STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF THE BIDEN ADMINISTRATION'S WATERS OF THE UNITED STATES (WOTUS) RULE

(118–3)

HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

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FEBRUARY 3, 2023

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Subcommittee Hearing on "*Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule*"

I. PURPOSE

The Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure will meet on Wednesday, February 8, 2023, at 10:00 a.m. ET in Room 2167 of the Rayburn House Office Building to receive testimony on "*Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule*." At the hearing Members will receive testimony from representatives from Earth & Water Law LLC, the Missouri Farm Bureau, National Stone, Sand & Gravel Association, National Association of Home Builders, and the UC College of the Law, San Francisco. The hearing will examine the rule from the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps) redefining of the term "waters of the United States," under the Clean Water Act, and the regulatory impact the rule may have on interested stakeholders.

II. BACKGROUND

"WATERS OF THE UNITED STATES" IN THE CLEAN WATER ACT

Congress enacted the 1972 amendments to the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] The CWA protects "navigable waters," which is defined in the CWA as the "waters of the United States, including the territorial seas."[2]

However, the CWA does not further define the term "waters of the United States" (WOTUS), leaving it up to EPA and the Corps to define which waters are subject to Federal regulation under the CWA. Since the CWA grants authority to EPA and the Corps to implement the Act, EPA and the Corps have promulgated several sets of rules interpreting the agencies' jurisdiction over WOTUS and the corresponding scope of CWA authority.

The definition of WOTUS governs the application of CWA programs—including tribal and state water quality certification programs, pollutant discharge permits, and oil spill prevention and planning programs. For example, Section 303, which requires states to develop water quality standards for their waters such as Total Max-

[1] CWA, Pub. L. 92–500, 86 Stat. 816.
[2] *Id*. at §502(7).

imum Daily Load (TMDL), Section 311, which prohibits the discharge and mandates reporting of oil and other hazardous substances into WOTUS, and Section 401, which outlines state approval for Federal permits that would affect a WOTUS, are all dependent on the definition of WOTUS.[3]

In addition, the CWA prohibits the discharge of any pollutant by any person, unless in compliance with one of the enumerated permitting provisions in the Act. The two permitting authorities in the CWA are Section 402 (the National Pollutant Discharge Elimination System, or "NPDES") for discharges of pollutants from point sources, and Section 404, for discharges of dredged or fill material.[4] Both Sections 402 and 404 govern discharges into "navigable waters," and thus are directly dependent on the definition of WOTUS.

SUPREME COURT CASES

There has been a substantial amount of litigation in the Federal courts on the scope of CWA jurisdiction over the years, including multiple United States Supreme Court cases.

In 1985, the Supreme Court took up *United States v. Riverside Bayview Homes, Inc.* (*Riverside Bayview*).[5] The Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters and held that such wetlands were "waters of the United States" under the CWA.[6] Following *Riverside Bayview*, EPA and the Corps promulgated regulations in 1986 and 1988, which remained in effect for much of the past several decades.[7]

In 2001, the Court ruled in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"), evaluating whether CWA jurisdiction included an abandoned sand and gravel pit which had become a habitat for migratory birds.[8] A 5–4 decision rejected the Corps' claim that CWA jurisdiction extended over isolated waters purely based on their usage by migratory birds, but did not affect the agencies' underlying regulations defining WOTUS.[9]

In 2006, the Court issued a 4–1–4 opinion in *Rapanos v. United States* (*Rapanos*) that did not produce a clear, legal standard on determining jurisdiction under the CWA.[10] The *Rapanos* decision produced three distinct opinions on the appropriate scope of Federal authorities under the CWA. Justice Scalia's plurality opinion provided a "relatively permanent/flowing waters" test with "continuous surface connection."[11] Writing alone, Justice Kennedy proposed a "significant nexus" test for WOTUS, concluding that a case-by-case basis for determining navigable waters was appropriate.[12] Justice Stevens' dissenting opinion advocated for maintenance of existing EPA and Corps authority over waters and wetlands.[13]

Following the *SWANCC* and *Rapanos* decisions, EPA and the Corps issued several guidance documents interpreting how the agencies would implement the Supreme Court decisions. Under 2008 guidance, CWA jurisdiction over navigable waters would be asserted if such waters meet either the Scalia ("relatively permanent water") or Kennedy ("significant nexus") tests.[14]

In January 2022, the Supreme Court announced it would hear arguments in a case that could also affect the definition of WOTUS: *Sackett v. EPA* (*Sackett*).[15] The *Sackett* case raises the question of whether certain wetlands are WOTUS, and thus subject to CWA jurisdiction, and could be resolved with a narrow ruling based solely

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[3] *Id.* at §§ 303, 311, 401.
[4] *Id.* at §§402(b) and 404.
[5] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).
[6] *See id.*
[7] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206 (November 13, 1986); Clean Water Act Section 404 Program Definitions and Permit Exemptions, Section 404 State Regulation Programs, 53 Fed. Reg. 20764 (June 6, 1988).
[8] Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
[9] *See generally* Stephen P. Mulligan, *Evolution of the meaning of "waters of the United States" in the Clean Water Act*, CONG. RESEARCH SERVICE (R44585), updated March 5, 2019 [Hereinafter CRS REPORT R44585] *available at* https://www.crs.gov/reports/pdf/R44585/R44585.pdf.
[10] Rapanos v. United States, 547 U.S. 715 (2006).
[11] *Id.* at 739 and 742.
[12] *Id.* at 782 (Kennedy, J., concurring).
[13] *See id.* at 788 (Stevens, J., dissenting).
[14] EPA & DEP'T OF THE ARMY, REVISED MEM. CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES AND CARABELL V. UNITED STATES* (Dec. 2, 2008) *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.
[15] Sackett v. EPA, *cert. granted*, (21–454) 142 S. Ct. 896 (Jan. 24, 2022).

on the facts of the case.[16] However, *Sackett* may also be an opportunity for the Supreme Court to rule broadly on what the proper test is for determining WOTUS.[17]

The petitioners in the *Sackett* case own a parcel of land in Idaho which sits across the street from an area of wetlands that drains into an unnamed tributary of a creek, which in turn flows into Priest Lake.[18] The Sacketts' efforts to build on their parcel of land, around thirty feet from the area of wetlands, has been the subject of a now decades-long dispute with EPA and the Corps regarding CWA jurisdiction and regulatory process.[19] The petitioners in the case have urged the Supreme Court to review the *Rapanos* case and adopt Justice Scalia's plurality opinion.[20]

The Supreme Court heard oral arguments in the *Sackett* case on October 3, 2022.[21] It is currently unclear when a decision in the case could be released. The implications of the *Sackett* decision on the current WOTUS definition and the CWA will likely depend on the scope of the Supreme Court's ruling.[22] For example, if the majority of the Court rules against the "significant nexus" test laid out by Justice Kennedy in *Rapanos*, it could require a significant alteration of the Biden Administration's most recent WOTUS definition.[23] Similarly, the Court could leave the Biden WOTUS definition in place and issue a narrow opinion based on the EPA's application of adjacency and the specific facts of the *Sackett* case.[24]

OBAMA-ERA WOTUS RULE

In 2015, the Obama Administration published in the Federal Register regulatory changes to the definition of WOTUS that allowed the Corps and EPA to utilize both the "relatively permanent waters" or "significant nexus" concepts.[25] This rule, known as the Clean Water Rule, redefined WOTUS in the agencies' regulations for the first time since the 1980s.

The 2015 Clean Water Rule maintained some aspects of the 2008 guidance, including the three-tiered jurisdictional analysis of waters being categorically jurisdictional, jurisdictional on a case-by-case basis subject to the "significant nexus" test, or categorically excluded from being a WOTUS.[26]

The Clean Water Rule also incorporated new features not found in the 2008 guidance, including definitions and criteria which established when waters fell into each of the three tiers, such as "adjacent," "neighboring," "floodplain," "tributary," "wetlands" and "significant nexus."[27] Some of these changes from the 2008 guidance expanded waters that could be classified as *categorically* WOTUS (rather than demonstrating CWA jurisdiction under a significant nexus analysis), and subject to CWA jurisdiction and regulation.[28]

While the Corps and EPA contended that their primary intent in the 2015 Clean Water Rule was simply to clarify regulatory jurisdiction, stakeholder reaction to the rule was mixed. Some viewed the rule as an expansion of CWA jurisdiction, while others argued that it excluded too many waters from Federal jurisdiction.[29] Following the Clean Water Rule's publishing, many states, industry stakeholders, and several environmental groups challenged the legality of the rule in courts across the

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[16] Ariel Wittenberg & Hannah Northey, *Can EPA's Clean Water Rule survive the courts*, E&E NEWS, Jan. 3, 2023, *available at* https://www.eenews.net/articles/can-epas-clean-water-act-rule-survive-the-courts [Hereinafter Wittenberg & Northey].

[17] *Id.*

[18] Kate R. Bowers, *Supreme Court revisits scope of "waters of the United States" (WOTUS) under the Clean Water Act*, CONG. RESEARCH SERVICE LEGAL SIDEBAR (LSB10707), March 11, 2022, *available at* https://www.crs.gov/reports/pdf/LSB10707/LSB10707.pdf.

[19] *Id.*

[20] Transcript of Oral Argument, Sackett v. EPA (21–454), *available at* https://www.supremecourt.gov/oral__arguments/argument__transcripts/2022/21-454__g31h.pdf.

[21] *Id.*

[22] *See* Wittenberg & Northey, *supra* note 16.

[23] *Id.*

[24] *Id.*

[25] Clean Water Rule: Definition of "waters of the United States;" Final Rule, 80 Fed. Reg. 37054 (June 29, 2015).

[26] *See id.*

[27] *Id.*

[28] Laura Gatz & Kate R. Bowers, *Redefining waters of the United States (WOTUS): Recent developments*, CONG. RESEARCH SERVICE (R46927), updated July 8, 2022 [Hereinafter CRS REPORT R46927], *available at* https://www.crs.gov/reports/pdf/R46927/R46927.pdf.

[29] *See e.g.*, Carolina Bolado, *Fla., others sue EPA, Corps, over Clean Water Act expansion*, LAW360 (June 30, 2015) *available at* https://www.law360.com/articles/674120/fla-others-sue-epa-corps-over-clean-water-act-expansion; Press Release, CENTER FOR BIOLOGICAL DIVERSITY, *EPA and Army Corps release weak Clean Water Rule* (May 27, 2015) *available at* https://www.biologicaldiversity.org/news/press__releases/2015/clean-water-rule__05-272015.html.

country, continuing the mire of litigation that plagued the definition of WOTUS over the last two decades.[30]

TRUMP-ERA WOTUS RULE

Following the 2015 Clean Water Rule taking effect, the Trump Administration, favoring a WOTUS definition more consistent with the Scalia opinion in *Rapanos*, took steps to amend and rescind the Obama-Era rule.[31] In 2017, President Trump signed Executive Order 13778, "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule," which directed EPA and the Corps to review the 2015 Clean Water Rule and consider proposing a new rule to rescind or revise that rule.[32]

EPA and the Corps responded to the Executive Order in two steps. First, the agencies rescinded the Clean Water Rule, and recodified the 2008 guidance (and its use of either *Rapanos*-based test for WOTUS) in effect prior to the 2015 Rule.[33] Second, in 2020, EPA and the Corps published in the Federal Register the Navigable Waters Protection Rule, which redefined WOTUS.[34]

Overall, the Navigable Waters Protection Rule narrowed the scope of waters and wetlands that were considered WOTUS and therefore fell under Federal jurisdiction compared to both the 2015 Clean Water Rule and the pre-2015 rules.[35] The Navigable Waters Protection Rule was structured to focus the WOTUS definition primarily on relatively permanent bodies of water that provide surface flow to navigable waters or the territorial seas in a typical year.[36] The 2020 Rule also moved away from the "significant nexus" test. The Trump-Era Rule maintained wetlands and adjacent waters as WOTUS but focused the definitions of "wetlands" and "adjacent waters" as compared to prior regulations.[37]

As with the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule was met with mixed reactions. While some praised the Navigable Waters Protection Rule as limiting government overreach and clarifying uncertainty of WOTUS under the CWA, others criticized the Rule for potential negative effects on water quality and resulting in regulatory inconsistency among state programs.[38] Again, the 2020 Rule was met with a myriad of legal challenges and litigation in the courts, similar to the 2015 Rule.[39]

III. WATERS OF THE UNITED STATES—BIDEN ADMINISTRATION RULE

Continuing the back-and-forth nature of WOTUS definitions under various Presidential Administrations, in 2021, the Biden Administration announced that it would be repealing the Trump Administration's Navigable Waters Protection Rule.[40] To begin with, shortly after taking office in January 2021, President Biden signed an Executive Order revoking President Trump's Executive Order directing EPA and the Corps to revise and rescind the Clean Water Rule.[41] In addition, EPA sent a letter to the U.S. Department of Justice (DOJ) in which EPA requested DOJ seek stays

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[30] CRS REPORT R46927, *supra* note 28.

[31] *See e.g.*, Press Release, EPA, *U.S. Army repeal 2015 Rule defining "waters of the United States" ending regulatory patchwork* (Sept. 12, 2019) *available at* https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork.

[32] Exec. Order No. 13778, (February 28, 2017), *available at* https://www.govinfo.gov/content/pkg/DCPD-201700147/pdf/DCPD-201700147.pdf.

[33] Definition of "waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

[34] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (April 21, 2020) [Hereinafter Navigable Waters Protection Rule].

[35] CRS REPORT R46927, *supra* note 28 at 7.

[36] *Supra* note 34 at 22273–22274.

[37] *Id*. at 22251, 22273.

[38] *See e.g*. Letter from Gregory Ugalde, Chairman of the Board, Nat'l Ass'n of Homebuilders, to EPA Administrator Andrew Wheeler (March 2020) *available at* https://www.nahb.org/-/media/NAHB/advocacy/docs/industry-issues/waters-of-the-us/wotus-analysis-2020.pdf; Press Release, WATERKEEPER ALLIANCE, *"Navigable Water Protection Rule" guarantees widespread pollution of our Nation's waters*, (Feb. 13, 2020), *available at* https://waterkeeper.org/news/navigable-water-protection-rule-guarantees-widespread-pollution-of-our-nations-waters.

[39] *See* CRS REPORT R44585, *supra* note 9.

[40] Press Release, WHITE HOUSE, *Fact Sheet: List of Agency Actions for Review*, (Jan. 20, 2021) *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review.

[41] Exec. Order No. 13990, (Jan. 20, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01765.pdf.

to legal challenges to the Navigable Waters Protection Rule, while EPA reviewed the Rule.[42]

In June of 2021, EPA and the Corps officially announced their intent to revise the WOTUS definition.[43] Following a rulemaking process intended to return the regulatory landscape to pre-2015 Clean Water Rule implementation and gauge stakeholder perspectives, the agencies issued a proposed Rule to change the definition of WOTUS in December 2021.[44]

On December 30, 2022, EPA and the Corps released their final "Revised Definition of the 'Waters of the United States'" Rule, which is scheduled to go into effect on March 20, 2023.[45] The 2022 WOTUS definition is based largely upon the pre-2015 regulations, while again authorizing CWA jurisdiction under either the "relatively permanent waters" or "significant nexus" test concepts.[46]

Once more, initial public feedback to the latest definition has been mixed. Some stakeholders have lauded it for returning to a WOTUS definition viewed as more consistent with Congressional intent, as outlined in the goals of the CWA.[47] However, others have been critical of the definition for possibly adding uncertainty to CWA regulatory processes and for Federal overreach beyond Congressional intent.[48]

IV. WITNESSES

- Mr. Garrett Hawkins, President, Missouri Farm Bureau
- Ms. Alicia Huey, Chairman, National Association of Home Builders
- Mr. Mark Williams, Environmental Manager, Luck Companies, on behalf of National Stone, Sand & Gravel Association
- Ms. Susan Parker Bodine, Partner, Earth & Water Law LLC
- Mr. Dave Owen, Professor of Law and Faculty Director of Scholarly Publications, UC College of the Law, San Francisco

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[42] Letter from Melissa Hoffer, Acting General Counsel, EPA, to Jean E. Williams & Bruce S. Gelber, Environmental and Natural Resources Division, DOJ, (Jan. 21, 2021).

[43] Press Release, EPA, *EPA, Army announce intent to revise definition of WOTUS*, (June 9, 2021) *available at* https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

[44] Revised definition of "waters of the United States" Proposed Rule, 86 Fed. Reg. 69372 (Dec. 7, 2021).

[45] Revised definition of "waters of the United States" Final Rule, 88 Fed Reg. 3004 (Jan. 18, 2023).

[46] *Id.*

[47] *See* Press Release, EARTHJUSTICE, *EPA Finalizes Rule Protecting 'Waters of the United States'*, (Dec. 30, 2022) *available at* https://earthjustice.org/news/press/2022/epa-finalizes-rule-for-protecting-waters-of-the-united-states.

[48] *See* Press Release, AMERICAN FARM BUREAU FEDERATION, *EPA wrong about New WOTUS Rule*, (Jan. 4, 2023) *available at* https://www.fb.org/viewpoints/epa-wrong-about-new-wotus-rule.

STAKEHOLDER PERSPECTIVES ON THE IMPACTS OF THE BIDEN ADMINISTRATION'S WATERS OF THE UNITED STATES (WOTUS) RULE

WEDNESDAY, FEBRUARY 8, 2023

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:01 a.m., in room 2167 Rayburn House Office Building, Hon. David Rouzer (Chairman of the subcommittee) presiding.

Members present: Mr. Rouzer, Mr. Graves of Missouri, Mr. Webster of Florida, Mr. Massie, Dr. Babin, Mr. Bost, Mr. LaMalfa, Mrs. González-Colón, Mr. Owens, Mr. Burlison, Mr. James, Mr. Van Orden, Mr. Williams of New York, Mr. Collins, Mr. Ezell, Mr. Duarte, Mrs. Napolitano, Mr. Larsen of Washington, Mr. Garamendi, Mrs. Sykes, Mr. Huffman, Mr. Ryan, Ms. Hoyle of Oregon, Ms. Scholten, Ms. Brownley, Mr. DeSaulnier, Mr. Stanton, Mr. Carter of Louisiana, and Ms. Norton.

Mr. ROUZER. The Subcommittee on Water Resources and Environment will come to order.

I ask unanimous consent that the chairman be authorized to declare a recess at any time during today's hearing.

Without objection, so ordered.

I also ask unanimous consent that Members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and ask questions.

Without objection, so ordered.

I now recognize myself for the purposes of an opening statement for 5 minutes.

OPENING STATEMENT OF HON. DAVID ROUZER OF NORTH CAROLINA, CHAIRMAN, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

Mr. ROUZER. For more than a half century, the Clean Water Act has functioned to improve the quality of our Nation's rivers, lakes, and streams, and we should be proud of what we have done and acknowledge its success in protecting waters all around the country.

However, sweeping legislation like the Clean Water Act, while certainly beneficial, can lead to bureaucratic overreach and regu-

latory headaches that often don't make sense to regulated communities.

Regulations of any type should be simple and easy to follow. They should carry out the intent of the law in a clear and transparent manner, making them easily enforced just by their mere simplicity. There should be no subjectivity or wiggle room for any bureaucrat or bureaucrats to substitute their own biases.

Unfortunately, that is not the case here. As I have said before, there is no greater example of bureaucratic overreach under the Clean Water Act than the regulatory nightmare of complying with and understanding the definition of a "water of the United States," or WOTUS, as we call it.

For the purposes of what the Clean Water Act covers, this definition is obviously essential and crucial. It is used for determining a number of applications under the law, including State and Tribal water quality certification programs, pollutant discharge permits, and oilspill prevention and planning programs.

Importantly, this definition is used for determining who must obtain a Clean Water Act section 404 "dredge and fill" permit, which is well known for being a costly and time-consuming process, and at times simply is used as a roadblock to stop projects that some don't like, never mind the merits.

