in upland for the purpose of obtaining fill, sand, or gravel."*

- **Stormwater Control Features**

The Chamber supports the continued exemption for stormwater control features, as this exemption is critical to federal, state and local infrastructure. The Agencies propose that this exclusion would apply to *"stormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off."*

The Agencies should clarify that those features constructed in upland will be assessed based on current conditions rather than historic conditions. Additionally, the Agencies should explicitly exclude municipal separate storm sewer systems (MS4s) that are managed via state and local permits from this exclusion in order to avoid double regulation. MS4s and the component parts of these systems that channel runoff are already regulated as 'point sources' under other CWA programs.

- **Wastewater Recycling Structures Constructed in Uplands**

The Chamber supports the Agencies continued exclusion of wastewater recycling structures constructed in uplands from the scope of WOTUS. This exclusion continues current practice and recognizes the importance of water reuse and recycled water supplies in areas with limited water supplies and where droughts further exacerbate supply issues.

- **Waste Treatment Systems**

The Chamber supports the Agencies continued exclusion of waste treatment systems (WTS) from the scope of WOTUS. The Agencies proposal defines WTS as "*all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).*" This exclusion codifies existing practices and reflects the Agencies longstanding practice in identifying WTS.

Data collection, geospatial datasets and mapping

Comprehensive data collection is a pivotal aspect of administering the CWA and making jurisdictional determinations. The Agencies should ensure that all water resources are metered and monitored and data is collected, in real-time, on all water use, reuse, flow, quality, storage, and consumption. Moreover, the Agencies should utilize this data to develop a geospatial mapping capability for the proposed categories and exclusions of WOTUS.

This data should be available in formats that are compatible with existing datasets, promote investment in water-use efficiency and water infrastructure, support innovation, and encourage the productive uses of water resources and the highest and best value uses of those resources. Data analysis, management and security of data are critical elements of any data collection program and must be prioritized in all data program developments.

Resources, both financial and technical should be applied to develop and apply aquatic resource mapping, remote sensing technology, or satellite data collection to facilitate the implementation of this proposed definition of 'waters of the United States,' and the overall management of the Nation's water resources.

The Agencies are encouraged to seek opportunities from like-minded individuals and organizations to prioritize the development of this shared data resource and to facilitate early achievement of a complete real-time data collection, analysis and management capability.

Conclusion

The Chamber commends the Agencies for their diligent and timely undertaking of this rulemaking process and the open and transparent manner that guided industry and community discussions prior to the finalization and publication of this proposed 2019 WOTUS rule.

It is clear to the Chamber that the Agencies have responded to the widespread concerns with the 2015 WOTUS rule. The outcomes of the 2015 process delivered a WOTUS rule that increased business uncertainty, encroached on private property rights, transferred power from the states to federal agencies and offered limited additional environmental benefits beyond what existed prior to the introduction of that 2015 WOTUS rule.

The Chamber believes that this proposed 2019 WOTUS rule, when finally enacted, will be a superior product that will guide environmental protection of the Nation's water resources, as well as the productive, consumptive and community uses and reuses of these water resources.

Agriculture is Georgia's largest industry. Along with other industry sectors, agriculture will benefit from the certainty and clarity outlined in this proposed 2019 WOTUS rule.

Preserving the legitimate role of states in the management of land and water resources, when combined with the benefits that will be attained from positive engagement of those families, businesses and communities who have a vested interest in the maintenance of high quality water resources will achieve robust, sustainable outcomes built on trust and willingness to invest in innovation and leading-edge water resource management solutions.

The Chamber looks forward to continuing to work with the Agencies on this important issue.

Sincerely



Chris Clark
President & CEO
Georgia Chamber of Commerce



Kentucky Chamber
Uniting Business Advancing Kentucky

April 15, 2019

VIA ELECTRONIC FILING

U.S. Environmental Protection Agency, EPA Docket Center
Office of Water Docket
Docket ID No. EPA-HQ-OW-2018-0149
Mail Code 28221T
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Submitted to OW-Docket@epa.gov

RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

The Kentucky Chamber of Commerce (Kentucky Chamber) welcomes the opportunity to provide the following comments Revised Definition of "Waters of the United States" published 84 Fed. Reg. 4154 (Feb.14, 2019) (the "Notice") by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the "agencies").

The Kentucky Chamber, founded in 1946, is an association of Kentucky businesses, and is the largest, broad-based business association in Kentucky. The Kentucky Chamber represents the business interests of more than 68,000 Kentucky-based businesses. The Kentucky Chamber's powerful grassroots network, through a partnership with more than 80 local chambers in the state, consists of 25,000 business professionals. The Kentucky Chamber promotes economic development, including bringing new business operations into the Commonwealth. The business and industry members of the Kentucky Chamber have operations throughout the state that are subject to water-related regulations and requirements. Accordingly, the Kentucky Chamber has a substantial interest in the definition of Waters of the United States or "WOTUS."

The Kentucky Chamber supports the agencies' proposed definition because it provides more clear lines of jurisdiction and corrects past agency practices, guidance, and regulations that have improperly expanded the scope of the definition of WOTUS beyond permissible statutory construction of the Clean Water Act ("CWA"), proper application of the U.S. Constitution, and reasonable application of scientific justification. The proposed WOTUS definition is more consistent with the CWA and judicial precedent interpreting it. The Kentucky Chamber provides

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these comments on clarifications and changes to improve the proposed rule and its implementation.

I. The Proposed Definition Comports with the Language of the CWA, Congressional Intent and Legal Precedent

As an initial matter and in response to the agencies' request for comment on several threshold legal principles, the Kentucky Chamber believes the proposal represents a legally defensible approach to defining the scope of federal jurisdiction under the CWA. Unlike the 2015 WOTUS Rule, the proposal aligns with the text of the CWA, acknowledges the scope of the agencies' authority under the Commerce Clause, respects the role of the states, and comports with relevant Supreme Court precedent.

The Supreme Court has recognized important limits on the scope of CWA jurisdiction. In enacting the CWA, Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[1] But Congress's use of the term "navigable" reflects a fundamental limit on federal CWA authority, and that term must be given some effect.[2]

II. Categories Included in the WOTUS Definition

A. Traditional Navigable Waters (TNWs)

Because it is the beginning point of the CWA's prohibition on the discharge pollutants, Congress's use of the term "navigable waters" as it applies to WOTUS is of critical importance. As Justice Scalia summarized its scope, "the phrase 'the waters of the United States' 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' . . . The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[3] The Kentucky Chamber supports the agencies' efforts to implement the CWA such that "navigable waters" again has important meaning.

The Kentucky Chamber believes that past interpretations of TNWs have been so broad as to read "navigable" out of the definition. Although past court decisions have noted that the CWA's use of "navigable waters" means more than traditional navigable waters, the word must still have some effect.[4] The "term 'navigable' has at least the import of showing us what Congress had in

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[1] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC")*, 531 U.S. 159, 172 (2001).
[2] *See, e.g., SWANCC*, 531 U.S. at 172; *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (J. Kennedy, concurring).
[3] *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (Scalia, J.).
[4] *See, e.g., SWANCC*, 531 U.S. at 172.

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."[5]

With regard to the proposed rule's categories of included waters, the Traditional Navigable Waters category ("TNW") is of fundamental importance because the extent of other categories of waters are deemed jurisdictional based on their relationship to TNWs. Consistent with previous WOTUS definitions, the proposal defines TNWs as "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." The proposal seeks comment on whether the existing guidance or the proposed regulatory text should be modified in light of the fact that "determinations made by the agencies [in the past] may have allowed for the regulation of waters that are not navigable-in-fact within the legal construct established for such waters by the courts." As such, the agencies had interpreted TNWs to include waterways that are merely *used in* commerce rather than used *for the transportation of goods* in interstate commerce. An expansive definition that relies on an equally expansive view of "commerce" may exceed the authority of the federal government under the Commerce Clause. Congress does not have unfettered ability to impose obligations under a cloak of alleged commerce.[6]

To give effect to the concept of TNWs that was intended by Congress and to comport with the proper limits of the Constitution, the agencies should revise the proposed TNW definition as follows:

> (i) Waters which are currently used, or were used in the past, or may be susceptible to ~~use in~~ transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.[7]

B. Tributaries to TNWs

The proposed rule includes tributaries as a WOTUS category and defines tributary as a "river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a [TNW] in a typical year either directly or indirectly through [other jurisdictional waters] or through water features [expressly excluded] in paragraph (b) . . . so long as those water features convey perennial or intermittent flow downstream."[8] As such, the definition excludes surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos and other similar features. Furthermore, the preamble explains that a perennial or intermittent stream that flows into a nonjurisdictional ephemeral feature would not meet the definition of "tributary" if the perennial or intermittent flow does not reach a traditional navigable water or territorial sea as the ephemeral feature would sever jurisdiction.[9]

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[5] *SWANCC*, 531 U.S. at 172.
[6] *See, e.g., United States v. Lopez*, 514 U.S. 549, 639 (1995) (invalidating a law because it regulates an activity that does not arise out of a commercial transaction that substantially affects interstate commerce).
[7] *See 84 Fed. Reg. 4210, citing* §122.2.
[8] 84 Fed. Reg. 4203, 4204.
[9] 84 Fed. Reg. 4174

The Kentucky Chamber strongly supports the exclusion of ephemeral streams and similar features and the concept of "severed connection" but suggests a further modification of the tributary definition to give effect to both the statutory term "navigable" and adhere to the CWA Sec. 101(b) policy objective of recognizing and preserving the role of the states. The Kentucky Chamber recommends that the agencies limit the definition of "tributary" to those waters that flow to such navigable waters for at least 90 continuous days at a specified and significant flow magnitude. This modification will help not only help define tributaries, but it would exclude many intermittent streams from characterization as WOTUS tributaries. It is difficult to distinguish many intermittent from ephemeral streams because they may cycle back and forth between stream classifications. That is, some ephemeral streams (not WOTUS) may appear to be intermittent streams. A definition of tributaries that excludes both ephemeral and intermittent streams would provide much-needed certainty and is consistent with the plurality opinion in *Rapanos* that the CWA confers jurisdiction over only "relatively permanent bodies of water."[10]

C. Certain Ditches

The proposal contains a narrow definition of ditches that are considered jurisdictional: artificial channels used to convey water that qualify as a TNW, or if they are constructed in waters meeting the "tributary" or "adjacent wetlands" definitions.[11] Importantly, the proposal excludes all other ditches from the definition of WOTUS.

The Kentucky Chamber supports a narrow reading of CWA jurisdiction over ditches because this exclusion is vitally important in the practical operations of our members in the natural resources, agriculture, industrial, and commercial sectors.

D. Lakes and Ponds

The proposal would create a new category of jurisdictional waters: lakes and ponds. Pursuant to the proposal, if a lake or pond meets the TNW definition, contributes perennial or intermittent flow to a TNW in a "typical year" through another jurisdictional water, or is flooded by a jurisdictional water in a "typical year," it is a jurisdictional water.[12] The Kentucky Chamber does not object to identifying these bodies of water as WOTUS so long as they satisfy the specified characteristics.

E. Impoundments

Consistent with long-standing agency practice, the agencies propose to retain impoundments as jurisdictional under the new proposal, subject to a few limited exclusions. The Kentucky Chamber does not object this inclusion.

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[10] 574 U.S. at 734.
[11] *Id.* at 4203.
[12] 84 Fed. Reg. at 4203-4.

F. Adjacent Wetlands

The Kentucky Chamber supports the agencies' approach to determining which wetlands are jurisdictional. Under the proposed rule, wetlands are jurisdictional only if they abut (i.e., actually touch) or have a direct hydrologic surface connection (i.e. inundation via perennial or intermittent flow) to a jurisdictional water in a "typical year."[13] Wetlands that are physically separated from jurisdictional waters by upland, dikes, barriers, or similar structures which lack a direct hydrologic surface connection to jurisdictional waters are not jurisdictional.[14] Because of the interdependence of the categories on "(a)(1)" WOTUS, it is vitally important to ensure that adjacent wetlands are evaluated in the context of their association with those navigable waters used to transport interstate commerce. With the fundamental relationship as a starting point, the definitions used in the proposed rule describe a workable and proper scope of WOTUS as applied to wetlands.

III. Comments on the Proposed Exclusions

The proposed rule identifies eleven exclusions from the WOTUS definition. These exclusions are vital for providing clarity and regulatory certainty with respect to the reach of the CWA.

A. Waste Treatment Systems

Waste treatment systems have long been excluded from definitions of WOTUS. However, for the first time the agencies have proposed a definition of waste treatment systems that will provide additional necessary regulatory and business certainty. The Kentucky Chamber supports the proposed definition of waste treatment that applies the exclusion to "all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)."[15] The preamble also clarifies that waste treatment systems can be constructed in existing WOTUS, noting that "when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system, the agencies are affirmatively relinquishing jurisdiction over the resulting waste treatment system as long as it is used for this permitted purpose, consistent with longstanding practice."[16] Finally, the preamble also notes that the exclusion applies to systems constructed either in accordance with the requirements of the CWA, or prior to the 1972 CWA amendments.[17]

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[13] *Id.* at 4204.
[14] *Id.*
[15] *Id.* at 4205.
[16] *Id.* at 4192.
[17] *Id.* at 4193.

B. Groundwater

The Kentucky Chamber supports the retention of the groundwater exclusion that was included in the 2015 rule. The proposal excludes groundwater, including groundwater drained through subsurface drainage systems.[18] Such an approach is consistent with the CWA, agency practice and applicable caselaw. Clearly, groundwater is not a "navigable water" for purposes of the CWA.

C. Ephemeral Features and Diffuse Stormwater Run-Off

The Kentucky Chamber supports the express exclusion for ephemeral features such as swales and erosional features including gullies and rills. The Kentucky Chamber also supports the exclusion for diffuse stormwater run-off, such as directional sheet flow over upland. Finally, with reference to the section on Tributaries, above, the Kentucky Chamber urges the agencies to clarify that intermittent as well as ephemeral features are excluded.

D. Ditches

The Kentucky Chamber supports the proposal's express exclusion of all ditches that do not qualify as a TNW and were not constructed in waters meeting the "tributary" or "adjacent wetlands."

E. Artificial Lakes, Ponds, Water-filled Depressions, and Stormwater Control Features

The Kentucky Chamber supports the exclusion of constructed or artificial lakes, ponds, water-filled depressions, and stormwater control features incidental to certain types of activities. In particular, we support the agencies' proposal to expand the exclusion to cover "water-filled depressions created in upland incidental to mining activity."[19] Such features are often needed for facility management but are not part of the natural tributary system. The exclusion will encourage environmentally sound management but will not subject the owner/operator to unwarranted CWA jurisdiction over those activities.

F. Wastewater Recycling Structures

The Kentucky Chamber supports the exclusion for wastewater recycling structures constructed in upland, such as detention, retention, and infiltration basins and ponds, and groundwater recharge basins.

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[18] 84 Fed. Reg. 4204
[19] *Id.* at 4192.

IV. Conclusion

The Kentucky Chamber appreciates this opportunity to provide comments on the proposed revised WOTUS definition.

Sincerely,

Kate Shanks

Kate Shanks
Vice President of Policy Development
Kentucky Chamber of Commerce

OHIO CHAMBER of COMMERCE

April 15, 2019

Mr. Michael McDavit
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Ms. Jennifer A. Moyer
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The Ohio Chamber of Commerce submits these comments to the U.S. Environmental Protection Agency and Army Corps of Engineers (the Agencies) in support of the Agencies' proposal to revise the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).[1]

The Agencies' proposed revisions to the definition of WOTUS will provide Ohio businesses with much-needed regulatory certainty by accurately reflecting the jurisdictional limits that Congress, as clarified by the Supreme Court, envisioned under the CWA. The proposed revisions provide Ohio businesses with the "bright lines" needed to identify jurisdictional waters, give meaning to the term "navigable," and preserve Ohio's authority over land and water use. The proposed revision will allow businesses to continue to invest in the state and protect water resources without the threat of endless regulatory and litigation risk.

The 2015 WOTUS Rule dramatically expanded the definition of "navigable waters" under the CWA, and in doing so asserted federal authority over vast new areas, including backyard ditches and intermittent streams that only flow after storms. The scope of such authority was immense, affecting a wide range of businesses, from construction and real estate to mining, manufacturing, agriculture, energy, and even homeowners.

The 2015 WOTUS Rule ultimately resulted in a great deal of regulatory uncertainty for stakeholders, including in Ohio, where the Ohio Chamber of Commerce called for U.S. EPA to institute reforms.

The scope of federal jurisdiction under the CWA has long been uncertain and subject to much

[1] Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110,112,116,117,122, 230, 232, 300, 302, and 401).

debate, leading to uncertain and inconsistent enforcement. The Supreme Court has addressed the issue of what constitutes WOTUS in three seminal decisions: *United States v. Riverside Bayview Homes, Inc.; SWANCC v. U.S. Army Corps of Engineers;* and *Rapanos v. United States.* Each has limited the scope of federal authority in order to bring the definition of WOTUS more in line with the CWA's objectives.

Unfortunately, the 2015 WOTUS Rule asserted sweeping jurisdiction over waters that have little or no relationship to navigable waters. It exacerbated uncertainty by relying on case-by-case subjective assessments, blindly leading to jurisdictional determinations that were inconsistent and unpredictable. The Agencies' proposal addresses these shortcomings by providing the regulated community with the "bright lines" needed to make jurisdictional and non-jurisdictional determinations. Further, the proposal clearly and transparently categorizes features subject to those determinations.

The Clean Water Act is a statute grounded in the principles of cooperative federalism and Congress explicitly intended to "recognize, preserve, and protect the responsibilities and rights of *States* to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources."[2] The CWA also provides that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[3]

Congress never intended that *all* water features in the United States could be potentially subject to federal jurisdiction as WOTUS, or that the CWA could be the exclusive vehicle for addressing such features. Rather, Congress intended that some water features be addressed by the States or other federal, state, or local measures. For example, provisions included in the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA) also address water features at the federal level. Several state and local laws and regulations addressing such features also exist.

During the rulemaking process for the 2015 WOTUS rule, multiple stakeholders recognized that the Agencies only considered the implications of the definition of WOTUS as it pertained to the section 404 dredge-and-fill program. The Agencies' proposal recognizes that the definition of WOTUS applies to many other programs included in the CWA, as well as state and local programs. For example, the definition of WOTUS is also found in the Act's provisions covering the discharge of oil and hazardous substances and the administration of the National Pollutant Discharge Elimination System (NPDES) permitting program.

The programmatic assessment included in the proposal addresses these programs further and enhances transparency by allowing all regulated parties to understand the scope of the proposal and the implications that revising the definition of WOTUS would have on all CWA regulatory programs.

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[2] 33 U.S.C. §§ 1251(b).

[3] *Id.* at § 1251(g).

The Ohio Chamber of Commerce appreciates that opportunity to comment on the Agencies' proposal.

Sincerely,

Zachary L. Frymier

Zachary L. Frymier
Director, Energy and Environmental Policy



April 15, 2019

VIA ELECTRONIC FILING

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RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149; FRL-9988-15-OW

Dear Sir and Madam,

The Tennessee Chamber of Commerce & Industry submits these comments to the U.S. Environmental Protection Agency and Army Corps of Engineers (the Agencies) in support of the Agencies' proposal to revise the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA). The Tennessee Chamber represents more than 1,000 manufacturers and related businesses across our state. A number of our members are small businesses and many members are dependent upon the waters of the state in their operations.