I think we will hear a lot about these permits today, as they can require mitigation, getting into hundreds of thousands of dollars for everyday activities people undertake to improve their own private property. If they take an action modifying a water and later find the area in question indeed was a WOTUS, they can face staggering fines and even jail time.

The WOTUS question has been debated for decades in court, and varying Presidential administrations have issued regulatory definitions of WOTUS that are quite expansive and subjective, which was most definitely the case with the 2015 Obama EPA WOTUS rule.

So, I was heartened in 2020 when the Trump administration released the Navigable Waters Protection Rule, which finally brought some clarity and predictability to the nagging question of what a WOTUS should be. The Trump rule balanced State jurisdiction with Federal responsibilities I thought quite well.

As such, I was concerned when the Biden administration released its final version of a new WOTUS definition, notably, on the Friday before New Year's Eve, in the thick of the hustle and bustle of the holidays. Imagine that.

This new definition once again places unnecessary burdens on the communities, farmers, businesses, and industries who rely on clean water and clarity of the law.

For example, in areas like North Carolina's Seventh Congressional District, which I represent, storms can be frequent. Water often lingers in areas that shouldn't be classified as wetlands. This inconsistency of the law's interpretation and the ever-changing status of the weather promises years of headaches and legal wrangling for North Carolinians and Americans across the board.

Early last year, the Supreme Court announced it would hear a case on the definition of WOTUS, which highlights the enormous impacts these rulemakings have on citizens across the country. In

addition to the content of the Biden administration's WOTUS rule itself, I am particularly disappointed they forced it on the public before the Supreme Court's forthcoming decision.

This action irresponsibly risks taxpayer resources and everyone's time, as the Supreme Court could very well send the administration back to the drawing board on a WOTUS definition, ultimately creating even more confusion and uncertainty. It would be common sense to pause and wait to see what the Supreme Court decides before jamming this through now.

It is for this reason, along with those I mentioned previously, that Chairman Graves and I are leading, along with more than 150 of my Republican colleagues, a Congressional Review Act resolution that would void this ill-advised rulemaking. We should not have to take this step, as the Biden administration did not have to take this action. However, this is the situation we find ourselves in, and I am confident the House will pass the resolution.

I am looking forward to hearing from our panel today about how this administration's actions will impact various sectors of the economy and our constituents.

[Mr. Rouzer's prepared statement follows:]

Prepared Statement of Hon. David Rouzer, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Water Resources and Environment

For more than half a century, the Clean Water Act has functioned to improve the quality of our Nation's rivers, lakes, and streams. We should be proud of what we have done and acknowledge its success in protecting waters all around the country.

However, sweeping legislation like the Clean Water Act—while certainly beneficial—can lead to bureaucratic overreach and regulatory headaches that often don't make sense to regulated communities. Regulations of any type should be simple and easy to follow. They should carry out the intent of the law in a clear and transparent manner, making them easily enforced by their mere simplicity. There should be no subjectivity or wiggle room for any bureaucrat or bureaucrats to substitute their own biases.

That's not the case here, unfortunately. As I've said before, there's no greater example of bureaucratic overreach under the Clean Water Act than with the regulatory nightmare of complying with and understanding the definition of a "water of the United States." For the purposes of what the Clean Water Act covers, this definition is crucial. It is used for determining a number of applications under the law, including state and tribal water quality certification programs, pollutant discharge permits, and oil spill prevention and planning programs.

Importantly, this definition is used for determining who must obtain a Clean Water Act Section 404 "dredge and fill" permit, which is well-known for being a costly and time-consuming process, and at times simply used as a roadblock to stop projects that some don't like—never mind the merits. I think we'll hear a lot about these permits today, as they can require mitigation—getting into hundreds of thousands of dollars for everyday activities people undertake to improve their own private property. If they take an action modifying a water, and later find the area in question indeed was a WOTUS, they can face staggering fines and even jail time.

The WOTUS question has been debated for decades in court, and varying presidential administrations have issued regulatory definitions of WOTUS that are quite expansive—and subjective—which was most definitely the case with the 2015 Obama EPA WOTUS Rule.

I was heartened back in 2020, when the Trump Administration released the Navigable Waters Protection Rule, which finally brought clarity and predictability to the nagging question of what a WOTUS should be. The Trump rule balanced state jurisdiction with federal responsibilities. As such, I was quite concerned when the Biden Administration released its final version of a new WOTUS definition, notably, on the Friday before New Year's Eve, in the thick of the hustle and bustle of the holidays. This new definition, once again, places unnecessary burdens on the commu-

nities, farmers, businesses, and industries who rely on clean water and clarity of the law.

For example, in areas like North Carolina's Seventh District, where storms can be frequent, water often lingers in areas that shouldn't be classified as wetlands. This inconsistency of the law's interpretation and the ever-changing status of the weather promises years of headaches and legal wrangling for North Carolinians and Americans.

Early last year, the Supreme Court announced it would hear a case on the definition of WOTUS, which highlights the enormous impacts these rulemakings have on citizens across the country. In addition to the content of the Biden Administration's WOTUS rule itself, I am particularly disappointed they forced it on the public before the Supreme Court's forthcoming decision. This decision irresponsibly risks taxpayer resources and everyone's time, as the Supreme Court could very well send the administration back to the drawing board on a WOTUS definition—ultimately creating even more confusion and uncertainty. It would be common sense to pause and wait to see what the Supreme Court decides before jamming this through now.

It is for this reason, along with those I mentioned previously, that Chairman Graves and I are leading, along with more than 150 of my Republican colleagues, a Congressional Review Act resolution that would void this ill-advised rulemaking. We should not have to take this step, as the Biden Administration did not have to take this action. However, this is the situation we find ourselves in, and I am confident the House will pass the resolution.

I'm looking forward to hearing from our panel today about how the Biden Administration's actions will impact various sectors of the economy and our constituents.

Mr. ROUZER. I now recognize my dear friend, Ranking Member Napolitano, for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. GRACE F. NAPOLITANO OF CALIFORNIA, RANKING MEMBER, SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

Mrs. NAPOLITANO. Thank you, my friend, Mr. Chairman, and congratulations on your new role leading the Subcommittee on Water Resources and Environment. I am excited to continue working with you to provide flood control, water quality protection, environmental restoration, and navigation for all our local communities across the country.

This subcommittee was extremely successful last Congress in addressing the bipartisan needs of the Nation. From enactment of our fifth consecutive and bipartisan WRDA bill—thank you—to the first reauthorization of the Clean Water SRF since its inception, to addressing the individual needs of unique watersheds throughout the country on a bipartisan basis, this subcommittee addressed our critical water infrastructure needs while also protecting our environment for future generations. We look forward to a sixth bipartisan WRDA bill this Congress.

Clean water was not always a partisan issue. In 1972, the House voted to enact the Clean Water Act over the veto of former President Nixon by a 10-to-1 margin, and no issue has more support among American families than the protection of our Nation's waters.

The history of water pollution protection in this country, the law, and science require a comprehensive approach to protecting our rivers, streams, and wetlands. Yet, former President Trump's "dirty water rule" will return us to those days when the Great Lakes were declared dead and some rivers literally caught fire.

There should be a strong partnership between the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and our States, for each entity plays a responsible role in ensuring a

level playing field of clean water amongst upstream and downstream States. Yet, our limited experience under the "dirty water rule" showed the exact opposite.

To demonstrate, I ask unanimous consent that a summary of State legal constraints on protecting waters not covered by the Clean Water Act prepared by the Environmental Law Institute be made part of today's hearing record.

Mr. ROUZER. Without objection.

[The information follows:]

Comment, "State Protection of Nonfederal Waters: Turbidity Continues," James McElfish, Environmental Law Reporter, September 2022, Submitted for the Record by Hon. Grace F. Napolitano

The 14-page comment is retained in committee files and is available online at https://www.eli.org/sites/default/files/files-pdf/52.10679.pdf.

Mrs. NAPOLITANO. Thank you, sir.

Mr. Chairman, the Clean Water Act ensures our cities, our businesses, and our farmers have sufficient, safe, and sustainable supplies of water to meet quality-of-life needs, our economic and agriculture needs, and our day-to-day survival, especially in arid regions of the country such as the ones that I represent in southern California.

The Trump "dirty water rule" eliminated Federal protections on a minimum of 75 percent of streams and wetlands that have been protected by the act since its inception. These are the very same waters and wetlands that are critical to capturing and storing rain and snowmelt to ensure a long-term water supply and recharge our underground aquifers.

The "dirty water rule" removed protections for streams and wetlands that are a source of drinking water to over 117 million Americans.

We recognize there is a cost to protecting our communities, our sources of drinking water, and our environment. However, we believe this cost should be borne by those seeking to pollute our waterways or to fill our wetlands for their own personal gain rather than transferring that cost to average Americans or to downstream States.

The Trump "dirty water rule" would have led to higher water bills for American families and businesses as water agencies will be forced to clean the polluted water prior to it being delivered to our taps.

The "dirty water rule" would have increased the level of pollution in our water bodies, increased the downstream risk of flooding in our communities, polluted sources of our drinking water, and make hard-working American families pay for the mess with increased water rates.

We all want certainty. For decades, the regulations established by former President Reagan and implemented by every Republican and Democratic administration since then established a framework to achieve that certainty. But we believe we can have certainty as well as clean water. We don't have to choose between them.

The Trump "dirty water rule" chose one definition of certainty—the elimination of Federal protection of our rivers, streams, and wetlands—over the goals of the Clean Water Act, which seeks rightly to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Now, supporters of the Trump "dirty water rule" are urging the Supreme Court to create even more uncertainty through a test that could result in increased litigation and decreased protection of our water bodies.

I applaud the Biden administration for overturning the Trump "dirty water rule" and reinstating decades-old and well-understood protections of our Nation's rivers, streams, and wetlands. The Biden administration recognizes that families and businesses should not be burdened with paying to clean up the water pollution of others in order to have clean water at their tap.

We must protect and strengthen the Clean Water Act to preserve the health of our economy as well as our communities, our environment, and our water-dependent futures.

Again, Mr. Chairman, congratulations on your new role as chairman of the Subcommittee on Water Resources and Environment, and I look forward to working with you.

I yield back the balance of my time.

[Mrs. Napolitano's prepared statement follows:]

Prepared Statement of Hon. Grace F. Napolitano, a Representative in Congress from the State of California, and Ranking Member, Subcommittee on Water Resources and Environment

Thank you, Mr. Chairman, and congratulations on your new role leading the Subcommittee on Water Resources and Environment. I am excited to continue to work with you to provide flood control, water quality protection, environmental restoration, and navigation for our local communities across the country.

This subcommittee was extremely successful last Congress in addressing the bipartisan needs of the nation. From enactment of our fifth-consecutive and bipartisan WRDA bill, to the first reauthorization of the Clean Water SRF since its inception, to addressing the individual needs of unique watersheds throughout the county on a bipartisan basis, this subcommittee addressed our critical water infrastructure needs while also protecting our environment for future generations. We look forward to a sixth bipartisan WRDA bill this Congress.

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In 1972, the House voted to enact the Clean Water Act over the veto of former President Nixon by a 10-to-1 margin, and no issue has more support among American families than the protection of our nation's waters.

The history of water pollution protection in this country, the law, and science require a comprehensive approach to protecting our rivers, streams, and wetlands. Yet, former-President Trump's Dirty Water Rule will return us to the days when the Great Lakes were declared "dead," and when some rivers literally caught fire.

There should be a strong partnership between the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and our States, where each entity plays a responsible role in ensuring a level-playing field of clean water among upstream and downstream states. Yet, our limited experience under the Dirty Water Rule showed the exact opposite.

To demonstrate, I ask unanimous consent that a summary of state legal constraints on protecting waters not covered by the Clean Water Act prepared by the Environmental Law Institute be made part of today's hearing record.

Mr. Chairman, the Clean Water Act ensures our cities, our businesses, and our farmers, have sufficient, safe, and sustainable supplies of water, to meet our quality-of-life needs, our economic and agricultural needs, and our day-to-day survival, especially in the arid regions of the country, such as I represent in southern California.

The Trump Dirty Water Rule eliminated federal protections on a minimum of 75 percent of streams and wetlands that have been protected by the Act since its inception. These are the very same waters and wetlands that are critical to capturing and storing rain and snowmelt to ensure a long-term supply of water and recharge our underground aquifers. The Dirty Water Rule removed protections of the streams and wetlands that are a source of the drinking water to over 117 million Americans.

We recognize that there is a cost to protecting our communities, our sources of drinking water, and our environment. However, we believe that this cost should be borne by those seeking to pollute our waterways or fill our wetlands for their own personal gain rather than transferring that cost to average Americans, or to downstream states. The Trump Dirty Water Rule would have led to higher water bills for American families and businesses, as water agencies will be forced to clean the polluted water, prior to it being delivered to our taps.

The Dirty Water Rule would have increased the level of pollution in our waterbodies, increased the downstream risk of flooding in our communities, polluted sources of our drinking water, and made hard working American families pay for the mess with increased water rates.

We all want certainty—and for decades, the regulations established by former President Reagan, and implemented by every Republican and Democratic administration since then, established a framework to achieve that certainty—but we believe we can have certainty, as well as clean water—and we don't have to choose between them.

The Trump Dirty Water Rule chose one definition of certainty—the elimination of federal protection of our rivers, streams, and wetlands—over the goals of the Clean Water Act, which seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Now, supporters of the Trump Dirty Water Rule are urging the Supreme Court to create even more uncertainty through a new test that could result in increased litigation and decreased protection of our waterbodies.

I applaud the Biden administration for overturning the Trump Dirty Water Rule and reinstating decades-old and well-understood protections of our nation's rivers, streams, and wetlands. The Biden Administration recognizes that families and businesses should not be burdened with paying to clean up the pollution of others in order to have clean water at their tap. We must protect and strengthen the Clean Water Act to preserve the health of our economy as well as our communities, our environment, and our water-dependent futures.

Again Mr. Chairman, congratulations on your new role as Chairman of the Subcommittee on Water Resources and Environment. I yield back the balance of my time.

Mr. ROUZER. I thank the dear lady.

I now recognize the chairman of the full committee, Mr. Graves, for up to 5 minutes for an opening statement.

Mr. GRAVES OF MISSOURI. Thank you, Mr. Chairman. I am not going to take up much time. By the way, happy birthday.

Mr. ROUZER. Thank you. It is actually my brother's birthday today. Mine will come next week. But we are celebrating early.

OPENING STATEMENT OF HON. SAM GRAVES OF MISSOURI, CHAIRMAN, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Mr. GRAVES OF MISSOURI. I am not going to take up much time.

I believe that the Obama administration, and then following up with the Biden administration, this is a massive overreach of regulatory abuse when it comes to the waters of the U.S.

But the thing that sticks in my craw more than anything else is when people come up to me and tell me that—and I am specifically speaking to agriculture, but this has created so much uncertainty with communities, businesses, agriculture, farmers, you name it—but I get frustrated when people come up to me and tell me: Why are you so worried about this? It exempts farmers. It exempts agriculture.

And have I one simple question: If that is the case, then why are so many of my farmers embroiled in litigation over the WOTUS definitions? Person after person in my district calls to say: What do I do? I am being sued over this or I am being sued over that. I can't build a pond, I can't build any of my retainment structures, whatever the case may be, and it is extraordinarily frustrating.

So, when people tell you that this group or that group is exempt from WOTUS, it is simply not the case.

And with that, I yield back.

Mr. ROUZER. I now recognize the ranking member of the full committee, Mr. Larsen, for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. RICK LARSEN OF WASHINGTON, RANKING MEMBER, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Mr. LARSEN OF WASHINGTON. Thank you, Mr. Chair.

If the WOTUS rule was a Member of Congress, I think its seniority number would be about 75. I have been at this issue since 2005, I think was the first hearing I attended in this committee on the WOTUS rule. So, it has been a while. Hopefully, we can get to an end at some point.

But my State itself is defined by its clean water, including the health of the Puget Sound, the hundreds of lakes that we have, thousands of miles of rivers and streams throughout the State.

People in my State know that rivers, streams, and wetlands are intrinsically connected, and the health of our waters and our water-related economy depend on a strong partnership with the Federal Government and a level playing field among its upstream and downstream neighbors, including Tribal lands.

The need for a level playing field was the reason why, 50 years ago, this committee passed the original Clean Water Act. In the 1970s, Congress specifically noted in the legislative history of the act that a State-by-State, go-it-alone approach was, quote "inadequate in every vital aspect," end quote, and left waters severely polluted.

Recently, my State joined several others in highlighting to the Supreme Court Congress' deliberate decision in 1972 to replace an ineffective patchwork of State laws with the Clean Water Act. In doing so, Congress sought to protect the interests of downstream States that might otherwise suffer the environmental consequences and economic burdens of weak or nonexistent pollution control upstream.

That was our shared bipartisan view of clean water for decades—a strong Federal-State partnership to protect our waters, where the Corps and the EPA set a robust Federal floor of protections, and States could choose to do more but not less.

It was that view, embodied in the Reagan-era regulations, that for the most part, have been adopted by every Presidential administration since. It is also the view embodied in the Biden proposal that seeks to clarify Clean Water Act regulations after a Federal district court tossed out the Trump administration rules.

In 2006, the Supreme Court, though, complicated the Clean Water Act by issuing a decision that instituted the use of a test for determining what waters remain protected by the act, but the

Court did not agree on a single test. That is where I started following the WOTUS issue in several marathon hearings before this committee and subcommittee—discussing many of the same issues we are discussing today.

Since the *Rapanos* decision, every Presidential administration has adopted the two tests outlined by the Supreme Court—the "relatively permanent" test and the "significant nexus" test—for determining Clean Water Act protections.

The Trump administration's second rulemaking attempt abandoned the "significant nexus" test. The result was an unfathomable loss of Federal protections in place since 1972 and no evidence that States have the desire or resources to fill in those gaps.

The Trump rule defied clean water history, defied the law, and defied science on how watersheds function, and, fortunately, this rule was rejected by a Federal court only 14 months after it took effect, reinstating the Reagan-era regulations and continued use of both those tests.

The Biden rule recodifies the Reagan-era framework and the use of both jurisdictional tests, but also includes significant improvements and exemptions requested by stakeholders to address legitimate concerns over uncertainty and to ease compliance.

The rule seeks to balance the need to protect waters and wetlands consistent with the goals of the Clean Water Act, while trying to comply with the law, the science, and various opinions of the Supreme Court.

The Biden rule is not perfect, but in my opinion, it is a far better place to start for certainty, for legality, and protecting the quality of our Nation's waters.

Unfortunately, the recently introduced Congressional Review Act resolution to block the proposal is likely to create more uncertainty. Should this resolution become law, it has the potential to cause even more chaos and confusion.

For example, if the resolution is adopted, it is unlikely to prevent the continued use of the "significant nexus" test, as this test is already being utilized today. However, passage of the resolution would eliminate those stakeholder-led clarifications in the Biden rule and prevent future administrations from further improving the rule unless Congress decides to intervene.

Further, enactment of this resolution could block agencies from helping stakeholders comply with any new jurisdictional tests that might be announced by this Supreme Court. If that were the case, stakeholders could be left with an invalidated rulemaking and a framework for a new, judicially led test, but no guidance on how to apply that test in the field.

In my view, that is the exact opposite of certainty and a big mistake. I support this administration's efforts to protect water quality and provide stakeholders with some additional clarity on how to comply with the Clean Water Act.

So, I want to thank you for the chance to give an opening statement.

I thank the witnesses for joining us today and look forward to your testimony.

Thank you.

[Mr. Larsen of Washington's prepared statement follows:]

Prepared Statement of Hon. Rick Larsen, a Representative in Congress from the State of Washington, and Ranking Member, Committee on Transportation and Infrastructure

My state is defined by its clean water, including the health of the Puget Sound and the hundreds of lakes, and thousands of miles of rivers and streams throughout Washington.

Washingtonians know that rivers, streams, and wetlands are intrinsically connected. The health of Washington's waters and its water-related economy depends on a strong partnership with the federal government and a level playing field among its upstream and downstream neighbors, including Tribal lands.

The need for a level playing field was the reason why, 50 years ago, this committee passed the original Clean Water Act. In the 1970s, Congress specifically noted in the legislative history of the Act that a state-by-state, go-it-alone approach was "inadequate in every vital aspect" and left waters severely polluted.

Recently, my state joined several others in highlighting to the Supreme Court Congress' deliberate decision in 1972 to replace an ineffective patchwork of state laws with the Clean Water Act.

In doing so, Congress sought to protect the interests of downstream states that might otherwise suffer the environmental consequences and economic burdens of weak or non-existent pollution controls upstream.

That was our shared, bipartisan view of clean water for decades—a strong federal, state partnership to protect our waters, where the Corps and EPA set a robust federal floor of protections and states could choose to do more, but not less.

It was the view embodied in the Reagan-era regulations that, for the most part, have been adopted by every Presidential administration since—including the previous administration, until it changed its mind.

It is also the view embodied in the Biden proposal that seeks to clarify Clean Water Act regulations after a federal district court tossed out the Trump administration rules.

In 2006, the Supreme Court complicated the Clean Water Act by issuing a decision that instituted the use of a test for determining what waters remained protected by the Act, but the Court did not agree on a single test. That is where I started following the WOTUS issue in several marathon hearings before this committee and subcommittee—discussing many of the same issues and uncertainty we are discussing today.

Since the *Rapanos* decision, every Presidential administration has adopted the two tests outlined by the Supreme Court—the "relatively permanent" test and the "significant nexus" test—for determining Clean Water Act protections.

The Trump administration's second rulemaking attempt abandoned the "significant nexus" test. The result was an unfathomable loss of federal protections in place since 1972 for countless streams, lakes, and wetlands, and no evidence that states have the desire or resources to fill in the gaps.

The Trump rule defied clean water history, defied the law, and defied the science on how watersheds function. Fortunately, this rule was rejected by a federal court only 14 months after it took effect, reinstating the Reagan-era regulations and the continued use of both the "relatively permanent" and "significant nexus" tests.

The Biden rule recodifies the Reagan-era framework and the use of both jurisdictional tests, but it also includes significant improvements and exemptions, requested by stakeholders, to address legitimate concerns over uncertainty and to ease compliance.

The Biden rule seeks to balance the need to protect waters and wetlands, consistent with the goals of the Clean Water Act, while trying to comply with the law, the science, and the opinions of the Supreme Court.

The Biden rule is not perfect. But, in my opinion, it is a far better starting place for certainty, legality, and protecting the quality of our nation's waters than the Dirty Water Rule.

Unfortunately, the recently introduced Congressional Review Act resolution to block the Biden proposal is likely to create more uncertainty. Should this resolution become law—and I certainly will work to ensure it does not—it has the potential to cause even more chaos and confusion over what waters remain protected by the Clean Water Act.

For example, if the resolution is adopted, it is unlikely to prevent the continued use of the "significant nexus" test, as this test is already being utilized today. However, passage of the resolution would eliminate those stakeholder-led clarifications

in the Biden rule and would prevent future administrations from further improving the rule unless Congress decides to intervene.

Further, enactment of this resolution could block agencies from helping stakeholders comply with any new jurisdictional test that might be announced by the Supreme Court. If that were the case, stakeholders could be left with an invalidated rulemaking and a framework for a new, judicially-led test, but no guidance on how to apply that test in the field.

In my view, that is exactly the opposite of certainty and a big mistake. I support this administration's efforts to protect water quality and to provide stakeholders with some additional clarity on how to comply with the Clean Water Act.

I thank the witnesses for joining us today and I look forward to your testimony.

Mr. ROUZER. Thank you, Mr. Larsen.

The ranking member and I, I see, have a series of dueling documents to submit for the record. And so, I will go first.

I ask unanimous consent to enter into the record a letter from the Associated Builders and Contractors dated February 7, 2023.

Without objection, so ordered.

[The information follows:]

Letter of February 7, 2023, to Hon. David Rouzer, Chairman, Subcommittee on Water Resources and Environment, from Kristen Swearingen, Vice President, Legislative and Political Affairs, Associated Builders and Contractors, Submitted for the Record by Hon. David Rouzer

FEBRUARY 7, 2023.

The Honorable DAVID ROUZER,
Chairman,
U.S. House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment.

DEAR CHAIRMAN ROUZER AND MEMBERS OF THE U.S. HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 68 chapters representing more than 21,000 members, I write to comment on the U.S. House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment Hearing, "Stakeholder Perspectives on Impacts of the Biden Administration's Water of the United States Rule."

ABC applauds the subcommittee for calling this important hearing to gather stakeholder perspectives. ABC is also appreciative of Chairmen Graves and Rouzer's joint resolution of disapproval on the Biden administration's burdensome WOTUS rule under the Congressional Review Act and urges the U.S. House of Representatives to swiftly consider the legislation.

As a member of the Waters Advocacy Coalition, ABC filed comments on the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers' proposed rule to revise the definition of "waters of the United States" applicable to all Clean Water Act programs. On Jan. 18, 2023, the agencies released a final rule, effective March 20, that unfortunately entirely disregarded the concerns expressed by ABC and the WAC coalition in the comment letter.

The rule would repeal the Trump administration's Navigable Waters Protection Rule and codify a definition that reflects the pre-2015 regulatory regime that the agencies are currently implementing. Raising numerous important concerns, the coalition urged the agencies to withdraw the proposed rule, reconsider the rule while addressing the coalition's concerns and reengaging stakeholders and repropose a rule that adheres to the CWA and relevant U.S. Supreme Court precedent. Instead, ABC supports maintaining the NWPR's concise definition of WOTUS under the CWA so contractors have the information they need to comply with the law while also serving as good stewards of the environment.

ABC and the WAC have consistently urged the agencies to define WOTUS in a way that:

- Gives appropriate weight to the explicit statutory policy to recognize, preserve and protect the states' traditional and primary authority over land and water use;

- Adheres to the full Supreme Court precedent on the definition of WOTUS under the CWA;
- Gives effect to the term "navigable" in the statutory text;
- Draws clear lines between federal and state or tribal jurisdiction so that regulators and regulated entities can easily identify which features are subject to federal CWA jurisdiction; and
- Accounts for science but recognizes that the statutory text ultimately dictates jurisdiction.

ABC and the WAC continue to believe that the NWPR is an appropriate foundation for a durable and defensible rule. Rather than wiping out that rule in its entirety and replacing it with the flawed framework that prompted stakeholders to demand more clarity and certainty, the agencies should focus their efforts on revisions to the NWPR or related implementation guidance.

Under the 2015 WOTUS rule, the EPA and the Corps gave themselves unprecedented permitting and enforcement authority over land-use decisions that Congress did not authorize and had previously been under state or local jurisdiction. Under that rule, construction companies needed to rethink conventional building practices near any wet area, and property owners could face heavy fines for using their own ponds and creeks. Further, critical infrastructure projects could be slowed as a result of additional permitting requirements that involve the EPA and the Corps, when in the past they may have only included city, county or state governments.

Further, as Congress continues to debate permitting reform efforts, ABC urges that the codification of the 2020 NWPR remains a priority. Sen. Shelley Capito's, R-W.Va., ABC-supported legislation, The START Act, would codify the 2020 NWPR and the Trump administration's Section 401 Certification Rule under the CWA to prevent state actions that unreasonably block energy projects, which ABC would welcome.

Finally, because the Supreme Court has decided to hear the case of Sackett v. Environmental Protection Agency, which challenges EPA's overreach of its CWA jurisdiction, there is no sense in rushing through a rulemaking proceeding that codifies a standard that the Supreme Court could change or foreclose altogether.

ABC and its members are committed to building our nation's infrastructure projects with the highest standards of safety and quality. ABC members stand ready for the opportunity to build and maintain America's energy infrastructure to the benefit of the communities that it will serve.

Sincerely,

KRISTEN SWEARINGEN,
Vice President, Legislative and Political Affairs,
Associated Builders and Contractors.

CC: Members of the U.S. House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment

Mr. ROUZER. I ask unanimous consent to enter into the record a statement from the American Road and Transportation Builders Association from February 8, 2023.

Without objection, so ordered.

[The information follows:]

Statement of the American Road and Transportation Builders Association, Submitted for the Record by Hon. David Rouzer

The American Road and Transportation Builders Association (ARTBA) thanks Chairman Rouzer and Ranking Member Napolitano for holding today's hearing, "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule." The rule marks the third time in the past seven years the U.S. Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) have redefined the federal jurisdiction of the Clean Water Act (CWA).

ARTBA's principal concern with this series of rule changes has been roadside ditches, which our members commonly deploy to ensure safety and environmental compliance on transportation construction projects. Overreaching or uncertainty in their jurisdiction can trigger federal permitting requirements, potentially delaying or even interrupting these projects (while also likely increasing their costs).

Under the 2015 WOTUS rule, virtually any ditch with standing water could fall under EPA and Corps jurisdiction. In 2020, the Corps and EPA explicitly exempted

roadside ditches from the federal regulation. Unfortunately, the latest WOTUS rule reverts to the previous approach, a combination of needless overregulation and onerous case-by-case determinations of jurisdiction.

Consequently, ARTBA supports the joint resolution introduced by Chairman Graves and Subcommittee Chairman Rouzer that would rescind the recent WOTUS rule and restore clarity to the federal permitting process for transportation construction projects.

Because of the CWA's importance to planning and building projects, ARTBA has participated in litigation concerning federal jurisdiction over the nation's waters and wetlands for nearly two decades. This includes the case of *Sackett v. EPA*, which the U.S. Supreme Court agreed to hear in 2022. The Court will determine whether CWA jurisdiction should be based on "significant nexus" or a "continuous surface water connection." Nonetheless, with this critical decision pending, the EPA and Corps have continued proceeding with the new WOTUS rule. Doing so prior to the disposition of *Sackett*, these agencies risk moving forward with a rule that may require an almost immediate rewrite. Therefore, it makes sense for them to suspend implementation of their new rule until the Court reaches its decision.

At the same time, the Infrastructure Investment and Jobs Act (IIJA) features an historic federal investment in our nation's infrastructure, which should yield associated economic benefits across all communities. Public agencies and the transportation construction industry are working diligently to maximize these results through safe, efficient and timely project delivery. Regulatory overreach—such as the latest WOTUS revision—poses the greatest threat to these efforts.

Through a key IIJA provision, the codification of One Federal Decision, the law seeks to complete the review and approval process for projects within two years[1]. Unfortunately, with its expanded jurisdiction determinations and permitting requirements, the EPA and Corps' latest WOTUS rule will put this two-year objective out of reach for many such projects. Do the EPA and Corps want their bureaucratic obstinance to interfere with achieving this objective, as well as delaying or diminishing the IIJA's economic benefits?

For all these reasons, it is inopportune for the EPA and Corps to proceed with their third WOTUS revision in seven years. The agencies should instead definitively exempt roadside ditches from federal jurisdiction, or, at the very least, suspend implementation of their latest rule until the Supreme Court issues its decision in *Sackett*.

ARTBA looks forward to continued collaboration with the committee towards a clear and consistent CWA regulatory system. Thank you for considering the viewpoint of the transportation construction industry on this important policy matter.

Mr. ROUZER. I ask unanimous consent to enter into the record a letter from the National Multifamily Housing Council and the National Apartment Association dated February 8, 2023.

Without objection, so ordered.

[The information follows:]

[1] IIJA, Sec. 11301. According to the White House Council on Environmental Quality, it currently takes an average of five to seven years for a transportation project to complete the environmental review and approval processes.

Letter of February 8, 2023, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Cindy V. Chetti, Senior Vice President, Government Affairs, National Multifamily Housing Council, and Gregory S. Brown, Senior Vice President, Government Affairs, National Apartment Association, Submitted for the Record by Hon. David Rouzer

FEBRUARY 8, 2023.

The Honorable SAM GRAVES,
Chairman,
Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable DAVID ROUZER,
Chairman,
Subcommittee on Water Resources and Envir., Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Subcommittee on Water Resources and Envir., Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN GRAVES, RANKING MEMBER LARSEN, CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

The National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) provide a single voice for the apartment industry including the developers, owners and operators of multifamily rental housing. We are committed to providing affordable and attainable housing nationwide, yet the nation faces a significant housing affordability challenge that is exacerbated by an insufficient housing supply. Therefore, we appreciate the Committee gathering for a hearing entitled "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule" and encourage you to support efforts to ensure that federal water requirements do not undermine the ability to develop and build America's much-needed housing.

One-third of all Americans rent their housing, and our industry plays a critical role in meeting the nation's housing needs by providing apartment homes for nearly 39 million residents and contributing $3.4 trillion annually to the economy. However, undue regulatory barriers hinder our ability to produce necessary housing and the recently released U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps) final rule revising the definition of WOTUS under the Clean Water Act (CWA) poses potentially significant harm to the real estate sector. While the apartment industry strongly supports protecting our nation's water resources, expanding the scope of the CWA would result in undue federal regulatory requirements for housing providers. These additional hurdles would create delays, add costs and ultimately dampen critically needed housing construction and development.

CRITICAL HOUSING SHORTAGES AND REGULATORY BARRIERS

It is essential that we build housing at all price points to address the nation's critical housing challenges and ensure economic stability for American households. According to recent research commissioned by NMHC and NAA, *the U.S. is facing a pressing need to build 4.3 million new apartment homes by 2035.*[1] This includes an existing shortage of 600,000 apartment homes stemming from underbuilding due in large part to the 2008 financial crisis. Further, underproduction of housing has translated to higher housing costs—resulting in a consequential loss of affordable housing units (those with rents less than $1,000 per month), with a decline of 4.7 million units from 2015 to 2020.

In fact, the total share of cost-burdened apartment households (those paying more than 30% of their income on housing) has increased steadily over several decades

[1] Hoyt Advisory Services, "Estimating the Total U.S. Demand for Rental Housing by 2035." (2022), https://www.weareapartments.org/.

and reached 57.6% in 2021.[2] During this same period, the total share of *severely* cost-burdened apartment households (those paying more than half their income on housing) increased from 20.9% in 1985 to 31.0%.[3]

Meanwhile, it is becoming increasingly difficult to build housing that is affordable to a wide range of income levels. Rental housing providers stand ready to help meet current and future demand, but cannot do it alone. Unnecessary, duplicative or unduly burdensome laws, policies and regulations at all levels of government prevent us from delivering the housing our country so desperately needs. High regulatory costs, in particular, create a barrier to affordable housing supply. Recent research published by NMHC and the National Association of Home Builders found that *regulation imposed by all levels of government accounts for 40.6 percent of multifamily development costs*.[4]

IMPACTS OF WOTUS RULE

For years, we have asked for clarity on the application of CWA requirements. Instead, numerous lawsuits, failed congressional reform efforts and inconsistent rulemakings have created uncertainty and confusion for property owners. We are therefore deeply disappointed that this latest WOTUS Rule does not resolve the tension apartment firms face over the scope of federal jurisdiction under the CWA. Without such clarity, property owners are deterred from undertaking critically needed housing construction and development projects.

This federal overreach will greatly expand the universe of properties, including many with only a tenuous relationship to a body of water, required to seek very expensive federal permits to develop or redevelop housing. This additional requirement will create uncertainty and delay in permitting, add potentially significant costs and create additional legal risks that will exacerbate the nation's housing affordability crisis. Further, expanded, federal water regulations are an expensive, but unnecessary overlay, given that states and localities have their own water protection rules. Simply determining whether a property needs a federal permit is an expensive endeavor.

Moreover, the release of this rule now ignores the forthcoming Supreme Court decision in *Sackett v. EPA*, which directly relates to this issue. Implementation of the new rule prior to the release of the Court's opinion will require businesses to spend significant time and resources in compliance efforts that may prove inconsistent with the Supreme Court's decision.

CONCLUSION

Federal policy efforts should focus on incentivizing and breaking down existing barriers to housing development rather than add new regulatory burdens. Improving housing affordability and availability are key national priorities. We must recognize that additional, inconsistent and potentially duplicative regulation has a chilling effect on the market, drives up the cost of housing and disrupts needed investment at a time of significant affordability and supply challenges. We are committed to working with policymakers on protections for our water resources that support the creation of more housing, preserve affordability and ensure that every American has a safe, quality place to call home.

Sincerely,

CINDY V. CHETTI,
Senior Vice President, Government Affairs, National Multifamily Housing Council.

GREGORY S. BROWN,
Senior Vice President, Government Affairs, National Apartment Association.

CC: Members of Subcommittee on Water Resources and Environment, House Committee on Transportation and Infrastructure

Mr. ROUZER. I ask unanimous consent to enter into the record a letter from the National Association of Manufacturers dated February 8, 2023.

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[2] NMHC tabulations of 1985 American Housing Survey microdata, U.S. Census Bureau; 2021 American Housing Survey, U.S. Census Bureau.

[3] *Id.*

[4] National Multifamily Housing Council and National Association of Home Builders Regulation: 40.6 Percent of the Cost of Multifamily Development, https://www.nmhc.org/globalassets/research--insight/research-reports/cost-of-regulations/2022-nahb-nmhc-cost-of-regulations-report.pdf.

Without objection, so ordered.
[The information follows:]

Letter of February 8, 2023, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Nile Elam, Senior Director, Energy and Resources Policy, National Association of Manufacturers, Submitted for the Record by Hon. David Rouzer

FEBRUARY 8, 2023.

The Honorable DAVID ROUZER,
Chairman,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE NAPOLITANO,
Ranking Member,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

We thank you for holding today's hearing, "*Stakeholder Perspectives on the Impacts of the Biden Administration's Water of the United States (WOTUS) Rule*," and for your focus on examining the role of WOTUS and impacts on the regulated community. The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million Americans, contributes $2.81 trillion to the U.S. economy annually, pays workers over 18% more than the average for all businesses and has one of the largest sectoral multipliers in the economy. Taken alone, manufacturing in the United States would be the eighth-largest economy in the world.

The Clean Water Act jurisdictions that fall under WOTUS are key for manufacturers and communities alike regarding the standards and scope of various permits protecting clean water. A durable and pragmatic WOTUS rule with clear definitions, that are easily understandable and applicable across the country, ensures the public has access to clean water and regulated entities understand their water permits.

Manufacturers prioritize environmental stewardship and protecting our national waterways, but the EPA's current WOTUS rule leaves stakeholders confused and relying on unclear terminology that is difficult to apply universally. Multiple Supreme Court decisions have touched on the definition of "navigable waters" over the years, but neither the SCOTUS nor the Agencies have provided sufficient clarity. Compounding this confusion, controversial legal arguments, including application of "significant nexus" underpins the current the proposal, which broadly expands federal jurisdiction beyond traditional navigable waters. The rule creates a new sprawling category of various waters—know as (a)(5) waters—a jurisdictional assertion that has not been seen since 2003. Because of these expansions and ambiguous terms, the careful balance between local and state regulators is unpredictable and can leave permit seekers with little guidance, aside from the need for more time and money to achieve their permitting requests.

Despite a pending ruling from the Supreme Court on *Sackett v EPA*, which could definitively change Clean Water Act jurisdiction and WOTUS application, the EPA recently released its new WOTUS rule. The NAM has repeatedly argued that the EPA wait to release any WOTUS rule until this consequential verdict is released—which many expect by spring—yet these calls have been ignored, as the EPA has produced a rule that may no longer be relevant and need to be redrafted before the end of the year.

The Clean Water Act is a key permitting avenue for any manufacturer, and as it stands now, WOTUS is ripe with ambiguity and inconsistent terminology, and we need Congressional intervention in order to facilitate manufacturing expansion while achieving environmental stewardship. Today's hearing is a necessary step towards educating the public and policy stakeholders regarding the immense permitting regulatory efforts necessary under local and state jurisdictions, and the need for a complimentary WOTUS rule that advances permitting protections at the federal level while providing certainty for the regulated community.