The Agencies' proposed revisions to the definition of WOTUS will provide stakeholders with much-needed regulatory certainty by accurately reflecting the jurisdictional limits that Congress, as clarified by the Supreme Court, envisioned under the CWA. The proposed revisions provide stakeholders with the "bright lines" needed to identify jurisdictional waters, give meaning to the term "navigable," and preserve the states' authority over land and water use. The proposed revisions, once finalized, will empower citizens and businesses to continue to invest in their communities and protect their own water resources without the threat of endless regulatory and litigation risk.

Practical Impacts of the 2015 Rule

The 2015 WOTUS Rule dramatically expanded the definition of "navigable waters" under the Act, and in doing so asserted federal authority over vast new areas, including backyard ditches and intermittent streams that only flow after storms. The scope of such authority was immense, affecting a wide range of businesses, from construction and real estate to mining, manufacturing, agriculture, energy, and even homeowners.

The 2015 WOTUS Rule ultimately resulted in a great deal of regulatory uncertainty for stakeholders, including many here in Tennessee, where the Tennessee Chamber of Commerce & Industry, both U.S.

Senators and several U.S. Representatives called for EPA to reconsider and revise the 2015 WOTUS Rule. In particular the 2015 Rule called into question a highly effective methodology developed in the State of Tennessee that accounts for the challenges of various topography across the state. This methodology used to distinguish between ephemeral and intermittent bodies is widely accepted by all stakeholders.

Specifically, Tennessee law defines a "stream" as "a surface water that is not a wet weather conveyance." *Tenn. Code Ann. § 69-3-103(41).* A wet weather conveyance is an ephemeral stream which is not assigned any classified uses. A wet weather conveyance is further defined as watercourses:

- That flow only in direct response to precipitation runoff in their immediate vicinity;
- Whose channels are at all times above the groundwater table;
- That are not suitable for drinking water; and
- In which hydrological and biological analysis indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months.

Tenn. Code Ann. § 69-3-103 (46).

Additional criteria for ephemeral streams or wet weather conveyances are provided in greater detail in Tennessee rules. See *Tenn. Comp. R & Regs. Ch 0400-40-03-.05(9).* The biological evaluation is a valuable tool in addressing "close calls" between an ephemeral and intermittent stream. The concept is that obligate lotic aquatic organisms identified in the state rules can only survive with at least two months of flowing water. The state of Tennessee uses a scoring method with criteria further set out in the rules. This method of identification has proven to be widely accepted, cutting down tremendously on time and expense relating to permitting.

Business and Industry Support the Revisions to Waters of the United States

Tennessee's Business and Industry are supportive of the following concepts articulated throughout the Agencies' proposed revisions to the WOTUS definition.

Regulatory Certainty and Clarity: The scope of federal jurisdiction under the CWA has long been uncertain and subject to much debate, leading to uncertain and inconsistent enforcement. The Supreme Court has addressed the issue of what constitutes WOTUS in three seminal decisions – United States v. Riverside Bayview Homes, Inc., SWANCC v. U.S. Army Corps of Engineers, and Rapanos v. United States – and has limited the scope of federal authority in order to bring the definition of WOTUS more in line with the CWA's objectives, and provide the necessary context for determining the appropriate jurisdictional limits under the Act.

Unfortunately, the 2015 WOTUS Rule asserted sweeping jurisdiction over waters that have little or no relationship to navigable waters. It exacerbated uncertainty by relying on case-by-case subjective assessments, often blindly leading to jurisdictional determinations that were inconsistent and unpredictable. The Agencies' proposal addresses these shortcoming by providing stakeholders with the "bright lines" needed to make jurisdictional and non-jurisdictional determinations. Further, the proposal clearly and transparently categorizes features subject to those determinations.

Cooperative Federalism: The Clean Water Act is a statute grounded in the principles of cooperative federalism and Congress explicitly intended to "recognize, preserve, and protect the responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and to] plan the development and use...of land and water resources..." The Act also provides that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."

Congress never intended that all water features in the country be potentially subject to federal jurisdiction as WOTUS, or that the CWA be the exclusive vehicle for addressing such features. Rather, Congress intended that some water features be addressed by the States or other federal, state, or local measures. For example, provisions included in the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA) also address water features at the federal level. A number of state and local laws and regulations addressing such features also exists.

The Agencies' proposal clearly delineates which water features should be subject to federal control and which water features be subject to state or local control. The definition of WOTUS is just one part of a larger regulatory framework intended to protect the nation's water resources.

Transparency: The definition of WOTUS is applicable to multiple provisions found throughout the Clean Water Act. During the rulemaking process for the 2015 WOTUS rule, multiple stakeholders recognized that the Agencies only considered the implications of the definition of WOTUS as it pertained to the section 404 dredge-and-fill program.

The Agencies' proposal recognizes that the definition of WOTUS applies to many other programs included in the CWA, as well as state and local programs. For example, the definition of WOTUS is also found in the Act's provisions covering the discharge of oil and hazardous substances and the administration of the national pollutant discharge elimination system (NPDES) permitting program. The programmatic assessment included in the proposal addresses these programs further and enhances transparency by allowing all regulated parties to understand the scope of the proposal and the implications that revising the definition of WOTUS would have on all CWA regulatory programs.

Thank you for the opportunity to provide comments on behalf of Tennessee businesses.

Respectfully,



Charles Schneider
Vice President for Government Affairs | Environment & Energy
Tennessee Chamber of Commerce & Industry

WMC

WISCONSIN MANUFACTURERS & COMMERCE

April 15, 2019

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RE: Revised Definition of "Waters of the United States;" 84 Fed. Reg. 4,154 (Feb. 14, 2019); Docket No. EPA-HQ-OW-2018-0149

Wisconsin Manufacturers & Commerce (WMC) submits these comments in the above-referenced docket regarding the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineer (collectively "the Agencies") February 14, 2019 proposal to define the scope of waters federally regulated under the Clean Water Act (CWA). WMC generally supports the EPA's proposal to revise the regulatory definition of "Waters of the United States" (WOTUS) to more closely align with the constitutional and statutory limitations as prescribed by the CWA.

WMC is Wisconsin's statewide chamber of commerce and manufacturers' association. With roughly 3,800 members statewide, WMC is Wisconsin's largest business trade association. Member companies are of all sizes and across all sectors of Wisconsin's economy. Since our founding in 1911, WMC has been dedicated to ensuring that Wisconsin is the most competitive state in the nation to do business. The scope of the 2015 WOTUS Rule and this proposal affects the entirety of our membership, from non-metallic mines, paper mills, agricultural producers, energy generators, and of course, manufacturers.

Our members want clean and healthy water. They rely on it for their personal use, their employee's use, and for their livelihood. They also want a fair, stable, predictable and transparent regulatory structure in which to operate. The 2015 rule represents an unjustifiable expansion of Clean Water Act jurisdiction far beyond the limits of the federal regulation explicitly established by Congress ~~has intentionally preserved to the States~~. We appreciate the recognition by the Agencies that the proposed definition should be clearer and more easily understood by those subject to resulting regulation.

The scope of federal jurisdiction under the CWA has long been uncertain, leading to inconsistent enforcement. The jurisdictional boundaries of the CWA has been the subject of multiple Supreme

Court decisions, all of which have limited the scope of this federal authority in order to bring the definition of WOTUS more in line with the underlying cooperative federalism principles of the CWA.

There is no doubt that the CWA is grounded in the principles of cooperative federalism, not sweeping federal jurisdiction. Congress explicitly stated that the purpose of the Act is to "recognize, preserve, and protect the responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and to] plan the development and use ... of land and water resources."[1] Further, the Act requires that "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[2]

The 2015 WOTUS Rule asserted sweeping jurisdiction over waters that have little or no relationship to navigable waters. It exacerbated uncertainty by relying on case-by-case subjective assessments, often leading to jurisdictional determinations that were inconsistent and unpredictable. The Agencies' proposal instead provides the regulated community with the tools needed to make jurisdictional determinations. Our members cannot operate or thrive under unpredictable and inconsistent enforcement of regulations and therefore welcome the clarity and "bright-line" rules that our members can follow.

The Agencies' proposal clearly delineates which waters should be subject to federal control and which waters be subject to state or local control. The definition of WOTUS is just one part of a larger regulatory framework intended to protect the nation's water resources. It is clear that Congress never intended that all water in the country be subject to federal jurisdiction as WOTUS, or that the CWA would be the only means by which water would be regulated. Congress intended that some water be addressed by the States or other federal, state, or local measures. For example, provisions included in the Safe Drinking Water Act (SDWA) and Resource Conservation and Recovery Act (RCRA) also address water at the federal level. This is in addition to numerous state and local regulations of water.

This proposal necessarily reverses course from the overly expansive, over-burdensome definition in the 2015 WOTUS rule and greatly improves regulatory certainty and clarity, provides additional transparency, while also respecting the principles of cooperative federalism envisioned by Congress in passing the CWA. WMC would also like to echo the comments of other stakeholder groups that the Agencies should take into account in finalizing the proposed rule including ensuring clarity in exclusion definitions, and limiting the opportunity for sue-and-settle opportunities when possible.

WMC appreciates the opportunity to comment on this proposed rule.

Sincerely,

/s/ Lane Ruhland

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[1] 33 U.S.C §§ 1251(b)
[2] *Id.* at § 1251(g)

Lane Ruhland
Director, Environmental & Energy Policy
Wisconsin Manufacturers & Commerce



Edison Electric
INSTITUTE

Thomas R. Kuhn
President

June 12, 2019

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

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

The Honorable Kevin Cramer
Chairman, Subcommittee on Fisheries,
Wildlife, and Water
Committee on Environment and Public Works
United States Senate
410 Dirksen Building
Washington, DC 20510

The Honorable Tammy Duckworth
Ranking Member, Subcommittee on Fisheries,
Wildlife, and Water
Committee on Environment and Public Works
United States Senate
456 Dirksen Building
Washington, DC 20510

Dear Chairman Barrasso, Chairman Cramer, Ranking Member Carper, and Ranking Member Duckworth:

The Edison Electric Institute (EEI) appreciates the opportunity to express support for efforts by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) (collectively the Agencies) to propose a revised "Waters of the United States" (WOTUS) definition.