The NAM stands ready to work with your T&I colleagues, along with the EPA and Corps, regarding sensible, predictable and clear WOTUS regulations. Thank

you again for your focus on permit certainty and in turn, enhancing manufacturers' ability to deliver their goods, expand their operations and grow their workforce.

Respectfully,

NILE ELAM,
Senior Director, Energy and Resources Policy,
National Association of Manufacturers.

Mr. ROUZER. I ask unanimous consent to enter into the record a letter from the National Federation of Independent Business dated February 8, 2023.

Without objection, so ordered.

[The information follows:]

Letter of February 8, 2023, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Kevin Kuhlman, Vice President, Federal Government Relations, National Federation of Independent Business Inc., Submitted for the Record by Hon. David Rouzer

FEBRUARY 8, 2023.

The Honorable DAVID ROUZER,
Chairman,
Water Resources and Environment Subcommittee, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

The Honorable GRACE F. NAPOLITANO,
Ranking Member,
Water Resources and Environment Subcommittee, Committee on Transportation and Infrastructure, U.S. House of Representatives, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO,

On behalf of NFIB, the nation's leading small business advocacy organization, I write concerning today's hearing entitled, "Stakeholder Perspectives on the Impacts of the Biden Administration's Waters of the United States (WOTUS) Rule."

On behalf of small businesses across the United States, thank you for holding today's hearing. Small business owners appreciate the opportunity to discuss the impacts of the Environmental Protection Agency's (EPA) and the Department of the Army's final rule, which significantly expanded the federal government's regulatory authority over wetlands, farms, and private property. This regulatory overreach will increase the regulatory burdens and uncertainty facing America's small farmers, ranchers, developers, contractors, and other small businesses.

For many years, NFIB members have ranked "unreasonable and burdensome government regulation" as one of the top problems facing small businesses.[1] Unfortunately, the red tape added by the Biden Administration's regulatory onslaught is unprecedented. In 2021, the Biden Administration finalized 283 regulations and imposed more than $200 billion in regulatory costs, the largest total in the first year of a presidency.[2] The Biden Administration has followed up these finalized rules with an additional 311 proposed rules that could add another $191.2 billion in costs for regulated entities.[3]

These added regulatory costs will fall disproportionately on small businesses, which do not have compliance divisions to navigate complex regulatory issues. Unfortunately, the regulatory cost estimates of the finalized and proposed rules will likely understate the regulatory burdens imposed on small businesses. For example, when the EPA and the Department of the Army certified the final WOTUS rule, the agencies stated the rule "will not have a significant economic impact on a substantial number of small businesses."[4] This conclusion by the EPA and Department of the Army is farcical. America's small farmers, ranchers, developers, contractors,

[1] Holly Wade & Andrew Heritage, *Small Business Problems & Priorities*, NFIB Research Center, August 2020, https://assets.nfib.com/nfibcom/NFIB-Problems-and-Priorities-2020.pdf.

[2] Dan Bosch, *2022: The Year in Regulation*, American Action Forum, January 2023, https://www.americanactionforum.org/research/2022-the-year-in-regulation/.

[3] *Id.*

[4] 88 *Fed. Reg.* 3139, col. 3. https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf.

and other small business owners believe the final rule will significantly increase their regulatory costs and uncertainty at a time when many face inflation, supply chain disruptions, and labor shortages.

The disappointing reality is that this regulatory uncertainty facing small businesses did not have to occur. The Biden Administration could have simply waited for the Supreme Court decision in the *Sackett v. EPA* case, which is anticipated in the coming months. However, by finalizing the rule before the Supreme Court decision, the Biden Administration threw caution to the wind and ignored the calls of small businesses. This inexplicable decision increased the regulatory uncertainty for small businesses as the federal authority under the Clean Water Act could once again change following the court decision.

The current regulatory path is not sustainable. Small businesses cannot invest and grow in an environment where goalposts constantly shift with every election. We urge Congress to clarify the federal authorities granted under the Clean Water Act to provide certainty for regulated entities. Specifically, Congress must:

1. Repeal the EPA's and the Department of the Army's final WOTUS rule.
2. Write and enact clear statutes to eliminate uncertainty regarding Congressional intent and improve the ability of small businesses to comply with the law.
3. Require agencies to conduct thorough economic analyses that examine the direct and indirect costs of regulations on regulated entities, including small businesses and consumers.
4. Require agencies to eliminate or streamline outdated, unnecessary, and burdensome regulations.
5. Conduct robust oversight of and reduce Congressional appropriations for federal agencies that exceed their regulatory authorities granted under law.

As this subcommittee conducts oversight and examines legislative options related to the Clean Water Act, we urge Congress to provide certainty to America's farmers, ranchers, developers, contractors, and other small businesses. Small businesses across America appreciate your leadership on this critical issue and look forward to working with you to reduce the regulatory and compliance burdens faced by small businesses.

Sincerely,

KEVIN KUHLMAN,
Vice President, Federal Government Relations, NFIB.

Mr. ROUZER. I ask unanimous consent to enter into the record a letter from the National Mining Association dated February 8, 2023.

Without objection, so ordered.

[The information follows:]

Letter of February 8, 2023, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from the National Mining Association, Submitted for the Record by Hon. David Rouzer

FEBRUARY 8, 2023.

Chairman DAVID ROUZER,
House Committee on Transportation and Infrastructure,
Subcommittee on Water Resources and Environment, 2333 Rayburn House Office Building, Washington, DC 20515.

Ranking Member GRACE NAPOLITANO,
House Committee on Transportation and Infrastructure,
Subcommittee on Water Resources and Environment, 1610 Longworth House Office Building, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

As the Subcommittee on Water Resources and Environment works to support a regulatory atmosphere that ensures durability and certainty for all domestic industries, the National Mining Association (NMA) writes to express opposition to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) final rule defining "Waters of the United States."

The NMA is the voice of the American mining industry in Washington, D.C. Membership includes more than 275 corporations involved in all aspects of mining in-

cluding mineral and coal producers, mineral processors, equipment manufacturers, state mining associations, bulk transporters, engineering firms, consultants, financial institutions, and other companies that supply goods and services to the mining industry.

The Clean Water Act was intended to provide both essential environmental protections for our nation's waterways as well as the regulatory certainty necessary for investment and a thriving economy. The mining industry relies on these basic regulatory tenets to make confident decisions that will create jobs, strengthen local communities, and provide the energy and materials that are the foundation of our economy.

Unfortunately, the final WOTUS rule could not have been announced at a more consequential time as our nation intensifies efforts to secure mineral and material supply chains for infrastructure and energy, including metallurgical coal for steel production, minerals for electric vehicle batteries and renewable energy technologies, and other materials used to support our national defense. The U.S. Geological Survey's annual commodity summary released last month highlights the dire state of America's import overreliance, which now makes up more than one-half of the U.S. apparent consumption for 51 nonfuel mineral commodities, of which we were 100 percent net import reliant for 15 of those.[1]

While the agencies state the final rule is a return to the familiar and predictable pre-2015 regulatory regime, the final rule expands jurisdiction compared to the status quo in several important ways, including:

- The rule continues to rely on the confusing and subjective significant nexus test;
- It expands potential jurisdiction with the creation of a new catchall (a)(5) "other waters" category, which allows federal jurisdiction over features not identified as (a)(1) through (4) waters that meet either the relatively permanent or significant nexus test;
- The rule expands its regulatory overreach by changing the way the agencies plan to implement the significant nexus test that will generally be broader than has been done previously; and
- The exclusions in the final rule are not clearly defined and will be difficult for the mining industry and other regulated entities to implement.

Despite these and other expansions, the agencies assert that there are only de minimis costs and benefits associated with this rulemaking. The same cannot be said for the effect the rule will have on the future of domestic mining. Currently, it takes between seven and ten years, and often longer, for a mine to receive all necessary federal permits to begin production. The uncertainty intrinsic in the final rule will ultimately disincentivize mining investment in the U.S. due to the long permitting timelines which require capital-intensive investments to develop a mine.

The domestic mining industry and the communities in which they operate deserve certainty and assurance that regulations can be efficiently administered in a durable and predictable manner and without the threat of financial hardship and punitive burdens. The NMA appreciates the Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment's consideration and engagement on these key domestic mining priorities. We look forward to continuing to work with you.

Mr. ROUZER. I ask unanimous consent to enter into the record a letter from the Republican Governors Association dated January 30, 2023.

Without objection, so ordered.

[The information follows:]

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[1] U.S. Geological Survey, 2023 Commodity Summary, https://pubs.er.usgs.gov/publication/mcs2023

Letter of January 30, 2023, to President Joseph R. Biden, Jr., from the Republican Governors Association, Submitted for the Record by Hon. David Rouzer

JANUARY 30, 2023.

President JOSEPH R. BIDEN, JR.,
The White House,
1600 Pennsylvania Avenue, Washington, DC 20500.

DEAR PRESIDENT BIDEN,

We write in opposition to your rule regarding the Clean Water Act (CWA) and the revised definition of "Waters of the United States" (WOTUS). Specifically, we request you delay its implementation until the U.S. Supreme Court issues a ruling in *Sackett v. EPA*. The WOTUS definition has been under scrutiny for nearly twenty years, and your Administration's rule only further complicates the efforts to create certainty under the CWA for rural communities. The problem is exacerbated by the pending Supreme Court ruling. The final WOTUS rule released during the holidays is concerning in terms of timing, substance, and process.

The rule is problematic in and of itself, but its timing is particularly troubling given record inflation and gas prices that threaten the livelihoods of so many communities. Those who rely on farming and small business as a backbone of their local economies are particularly vulnerable. Another burdensome and overbroad regulation from the federal government could not come at a worse time for America. Having already squandered much of America's energy independence, you should not increase costs for consumers by tying up energy production with even more red tape.

We call into question the timing and necessity of the rule with the Court's upcoming *Sackett* decision which is expected by June of this year. That opinion could significantly impact the final rule and its implementation. To change the rule multiple times in six months is an inefficient and wasteful use of State and federal resources and will impose an unnecessary strain on farmers, builders, and every other impacted sector of the American economy.

The substance of the rule hinders State governments as we seek to give clarity and consistency to businesses, farms, and individuals regarding the regulatory framework for water. The broad definitions used in the 514-page document only add to the confusing and complicated history of WOTUS. In fact, it appears that the EPA is seeking to regulate private ponds, ditches, and other small water features.

Understanding the final WOTUS rule will require States and the regulated community to wade through an extensive and unclearly written web of interpretations. Given the many outstanding issues the recent WOTUS rule generates, particularly in rural America, we ask that you delay implementation of the rule until the Court decides *Sackett*. Small businesses, farmers, and communities across America simply cannot afford another costly revision.

Thank you for your consideration of this request. If you have further questions or would like to learn more from our State agencies, please do not hesitate to reach out to us.

Sincerely,

GOVERNOR BRAD LITTLE,
State of Idaho.
GOVERNOR KAY IVEY,
State of Alabama.
GOVERNOR MIKE DUNLEAVY,
State of Alaska.
GOVERNOR SARAH SANDERS,
State of Arkansas.
GOVERNOR RON DESANTIS,
State of Florida.
GOVERNOR BRIAN KEMP,
State of Georgia.
GOVERNOR ERIC HOLCOMB,
State of Indiana.
GOVERNOR KIM REYNOLDS,
State of Iowa.
GOVERNOR TATE REEVES,
State of Mississippi.
GOVERNOR MIKE PARSON,
State of Missouri.
GOVERNOR GREG GIANFORTE,
State of Montana.
GOVERNOR JIM PILLEN,
State of Nebraska.
GOVERNOR JOE LOMBARDO,
State of Nevada.
GOVERNOR CHRIS SUNUNU,
State of New Hampshire.
GOVERNOR DOUG BURGUM,
State of North Dakota.
GOVERNOR MIKE DEWINE,
State of Ohio.
GOVERNOR KEVIN STITT,
State of Oklahoma.
GOVERNOR HENRY MCMASTER,
State of South Carolina.
GOVERNOR KRISTI NOEM,
State of South Dakota.
GOVERNOR BILL LEE,
State of Tennessee.
GOVERNOR GREG ABBOTT,
State of Texas.
GOVERNOR SPENCER COX,
State of Utah.

GOVERNOR GLENN YOUNGKIN,
Commonwealth of Virginia.
GOVERNOR JIM JUSTICE,
State of West Virginia.
GOVERNOR MARK GORDON,
State of Wyoming.

Mr. ROUZER. I now recognize my friend and colleague from California.

Mrs. NAPOLITANO. That is a long one, Mr. Chairman. Thank you.

I ask unanimous consent that the following statements be made part of today's record.

It is a letter from the Clean Water for All Coalition.

Mr. ROUZER. Without objection.

[The information follows:]

Letter of February 8, 2023, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, from the Clean Water for All Coalition, Submitted for the Record by Hon. Grace F. Napolitano

FEBRUARY 8, 2023.

The Honorable SAM GRAVES,
Chairman,
Committee on Transportation and Infrastructure, United States House of Representatives, 2164 Rayburn House Office Building, Washington, DC 20515.

The Honorable RICK LARSEN,
Ranking Member,
Committee on Transportation and Infrastructure, United States House of Representatives, 2164 Rayburn House Office Building, Washington, DC 20515.

CHAIRMAN GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIRMAN ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO,

On behalf of the undersigned members and partners of the Clean Water for All Coalition, thank you for holding this hearing and prioritizing discussion of our country's water and the ways in which the U.S. EPA ("EPA") and U.S. Army Corps of Engineers ("USACE") are responsible for ensuring we strive toward the Clean Water Act's (CWA) goal: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters".

Clean Water for All is a national coalition that brings together diverse organizations to advance equitable policies that promote and increase clean water protections, access, and affordability across the nation. Our members are from all across the country and include hunters and fishers, local waterkeepers, environmental justice advocates, and sustainable businesses. Clean and abundant water resources are important for public health, agriculture, transportation, flood control, climate resilience, energy production, recreation, fishing and shellfishing, municipal and commercial uses, indigenous cultural practices, and much more. Because of the myriad values of water bodies, including wetlands protected by the Clean Water Act, our members are keenly interested in the "Revised Definition of 'Waters of the United States'" rule ("the Revised Definition rule").

The Revised Definition rule is a return to a familiar approach for EPA and USACE, and regulated entities. In this rule, EPA and USACE identify waters that qualify as "Waters of the United States" in a way that tracks with the agencies' longstanding framework. In virtually every respect, it is a codification of the approach outlined in the Bush administration's 2008 guidance, which has been the basis for agency decisions for most of the past 15 years. That approach is decidedly more narrow than the rules implemented in the first three decades of the Clean Water Act and also substantially narrower than the 2015 Clean Water Rule.

Additionally, the Revised Definition rule is well within the limits identified in Supreme Court precedent, relies on the best available science, and draws on the agencies' experience and technical expertise. The scientific record includes hundreds of studies highlighting the ways different kinds of waters affect traditional navigable and interstate waters and therefore should be eligible for protection. The agencies have long made site-specific jurisdictional determinations under the CWA by considering this kind of scientific evidence, in both Republican and Democratic administrations. The science confirms what the agencies know, and what the authors of the

CWA knew: the kinds of waters eligible for coverage under the rule (though, importantly, not categorically covered) perform important functions related to navigable and interstate waters' physical, chemical, and biological condition.

In addition to consistency with historical approaches to administering the CWA and consistency with modern science, the Revised Definition rule thoroughly rejects the legal, policy, and factual bases for the Trump Administration's dangerous and misnamed "Navigable Waters Protection Rule". This rule departed from established precedent and authorized the pollution or destruction of tens of thousands of water bodies across the country and especially in the arid Southwest. The Revised Definition rule provides certainty that a threat to our waters like the last administration's rule will not be revived.

More than three in four people support stronger federal protections for our nation's waters—ensuring everyone has clean water is a bipartisan, common sense issue. Too many communities, especially Indigenous communities, communities of color, and low wealth communities, still lack clean water. Our country must continue siding with people over polluters and work to ensure everyone, no matter their race, zip code, or income, has access to clean water. We all deserve clean water to drink, lakes where we can teach our children to swim, rivers where we can fish with family, and assurances that valuable wetlands and waters will flourish for generations to come. The Revised Definition rule is an important, reasonable, and practical step towards such a future.

Sincerely,

ALABAMA RIVERS ALLIANCE.
ALLIANCE FOR THE GREAT LAKES.
AMERICAN RIVERS.
ANACOSTIA RIVERKEEPER.
CLEAN WATER ACTION.
EARTHJUSTICE.
ENVIRONMENT AMERICA.
ENVIRONMENTAL LAW & POLICY CENTER.
ENVIRONMENTAL PROTECTION NETWORK.
FRESHWATER FUTURE.
GREENLATINOS.
LEAGUE OF CONSERVATION VOTERS.
NATIONAL PARKS CONSERVATION ASSOCIATION.
NATIONAL WILDLIFE FEDERATION.
NATURAL RESOURCES DEFENSE COUNCIL.
OHIO RIVER FOUNDATION.
POTOMAC RIVERKEEPER NETWORK.
RIVER NETWORK.
SIERRA CLUB.
SOUTHERN ENVIRONMENTAL LAW CENTER.
SURFRIDER FOUNDATION.
SUSTAINABLE FUTURES L3C.
THE WATER COLLABORATIVE OF GREATER NEW ORLEANS.

Mrs. NAPOLITANO. A letter from Trout Unlimited.
Mr. ROUZER. Without objection.
[The information follows:]

Letter of February 8, 2023, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Kate Miller, Director of Government Affairs, Trout Unlimited, Submitted for the Record by Hon. Grace F. Napolitano

FEBRUARY 8, 2023.

The Honorable SAM GRAVES,
Chair,
House Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515–6256.

The Honorable DAVID ROUZER,
Chair,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, H2–585 Ford House Office Building, Washington, DC 20515–6256.

The Honorable RICK LARSEN,
Ranking Member,
House Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515–6256.

The Honorable GRACE F. NAPOLITANO,
Ranking Member,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, H2–585 Ford House Office Building, Washington, DC 20515–6256.

Re: Letter for the Record, House Subcommittee on Water Resources and Environment, February 8, 2023 Hearing, "Stakeholder Perspectives on the Impacts of the Biden Administration's Water of the United States (WOTUS) Rule."

CHAIRMAN GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIRMAN ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO:

Trout Unlimited ("TU") submits this letter for the record in connection with your hearing on stakeholders' perspectives on the Clean Water Act and its implementation by the U.S. EPA ("EPA") and U.S. Army Corps of Engineers ("USACE"), specifically the agencies' recent publication of their "Revised Definition of 'Waters of the United States'" rule ("the Revised Definition Rule").

TU has more than 350,000 members and supporters in 380 chapters and 36 state councils across America. Our mission is to bring together diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. Our members cherish their personal connections with their nearby streams and rivers. They care deeply about the health of the nation's waterways and our responsibility to steward water resources for future generations.

TU supported the revised "Waters of the United States" definition because it meets the purpose of the Clean Water Act, which is to make our waters healthy, fishable, and swimmable. The revised definition is rooted in sound science and ensures protection of small streams and wetlands that provide clean water not just for trout and salmon fisheries but also for farmers, businesses, and communities. TU has been a leader in defending the Clean Water Act, and we write today in support of the Revised Definition Rule.

1. The Revised Definition Rule is a return to the approach under the Reagan and Bush Administrations.

The Revised Definition Rule is a return to a familiar approach for EPA and USACE. The agencies' rule returns to the regulatory approach that dates to President Reagan's administration, updated to reflect limits the U.S. Supreme Court has placed on federal jurisdiction during the intervening 36 years. President George H.W. Bush presided over implementation of a similar agency rule. The agencies' Revised Definition Rule also tracks the 2008 guidance issued under the President George W. Bush Administration, which has been the basis for agency decisions for most of the past 15 years.