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than 7 million jobs in communities across the United States.

The proposed revisions to the Agencies' WOTUS definition are crucial for the electricity sector. EEI members must be able to efficiently assess their federal permitting obligations as they develop the nation's critical infrastructure and modernize the electric grid. The proposed rule, which is consistent with the text of the Clean Water Act and applicable Supreme Court precedent, will help streamline those activities by better defining the scope of federal Clean Water Act jurisdiction.

By proposing a clearer WOTUS definition, EPA and USACE have taken an important step in providing EEI's member companies with greater regulatory certainty, which in turn will promote more efficient energy infrastructure permitting.

EEI commends the Agencies for their continuing efforts to provide certainty to the regulated public while ensuring the protection of our nation's waters, and the Committee for holding a hearing to highlight the importance of both policy goals.

Sincerely,



Thomas R. Kuhn
President

United States District Court
Southern District of Texas
ENTERED
May 28, 2019
David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATE OF TEXAS, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 3:15-CV-00162
	§	
UNITED STATES ENVIRONMENTAL	§	
PROTECTION AGENCY, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are the Private Party Plaintiffs'[1] Motion for Summary Judgment (Dkt. 156) and the Plaintiff States'[2] Motion for Summary Judgment (Dkt. 157). After reviewing the motions, the responses, the replies, the *amici curiae* briefs, and the applicable law, the Court **GRANTS** the motions. Accordingly, the Court **ORDERS** that the "Clean Water Rule: Definition of 'Waters of the United States'" (the "Final Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), be **REMANDED** to the appropriate administrative agencies for further proceedings consistent with this opinion. Furthermore, the Court **ORDERS** that the preliminary injunction issued by this Court on September 12, 2018 (Dkt. 140) remain in place pending the proceedings on remand.

[1] The Private Party Plaintiffs are the following groups: American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Association Of American Railroads; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Manufacturers; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; Port Terminal Railroad Association; Public Lands Council; Texas Alliance for Responsible Growth, Environmental and Transportation; and Texas Farm Bureau.

[2] The Plaintiff States are Texas, Louisiana, and Mississippi.

Factual Background and Proceedings

In 1972, Congress passed the Clean Water Act ("the Act") with the stated objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Act made it "unlawful" to "discharge…any pollutant" into "navigable waters," which were defined as "the waters of the United States, including the territorial seas." *Id.* § 1311(a); *id.* § 1362(12); *id.* § 1362(7). "Because many of the Act's substantive provisions apply to 'navigable waters,'" the definition of the "phrase 'waters of the United States' [effectively] circumscribes the geographic scope of the Act." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018). However, the Act does not define this phrase.

To "provide clarity and [] avoid confusion," the United States Army Corps of Engineers (the "Army Corps") first defined the phrase "waters of the United States" ("WOTUS") in 1986.[3] Since then, this definition has remained relatively unchanged. *See*

[3] The first definition of the phrase WOTUS, which has remained essentially unchanged until now, reads as follows:
(a) The term "waters of the United States" means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a) (1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section.

58 Fed. Reg. 45,008, 45,036 (Aug. 25, 1993) (amending the definition of the phrase WOTUS to clarify that it does not include "prior converted cropland."). Yet, the idea of what is a WOTUS is still an unsettled question. Indeed, the Supreme Court has wrestled with providing a precise definition over the past 30 years. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985); *see also Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001); *see also Rapanos v. United States*, 547 U.S. 715, 719 (2006). To this day, the Circuits disagree as to how the phrase WOTUS should be interpreted. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (holding that Justice Kennedy's concurrence in *Rapanos* provided the controlling test for what is a navigable water under the Act); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (approving of the use of the plurality's opinion and the Kennedy opinion in *Rapanos* as the controlling test for determining what is a navigable water); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (applying pre-*Rapanos* Circuit precedent because it could not discern clear direction from *Rapanos*).

Against this backdrop, the Army Corps and the United States Environmental Protection Agency ("EPA") (collectively, "the Agencies") set out to "make the process of identifying 'waters of the United States' less complicated and more efficient." 79 Fed. Reg. 22,188, 22,190 (Apr. 21, 2014). The Agencies also wanted to ensure that the Act enabled jurisdiction over "a particular category of waters," which "either alone or in combination with similarly situated waters in the region, significantly affect[ed] the

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51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986).

chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas." *Id.* at 22,197. For these reasons, the Agencies jointly proposed a new definition of the phrase WOTUS in 2014 (the "Proposed Rule").[4] The technical basis for this newly Proposed Rule was a preliminary report drafted by the EPA that reviewed "more than a thousand publications from peer-reviewed scientific literature" and discussed the connected nature of the nation's waters (the "Draft Connectivity Report"). *Id.* at 22,197; Dkt. 180 at Tab M.

"Intend[ing] to...simpl[ify]" the previous definition of WOTUS, the Proposed Rule generally "separate[d] waters into three jurisdictional groups—waters that are categorically jurisdictional (*e.g.*, interstate waters)" ("Categorically Covered Waters"); "those that require a case-specific showing of their significant nexus to traditionally covered waters (*e.g.*, waters lying in the flood plain of interstate waters); and those that are categorically excluded from jurisdiction (*e.g.*, swimming pools and puddles)." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 626. In furtherance of this goal, the Proposed Rule defined the term "adjacent"—which would be used in determining whether the Agencies have

[4] (a) For purposes of all sections 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 identified in paragraphs (a)(1) through (3) and (5) of this section;
(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and
(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

79 Fed. Reg. at 22,262-22,263 (for the Proposed Rule);

jurisdiction over "(6) [a]ll waters...adjacent" to a Categorically Covered Water—as meaning "bordering, contiguous or neighboring." 79 Fed. Reg. at 22,263. And in turn, the term "neighboring" was defined as "waters located within the *riparian area or floodplain* of a [Categorically Covered Water], or waters with a *shallow subsurface hydrologic connection or confined surface hydrologic connection* to such a jurisdictional water." *Id.* (italics added).

For three months after its publication, the Agencies allowed interested parties an opportunity to comment on the Proposed Rule and its jurisdictional grouping scheme. *See* Dkt. 180 at Tab J, Tab K, Tab L. After this notice-and-comment period closed, the Science Advisory Board issued its revisory comments for the Draft Connectivity Report. *See* 79 Fed. Reg. 63,594 (Oct. 24, 2014). In response, the Agencies reopened the comment period for the Proposed Rule for another month. *Id.* However, the Agencies declined to do the same after issuing the revised version of the connectivity report on January 15, 2015 (the "Final Connectivity Report"). 80 Fed. Reg. 2,100 (Jan. 15, 2015). This meant that the Proposed Rule was never open for public comment after the Final Connectivity Report was finalized.

Almost six months after publishing the Final Connectivity Report, the Agencies released the Final Rule on June 29, 2015, which proposed a different definition of the phrase WOTUS.[5] Although generally similar to the Proposed Rule in that it defined the

[5] (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;

phrase WOTUS in jurisdictional groups, the Final Rule departed from the Proposed Rule in at least one key respect. Namely, the Final Rule defined "adjacent waters" under the Act using distance-based criteria, rather than the ecologic and hydrologic criteria used in the Proposed Rule.

Specifically, the Final Rule, like the Proposed Rule, defined "adjacent" as "bordering, contiguous or neighboring." *Id.* at 37, 105. But, the Final Rule changed the definition of the term "neighboring" to mean "[a]ll waters located within 100 feet of the ordinary high water mark of a" Categorically Covered Water, "[a]ll waters located within the 100-year floodplain of a" Categorically Covered Water, and "[a]ll waters located within 1,500 feet of the high tide line of" either some Categorically Covered Waters or "1,500 feet of the ordinary high water mark of the Great Lakes." *See id.* This was the first time that the Agencies gave notice that they intended to define adjacency by precise numerical distance-based criteria—rather than the ecologic and hydrologic criteria in the Proposed Rule.

In the pending motions for summary judgment the Plaintiffs ask the Court to vacate the Final Rule because it violates (1) the Administrative Procedure Act (the "APA"), (2) the Act, (3) the Commerce Clause, and (4) the Tenth Amendment to the United States Constitution. Dkt. 156; Dkt. 157. The Court finds that the Final Rule violates the notice-and-comment requirements of the APA and therefore grants summary

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(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....

80 Fed. Reg. 37,054, 37,104 (June 29, 2015).

judgment in favor of the Plaintiffs on this ground alone. So being, the Court declines to address the substantive challenges to the Final Rule because they are premature at this time. For the following reasons, the Final Rule will be remanded to the appropriate administrative agencies for further proceedings consistent with this opinion.

Standard of Review

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the context of a challenge under the APA, "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008). Thus, in evaluating a challenge under the APA on summary judgment, the court applies the standard of review from the APA. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001); *see Tex. Oil & Gas Ass'n v. United States EPA*, 161 F.3d 923, 933 (5th Cir. 1998). Under the APA standard of review, a "reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be...without observance of procedure required by law." 5 U.S.C. § 706.

Analysis

Plaintiffs assert that the Final Rule violates the notice-and-comment requirements of the APA because (1) the Final Rule's definition of "adjacent" was not a logical outgrowth of the Proposed Rule's definition, and (2) the Agencies denied interested

parties an opportunity to comment on the Final Connectivity Report, which serves as the technical basis for the Final Rule.[6] The Court agrees.

A. Violations of the APA

Under the APA, agencies are required to publish "[g]eneral notice of proposed rule making[s]...in the Federal Register." *Id.* § 553(b). The notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* at § 553(b)(3). After notice has been given, the Agencies must then allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* at § 553(c).