Although narrower than the 2015 Clean Water Rule, the Revised Definition Rule is well within the limits identified in Supreme Court precedent, relies on the best-available science, and draws on the agencies' experience and technical expertise. The agencies have long made site-specific jurisdictional determinations under the Clean Water Act, under both Republican and Democratic administrations.

Because the Clean Water Act itself exempts from permitting routine, ongoing farming and ranching activities, these important economic activities are protected under the Revised Definition Rule. Farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices are all exempt from 404 permitting under Section 404(f)(1)(A) of the Clean Water Act.[1] The Revised Definition Rule recognizes that American agriculture fulfills a vitally important public need and ensures that the agricultural exemptions are appropriately implemented.

2. The Revised Definition Rule corrects the deficiencies of the 2020 Navigable Waters Protection Rule.

Over the past two years, TU scientists have documented how drafters of the 2020 Navigable Waters Protection Rule failed to assess its potentially devastating impacts on "ephemeral" streams, which are critical tributaries of larger streams—and which a TU-led peer-reviewed publication estimated comprise 48% of stream channels by length in the coterminous U.S.[2] Trout Unlimited, which filed amicus briefs in two court challenges to the rule, also recently examined the EPA's Jurisdictional Determinations (JDs) database, to estimate the loss of Clean Water Act protection under the 2020 Navigable Waters Protection Rule. Based on previous jurisdictional determinations, we conservatively estimated that approximately 2.4 million stream miles, 23 percent of stream channels by length in the conterminous U.S., would lose the protection of jurisdictional consideration under the 2020 Navigable Waters Protection Rule.[3] This percentage is much higher in certain regions and watersheds, such as the more arid landscapes of the Southwestern United States.[4]

Below is a map showing the percentage of ephemeral streams by watershed, based on TU research, indicating that over half of Colorado's stream miles are ephemeral, and therefore categorically excluded even from consideration for Clean Water Act jurisdiction by the 2020 Navigable Waters Protection Rule.

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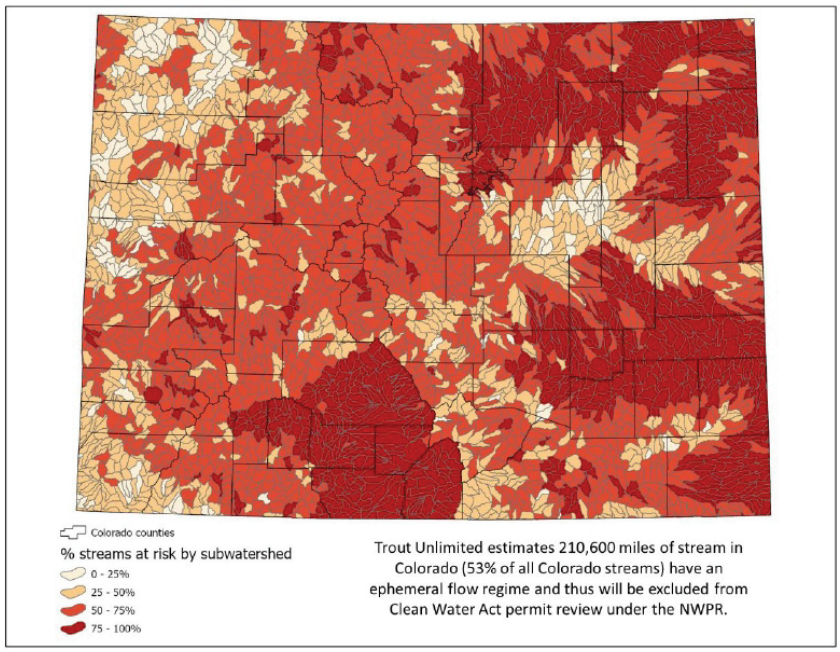
[1] Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities, United States Environmental Protection Agency and United States Department of the Army, (May 3, 1990), available at: https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities (last visited on February 7, 2023).

[2] K. Fesenmyer et al. *Large portion of USA streams lose protection with new interpretation of Clean Water Act*. Freshwater Science 40(1) (2021), attached as Ex. 1.

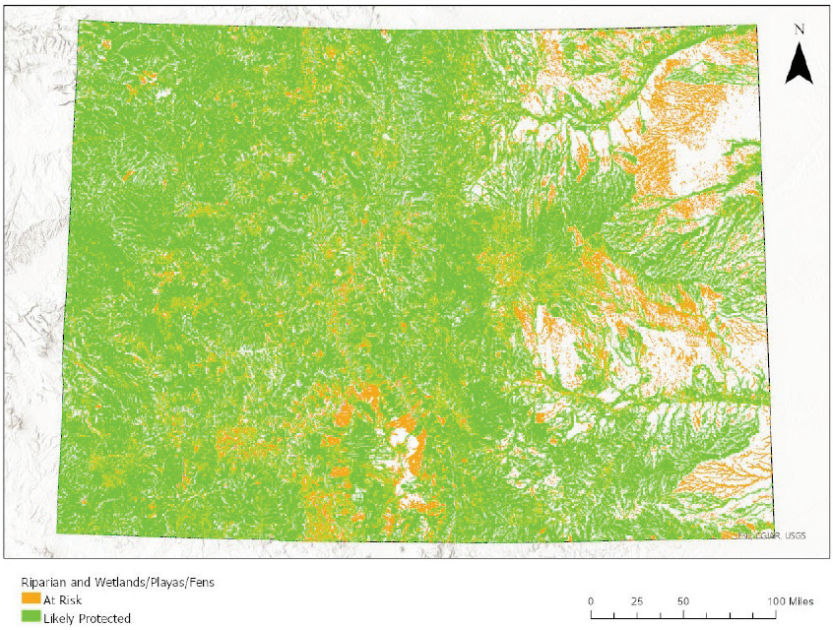
[3] K. Fesenmyer et al. *Large portion of USA streams lose protection with new interpretation of Clean Water Act*. Freshwater Science 40(1) (2021), attached as Ex. 1.

[4] L.R. Levick et al, *The ecological and hydrological significance of ephemeral and intermittent streams in the arid and semi-arid American Southwest*, EPA & USDA/ARS Southwest Watershed Research Center, EPA/600/R–08/134, ARS/233046 (2008). (Levick et al (2008)) (AR 0037).



The 2020 Rule also categorically excluded geographically isolated, non-floodplain wetlands from Clean Water Act protection, along with wetlands that may be adjacent to navigable waters and their tributaries, but do not directly abut those waters, and do not have a continual surface water connection to them. Non-floodplain wetlands alone in Colorado cover an estimated 449,428 acres.[5] This constitutes approximately 22 percent of the state's remaining wetland acres that would have been categorically excluded by the 2020 Rule. Half of Colorado's wetlands have already been lost to human activity. See below map of Colorado's wetlands that would have been at-risk under the 2020 Navigable Waters Protection Rule.

[5] C.R. Lane and E. D'Amico, *Identification of putative geographically isolated wetlands of the conterminous United States*, 52 J. Am. Water Resources Association 705 (2016) (AR 11724).



Those wetlands that remain have an outsized importance for fish and wildlife in the state. While wetlands occupy only 2 percent of the state's land, they provide habitat for 75 percent of the state's species, including at risk species.[6] What is more, many of these now vulnerable wetlands are the rare, ancient groundwater-fed fens in Colorado's mountains, a preservation priority of Region 6 of the U.S. Fish and Wildlife Service (USFWS) since 1999.[7] The USFWS explains that fens take thousands of years to develop, and essentially are irreplaceable. Fens also perform important hydrological and water quality functions. For example, rare native cutthroat trout often benefit from the water-cleansing action of fens in headwaters of streams. They also often possess unique biotic assemblages. For all these reasons, the USFWS mitigation goal for Colorado's mountain fens is *no loss of existing habitat value*. In other words, because of the irreplaceability of the type of habitat, every reasonable effort should be made to avoid impacting them. However, the 2020 Rule would have categorically excluded Colorado's mountain fens from Clean Water Act jurisdiction and permitting requirements.

Taking into account both isolated, non-floodplain wetlands and the various categories of floodplain wetlands that do not abut or have a clear surface water connection to perennial and intermittent streams, recent geospatial modeling estimates indicate that tens of millions of the nation's remaining wetlands could have lost Clean Water Act protections due to the 2020 Rule's insistence upon evidence of a surface water connection to a tributary in a "typical year."[8] The Revised Definition Rule's reversal of the 2020 Rule's roll-back of wetland jurisdiction is especially important at a time when climate change is driving long-term aridification of the Colorado River Basin.[9] Given that reality, scientists began realizing more than a decade ago that comparing historic conditions to current or future ones is increasingly unreliable.[10]

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[6] Colorado Parks and Wildlife, https://cpw.state.co.us/aboutus/Pages/Wetlands.aspx#:~:text=Why%20should%20you%20care%3F,lost%20half%20of%20its%20wetlands.

[7] US FWS Region 6, https://www.fws.gov/mountain-prairie/es/fen/FWSRegion6FenPolicy1999.pdf

[8] U.S. Fish and Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States 2004–2009," at 16, 37 (2009), available here.

[9] Overpeck and Udall, https://www.pnas.org/content/pnas/117/22/11856.full.pdf

[10] Stationarity is dead, https://science.sciencemag.org/content/319/5863/573.

3. The Revised Definition Rule protects sizable, sustainable economic activity.

With the adoption of the Revised Definition Rule, the agencies also restored the important economic driver of healthy waters that includes the outdoor recreation economy, anglers, hunters, boaters, swimmers, other outdoor enthusiasts, commercial fisheries and the fishing industry. For example, as of 2020, an estimated 1.1 million people fished and 363,000 went hunting in Colorado,[11] which delivered $3.28 billion to the state's economy.[12] In Colorado, recreation and tourism accounted for twice the amount of private earnings as extractive industries and employed more than five times as many people in 2010.[13]

CONCLUSION

TU commended the EPA and ACOE for taking a significant step forward with a revised definition that is in line with the objectives of the Clean Water Act and is based on a compelling scientific and technical record. TU submits this written testimony for the record in support of the Revised Definition Rule and urges the Subcommittee to ensure that accurate information about the Rule is conveyed in the public discourse of the Rule, particularly about the Rule's clear protections for America's farmers and ranchers.

Thank you for considering our views.

Sincerely,

KATE MILLER,
Director of Government Affairs, Trout Unlimited.

Mrs. NAPOLITANO. A letter from the American Fisheries Society.

Mr. ROUZER. Without objection.

[The information follows:]

Letter of February 7, 2023, to Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from Douglas J. Austen, Ph.D., Executive Director, American Fisheries Society, Submitted for the Record by Hon. Grace F. Napolitano

FEBRUARY 7, 2023.

Chairman DAVID ROUZER,
U.S. House of Representatives,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, 2165 Rayburn House Office Building, Washington, DC 20515.

Ranking Member GRACE NAPOLITANO,
U.S. House of Representatives,
Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, 2165 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN ROUZER AND RANKING MEMBER NAPOLITANO:

On behalf of the American Fisheries Society (AFS), thank you for the opportunity provide testimony on the impacts of the Biden Administration's Waters of the United States (WOTUS) rule (2023 Rule) published in the Federal Register on January 18, 2023.

AFS is the world's oldest and largest professional society of fisheries and aquatic scientists and managers. The Society seeks to improve the conservation and sustainability of fisheries and aquatic ecosystems by advancing science and promoting the development of fisheries professionals. We greatly value the country's clean waters and healthy aquatic ecosystems as they are critical to maintaining fisheries and other critical ecosystem services such as supporting biodiversity, flood control, and carbon storage.

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[11] Business for Water Stewardship, https://businessforwater.org/wp-content/uploads/2020/06/Southwick-Technical-report-2020.pdf

[12] Colorado Parks & Wildlife, https://cpw.state.co.us/Documents/Trails/SCORP/2017ColoradoOutdoorRecEconomy.pdf

[13] Benjamen Taber, *Recreation in the Colorado River Basin: Is America's Playground Under Threat*?, 2012 Colorado College State of the Rockies Report Card, at Fig's 2 and 3, accessible from: https://www.coloradocollege.edu/dotAsset/c1d0b548-4350-4be7-b0a5-8de6692b973b.pdf (accessed on May 17, 2021).

The mandate of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. This can only be achieved if the definition of WOTUS is grounded in sound science that recognizes the multiple dimensions of waterbody connectivity: physical/hydrologic, chemical, and biological.

AFS has long supported a science-based definition of WOTUS. The 2023 Rule, seeks to balance the science with efficiency and provides additional clarity for implementation of the rule. We oppose returning to the 2020 Navigable Waters Protection (2020 NWPR) rule. The limited protections in the 2020 NWPR threaten highly valued fish, fisheries, ecosystem services, and the communities that rely on them (Colvin et al. 2019). The 2020 NWPR removes protections for millions of miles of headwater streams and millions of acres of wetlands and would result in severe ecological and economic losses and cause irreparable cultural and social damage (Cohen et al. 2016; Fesenmyer et. al. 2021; Creed et. al. 2017; Sullivan Declaration 2020.)

More than a half century of scientific research demonstrates that the integrity of "traditionally navigable" waters fundamentally depends on tributaries—including headwater ephemeral, intermittent, and perennial streams—as well as many associated lakes, wetlands, and off-channel habitats (USEPA, 2015). Aquatic ecosystems depend upon transfers of chemical components, organisms, sediment, and organic materials among waterbodies to support the life in and around their shores. Without the safeguards of the Clean Water Act for these streams and wetlands, the ability of these waters to convey nutrients, provide pathways for migrating organisms such as fish and wildlife, and serve as a drainage and storage system for floodwaters is severely undermined.

AFS fully supported the 2015 Clean Water Rule (2015 CWR) because it was based on the demonstrated importance of the many physical, chemical, and biological connections of headwaters to the ecological condition of downstream and downslope navigable waters and their biota. The 2015 CWR was informed by the best scientific information available as set forth in the comprehensive scientific report that accompanied the rule, i.e., the "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (herein the "Connectivity Report" but described in the 2015 CWR as the "Science Report"). The Connectivity Report synthesized over 1,200 peer-reviewed publications and provided the technical basis for the 2015 CWR. In the intervening years, interdisciplinary scientific efforts have further demonstrated the importance of protecting non-permanent waterbodies, including intermittent and ephemeral headwater streams and wetlands that are hydrologically and biologically connected to navigable waters (e.g., Cohen et al. 2016, Rains, et al. 2016, Fritz et al. 2018, Harvey et al. 2018, Leibowitz et al. 2018, Schofield et al. 2018, Colvin et al. 2019).

In contrast, the 2020 NWPR was not based on current science and reversed decades of protections that were put in place to ensure clean water would be available for future generations (Sullivan et al. 2019, Sullivan et al. 2020). The 2020 NWPR rule focused only on hydrological surface connections to establish jurisdiction. It ignored many key biological and chemical connections that are critical for fully functioning aquatic ecosystems. It only recognized a limited subset of connectivity conditions, and it relied on flow permanence and physical abutment as measures of jurisdiction. Hence, it arbitrarily ignored other ecologically critical aspects of physical connectivity such as bed, banks, and high-water marks, and chemical, biological and ecological connectivity that were incorporated in the 2015 CWR.

The 2020 NWPR eliminated protections for a staggering number of headwater streams, which 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. Headwaters include wetlands outside of floodplains and small streams with permanent flow, intermittent flow, and ephemeral flows. Headwaters affect downstream and downslope streams and wetlands; that is, they are hydrologically, chemically, physically, biologically and ecologically connected to what happens downstream.

Headwaters are key to the sustainability of fish stocks in both upstream and downstream waters and should be protected (Colvin et al., 2019). The loss of Clean Water Act protections for headwaters would diminish ecosystem services provided by those waters, increase threats to imperiled species, impair commercial and recreational fisheries in both fresh and salt waters, and degrade fishes of great cultural value to Native Americans and the recreating public.

Climate change will only exacerbate those losses. Aquatic resources in many states, particularly in the central and western U.S., are already stressed by overuse of water and extreme weather patterns. The reduction in groundwater has greatly impaired flow regimes, causing many streams to shift from perennial to intermittent or even ephemeral (Colvin et al., 2019). Under the 2020 NWPR rule, streams and

playas may no longer be protected that were historically perennial but now have impaired flows because of groundwater depletion. Whereas water rights and use largely fall outside the jurisdiction of the Clean Water Act, the negative impacts of unregulated dredge and fill within those streams and playas would amplify the current stresses faced by aquatic ecosystems and further reduce the potential for habitat recovery. Such cumulative impacts increase the likelihood of future listings and extinctions of fish, amphibians and waterfowl, thereby jeopardizing the ecological integrity and function of our waters.

In addition to the loss of protection for headwaters, the 2020 NWPR seeks to eliminate protections for wetlands that do not abut or have a direct hydrologic surface connection to other WOTUS. Wetlands provide essential ecosystem services such as protection of drinking water quantity and quality, provision of floodwater and carbon storage, storm damage mitigation, resilience against sea-level rise and drought, and essential fish, shellfish, waterfowl, and wildlife habitat. Wetland loss in some regions of the U.S. already approaches or exceeds 85 percent. As documented in the Connectivity Report, wetlands that neighbor other WOTUS, but are not necessarily abutting or having a direct hydrologic surface connection in a typical year, often exhibit functional connections with other WOTUS, and should be protected. These waters equal the size of West Virginia and the loss of ecosystem services they provide would be staggering.

The 2023 Rule is a vast improvement over the 2020 NWPR and represents a step forward in protecting our Nation's waters and the critical ecosystem services they provide for people and the environment. It appropriately recognizes that science is complex and cannot be ignored for the convenience of administering the Clean Water Act. The 2023 Rule addresses the major flaws with the 2020 NWPR, seeks to balance the science with efficiency, and provides additional clarity for implementation. It considers the science as established in the Connectivity Report as well as more recent research on waterbody connectivity. Further, the 2023 Rule takes a first step at addressing climate change in the context of federal water protection. Notably, the 2023 Rule states that science does not provide bright lines relative to defining a specific distance required for adjacency, and clearly outlines those waters that constitute exclusions from jurisdiction. The 2023 Rule defines the geographic scope (i.e., in the region) for purposes of significant nexus analysis. It also clarifies that wetland complexes (i.e., two or more individual wetland areas that are functionally related and geographically clustered) are to be considered in the aggregate.

To more fully protect aquatic resources, we recommend that future rule revisions provide protections to ensure chemical and biological connectivity as well as groundwater protections.

In closing, we urge you to uphold the 2023 Rule and not return to the 2020 NWPR for the significant harm it would cause to wildlife, fish, fisheries and the communities that rely on them. Thank you for the opportunity to comment. We are willing to assist should you need additional information or consultation.

Sincerely,

DOUGLAS J. AUSTEN, PH.D.,
Executive Director, American Fisheries Society.

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Mrs. NAPOLITANO. That is it. Thank you.

Mr. ROUZER. I thank the gentlelady.

As a reminder, for documents submitted into the record, we would ask that you also please email those documents to DocumentsTI@mail.house.gov. Again, that is DocumentsTI@mail.house.gov.

I would now like to welcome our witnesses and thank them for being here today. Mr. Garrett Hawkins, president of the Missouri Farm Bureau. Ms. Alicia Huey, chairman of the National Association of Home Builders. Mr. Mark Williams, environmental manager, Luck Companies, on behalf of the National Stone, Sand & Gravel Association. Ms. Susan Parker Bodine, partner, Earth & Water Law LLC. And Mr. Dave Owen, professor of law and faculty director of scholarly publications, UC College of Law, San Francisco.

Thank you all for coming. We appreciate the opportunity to hear from you today.

As you know, when the light hits yellow, that means to wind it down. We ask that you keep your testimony as close as you can to 5 minutes. If you run over 5 minutes, I will have to shut you down, and I don't want to do that. So, try to keep it within the time limit.