Hardly trivial, these notice-and-comment "requirements are 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, UMW v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Moreover, the notice-and-comment requirements assist in the substantive formation of a rule by ensuring "that the broadest base of information [is] provided to the agency by those most interested and perhaps best informed on the subject of the

[6] Plaintiffs also argue that the Final Rule violates the notice-and-comment requirements of the APA because the Final Rule excludes "farmland from the per se adjacent waters category, but not the per se tributary category, [which was] not part of the proposed version of the Rule...." Dkt. 157 at 39. The Court finds this argument unpersuasive. No such exemption existed under the prior rule. *See* 33 C.F.R. § 328.3(a)(5) (1987). Therefore, the Defendants did not violate the APA by preserving the status quo. *See New York v. United States EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) ("One logical outgrowth of a proposal is surely, as EPA says, to refrain from taking the proposed step.").

rulemaking at hand." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994).

An agency "undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule." *Small Refiner Lead Phase-Down Task Force v. United States Envtl. Prot. Agency*, 705 F.2d 506, 546 (D.C. Cir. 1983). "A contrary rule would lead to the absurdity that...the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973). "However, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547. Thus, to comply with the mandates of the notice-and-comment requirement, the final rule must be a "logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Whether a final rule is a "logical outgrowth" of a proposed rule will turn on whether the interested parties "should have anticipated" the final rule from the proposed rule. *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549. "The object, in short, is one of fair notice." *Long Island Care at Home, Ltd.*, 551 U.S. at 174.

Here, the Final Rule violated the APA's notice-and-comment requirements by deviating from the Proposed Rule in a way that interested parties could not have reasonably anticipated. Instead of continuing to use ecologic and hydrologic criteria to define "adjacent waters" as originally proposed, the summary judgment evidence reflects that the Final Rule abandoned this approach and switched to the use of distance-based

criteria. *See* 79 Fed. Reg. at 22,263; *c.f.* 80 Fed. Reg. at 37,105. This shift in terminology and approach led to the promulgation of a Final Rule that was different in kind and degree from the concept announced in the Proposed Rule.

Specifically, the Proposed Rule defined "adjacent waters" based on the presence of a "hydrologic connection" with a Categorically Covered Water or a Categorically Covered Water's "influence [on] the ecological processes and plant and animal community structure" of a potentially covered water. 79 Fed. Reg. at 22,263. The summary judgment evidence reflects that commentators to the Proposed Rule spent months evaluating the merits of this definition. However, in contrast, the Final Rule defined "adjacent waters" by proximity to Categorically Covered Waters:

> The term *adjacent* means bordering, contiguous, or neighboring...[and] the term *neighboring* means...[a]ll waters located within 100 feet [of a Categorically Covered Water]...[a]ll waters located within the 100-year floodplain [of a Categorically Covered Water]...[and a]ll waters located within 1,500 feet of the high tide line of" some Categorically Covered Waters or "1,500 feet of the ordinary high water mark of the Great Lakes....

80 Fed. Reg. at 37,105 (italics in original).

This change is significant—it alters the jurisdictional scope of the Act. *See Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624. As a result, the Final Rule was deprived of the benefit of comment "by those most interested and perhaps best informed on the subject of the rulemaking at hand." *Phillips Petroleum Co.*, 22 F.3d at 620. Indeed, the summary judgment evidence establishes that if interested parties had been notified of this change, the comments and evidence presented to the agencies would have been significantly and substantively different. Perhaps more importantly, those governed by the rule were

deprived of notice of a substantial change to our nation's environmental regulation scheme. *See Long Island Care at Home, Ltd.*, 551 U.S. at 174.

The Defendants' argument that a hydrologic and ecologic based definition for "adjacent waters" necessarily implies elements of "reasonable proximity" is unpersuasive. Dkt. 169 at 36. So too is the Defendants' argument that generally requesting comments regarding the merits of unspecified geographic limitations in the notice of proposed rulemaking provided adequate notice of the Final Rule. *Id.* at 37. Neither of these attempts at public notice is sufficiently specific to inform interested parties that the Agencies were considering the use of precise numerical distance-based criteria in the Final Rule to alter its jurisdictional scope. The APA does not envision requiring interested parties to parse through such vague references like tea leaves to discern an agency's regulatory intent regarding such significant changes to a final rule. Accordingly, the Court finds that the Final Rule was not a logical outgrowth of the Proposed Rule and that it was promulgated in violation of the APA.

The Final Rule also violated the APA by preventing interested parties from commenting on the studies that served as the technical basis for the rule. As the courts have held, "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007). Indeed, it is a "fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for

comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). "The most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation." *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

Here, the Agencies failed to give commentators an opportunity to refute the most critical factual material used to support the Final Rule—the Final Connectivity Report. Indeed, the summary judgment record establishes that the Final Connectivity Report was the technical basis for the Final Rule and was instrumental in determining what changes were to be made to the definition of the phrase WOTUS:

> As noted earlier, the agencies interpret the scope of 'waters of the United States' protected under [the Act] based on the information and conclusions in [the Final Connectivity Report]....In light of this information, the agencies made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus and conclude that 'tributaries' and 'adjacent waters,' each as defined by the rule, have a significant nexus such that they are 'waters of the United States' and *no additional analysis is required.*

80 Fed. Reg. at 37,065 (italics added). Commentators certainly are not expected to "have an opportunity to comment on every bit of information influencing an agency's decision." *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 326 (5th Cir. 2001). However, the Agencies' decision not to reopen the Proposed Rule for comment after the publication of the Final Connectivity Report prejudiced the ability of interested parties to (1) provide meaningful comments regarding the Final Rule's continuum-based approach to connectivity and (2) "mount a credible challenge" to the Final Rule. *See Am. Radio Relay League, Inc.*, 524 F.3d 227, 237-38. This prejudice is especially severe given the

substantive changes made between the Draft and Final Connectivity Reports. Dkt. 180 at Tab CCC (for the SAB's proposed changes to the Final Connectivity Report); Dkt. 180 at Tab H (for the Final Connectivity Report). Accordingly, depriving Plaintiffs of a meaningful "opportunity to comment" and possibly deconstruct the Final Connectivity Report violated the APA. *See Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 199.

B. Remedy

Having found that the Final Rule violated the APA, the only remaining question is what remedy would be appropriate under the circumstances of this case. The Court finds that remand, not vacatur of the Final Rule as requested by Plaintiffs, is the appropriate remedy in this case. As the Fifth Circuit has made clear, "[o]nly in rare circumstances is remand for agency reconsideration not the appropriate solution." *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238-39 (5th Cir. 2007). Especially where, as here, the Final Rule "is not sustainable on the basis of the administrative record, then the matter should be remanded to [the Agencies] for further consideration." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir. 1983). Moreover, the Court finds that vacatur "would be disruptive," and there is a "serious possibility" that the Agencies will be able to resolve the notice-and-comment defects with the Final Rule if "given an opportunity to do so." *Cent. & S. W. Servs. v. United States EPA*, 220 F.3d 683, 692 (5th Cir. 2000). Indeed, the Court notes that the Agencies have already begun reviewing whether changes should be made to the Final Rule.[7] Therefore, the Court finds that

[7] EPA, Waters of the United States (WOTUS) Rulemaking, (May 23, 2019), https://www.epa.gov/wotus-rule (for an update on the EPA's current efforts to revise and repeal the Final Rule).

remand is the best remedy here as it will facilitate the Agencies' active attempts to improve on their work of protecting the environment and bringing predictability and clarity to the definition of the phrase WOTUS.

Conclusion

For the foregoing reasons, the Court finds that the Final Rule violated the notice-and-comment requirements of the APA and therefore grants summary judgment in favor of the Plaintiffs on this ground.[8] The Court remands the Final Rule to the appropriate administrative agencies for proceedings consistent with this order. The injunction issued by this Court on September 12, 2018 (Dkt. 140) is to remain in place pending the proceedings on remand. All remaining pending motions are hereby denied as moot.

SIGNED at Galveston, Texas, this 28th day of May, 2019.

George C. Hanks Jr.
United States District Judge

[8] Considering the Agencies' APA violations, the Court finds that it would be premature to address Plaintiffs' substantive challenges to the Final Rule and it declines to do so at this time. Dkt. 156; Dkt. 157. The Court will consider these arguments when an adequate record is developed after remand.



June 11, 2019

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

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

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of National Parks Conservation Association and our more than 1.3 million members and supporters, I write to offer our perspective on the impact of the Trump administration's proposed rewrite of the Clean Water Act's ("CWA") "Waters of the U.S." definition on America's national parks. I ask that this letter be included in the record for the June 12, 2019 hearing "A Review of Waters of the U.S. Regulations: Their Impact on States and the American People."

Every year, hundreds of millions of people visit America's national parks. Many of these parks depend on waters that run through them. These waters provide crucial habitat for fish and wildlife, offer recreational opportunities for visitors, and in many cases are central to the parks' unique character and value. Such water-dependent parks are found across the country from Acadia National Park in Maine, to the Colorado River running through Grand Canyon National Park and Glen Canyon National Recreation Area, and from the Buffalo National River in Arkansas to the Rio Grande National Wild & Scenic River in Big Bend National Park.

Many national parks are inseparable from the waters that are in, surround, and flow through them. Because many park waters originate on lands outside of park boundaries, where beyond boundary activities impact park water quality and availability, the National Park Service ("NPS") often relies on the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Army Corps") to exercise their CWA authority to prevent impairment of park waters. Protecting upstream wetlands and intermittent and ephemeral streams is particularly important for preserving and restoring park water quality for visitors and wildlife.

That's why we're so concerned with the Trump administration's proposal to eliminate protections for our nation's wetlands and waters. The proposed changes to the CWA's "Waters of the U.S." definition will eliminate protection for many waters that have been considered jurisdictional for decades, a regulatory rollback that could lead to significant harm for our national parks and their waters.