Mr. Chairman, did you have anything you would like to mention?

Mr. GRAVES OF MISSOURI. Yes. Thanks for giving me just a second to thank Garrett Hawkins for being here. Garrett is the president of the Missouri Farm Bureau. Before he was elected to lead the Farm Bureau in our great State, he was the deputy director of agriculture in Missouri, and he served with Farm Bureau as the director of all national legislative programs.

So, he has been working with farmers and ranchers from all across Missouri, and for that matter, from across the country, when it comes to regulatory issues, including WOTUS, for almost 20 years, I believe.

So, I do appreciate you making the trip out here, and thanks for being here. I look forward to hearing what you have to say.

Mr. ROUZER. I ask unanimous consent that the witnesses' full statements be included in the record.

Without objection, so ordered.

So, now we will start with Mr. Hawkins.

You are recognized for 5 minutes for your testimony.

TESTIMONY OF GARRETT HAWKINS, PRESIDENT, MISSOURI FARM BUREAU; ALICIA HUEY, CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS; MARK WILLIAMS, ENVIRONMENTAL MANAGER, LUCK COMPANIES, ON BEHALF OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION; SUSAN PARKER BODINE, PARTNER, EARTH & WATER LAW LLC; AND DAVE OWEN, HARRY D. SUNDERLAND PROFESSOR OF LAW AND FACULTY DIRECTOR OF SCHOLARLY PUBLICATIONS, UNIVERSITY OF CALIFORNIA COLLEGE OF LAW, SAN FRANCISCO

TESTIMONY OF GARRETT HAWKINS, PRESIDENT, MISSOURI FARM BUREAU

Mr. HAWKINS. Well, thank you, Chairman Graves, for your leadership and your kind words.

Chairman Rouzer and Ranking Member Napolitano, thank for the opportunity to testify today.

My name is Garrett Hawkins, and I serve as president of the Missouri Farm Bureau. I am a fifth-generation farmer, a cattleman to be specific, from Appleton City, Missouri.

It is an honor to represent the American Farm Bureau Federation, and I speak on behalf of thousands of farm and ranch families, hard-working farm and ranch families, that produce the food, fiber, and renewable fuel that our Nation and our world depend upon.

For farmers and ranchers, our livelihood depends on healthy soils and clean water. We support the Clean Water Act. However, the vagueness of where jurisdictional lines lie has created confusion for landowners.

Unfortunately, we have experienced uncertainty for decades due to ever-changing rulemakings that redefine the Clean Water Act's scope. As a result, landowners, small businesses, and American families are the ones who have suffered the most.

The definition of WOTUS is critically important to farmers and ranchers, which is why we have participated in numerous rulemakings, legislation, and litigation on this issue for decades.

Unfortunately, our members are extremely disappointed by the Biden administration's new WOTUS rule.

The new rule will greatly expand the Federal Government's reach over private property by allowing them to assert jurisdiction over ephemeral drainages, such as ditches, swales, and low spots on a farm field. The use of the "significant nexus" test allows the agencies to aggregate waters together. And the reliance on the vague terms provides the agencies the latitude to reach whatever conclusion they please.

It is impossible for any farmer to know if a feature on their property is a WOTUS.

Considering these features as jurisdictional waters opens up the potential for regulation of activities that move dirt or apply products to the land. Everyday farm and ranch activity, such as tillage, planting, or even fence building in or near these features, could trigger the Clean Water Act's harsh civil or even criminal penalties unless a permit is obtained.

As an example, in Missouri, under the pre-2015 regulatory regime, EPA sent a threatening letter to a landowner which included severe fines and mitigation requirements because he was simply trying to save his property from eroding by placing rock along his streambank.

This is a classic case of heavy-handed punitive action against a landowner as EPA claimed jurisdiction on the small creek that ran through his property. They asserted the creek had a significant nexus to the Mississippi River via two other connecting rivers.

To add insult to injury, the agencies claim the costs associated with this rule are de minimis. This conclusion can only be made by failing to consider the entire gamut of costs that landowners will incur.

One must consider not only the cost of the permit, but also the expenses for experts needed to navigate the process, such as environmental consultants, attorneys, and engineers. You must also consider the cost of mitigation and project delays, which makes the process beyond the means of many.

One of the most important factors in the WOTUS debate centers around a highly consequential legal case that is currently being considered before the Supreme Court, *Sackett* v. *EPA*. This case should inform the agencies of the proper scope of a WOTUS definition. Finalizing this rule injects only more uncertainty for the regulated community.

The American Farm Bureau, Missouri Farm Bureau, numerous other organizations, and over 200 Members of Congress urge the agencies to halt this rulemaking because of this. It defies logic that the agencies would go ahead with the development of this rule knowing that a directive from the Supreme Court will be handed down imminently.

Farmers and ranchers are extremely frustrated that our concerns were not recognized in the final rule. This new rule will create more confusion for landowners and will harm important economic drivers that benefit our communities. This unnecessary regulatory redtape places a burden on farmers and ranchers while stripping the States of their regulatory role.

Thank you for the opportunity to share our perspective on this important issue. And I want to stress again that we as farmers support clean water, but we also need a clear rule.

I look forward to taking your questions.

[Mr. Hawkins' prepared statement follows:]

Prepared Statement of Garrett Hawkins, President, Missouri Farm Bureau

Chairman Rouzer and Ranking Member Napolitano, thank you for the opportunity to testify today. My name is Garrett Hawkins and I serve as President of Missouri Farm Bureau (MOFB). I am a fifth-generation farmer from Appleton City, Missouri, and the third generation in my family to own and operate the farm on which we live today. Agriculture runs deep in our extended family and spans livestock, row crop, and dairy production. It is an honor to be here representing the thousands of hard-working farm and ranch families that produce the abundant food, fiber, and renewable fuel that our nation and the world depend on.

The American Farm Bureau Federation® (AFBF) is the Voice of Agriculture® and no one cares more deeply about the health of our environment than our members—the nation's hardworking farm and ranch families. Unlike many other industry sectors, the livelihood of our businesses depends on healthy soils and clean water. We

support the objectives of federal environmental statutes such as the Clean Water Act (CWA), however the ambiguity of where the line between federal and state jurisdiction lies has created confusion for landowners. Unfortunately, we have lived in a world of regulatory uncertainty for decades due to everchanging rulemakings that redefine the scope of the CWA. We have seen WOTUS definitions change with each Administration, guidance documents offered and then rescinded and confusing litigation that have provided more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most.

Once again, the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) have finalized a new regulatory definition of "waters of the United States" (WOTUS) that greatly expands the federal government's role in regulating land use. I am pleased to share my perspective as a farmer on this rule and its potential impact on agricultural producers all across the nation.

THE NEW WOTUS RULE WILL PROFOUNDLY AFFECT EVERYDAY FARMING AND RANCHING ACTIVITIES.

The definition of WOTUS is critically important to farmers and ranchers across the country, which is why AFBF and state Farm Bureaus have participated in numerous rulemakings, legislative proceedings and litigation on this issue for decades. Farming and ranching are water-dependent enterprises. Whether they are growing plants or raising animals, farmers and ranchers need water. For this reason, farming and ranching tends to occur on lands where there is either plentiful rainfall or adequate water available for irrigation. There are many features on those lands that are wet only when it rains and that may be miles from the nearest "navigable" water. Farmers and ranchers regard these features as simply low spots on their land.

Additionally, many farm and ranch operations rely on ponds used for purposes such as livestock watering, providing irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals, or actual navigable waters that are the source of irrigation water—and they channel return flows back to these source waters. In short, America's farm and ranch lands are an intricate maze of ditches, ponds, wetlands, and so-called "ephemeral" drainages.

Considering these features as jurisdictional "waters" opens up the potential for regulation of activities on those lands that move dirt or apply products to the land. Everyday activities such as tillage, planting, or fence building in or near ephemeral drainages, ditches, or low spots could trigger the CWA's harsh civil or even criminal penalties unless a permit is obtained. Farmers need to apply weed, insect, and disease control products to protect their crops. Fertilizer application is another necessary and beneficial aspect of many farming operations that is nonetheless swept into the CWA's broad scope (even organic fertilizer, i.e., manure). 40 C.F.R. § 122.2 (defining "pollutant"). On much of our most productive farmlands (i.e., areas with plenty of rain), it would be extremely difficult to avoid entirely the small wetlands, ephemeral drainages, and ditches in and around farm fields when applying crop protection products and fertilizer. And yet, permits could also be required for those activities, and even accidental deposition would be unlawful, even when those features are completely dry and even harder to differentiate from the rest of the fields.

The tens of thousands of dollars in additional costs for federal permitting of ordinary farming activities are beyond the means of many small business farmers and ranchers. And even those farmers and ranchers who can afford it should not be forced to wait months, or even years, for a federal permit to till, plant, fertilize, or carry out any of the other ordinary farming and ranching activities on their lands. For all of these reasons, farmers and ranchers have a keen interest in how WOTUS is defined.

Unfortunately, our members are disappointed by the Agencies' final rule. We feel strongly that the Navigable Waters Protection Rule (NWPR) was a clear, defensible rule that appropriately balanced the objective, goals, and policies of the CWA. The Agencies should have kept the NWPR in place, rather than revert to definitions of WOTUS that test the limits of federal authority under the Commerce Clause and are not necessary to protect the nation's water resources. The agencies can ensure clean water for all Americans through a blend of the CWA's regulatory and nonregulatory approaches, just as Congress intended. It is unnecessary (and unlawful) to define non-navigable, intrastate, mostly dry features that are far removed from navigable waters as "waters of the United States."

THE RULE THRUSTS FARMERS AND RANCHERS BACK INTO A WORLD OF COSTLY UNCERTAINTY AND INCONSISTENCY.

The 2015 WOTUS Rule dramatically expanded the scope of CWA jurisdiction over land used for normal farming and ranching activities. The 2022 Rule is different only in degree and timing, not kind. The Agencies aggregation policy potentially allows them to assert jurisdiction over any sometimes-wet feature which, taken together with other sometimes-wet features in the region (broadly defined), have what the Agencies consider to be a "significant nexus" on a "foundational water." But the term "significant nexus" generated significant confusion and inconsistent results under the pre-2015 regime, and this rule is likely to only make things worse. Furthermore, the process to arrive at a jurisdictional determination is tortuous and costly. A jurisdictional determination could take between six months and a year to receive, and in the meantime a farmer or rancher is stuck in limbo. Adding insult to injury, the use of case-by-case determinations threatens to create a seriously unequal playing field, where identical features may be viewed as jurisdictional or not depending upon where the property is located. This is not a dependable, durable, or clear rule. Rather, the Agencies have set up a system that is based in arbitrary, interpretation-based decision-making. Furthermore, it is unclear whether or not the Agencies are equipped to respond to these determinations in a timely manner, increasing the potential for long wait times as farmers and ranchers are forced to comply.

Perversely, the Agencies' broad assertion of jurisdiction can make it more difficult for farmers and ranchers to engage in soil conservation activities. Farmers and ranchers have more incentive than most to preserve topsoil on their land; as such, where land is at risk of erosion, they may want to engage in mitigation activities. Farmers and ranchers also often take on projects that provide stormwater management, wildlife habitat, flood control, and nutrient processing and improve overall water quality in uplands and ephemeral features. But, if they cannot do this without applying for a federal permit, it may be cost-prohibitive, resulting in environmental degradation, not protection.

This rule threatens to impede farmers' and ranchers' ability to provide safe, affordable, and abundant food, fuel, and fiber to the citizens of this nation and the world. Their concerns are not hyperbole, nor are they isolated occurrences. They are lived experiences illustrating the pitfalls of returning to an overly expansive definition of "waters of the United States" and, specifically, an outsized view of what it means for a water to have a "significant nexus."

THE SIGNIFICANT NEXUS STANDARD MAY LEAD TO POTENTIALLY UNLIMITED JURISDICTION.

While the Agencies have resisted the urge to categorically regulate all tributaries and adjacent waters like they did in the 2015 Rule, the case-by-case approach that they use in this WOTUS rule is no less of an overreach. The Agencies once again resurrect the same broad and confusing significant nexus standard that was the foundation for the 2015 Rule. It is clear the Agencies will just expand their jurisdiction one watershed at a time, instead of by general fiat—but it is only a matter of time until the Agencies will find a significant nexus. This domino effect illustrates the almost limitless jurisdiction that the Agencies have over private property.

The significant nexus test can be used to assert jurisdiction over tributaries, adjacent wetlands, and basically any "other water" because the rule uses undefined, amorphous terms like "similarly situated," "in the region" and "material influence" that will leave farmers and ranchers guessing about whether waters on their lands are WOTUS. This suggests that regulators can manipulate the standard to reach whatever outcomes they please and that farmers and ranchers may not know the outcomes until they are already exposed to civil and criminal liability, including devastating penalties. As an example, in Missouri, under the pre-2015 regulatory regime, EPA sent a threatening letter to a landowner, which included fines and mitigation requirements, because he was simply trying to save his property from eroding by placing rock along his streambank. This is a classic case of heavy-handed, punitive action against a landowner as EPA claimed jurisdiction on the small creek that ran through his property, as it asserted the creek had a "significant nexus" to the Mississippi River via two other connecting rivers.

Because of the subjective nature of the significant nexus test, it all but guarantees that regulators' assessments are bound to vary from field-office to field-office and case to case. This approach does not give ordinary farmers and ranchers fair notice of when the CWA actually applies to their lands or conduct, nor does it provide any assurance against arbitrary or discriminatory enforcement. For these reasons, this rulemaking is unconstitutionally vague.

THE CASE-BY-CASE REGULATION OF EPHEMERAL DRAINAGES IS UNNECESSARY.

Much of where we disagree comes down to one classification of "waters": ephemeral drainage features. As previously mentioned, ephemeral drainages are dry land—they are not flowing rivers or streams. It is simply shocking to property owners to hear that a "tributary" can be interpreted to reach ephemerals and sweep in many features that look just like land. The NWPR provided important clarification regarding the status of ephemeral streams that flowed only in response to precipitation by correctly concluding that they were not WOTUS. The Agencies' rapid about-face in this rulemaking is disappointing, to say the least.

The Agencies set off on the wrong foot by failing to define tributary in the first place. The lack of a definition of tributary with measurable criteria results in significant vagueness and fairness concerns, especially where the application of "tributary" could substantially expand or limit the scope of jurisdiction under the CWA.

By failing to provide clarity, the Agencies are forcing farmers to either: (1) presume that an ephemeral drainage that carries water only when it rains will be deemed a jurisdictional tributary, (2) seek a jurisdictional determination from the Corps, or (3) take a chance that their activities near or in such features may result in unlawful discharges carrying civil penalties of nearly $60,000 a day.[1] Even worse, a farmer could face criminal liability with jail time and up to $100,000 a day in fines. With such stiff statutory penalties at stake—including the loss of one's own personal liberty—farmers and ranchers deserve more clarity.

Ultimately, the question is not whether tributaries or ephemeral streams are "important" or may as a scientific matter have some connection with downstream navigable waters; rather, the question is whether they should be considered as falling within the bounds of federal jurisdiction. As with so many other categories in the rulemaking, the agencies collapse that distinction. The NWPR was correct to exclude ephemeral streams categorically, and the Agencies are wrong to dismiss that approach.

THE ADJACENCY CATEGORY SHOULD BE LIMITED TO WETLANDS THAT DIRECTLY ABUT OTHER WOTUS.

The adjacency category is also rife with confusion. First, the rule's approach to "relatively permanent" is not consistent with the plurality's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), because the Agencies deprive the Court's requirement for a "continuous" connection of all meaning by turning it into a mere "physical connection or ecological connection" test. Further, the criteria for establishing whether a wetland is "adjacent"—such as whether a "shallow" subsurface connection exists or whether wetlands are in reasonably close proximity to a jurisdictional water—stray too far from the plurality's test in *Rapanos* and raise vagueness and fair notice concerns.

We also oppose the significant nexus approach to adjacent wetlands used in this rule. The Agencies' approach of aggregating wetlands is flatly contrary to Justice Kennedy's requirement that each wetland be judged in its own right to determine whether it (and it alone) bears a significant nexus to traditional navigable waters. This approach expands the reach of the significant nexus test even farther and is even less clearly implementable.

We believe that the Agencies should assert jurisdiction over only those wetlands that are directly abutting "waters of the United States;" which would provide much needed clarity that is capable of easy application in the field. Only those wetlands that directly touch "waters of the United States" should be considered "adjacent."

THE BROAD SWEEP OF THE "OTHER WATERS" CATEGORY IS PROBLEMATIC

The most obvious example of the rule's expansion of regulatory reach lies in the "other waters" category. This new category would reach many intrastate, non-navigable water features that would be considered "isolated."

Worse still is the rule's application of the significant nexus standard to "other waters," not least because, if that standard is ever to be applied, it should be to wetlands, and wetlands only. Applying the significant nexus standard elsewhere allows the Agencies to aggregate all similarly situated "other waters" (e.g., prairie potholes or ponds that are not part of a tributary system) across an entire watershed and claim jurisdiction over all such features based on a finding that they collectively perform a single important function for a downstream "foundational" water. This is plainly not what Congress intended, and not what the Supreme Court would allow. Through this rule, countless small wetlands or other small waters that are far re-

[1] See 87 Fed. Reg. 1,676, 1,678 (Jan. 12, 2022).

moved from traditional navigable waters (including ephemeral tributaries and ditches) or coast nevertheless will be potentially within the scope of federal jurisdiction.

The Agencies should have withdrawn the "other waters" category. Their ability to aggregate waters together will greatly expand the federal reach and it will be absolutely impossible for any farmer or rancher to know if a jurisdictional "other water" is located on their property.

THE EXEMPTIONS ARE CHALLENGING TO USE

Ditch Exclusion:

Ditches and similar water features commonly found on farms that are used to collect, convey, or retain water should be excluded from the definition of "waters of the United States." Without adequate drainage, farmlands could remain saturated after rain events and unable to provide adequate aeration for crop root development. Drainage ditches and other water management structures can help increase crop yields and ensure better field conditions for timely planting and harvesting. In areas without sufficient rainfall, irrigation ditches and canals are needed to connect fields to water supplies and to collect and convey water that leaves fields after irrigation. Put simply, ditches are vitally important to support American agriculture and ultimately, to feed the growing population.

While this rule does provide a ditch exclusion, unfortunately, it is not particularly meaningful because it is limited to features constructed on dry land or upland. Because these features are constructed to store water, it would not typically be useful for them to be constructed along the tops of ridges, for example. Rather, often the only rational place to construct a ditch or a farm or stock pond is in a naturally low area to capture stormwater that enters the ditch or pond through sheet flow and ephemeral drainages. Depending on the topography of a given patch of land, ditch or pond construction may be infeasible without some excavation in a natural ephemeral drainage or a low area with wetland characteristics.

Prior Converted Cropland Exclusion:

America's farmers and ranchers support the 2023 Rule's maintaining of the decades-old exclusion for prior converted croplands ("PCC"), of which there are approximately 53 million acres in the United States. Farmers and ranchers across the country rely on this critical exclusion which establishes that PCC may be used for any purposes, so long as wetland conditions have not returned. In practice, however, numerous issues have arisen regarding the interpretation and application of the PCC exclusion. For this reason, we have long advocated for a clear, commonsense definition and clarification of PCC in the Agencies' regulations. We welcomed the NWPR's approach to PCC and are disappointed to see that this rule fails to carry forward the NWPR's definition of PCC, which was designed to improve clarity and consistency. For example, the lack of a clear definition of PCC has presented problems in the past regarding when PCC can be "recaptured" and treated as jurisdictional.

The Agencies failed to acknowledge our strong opposition to the application of USDA's "change in use" principle. Additionally, they have failed to clearly convey if PCC that is shifted to non-agricultural use becomes subject to CWA jurisdiction. We have presented these questions to both EPA and Corps officials and have received completely different answers. Incorporating a "change in use" policy into the PCC exclusion would upend nearly 30 years of largely consistent implementation in accordance with the 1993 Rule. While we acknowledge that the Agencies have attempted to make constructive changes, the result fell well short of that goal.