Headquarters
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The National Park System received over 318 million visitors in 2018.[1] The NPS estimates that visits in 2017 created about $18.2 billion in spending in "gateway regions" near National Parks.[2] Some of the most visited national parks are fundamentally connected to water and depend on its quality. For instance, Grand Canyon National Park and Glen Canyon National Recreation Area received over 6 million and 4.5 million visitors, respectively, in 2017.[3] Both of these parks are in an arid region where intermittent and ephemeral streams play a significant hydrological role.[4] Acadia National Park, on the coast of Maine, received over 3.5 million visitors in 2017, and the Chattahoochee National River in Georgia had over 2.7 million visitors.[5] Clean water is an integral part of the experience at these parks, and its quality is critical to their preservation and conservation.

Visitors to national parks are also a part of the broader "outdoor recreation economy" estimated at $887 billion annually.[6] The U.S. Department of Commerce's Bureau of Economic Analysis found that outdoor recreation contributes 2.2 percent of the country's annual GDP.[7] Within that amount, boating and fishing amounted to the largest segment of economic activity at $36.9 billion annually.[8] These activities depend on clean water. If the water quality in national parks is degraded because hydrologically-linked wetlands and ephemeral streams lose CWA protection, the result could be a loss of economic benefits if visitors were to choose to stay away from these places.

The connectivity of our nation's waters and their economic importance should come as no surprise. The EPA and Army Corps' themselves previously concluded that tributaries and wetlands are important to downstream water quality and outdoor recreational opportunities. EPA has stated that "wetlands play a crucial role in the life cycle of up to 90 percent of the fish caught recreationally," while recognizing estimates of recreational fishing's economic impact at $116 billion annually.[9] The agencies also previously argued that "[p]rotection of tributaries under the CWA is critically important because they serve many important functions *which directly influence the integrity of downstream waters*."[10]

Instead of enhancing these economic contributions, the administration's proposal instead acknowledges that removing CWA protections would harm the outdoor recreation economy, including hunting and fishing activities specifically. The proposal notes that:

> ...narrowing the scope of CWA regulatory jurisdiction over waters may result in a reduction in the ecosystem services provided by some waters, and as a result, some entities may be adversely impacted. Some business sectors that depend on habitat, such as those catering to hunters or anglers, . . . could experience a greater impact than others.[11]

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[1] *Visitation Highlights*, NAT'L PARK SERV., *available at https://www.nps.gov/subjects/socialscience/highlights.htm*.
[2] NAT'L PARK SERV., 2017 NATIONAL PARK VISITOR SPENDING EFFECTS (2018), *available at* https://www.nps.gov/nature/customcf/NPS_Data_Visualization/docs/NPS_2017_Visitor_Spending_Effects.pdf.
[3] *Annual Park Report for Recreation Visits in 2018*, NAT'L PARK SERV., https://irma.nps.gov/Stats/SSRSReports/National%20Reports/Annual%20Park%20Ranking%20Report%20(1979%20-%20Last%20Calendar%20Year).
[4] *See* JULIANE M. BOWEN, U.S. GEOLOGICAL SURVEY, REVIEW OF AVAILABLE WATER-QUALITY DATA FOR THE SOUTHERN COLORADO PLATEAU NETWORK AND CHARACTERIZATION OF WATER QUALITY IN FIVE SELECTED PARK UNITS IN ARIZONA, COLORADO, NEW MEXICO, AND UTAH, 1925 TO 2004, SCIENTIFIC INVESTIGATIONS REPORT 2008-5130, at 5 (2008).
[5] *Annual Park Report for Recreation Visits in 2018*, *supra* note 3.
[6] OUTDOOR INDUS. ASS'N, THE OUTDOOR RECREATION ECONOMY (2017), *available at* https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.
[7] *Outdoor Recreation Satellite Account: Updated Statistics for 2012-2016* (2018), BUREAU OF ECON. ANALYSIS, https://www.bea.gov/news/2018/outdoor-recreation-satellite-account-updated-statistics-2012-2016.
[8] *Id.*
[9] EPA, ECONOMIC BENEFITS OF WETLANDS 2 (2006), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/economicbenefits.pdf.
[10] EPA& U.S. DEPT. OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 9 (May 27, 2015) [hereinafter "2015 Technical Support Document"], at 233 (emphasis added).
[11] 84 Fed. Reg. at 4201–02.

The proposal's accompanying economic analysis also correctly observes that "[c]hanges in water quality can also impact recreational activities and by extension those businesses and localities that support these activities."[12] These impacts would harm the multibillion-dollar outdoor recreation economy with potentially significant concentrated impacts in national parks that support fishing and boating recreation. Despite identifying these impacts as issues of concern, at no point does the proposal attempt to quantify their overall magnitude or assess whether, in light of these detrimental impacts, the proposal will be beneficial for the nation.

What's more, the proposal's exclusion of ephemeral streams and non-adjacent wetlands from CWA protections would have profound ecological and water quality impacts on national parks across the country. Intermittent and ephemeral streams are particularly important to water quality and flows in the Southwest, where they make up over 81% of streams.[13] Over a third of streams in the "arid west" would lose CWA protections under the proposal.

Scientific and technical studies demonstrate why the removal of CWA protection from ephemeral streams and non-adjacent wetlands would harm national parks in the West. In a 2008 scientific report on the Four Corners region, the U.S. Geological Survey ("USGS") and NPS identified several "Parks with significant intermittent or ephemeral drainages," including Chaco Wash in Chaco Culture National Historical Park, Pueblo Colorado Wash in Hubbell Trading Post National Historical Site, and the Little Colorado River in Petrified Forest National Park.[14] That report notes that:

> [El Morro National Monument], Sunset Crater National Monument . . ., and [Petroglyph National Monument] are dry most of the time. A vast network of perennial, intermittent, and ephemeral springs, pools, washes, and streams sustain the larger water bodies and their associated riparian corridor; these areas collectively support the diverse flora and fauna throughout the region. The intermittent and ephemeral features typically flow during spring runoff or following rainfall. Unique and significant water-dependent features such as hanging gardens and cottonwood stands are supported by springs.[15]

Furthermore, "[m]ore than 90 side canyons fed by springs and ephemeral drainages are considered tributaries to the main body of Lake Powell."[16] The USGS-NPS study identified fourteen intermittent or ephemeral streams that drain into Lake Powell as suffering from "one or more water-quality standard exceedance."[17] The report shows the extensive network of intermittent and ephemeral streams that feed into Glen Canyon National Recreation Area, including streams that pass through other National Parks such as Canyonlands, Capitol Reef, and Arches National Parks. Protecting the water in Lake Powell depends on protecting the water in intermittent and ephemeral streams that already violate water-quality standards.

The EPA's 2015 Connectivity Report also noted the extensive importance of ephemeral and intermittent streams in the Four Corners region. "Based on the National Hydrography Dataset, 94%, 89%, 88%, and 79% of the streams in Arizona, Nevada, New Mexico, and Utah, respectively, are nonperennial. Most of

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[12] EPA& ARMY CORPS, ECONOMIC ANALYSIS OF PROPOSED REVISED DEFINITION OF WATERS OF THE UNITED STATES 215 (2014) [hereinafter Economic Analysis].
[13] 2015 Technical Support Document, at 259.
[14] *See* JULIANE M. BOWEN, U.S. GEOLOGICAL SURVEY, REVIEW OF AVAILABLE WATER-QUALITY DATA FOR THE SOUTHERN COLORADO PLATEAU NETWORK AND CHARACTERIZATION OF WATER QUALITY IN FIVE SELECTED PARK UNITS IN ARIZONA, COLORADO, NEW MEXICO, AND UTAH, 1925 TO 2004, SCIENTIFIC INVESTIGATIONS REPORT 2008-5130, at 5 (2008).
[15] *Id.*
[16] *Id.* at 64.
[17] *Id.* at 67.

these streams connect to downstream waters."[18] These streams are "periodically connected to downstream waters by low-duration, high-magnitude flows."[19] According to that report, this "substantial connection [causes] important consequences of runoff, nutrients, and particulate matter originating from ephemeral tributaries on the integrity and sustainability of downstream perennial streams."[20]

EPA had previously published a report on *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, which provided a "comprehensive review of the present scientific understanding of the ecology and hydrology of ephemeral and intermittent streams [to] help place them in a watershed context, thereby highlighting their importance in maintaining water quality, overall watershed health, and provisioning of the essential human and biological requirements of clean water."[21] In that report, EPA noted that lowland leopard frogs in Saguaro National Park depend on ephemeral pools for breeding.[22] Furthermore, wildlife in Organ Pipe Cactus National Monument, including lizards and snakes, prefer mesquite woodlands that are "restricted to ephemeral and intermittent streams" in the monument.[23] These ephemeral habitats would lose CWA protections in the proposal.

The negative impacts of the proposal on water quality in national parks would not be limited to western parks with high concentrations of intermittent and ephemeral streams. Many eastern national parks also depend on non-adjacent wetlands or ephemeral streams for water quality that would not be covered by the proposal.

One example of a popular national park in the East facing water contamination issues is the New River Gorge National River in West Virginia, which receives over a million annual visitors. Particularly after heavy rains, the river suffers from impairment by fecal coliform. The USGS found that "tributary inflows to the New River are the major pathways for input of fecal contamination to the New River in the gorge."[24] That study found multiple tributaries contaminated with fecal coliform with flows below five cubic feet per second.[25] These streams would lose CWA protection under the Proposal's potential flow requirement of five cubic feet per second, which could result in increased contamination for this park.[26]

America's most popular national park, Great Smoky Mountains National Park, also faces coliform bacteria impacts to water sources, including along the Appalachian Trail.[27] Headwater streams in Great Smoky Mountains National Park also face threats from high acidity. According to the NPS, "acidic streams are suspected to be the main cause for the decline of the native brook trout population in the park."[28] Although wetlands make up a small percentage of the park and the surrounding ecosystems, these wetlands include karst-depression wetlands.[29] Wetlands within park boundaries would retain protection by NPS, but karst-depression wetlands outside of the park would likely be considered non-adjacent in the

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[18] EPA, CONNECTIVITY OF STREAMS &WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF SCIENTIFIC EVIDENCE (2015) [hereinafter "Connectivity Report"], at 5-7.
[19] *Id.*
[20] *Id.* at 5-8.
[21] EPA, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST 2 (2008), *available at* https://www.epa.gov/sites/production/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf.
[22] *Id.* at 55.
[23] *Id.* at 53–54.
[24] MELVIN V.MATHES, ET AL., U.S. GEOLOGICAL SURVEY & NAT'L PARK SERV., PRESUMPTIVE SOURCES OF FECAL CONTAMINATION IN FOUR TRIBUTARIES TO THE NEW RIVER GORGE NATIONAL RIVER,WEST VIRGINIA, 2004, at 5 (2007).
[25] *See id.* at 8.
[26] *See* 84 Fed. Reg. at 4178.
[27] Brian C. Reed & Mark S. Rasnake, *An Assessment of Coliform Bacteria in Water Sources Near Appalachian Trail Shelters Within the Great Smoky Mountains National Park*, 27 WILDERNESS & ENVTL.MED. 107 (2016).
[28] NAT'L PARK SERV., *Great Smoky Mountains: Water Quality*, *available at* https://www.nps.gov/grsm/learn/nature/water-quality.htm.
[29] *See, e.g.*, U.S. GEOLOGICAL SURVEY, *Gum Swamp in Great Smoky Mountain National Park, Tennessee*, *available at* https://www.usgs.gov/media/images/gum-swamp-great-smoky-mountain-national-park-tennessee.

proposal and therefore be at risk of dredging and filling. Wetlands can serve as buffers for acidity.[30] Karst-depression wetlands provides habitat for "plants and animals that are otherwise rare or absent in southern uplands" and the "ecological significance of karst wetlands is thus disproportionate to their limited area."[31] The loss of CWA protections for wetlands such as these in ecosystems near the park in North Carolina and Tennessee would undermine the benefits they provide in the acidity buffering and further threaten species such as native brook trout and reduce the benefits of the associated recreational fishery.

Instead of preserving existing protections necessary to protect our national parks, the administration's proposal to revise the definition of "Waters of the U.S." would significantly reduce the number of waters protected under the Clean Water Act. The proposal eliminates protection for ephemeral streams and for wetlands that do not have a continuous surface connection to waters covered by the new definition. As shown above, we believe the new proposal will cause significant ecological and economic harm to national parks by, among other things, impairing fish and wildlife habitat and impacting recreation.

Making such a dramatic change to the Clean Water Act demands that the proposal be based on sound science in order to meet the Clean Water Act's water quality goals. The administration's proposal, however, is an arbitrary and capricious attempt to revise such a significant policy. Neither the EPA or the Army Corps explains or justifies the departures they make from the scientific evidence underlying the 2015 rule. In fact, the administration's 2019 proposal introduces several new and poorly defined terms in its attempt to delineate the scope of jurisdiction that could ultimately create greater uncertainty and increase the administrative burden for permitting agencies, regulated entities, and the American public.

Thank you for considering our perspectives. We ask that they be made part of the official hearing record. If you have any questions, please don't hesitate to contact me at 202.454.3385 or clord@npca.org.

Sincerely,

Chad Lord
Senior Director, Water Policy

[30] *See. e.g.*, W.M. Mayes, et al., *Wetland Treatments at extremes of pH: A review*, 407 SCI. TOTAL ENV'T 3944 (2007).
[31] WILLIAM J.WOLFE, USGS, HYDROLOGY AND TREE-DISTRIBUTION PATTERNS OF KARST WETLANDS AT ARNOLD ENGINEERING DEVELOPMENT CENTER, TENNESSEE 2 (1996).



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Senator Tammy Duckworth, Ranking Member
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June 11, 2019

Dear Chairman Barrasso, Ranking Member Carper, Chairman Cramer, and Ranking Member Duckworth:

On behalf of the Natural Resources Defense Council and its more than three million members and online activists, I write regarding the Committee's hearing on June 12 titled, "A Review of Waters of the U.S. Regulations: Their Impact on States and the American People."

The Clean Water Act is the nation's most important safeguard against the pollution and destruction of streams, ponds, wetlands, and other waters. The Act includes a suite of pollution control and cleanup programs that apply to all of the waters of the United States. Excluding water bodies from the law's protections means diminished fishing and other recreational opportunities, harms to businesses whose products rely on a clean water supply, worsened flood damages, increased drinking water treatment costs, and more.

Unfortunately, in a series of administrative actions, the Trump administration has recklessly sought to exclude numerous water bodies from the Clean Water Act. Its most recent proposal in this effort would weaken existing regulations in several major respects, including:

- Eliminating decades-old protections for interstate waters;
- Excluding rain-dependent streams from Clean Water Act protection (plus likely other streams);
- Excluding so-called "isolated" waters which current rules would protect when they significantly impact the condition of downstream waters; and
- Excluding nearby wetlands and ponds except a narrow set of ones with specified surface water connections to other covered waters.

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The proposal also invites comment on a host of other changes, some of which would represent an even more massive cut in federal protections on top of the already enormous reductions proposed. For instance, the proposal asks whether the agencies should exclude all non-perennial streams (not only rain-dependent ones) from the Clean Water Act's coverage.

Incredibly, the administration either lacks or has failed to disclose critical information about the proposal. The agencies have not provided the public any meaningful analysis of the impact their rule would have on aquatic resources, on public health and safety, or on sectors of the economy dependent on clean water protections. Consequently, the administration cannot plausibly claim that the proposal represents sound clean water policy, much less that it is preferable to other potential options the agency might consider.

The administration's approach is particularly unreasonable in light of the numerous comments on the recent proposal highlighting the enormous value that water resources have. For instance, dozens of craft breweries told the agencies that clean water resources help to support an industry that "contributes about $76.2 billion to the U.S. economy each year, along with more than 500,000 jobs." The outdoor apparel company Patagonia commented that the proposal would harm the outdoor recreational economy, which "employed 7.6 million people nation-wide and generated $887 billion in revenue in 2017." The Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources commented to explain "how our commercial fishing family businesses, our livelihoods, and our coastal, resource dependent communities will be affected," and concluded that "these new Rules would have devastating negative impacts on America's clean water resources as well as on industries such as ours that ultimately depend on those clean water resources for their livelihoods."

The administration's cavalier deregulate-first-and-analyze-later approach makes its scheme illegal. It also shamefully deprives people of facts they deserve to understand – namely, how much worse the proposal is likely to make water quality and the nature and magnitude of the harms that will flow from it.

The Committee can and should demand better from the administration. If the agencies think the country would be better off by reversing nearly half a century of national clean water protections, they ought to be straight with the public, by analyzing and transparently disclosing the consequences of that policy. Please insist that the administration take these very basic steps before moving forward with any regulatory changes.

Sincerely,



Jon Devine
Senior Attorney & Director of Federal Water Policy
Nature Program
Natural Resources Defense Council

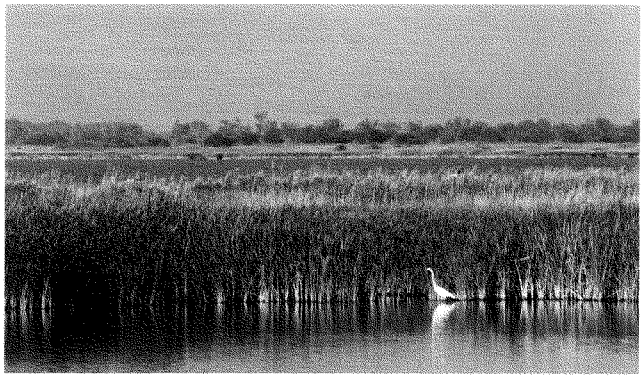
OPINION

The proposed change to the definition of "waters of the United States" flouts sound science

S. Mažeika P. Sullivan[a,1], Mark C. Rains[b], and Amanda D. Rodewald[c,d]

The U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (hereafter, "the agencies") have issued a proposed rule (1) that would remove Clean Water Act (CWA) protections from more than half of wetlands and one-fifth of streams in the United States (2). This move sharply contrasts with reports indicating that US waters remain threatened by storms, droughts, contaminants, algal blooms, and other stressors. Even the EPA's National Water Quality Inventory detected poor conditions in 46% of stream and river miles and 32% of wetlands (3). In short, the proposed rule does not reflect the best-available science and, if enacted, will damage our nation's water resources.

Despite the CWA's mandate "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (4), controversy persists over jurisdiction. For decades, the protected "waters of the United States" (WOTUS) included traditionally navigable waters (TNWs), such as large rivers, lakes, and territorial seas, as well as waters meaningfully connected to or affecting the integrity of TNWs. Operationalizing this connection has become a flashpoint for the science and politics of water protection.



A proposed rule under consideration by the US federal government does not reflect the best-available science and, if enacted, will damage the nation's water resources. Image credit: Shutterstock/Martha Marks.

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The authors declare no conflict of interest.

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Any opinions, findings, conclusions, or recommendations expressed in this work are those of the authors and have not been endorsed by the National Academy of Sciences.

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Connectivity among waterbodies was the cornerstone of the Obama administration's Clean Water Rule (CWR), which reflected a state-of-the-science synthesis of more than 1,200 scientific publications [known as the "Connectivity Report" (5)], input from 49 experts, and a rigorous review by a 25-member panel of the EPA's Scientific Advisory Board (SAB) (6). Since then, scientific evidence supporting the 2015 CWR, and hence contradicting the new proposal, has only accumulated, especially as related intermittent (i.e., flow seasonally) and ephemeral (i.e., flow periodically, after precipitation events) streams, riparian and floodplain zones, and non-floodplain wetlands (i.e., geographically isolated with no direct surface water connection to a navigable water) (Fig. 1) (7–9).

The Trump administration's proposed rule largely ignores or misrepresents several conclusions of the Connectivity Report and SAB review. In relying more upon case law than science, the proposed rule would remove protection for millions of stream miles and acres of wetlands that keep waters and watersheds healthy. Some of our most vulnerable waters will lose protection, including ephemeral streams, non-floodplain wetlands, and some floodplain wetlands. The proposed rule is inconsistent with the best-available science regarding scale, structural and functional connectivity, and consideration of multiple dimensions of connectivity.