REAL WORLD IMPACTS OF AN EXPANSIVE WOTUS RULE

The Agencies claim that the costs associated with this rule are de minimis. This conclusion can only be reached by failing to consider the entire gamut of costs that landowners will incur. One must consider not only the cost of the permit, but also the expenses for experts needed to navigate the permitting process—such as environmental consultants, attorneys and engineers. You must also consider the cost of mitigation and project delays, which can be exorbitant and makes the process simply untenable for many. These costs can amount to a $500/acre or greater decrease in value of the land. Mitigation costs to proceed with development could reach thousands of dollars per linear foot. Additionally, CWA compliance may also trigger review under other federal environmental statutes, such as the Endangered Species Act and the National Historic Preservation Act. Many small businesses are unable to take on these additional costs and they have no choice but to pass it on to their customers. Expansive regulatory actions like this new WOTUS definition will exacerbate the affordability challenges that plague many American families. This rule

puts us further away from the goal of providing affordable and accessible food, housing and energy.

THE RULE FAILS TO RESPECT THE STATES' ROLE IN PROTECTING WATERS

Additionally, the rule completely usurps the states' role in protecting our nation's waters. While many aspects of the CWA are unclear, one area of certainty is that Congress intended for the states to play an important role in regulating land within their borders. The objective of the CWA detailed in section 101B explains that environmental protections are a shared responsibility between the federal government and state governments. This language only solidifies the notion that there is a point where federal jurisdiction ends and state jurisdiction begins. However, this newly finalized WOTUS rule would greatly expand the federal government's role, effectively cutting against Congressional intent under the CWA. It is our belief that the states should retain the authority to protect ephemeral features, not the federal government.

NO WOTUS BEFORE SCOTUS

One of the most important factors in the WOTUS debate centers around a highly consequential legal case that is currently being considered before the Supreme Court: *Sackett v. EPA*. It is undeniable that this case has the potential to inject great certainty into the new WOTUS definition. The question before the High Court is whether the Army Corps can use the significant nexus test to assert jurisdiction. Given all of the legitimate legal concerns associated with this regulatory test, there is a strong likelihood that the Court will prevent the Agencies from using it. It defies logic that the Agencies would go ahead with the development of this rule, knowing that a directive from the Supreme Court will be handed down imminently. Considerable government resources have been expended to craft this rule, which will only be wasted when the Agencies have to return to the drawing board after a decision is handed down. Additionally, introducing a new regulatory definition, to an already convoluted compliance process, is harmful to the regulated community. We must now adapt to these new and confusing rules and our ability to plan any future business development will be hindered. Simply put, the Agencies should have waited until a decision was handed down before finalizing this rule.

CONCLUSION

Our nation's farmers and ranchers are very frustrated that our concerns were not recognized in the finalized rule. Retaining the NWPR would have been a far preferable alternative, given the certainty and predictability it provided. This new rule will only create more confusion for landowners and will inevitably slow down many of the important economic drivers that benefit our communities. This unnecessary regulatory red-tape places a burden on our nation's farmers and ranchers while stripping the states of their historic regulatory role. Farmers and ranchers want clean water and clear rules, so they can remain focused on what they do best—providing food, fiber and renewable fuel for our nation and the world.

Mr. ROUZER. I thank the gentleman. And right on time.

Ms. Huey, 5 minutes.

TESTIMONY OF ALICIA HUEY, CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS

Ms. HUEY. Thank you, Chairman Rouzer and Ranking Member Napolitano and members of this committee. On behalf of more than 140,000 members of the National Association of Home Builders, I appreciate the opportunity to testify on the impacts to the home building industry on the recent rule of waters of the U.S.

My name is Alicia Huey. I am president of AGH Homes, Inc., a custom builder and developer for over 30 years near Birmingham, Alabama. I serve as chairman of the NAHB board of directors.

I had the opportunity to participate in the agencies' WOTUS outreach. I recommended they avoid cumbersome jurisdictional con-

cepts like the "significant nexus" test and provide clarity and certainty to the home building industry.

After seeing the rule, I know the agencies ignored my advice.

It is difficult to overstate the impact of regulations on housing affordability. An NAHB study found that government regulations from Federal, State, and local governments account for up to 25 percent of the price of a new single-family home and over 40 percent of multifamily development.

Further, for every $1,000 increase in a median-priced home, it will price out over 117,000 households.

Creating lots and building homes requires substantial earth-moving activity. It has never been easy for builders or land developers to tell if their activities may impact a WOTUS and therefore require a Federal permit.

Home building activities are unique, and they are regulated twice under the Clean Water Act. Permitting requirements for controlling stormwater discharges and fill are triggered when those activities impact a WOTUS.

Homebuilders rely on a timely and consistent jurisdictional determination process to know when they need to get a permit.

A clear definition of WOTUS that bases Federal jurisdiction upon observable landscape features is essential for small homebuilders. The rule's reliance upon the "significant nexus" test during the JD process falls short of providing the clarity and certainty the home building industry needs.

The "significant nexus" test requires a Federal regulator to perform a case-by-case analysis on all nonnavigable isolated ephemeral waters before issuing the homebuilder a JD.

As Federal authority over private property increases, so do bureaucratic delays for homebuilders awaiting JDs while Federal permitting requirements increase. Our members are experiencing 6- to 12-month delays in securing JDs, particularly when their water requires a "significant nexus" test. This is in addition to significant delays during the permit process.

Living under a regulatory regime that relies on the "significant nexus" test and determinations from an unelected bureaucrat will make home building inefficient and costly.

Home building is most often financed using loans. During the highest inflationary period that our country has seen in over 40 years, we are being asked to float our finances while we wait for a decision under the "significant nexus" test. These delays cost real money and directly impact the cost of housing.

Unfortunately, homebuilders need to rely on the agencies for answers or be required to pay tens of thousands of dollars to consultants to help us comply with the Clean Water Act. These consultant fees are being passed down to the home buyers and renters.

Under that rule, homebuilders knew which waters were jurisdictional just by walking the land. A Navigable Waters Protection Rule removed the need for hiring consultants because it excluded waters that lacked relatively permanent flow and eliminated the "significant nexus" test. The new rule does not add new protections for our Nation's water resources but inappropriately expands the Government's authority over isolated and ephemeral waters.

The agencies suggest the rule provides clarity. However, it produces more questions. The rule allows the agencies to illegally take the easy way out by sweeping everything under Federal authority.

If the agencies are interested in developing a meaningful and balanced rule, they must take a more methodical and sensible approach. The agencies are gaining more authority than the Clean Water Act gives them, and our members must comply to keep the process moving.

Lastly, I want to thank Chairmen Graves and Rouzer for introducing the CRA to reverse the Biden WOTUS rule. Until that is enacted, I encourage Congress to direct the agencies to delay the implementation of this rule until the Supreme Court rules on *Sackett* v. *EPA*. NAHB believes there should be no WOTUS before SCOTUS.

Thank you for the opportunity to testify, and I look forward to answering your questions.

[Ms. Huey's prepared statement follows:]

Prepared Statement of Alicia Huey, Chairman of the Board, National Association of Home Builders

Chairman Rouzer, Ranking Member Napolitano, and members of the subcommittee, on behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Alicia Huey and I am the president of AGH Homes, Inc., a custom home building company I founded in 2000. I have been a developer for over 30 years near Birmingham, Alabama and was just sworn in as NAHB's Chairman of the Board.

NAHB members are involved in the home building, remodeling, multifamily construction, land development, property management, subcontracting and light commercial construction industries. Our industry is primarily dominated by small businesses, with our average builder member employing 11 employees. Since the Association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they buy or rent a home.

NAHB members are strong stewards of the environment; we recognize the need for clean and sustainable communities that benefit our residents and potential home buyers. NAHB members are vested in preserving and protecting our nation's land and water resources. Since its inception in 1972, the Clean Water Act (CWA) has helped to make significant strides in improving the quality of our water resources and our lives. As environmental stewards, the nation's home builders build neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources, including our lakes, rivers, ponds, and streams. Creating lots and building homes involves substantial amount of earth-moving activities.

Because the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (hereafter "the agencies") have historically asserted broad federal jurisdiction over "waters of the US" (hereafter "WOTUS") under the CWA, NAHB members must often obtain CWA permits to address stormwater, and wetlands impacts to complete their land development and home building projects. What is most important to these compliance efforts is a CWA regulatory definition of WOTUS that is consistently applied, predictable, timely, and focused on protecting actual aquatic resources. Or as our friends at the American Farm Bureau Federation describe, the agencies' goal when crafting a regulatory definition of WOTUS should be clean water and clear rules. Having a clearly understandable WOTUS regulatory definition empowers landowners to know when their activities require CWA permits and when the activities do not require CWA permits. Unfortunately, establishing a clear regulatory definition of WOTUS is becoming increasingly elusive.

In addition to federal mandates under the CWA, most builders and developers must also comply with a myriad of state and local environmental requirements designed to protect water quality and natural resources and promote conservation. For example, half of the states protect waterbodies and wetlands more broadly than required under the CWA, and twenty-three states have explicit regulatory authority

to issue permits for dredge and fill activities in wetlands.[1] Further, many local governments have adopted wetlands protection ordinances and regulations that offer additional protections.[2] Beyond complying with these federal, state, and local mandates, NAHB members regularly make property purchase decisions and design, site, and develop their projects to avoid impacting and preserving sensitive areas and seek to showcase natural resources as important project amenities. For most of the last two decades, builders and developers have faced constantly changing regulatory definitions of WOTUS, making our decisions, including project financing, land acquisitions, project design, land development, and homebuilding activities exceedingly difficult.

My business is dedicated to developing, building, and preserving affordable housing options for all citizens. I have a unique understanding of how the federal government's regulatory process impacts businesses in the real world. Additional regulations make it more difficult for me to provide homes or apartments at a price point that is attainable for working families. More importantly, living under a regulatory regime that relies on the significant nexus test and determinations from an unelected federal bureaucrat will make homebuilding inefficient and costly.

Housing is a great example of an industry that would benefit from more intelligent and sensible regulation. According to a study completed by the NAHB, government regulations from federal, state and local governments account for up to 25% of the price of a new single-family home and over 40% of multifamily development. Nearly two-thirds of this impact is due to regulations that affect the developer with the rest due to regulations that are imposed on the builder during construction.[3] The regulatory requirements we face as builders do not just come from the federal government. A key component of effective regulation is ensuring that federal, state, and local agencies cooperate and coordinate to streamline permitting requirements and respect the constitutional roles of each level of government. Notably, more sensible regulation will translate into job growth in the construction industry.

The U.S. homebuilding industry is already in a recession; few industries have struggled more recently than homebuilding. The costs of housing for homeowners and renters is increasing due to inflation being at a 40-year high, a broken supply chain, and building costs that are up 19% compared to last year.[4] Residential mortgage rates have more than doubled since the beginning of 2022, and the difference between a 3% and 6% mortgage equates to an increase in a family's monthly mortgage payment of more than $700 for the cost of a typical home. Adding increased regulatory pressure on top of these challenges makes it impossible to provide homes at an attainable price.

2022 was the first year that single-family starts declined in 11 years, falling an estimated 12% to 999,000 units. NAHB projects that single-family production will fall to 744,000 units this year before rebounding to its normal pace in 2024.[5] According to a report from Redfin, around 63,000 home-purchase agreements in the U.S. fell through in July 2022, which equates to 16.1% of all homes that went under contract.[6] NAHB economists recognize that we will need to exceed 1.1 million starts annually to reduce a deficit due to the underbuilding in the prior decade. If the home building industry operated normally, there would be millions more jobs in home building and related trades. Smart regulation can help unleash that growth.

Our impact on the economy is more than just jobs. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community. NAHB estimates the economic impacts of building 100 typical single-family homes to include $28 million in wage and business profits, $11.1 million in federal, state and local taxes, and 297 jobs. In the multifamily sector, the impacts of building 100

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[1] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act (May 2013).

[2] Kusler, J., Common Questions Local Government Wetland Protection Programs, Prepared by Association of State Wetlands Managers and International Institute for Wetlands Science and Public Policy (June 26, 2006), at 2.

[3] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

[4] Building Materials Prices Up More than 19% Year over Year, https://www.nahb.org/blog/2022/05/building-materials-up-more-than-19-percent-year-over-year

[5] A Housing Downturn in 2023 Followed by a Recovery in 2024, https://www.nahb.org/news-and-economics/press-releases/2023/01/housing-downturn-in-2023-followed-by-recovery-in-2024

[6] Homebuyers Are Increasingly Backing Out of Deals: How To Keep Your Sale on Track, https://moneywise.com/investing/real-estate/homebuyers-are-backing-out-of-deals?utm__source=syn__oath__mon&utm__medium=Z&utm__campaign=14843&utm__content=oath__mon__14843__home+purchase+agreements+fell+through

typical rental apartments include $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.[7]

Any effort to advance our nation's housing recovery is smart economic policy. To reach these goals, however, we need policies that streamline and enhance existing efforts and remove regulatory hurdles, not ones that add layers of regulatory red tape and provide minimal benefits.

"Waters of the United States" Final Rule:

On January 18, 2023, the Environmental Protection Agency and U.S. Army Corps of Engineers issued a final rule redefining the scope of waters protected under the CWA. For years, landowners and regulators alike have been frustrated with the continued uncertainty over the scope of federal jurisdiction over WOTUS. NAHB members initially hoped the agencies would create a durable and flexible rule to improve the CWA's implementation. Home builders support removing redundancy, clarifying jurisdictional authority, and having the agencies facilitate compliance while protecting and improving the aquatic environment. Unfortunately, the final rule fails to provide the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features already regulated at the state level.

Final Rule Inappropriately Expands Federal Jurisdiction, Especially Compared to the Navigable Waters Protection Rule.

In the agencies' press release announcing the final rule, they assert it "establishes a clear and reasonable definition of WOTUS and reduces the uncertainty from constantly changing regulatory definitions that have harmed communities and our nations waters."[8] This claim is simply inaccurate as the final rule establishes a two-tiered approach to asserting federal jurisdiction by analyzing certain water features under the relatively permanent standard or the significant nexus standard. By implementing this two-tiered approach to determine this water's jurisdictional status, the agencies are giving themselves "two bites at the apple" to regulate impoundments, adjacent wetlands, non-navigable intrastate waters, and ephemeral streams drainage ditches.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field, including stepping in where they may think a state has not gone far enough. The regulatory text lacks a clear definition of "significantly affect." Furthermore, key regulatory terms within the final rule remain completely undefined including terms such as what constitutes a "tributary," "neighboring," and the aforementioned, "similarly situated waters in the region," giving federal regulators in the field full and unfettered discretion to interpret and re-interpret these important and yet undefined terms in a manner that enables the broadest of federal jurisdiction over otherwise non-navigable, isolated, and ephemeral waterbodies and landscape features.

Instead of providing clear regulatory definitions, the agencies rely upon forthcoming regulatory guidance documents to explain how the regulatory text will be further interpreted and implemented across all Army Corps Districts. Importantly, none of these regulatory guidance documents have been subject to public notice and comment and can be revised or rescinded at any time. For any small business trying to comply with the law, the last thing needed is a set of new, vague and convoluted definitions that provide another layer of uncertainty.

Let me discuss some of the problematic features in detail:

Rule's Reliance on the Significant Nexus Test:

Through the significant nexus test, federal regulators using a case-by-case approach must determine the jurisdictional status of numerous types of waterbodies or landscape features based on several vague and completely undefined factors. Ultimately, the significant nexus process culminates with a federal regulator making a jurisdictional determination that a waterbody or landscape feature, either alone or in combination with similarly situated features in the region (another undefined

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[7] The Economic Impact of Home Building in a Typical Local Area Income, Jobs, and Taxes Generated, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics/economic-impact/economic-impact-local-area-2015.pdf

[8] https://www.epa.gov/newsreleases/epa-and-army-finalize-rule-establishing-definition-wotus-and-restoring-fundamental

term), has a material influence upon the chemical, physical, or biological integrity of a traditional navigable water (TNW). Under the recently finalized WOTUS rule, the "significantly affects" test will be applied to three out of the five jurisdictional categories, e.g., tributaries, adjacent wetlands, and intrastate waters. These categories include features such as isolated lakes, ponds, streams, human-made drainage ditches or even a wetland.

In the rule's preamble, the agencies outline that they will be providing useful tools to the public with step-by-step information needed for the agencies to make informed and consistent determinations of federal jurisdiction. That information should be part of the regulations and the public should have had the opportunity to comment. Furthermore, the rule goes into effect on March 20, 2023, and the public has yet to weigh in on any of these guidance documents. One such regulatory guidance the agencies have just recently released is entitled, "Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)."[9] This joint Corps/EPA regulatory guidance document creates a required internal interagency review process for all draft approved jurisdictional determinations (e.g., including those where the agency determined a feature was non-jurisdictional) under the final rule's significantly affects standard. Under this guidance document, the Corps districts must wait for a minimum period of five days to allow staff within the EPA's Regional Office to review and request additional information from the Corps District concerning the draft jurisdictional determination (JD). Under the guidance document, if the staff within the EPA Regional Office has any comment or questions about the Corps district's draft JD, an additional 14-day waiting period is triggered to allow EPA Regional Office staff time to review, comment, or even hold a meeting with Corps district staff to discuss its findings under the draft JD. If agreement cannot be reached on a draft JD between Corps district staff and staff within the EPA Regional Office, or if the draft JD concerns a "significant affect" determination for any feature covered under the final rule's intrastate water jurisdictional category, then a headquarters review by the agencies is triggered. Any headquarters review of a draft JD triggers an additional 14-day delay but can be extended beyond 14 days provided staff from both the agencies agree (in writing) to an unspecified longer timeframe to complete their review of the draft JD.

Importantly, nowhere within this joint regulatory guidance must the federal agencies either notify or seek the consent of the landowner who is seeking the JD from the Corps district. Nor under the joint guidance does a failure on the part of the agencies to adhere to the guidance's deadlines result in the issuance of the requested draft JD. Ultimately, this joint guidance illustrates the unnecessary complexity and bureaucratic delays that have become the hallmarks of the "significant nexus test."

By comparison, the WOTUS definition under the Navigable Waters Protection Rule (hereafter "NWPR"), which the recently finalized WOTUS rule rescinds, based federal jurisdiction on observable landscape conditions. That rule empowered landowners to determine whether their activities might impact a waterbody or landscape feature that is jurisdictional under the CWA. The NWPR's definition of WOTUS did this by requiring CWA jurisdictional features to maintain surface water connections during a "typical year" to TNWs and territorial seas, and tributaries of those features.

By linking CWA jurisdiction to observable surface conditions, the NWPR addressed many of NAHB's concerns. For example, the original 1986 regulations and this final rule define the extent of "adjacent wetlands" to encompass ambiguous terms such as "neighboring" features. By comparison, the NWPR clearly defined "adjacent wetlands" and eliminated vague and undefined regulatory concepts such as "neighboring" and "similarly situated," which rendered the "significant nexus" test irrelevant, and categorically exempted from CWA jurisdiction all "ephemeral" features that form only in response to rainfall events as well as all ditches that failed to meet the NWPR's definition of "tributary." Compared to the agencies' recently finalized WOTUS rule, the WOTUS regulatory definition under the NWPR provided many improvements including:

- *Eliminated "Significantly affects" test*: By avoiding the onerous significant nexus test the NWPR linked federal CWA jurisdiction to those waterbodies and landscape features that maintained a surface water connection to another traditional navigable water.
- *Encompassed far fewer adjacent wetlands*: Since the NWPR only asserted federal CWA jurisdiction over wetlands that directly abut (i.e., touch) or maintain

[9] https://www.epa.gov/system/files/documents/2022-12/Waters%20of%20the%20United%20States__Coordination%20Memorandum.pdf

a surface water connection to other jurisdictional water during a typical year (a defined term under the NWPR) and avoided overly expansive and confusing terms like "neighboring" and "similarly situated" found under today's final WOTUS rule.