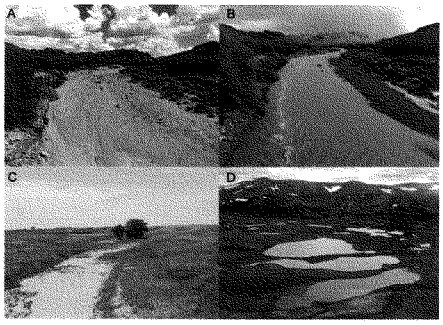


Fig. 1. The proposed WOTUS rule would remove protections for ephemeral streams, such as those seen here—dry and wet phases of a stream in Arizona (*A* and *B*), dry phase of a stream in Colorado (*C*)—as well as non-floodplain wetlands (*D*, in Alaska). Nonperennial streams comprise millions of stream miles, and non-floodplain wetlands encompass millions of acres in the United States. Image credits: *A* and *B*, Michael T. Bogan (University of Arizona, Tucson, AZ); *C*, Daniel C. Allen (University of Oklahoma, Norman, OK); and *D*, Mark Rains.

Delicate Balance

Clean water depends on complex and highly variable interactions among climate, geology, topography, land use–land cover, human perturbations, and ecosystem processes operating across multiple spatial and temporal scales. As such, the SAB cautioned that connectivity of any single waterbody must be evaluated from systems-level perspectives, such as watersheds and riverscapes, groundwater basins, and fluvial hydrosystems. Although the contribution of a single wetland or stream to water health may be small, the cumulative effects are striking. For example, ephemeral and intermittent streams constitute more than two-thirds of all streams in the conterminous United States (10), more than half of which feed public water systems supporting about a third of Americans (11). The proposed rule fails to consider watersheds from such a broad perspective, instead excluding the ephemeral streams and non-floodplain wetlands that maintain watershed integrity.

The proposed rule further deviates from science by improperly recognizing structural connectivity (i.e., how waterbodies are physically connected to one another) and functional connectivity (i.e., interactions among elements, such as the movement of sediments along river networks). Both mediate the movement of mass, energy, and biota among waterbodies (6, 10). Although streams are structurally connected to downstream waters through networks of continuous beds and banks, the proposed rule ignores the typical physical evidence (e.g., use of bed, banks, and an ordinary high-water mark) and suggests potentially using blue-line streams on U.S. Geological Survey topographic or National Hydrology Dataset maps as a way to indicate a jurisdictional stream. Although the agencies indicate that combining this information with other measures (for example, with fieldwork and the relative size of a stream, also known as "stream order") will be important to avoid overestimating flow and erroneously concluding the presence of a jurisdictional tributary, they fail to recognize the opposite problem. In fact, the poor resolution of currently mapped drainage networks can miss one-third of stream lengths relative to higher-resolution data (e.g., Light Detection and Ranging [LIDAR]) and thus lead to a gross underestimation of presence of streams.

To the extent that the proposed rule improperly quantifies structural connectivity, it ignores functional connectivity entirely. Functional connectivity varies widely over time, partly as related to floodplain and river size and the propensity for overbank flooding. Indeed, the functional connectivity of a water to downstream waters may persist even without direct hydrologic surface connection "in a typical year," a criterion used by the proposed rule to establish jurisdiction of wetlands. Consistent with new science, the SAB recommended that functional gradients of connectivity are not binary in nature and, rather, should be viewed as a gradient of frequency, duration, magnitude, and predictability of connections (6). Yet the proposed rule uses that binary lens to eliminate protection from all ephemeral streams and non-floodplain wetlands, irrespective of connectivity and the consequences for downstream waters.

The near-exclusive emphasis of the proposed rule on hydrologic connectivity contradicts the CWA's mandate to protect chemical and biological connectivity as well.

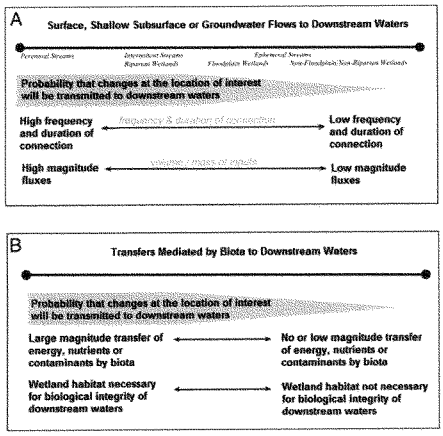


Fig. 2. The agencies improperly used the above figure from the SAB review to support removing federal protection for ephemeral streams and non-floodplain wetlands. The conceptual figure is meant to convey that connectivity between streams and wetlands and downstream waters is more appropriately represented by a connectivity gradient (*A* and *B*); this is not a binary property. Aggregate effects and low levels of connectivity can be important. Reprinted from ref. 6.

Multiple lines of evidence point to the importance of chemical and biological connectivity. For instance, non-floodplain wetlands can be important chemical sources (e.g., nutrients, dissolved organic compounds, salts) and sinks (via a suite of physicochemical processes including denitrification, sedimentation, long-term storage in plant detritus, and ammonia volatilization) to downstream waters (8). Likewise, animals transport nutrients, energy, and other organisms between disparate locations at both local and landscape scales. Through these movements, biota also prevent inbreeding, escape stressors, locate mates, find food resources, and recolonize habitats, thus contributing to biodiversity and exchanging nutrients and carbon among waterbodies and serving as critical agents of connectivity and resiliency among streams, wetlands, and downstream waters (7).

The proposed rule also misinterprets and contradicts previous recommendations from the EPA's own scientists and SAB. The rule is not only inconsistent with the science of the Connectivity Report and the SAB review, but its exclusions are justified with information from the SAB review that has been misinterpreted or taken out of context. For instance, the proposed rule justifies the removal of federal protection for ephemeral streams and non-floodplain wetlands by improperly referencing a conceptual model developed by the SAB. The model in question illustrates how connectivity gradients can facilitate the evaluation of the downstream impacts of changes to streams and wetlands (Fig. 2). Although the connectivity gradient does suggest that certain ephemeral streams and non-floodplain wetlands may be comparably less connected to downstream waters than perennial streams and floodplain wetlands, the SAB affirmed that even low levels of connectivity can be important relative to impacts on the chemical, physical, and biological integrity of downstream waters.

Indeed, the relative lack of connectivity between some wetlands and downstream waters is inversely related to their contribution to water quality (12). For instance, when non-floodplain wetlands capture water, materials, and nutrients from stormwater or agricultural runoff, pollution to downstream waters is prevented or reduced. Scientific advances since the development of this figure bolster the notion of a connectivity gradient, indicating that having no connectivity is unlikely, and that even habitat in non-floodplain wetlands is important for downstream waters.

Another shortcoming of the proposed rule is its departure from a critical recommendation from the SAB, which was that connectivity gradients must be contextualized within broader watershed processes, including the aggregate, collective effects of waterbodies. The cumulative effects of waterbodies are a particularly important consideration for non-floodplain wetlands, where the relative distance (compared with floodplain wetlands, for example) from a jurisdictional water may be greater and, thus, the impacts to downstream waters relatively lower. However, the cumulative effects of aggregated wetlands can strongly influence fluxes or transport of water, materials, and biota to downstream waters (8). Because of variability in the degree of connectivity between non-floodplain wetlands and downstream waters, the SAB recommended a case-by-case analysis to determine the degree of connection, which was adopted by the current CWR.

In addition to improperly using the science to justify summarily removing protections for all non-floodplain wetlands, the agencies go one step further by claiming that removing case-by-case evaluations of non-floodplain wetlands will help improve the clarity of the rule and ease of implementation. However, they propose case-by-case judgments in multiple other instances. For instance, the agencies suggest using a combination of methods to distinguish perennial and intermittent from ephemeral flows as defined by the proposed rule, including field visits and remote and field-based tools. Similarly, under the proposed rule, ditches that may have been constructed in a tributary would have to be evaluated on a case-by-case basis. Thus, the proposed rule selectively applies case-by-case consideration to waterbodies, for which such examination is likely to result in exclusion from CWA protections, and removes such consideration from waterbodies (i.e., non-floodplain wetlands) where a case-by-case examination may be more likely to afford protection.

Dire Implications

If enacted, the proposed rule will erode protections for millions of miles of ephemeral and headwater streams (10, 13) and more than 16 million acres of wetlands in the conterminous United States, including many playa lakes, prairie potholes, Carolina and Delmarva Bays, pocosins, and vernal pools (14). As such, the rule increases the vulnerability of already sensitive waters that provide critical ecosystem services, such as protecting water quality, recharging aquifers, transporting organic material, safeguarding habitats for endangered species, and supporting recreational and commercial endeavors. Severe losses of wetland functions are likely under the proposed rule, with impacts to wetlands in arid and semi-arid regions particularly high. For instance, the Cimarron River Watershed in northeastern New Mexico is projected to lose between 18 and 69% of wetland acres under the proposed rule (15).

Particularly worrisome is that the proposed rule is likely to facilitate the removal of waters from protection in the future, given anticipated trends in human activities and climate change. In some areas of the country, perennial streams are shifting to intermittent and ephemeral streams, presumably as a result of groundwater pumping accentuated by a changing climate (16). Under the proposed rule, these newly ephemeral streams will lose protection, setting a dangerous precedent by opening the door for further losses of protection.

Every nation's citizens need clean water to be healthy and productive—today and into the future. When carefully considered and integrated, science provides an evidence-based strategy to ensure clean water—as with the Obama administration's CWR. However, the current administration's proposed rule at once contradicts both the rich body of science about water connectivity and the clearly articulated mandate of CWA. Furthermore, it lacks the alleged clarity touted by the agencies. The apparent opposition to enacting science-based policies undermines decades of efforts—and investments by tax-paying Americans—to clean and protect our nation's waters.

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