- *Excluded all ephemeral features*: The NWPR included both a regulatory definition of ephemeral features and an explicit CWA categorical jurisdictional exclusion for all such ephemeral features., By contrast, the recently finalized WOTUS rule not only rescinds the NWPR's ephemeral definition and exclusion but purposefully fails to distinguish under the final rule's ditches exclusion when ephemeral flow equates to a CWA jurisdictional *relatively permanent flow*.
- *Narrowed federal jurisdiction over tributaries*: Since the NWPR required tributaries to maintain perennial or at least intermittent flow, the NWPR did not depend on subsequent field surveys such as observations of "bed and banks and ordinary high-water mark" (OHWM) that in arid and semi-arid areas of the country have proven to be difficult to discern from erosional features left on the landscape following instances of ephemeral flow. In comparison under the recently finalized WOTUS definition, determining the presence of a tributary return to a subjective field survey approach of locating a "bed and bank" and OHWM.
- *Excluded more ditches*: Under the NWPR all ditches were excluded unless they met the conditions of either a TNW or a tributary. By comparison under the recently finalized WOTUS rule, all ditches are included unless they meet narrow exemptions.
- *Excluded basing jurisdiction on "interstate waters"*: Under the NWPR, the agencies recognized that the federal government is limited to regulating "interstate commerce" and that just because a wetland or waterbody crosses a state line, it does not provide the federal government with jurisdiction over that feature.

Compared to the WOTUS regulatory definition under the NWPR, today's WOTUS rule subjects more areas to federal CWA jurisdiction and returns to ambiguous regulatory terms and requires landowners to await the results of overly complex and bureaucratic delays inherent under the "significant nexus test" before knowing the CWA jurisdictional status of many non-navigable, isolated, and ephemeral features. Instead of relying upon observable features as under the NWPR that had made making jurisdictional determinations in the field much easier.

Intrastate Waters

The rule also provides a catchall "intrastate waters" category for areas that may not fit neatly into a specific water category but for which the agencies have retained complete discretion to find a significant nexus on a case-by-case basis. Significantly, this also includes the ability to make blanket jurisdictional determinations by considering all similarly situated waters in the region to determine if they, taken together, have a significant nexus to a TNW. The ability to aggregate waters, even within a catchment area, further illustrates the notion that there is no limit to federal jurisdiction under this rule. These definitions will leave home builders in a constant state of confusion. This unpredictability will make it difficult for my business to comply and grow. The agencies suggest that the rule provides clarity; however, all it does is produce more questions. Unfortunately, builders will need to rely on the agencies for answers or be required to pay tens of thousands of dollars to consultants to help us comply with the CWA.

Under CWA Section 101(b), Congress explicitly recognizes the primary responsibilities and rights of states in helping to prevent, reduce and eliminate pollution in our waterbodies. Intrastate waterbodies that do not impact federal commerce or other jurisdictional waters should not be federally regulated. In fact, these waterbodies should be expressly excluded in any definition of WOTUS moving forward.

FINAL RULE IS INCONSISTENT WITH SUPREME COURT PRECEDENT:

The CWA was designed to strike a careful balance between federal and state authorities. This has proven to be a difficult task, and to some extent, the efforts of the courts to provide clarity have only added to the uncertainty. The courts have been clear on one issue, which is that there is a limit to the federal jurisdiction of waters. In fact, the Supreme Court has twice affirmed that the U.S. Constitution and CWA place limits on federal authority over intrastate waters. To view the rule through this legal framework, it is necessary to look at the key cases:

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC):

In 2001, for the first time, the Supreme Court limited the federal government's jurisdictional authority under the CWA through the *SWANCC* decision. The case questioned whether the CWA conferred the Corps of Engineers with authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago because they were susceptible to being used by migratory birds. The agency tried to explain that those isolated features impacted interstate commerce and therefore were navigable waters. The Court rejected the Corps' assertion of jurisdiction because the agency's authority does not extend to isolated, abandoned sand and gravel pits with seasonal ponds, which provide migratory bird habitats.[10] In other words, the Corps could not assert jurisdiction over a feature without a connection to navigation.

Rapanos v. United States and Carabell v. U.S. Army Corps of Engineering:

Both the *Rapanos*[11] and *Carabell*[12] cases followed the same fact pattern: wetlands miles away from TNWs that drained through multiple ditches, culverts, and creeks, eventually draining into a TNW. The question of this court case was over the jurisdictional theory that waters are jurisdictional if they have a "hydrological connection" to a TNW. *Rapanos* provided a significant clarification that CWA jurisdiction does not reach non-navigable features merely because they may be hydrologically connected to downstream navigable waters. In short, the "any hydrologic connection" theory was rejected.

However, two theories emerged from the majority's opinion in *Rapanos*. The first, written by Justice Scalia, claimed that CWA coverage extended to " . . . only those relatively *permanent, standing, or continuously flowing* [emphasis added] bodies of water 'forming geographic features that are described in ordinary parlance as 'stream[s,] . . . oceans, rivers, [and] lakes.'"[13] The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act."[14] The second test was authored by Justice Kennedy, who concurred with the judgment but wrote separately for himself. He elevated the concept of "significant nexus," by explaining that "[W]etlands possess the requisite nexus, and thus comes within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[15] "Consistent with *SWANCC* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense."[16]

The most significant clarification that *Rapanos* provided was that the five Justices agreed that CWA jurisdiction does not reach non-navigable features merely because they are hydrologically connected to downstream navigable water. However, many have maligned *Rapanos* because the Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction. In many cases, the existence of two tests only adds more confusion and disagreement regarding the scope of the CWA. While the agencies face a difficult task in resolving this conflict, the proposed rule is obviously inconsistent with these Supreme Court decisions and will expand the scope of waters that can be regulated by the agencies. The rule would extend coverage to many features that are remote and/or carry only minor volumes of water, and contrary to the Supreme Court's findings, its provisions provide no meaningful limit to federal jurisdiction. This broad overreach is unacceptable.

Sackett v. Environmental Protection Agency

The Supreme Court heard oral arguments in *Sackett v. EPA* on Monday, October 3, 2022. The question presented in *Sackett* is "Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?" If the Court answers this question affirmatively, it would reject that the significant nexus test is the proper test for determining CWA jurisdiction.

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[10] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)
[11] Rapanos v. United States, 126 S.Ct 2208 (2006)
[12] Carabell v. United States, 126 S.Ct. 1295 (2006)
[13] Rapanos 126 S.Ct. at 2225
[14] Id. at 2226
[15] Id. at 2226
[16] Id. at 2249

While the public waits for the Court's decision, the agencies rushed to finalize this rule. It is especially shortsighted and a waste of federal resources, given that the Supreme Court's upcoming ruling under *Sackett v. EPA* is squarely focused on the legality of the significant nexus test.

THE PROPOSED RULE IGNORES FEDERAL/STATE BALANCE

While many aspects of the CWA are vague, Congress explicitly intended to create a partnership between federal agencies and state governments to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal 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." Under this notion, there is a point where federal authority ends and state authority begins.

The rule published by the agencies, however, blatantly ignores this history of partnership and fails to recognize that there are limits to federal authority. If this rule is implemented as written, the federal government will severely cripple the state's role in protecting our nation's water resources, which would be a huge mistake and unconstitutional. Litigation is a likely result, and while it makes its way through the court system, regulators and businesses will be left in a lurch.

In addition, because the change in jurisdictional authority applies not only to section 404 of the CWA but also to all programs, the states will be required to conduct more monitoring and develop water quality standards for these newly jurisdictional waters in addition to those that are already covered. States will also be required to develop total maximum daily loads if these waters do not meet their water quality goals. Because many of these newly designated waters are on the drier side of the spectrum and/or will be conveyances designed to move water from one place to another, I am particularly concerned with the impacts this rule will have on section 402 stormwater permitting requirements and how the states and localities may pass on the myriad of new, onerous, and costly requirements to landowners. For many years, States have adequately regulated their own waters and wetlands. States take their responsibilities to protect their natural resources seriously and do not need the federal government to meddle in their affairs and unnecessarily assert jurisdiction. In fact, every state has the authority to exceed federal law so long as there is a compelling reason. If you looked around the country, you would find that many states are protecting their natural resources more aggressively than when the CWA was enacted—a testament to their desire and willingness to do so.

In these times of austere budgets and competing priorities, the agencies should heed the CWA's directive and allow the states to maintain their prerogatives to regulate the lands and waters within their boundaries as they see fit.

POTENTIAL IMPACTS ON CONSTRUCTION:

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land or purchasing smaller parcels, redrawing development, or house plans, and completing mitigation or resource enhancement projects. All these adaptations must be financed by the builder and ultimately arrive in the market as a combination of higher prices for the consumers and lower output for the industry. As output declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, already crippled by the economic downturn, cannot depend upon the future homebuying public to absorb the many costs associated with overregulation.

Because compliance costs for regulations are often incurred before home sales, builders and developers must essentially finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business yet is one of the difficult realities that home builders face every day. This final rule only adds to the headwinds that our industry faces.

Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate-income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those on the verge of qualifying for a new home will no longer be able to afford this purchase. As of 2021, an analysis done by NAHB illustrates the number of households priced out of the market for a median-priced new home due to a $1,000 price increase. Nationally, this price difference means that when

a median new home price increases from $345,000 to $346,000, 153,967 households can no longer afford that home.[17]

The picture becomes starker when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent annually by the private and public sectors obtaining wetlands permits.[18] Importantly, these ranges do not consider the cost of mitigation, which can be exorbitant. When considering these excesses, it becomes clear that we need to find a necessary balance between protecting our nation's water resources and allowing citizens to build and develop on their private land.

Increased Number of Federal Permits:

Construction projects rely on efficient, timely, consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to higher costs, which lead to greater risks. Onerous permitting liabilities could delay or eventually kill a real estate deal. If the rule is implemented as written, the ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added costs and delays in development and investment.

Specifically, for the "intrastate waters" category, builders will be at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determinations requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

Increased Federal Consultations:

Many federal statutes tie their approval/consultation requirements to those of the CWA—meaning that if one needs to obtain a CWA permit, he/she must also obtain others (examples include the Endangered Species Act, National Historic Preservation Act, and National Environmental Policy Act). If more areas are considered jurisdictional, more CWA permits will be required, triggering these additional statutory reviews. Because project proponents do not have a seat at the table during these additional reviews and the consulting agencies are not bound by a specific time limit, builders and developers are immediately placed at a disadvantage. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses, and it is doubtful that the agencies will be equipped to handle this inflow.

Preliminary Jurisdictional Determinations:

After the issuance and implementation of the Clean Water Rule in 2015, many home builders across the country felt helpless while waiting for the agencies to process their jurisdictional determinations. Instead, many within the industry turned to preliminary jurisdictional determinations to advance the permitting process.

As the Philadelphia District of the Corps explains it, "a landowner, permit applicant or other affected party may elect to use a preliminary JD to voluntarily waive or set aside questions regarding CWA jurisdiction over a particular site, usually in the interest of allowing the landowner to move ahead expeditiously to obtain a Corps permit authorization where the party determines that it is in his or her best interest to do so." [19] PJDs cannot be appealed.

Essentially, our members gave up their right to defend themselves just to move the process along. NAHB fears this will happen again with the implementation of this final rule. Many of our members will be stuck in permit backlogs AJD reviews so they will opt for a PJD instead. Through this, many home builders recognize that we are giving authority to the federal government to regulate the water that it does not have the authority to regulate—but to speed along the process, our members often accept this.

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[17] NAHB Priced-Out Estimates for 2021, https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-nahb-priced-out-estimates-for-2021-february-2021.pdf

[18] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

[19] https://www.nap.usace.army.mil/Missions/Regulatory/Jurisdictional-Determinations/

THE WOTUS RULE'S EXCLUSIONS ARE TOO LIMITED AND FAILS TO RECOGNIZE LONGSTANDING CATEGORICAL EXEMPTIONS:

NAHB is concerned that the agencies' failure to recognize longstanding categorical exclusions from federal jurisdiction under the WOTUS final rule will result in federal overreach and unnecessary regulatory confusion on the part of regulators and landowners. Under the final rule, the agencies have not recodified nearly a dozen features that were categorically excluded from CWA jurisdiction under prior iterations of the WOTUS regulatory definition. Instead, the agencies claim that they intend to implement exclusions under the final rule in a manner consistent with prior agency practices, where certain features were not specifically excluded by the rule, but the agencies would "generally" not assert jurisdiction over those features. NAHB believes that any clearly worded WOTUS regulatory definition must also have clearly worded jurisdictional exclusions rather than relying upon general statements by the agencies on how they have typically interpreted prior categorical exclusions. The agencies must instead ensure the final WOTUS rule is implemented in a consistent and clear manner by specifying within the final rule a list of features that are categorically excluded from jurisdiction by rule and can be relied upon by landowners and regulators alike. NAHB had urged agencies during the public comment process to include the following categorical exclusions for stormwater management facilities and treatment ponds, green infrastructure, and municipal separate storm sewer systems (MS4) infrastructure.

Stormwater Management Facilities including Stormwater Treatment Ponds are not WOTUS features:

NAHB members typically must secure NPDES stormwater permits before discharging stormwater to a WOTUS or a municipal separate storm sewer system (MS4). A required element of all NPDES stormwater permits for active construction sites is the Storm Water Pollution Prevention Plan (SWPPP), which identifies specific sediment and erosion control measures necessary to protect water quality. Historically, the preferred method for treating stormwater under an SWPPP has been using on-site retention or dentition ponds, infiltration trenches, or other conveyance systems. These man-made ponds and trenches are designed to slow concentrated stormwater runoff and trap sediment to protect receiving streams, lakes, and other downstream waterbodies (i.e., WOTUS features). Without an explicit exclusion, however, stormwater treatment ponds could be deemed a WOTUS because of the final WOTUS rule's overly broad jurisdictional categories including "tributary," "adjacent wetlands, " or "intrastate waters."

While the final WOTUS rule's categorical exclusion for "water treatment systems" should cover stormwater management facilities and stormwater treatment ponds, absent a specific categorical exclusion, NAHB remains concerned home builders could be punished. Specifically, without such categorical exclusions for stormwater treatment ponds, home builders face the prospect of being required to secure CWA Section 402 NPDES permits coverage to address construction-related stormwater discharges leaving their active construction sites and a federal wetlands permit (CWA Section 404 dredge or fill permit) for their own discharges into their own stormwater treatment ponds. This admittingly would be a perverse outcome and inconsistent with the common-sense interpretation of the agencies' "waste treatment systems" exclusion. Nevertheless, without an explicit categorical exclusion for stormwater treatment ponds, developers and home builders risk having to obtain CWA 404 permits for routine maintenance activities of these facilities.

Green Infrastructure Features are not WOTUS features:

EPA has defined green infrastructure as a means of "protecting and restoring natural landscape features and using natural systems (or systems engineered to mimic natural processes) to manage rainwater as a resource," and the agencies tout its many benefits, including increased climate resiliency, reduced urban island effects, lowering a buildings' energy demands, and sustainable communities.[20] The agencies "support(s) expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically sustainable communities" and see green infrastructure as part of its "strategic agenda to protect waters." Despite the agencies' unequivocal support for green infrastructure, there is no indication under the final WOTUS rule that green infrastructure features such as rain gardens, stormwater infiltration cells, and other low-impact development techniques to manage the stormwater runoff will be covered under the final WOTUS rule's waste treatment system exclusions. This is troubling to NAHB's membership since local-

[20] www.epa.gov/green-infrastructure/what-green-infrastructure

ities often encourage or require developers and builders to install green infrastructure on new projects. By not explicitly excluding green infrastructure features from CWA jurisdiction, the agencies have created a powerful disincentive to developers, builders, and local governments from installing such features moving forward. If green infrastructure features such as rain gardens, bioswales, and other stormwater management devices are not categorically excluded from the WOTUS regulatory definition, then landowners and local governments alike face the prospect of having to obtain costly and time-consuming CWA §404 permits to perform routine maintenance of these same features. A clear disincentive to NAHB members who otherwise would consider installing green infrastructure devices into new residential developments.

Municipal Separate Storm Sewer Systems (MS4) Are Not WOTUS Features:

Municipal Separate Storm Sewer Systems (MS4s) systems are owned and operated by state and local governments and vary in size; however, their function is universal—to transport or convey a city's stormwater through pipes, drains, gutters and open ditches.[21] Many MS4 systems are regulated as point sources and therefore are required to obtain §402 National Pollutant Discharge Elimination System permits and develop stormwater management programs. Because exposed ditches and intermittent streams are often part of MS4 systems, I am concerned that the proposed may regulate MS4s (or their components) as WOTUS. This would be problematic because these features are already regulated as a point source. Further, there are miles of roadside ditches that are simply there to carry stormwater from the roadways for public safety and for which it makes little sense to consider it as federally regulable water.

Impacts of Declaring Roadside Ditches Jurisdictional:

The dilemma caused by the CWA jurisdictional status of the common ditch is so important to the residential construction industry because ditches are so ubiquitous that they criss-cross the American landscape nearly everywhere. The Federal Highways Administration estimates there are more than 3.9 million miles of roadways within the United States, and federal regulations generally require those roads to be drained by ditches.[22] [23] Therefore, having the agencies declare even a fraction of the millions of miles of roadside drainage ditches jurisdictional has major regulatory and permitting ramifications for residential developers and builders. Particularly since NAHB members typically must install culverts, roads, and even driveways across ditches to access their residential developments or even an individual homebuilding lot.

Historically, the Corps did not assert jurisdiction over roadside drainage and irrigation ditches constructed in upland areas. In addition, Congress established a statutory exemption from CWA §404 permitting requirements for the construction or maintenance of irrigation or drainage ditches under CWA Section 404(f)(1)(C). The problem for NAHB's membership is that the Corps districts have applied the statutory exclusion from CWA 404 permitting requirements inconsistently across the country resulting in regulatory confusion and litigation.

Under the NWPR the agencies created an exclusion for irrigation and drainage ditches provided those ditches were not constructed within a wetland, relocated an existing tributary, nor satisfied the NWPR's definition of a tributary.[24] Because of the NWPR's ditch exclusion and the exclusion of all ephemeral features, the jurisdictional status of ditches narrowed under the NWPR. Furthermore, because the NWPR did not use the "significant nexus test," any isolated wetlands located near non-jurisdictional ditches could not subsequently be deemed jurisdictional by the agencies using a case-by-case approach. By comparison, the current WOTUS regulatory definition eliminated the NWPR's ditch exclusion. In addition, under the final rule, roadside drainage ditches (including ditches with only ephemeral flow) can be considered jurisdictional using the significant nexus test under either the tributary or interstate water jurisdictional categories. Finally, because the final rule returns to using the "significant nexus test" this means any isolated wetlands located nearby a jurisdictional ditch can also be deemed jurisdictional.

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[21] 40 C.F.R. § 122.26(b)(8).

[22] U.S. Department of Transportation, Federal Highways Administration, Highway Statistics 2021 §4 Highway Infrastructure, Public road length by ownership and Federal-aid highways at https://www.fhwa.dot.gov/policyinformation/statistics/2021/

[23] 30 C.F.R. § 816.151(d).

[24] 40 C.F.R. § 328.3(b)(5)

CONCLUSION:

The final rule does not add new protections for our nation's water resources but rather, inappropriately shifts the jurisdictional authority of many drier-end features and non-navigable isolated wetlands, streams, and drainage ditches to the federal agencies. As a builder serving the affordable housing market, I am concerned about additional government regulations and the continued uncertainty this rule ensures. Builders cannot continue to provide affordable housing to those in need while weighed down by additional regulatory burdens and requirements like these that provide little environmental benefit.

In addition, the rule allows the agencies to illegally "take the easy way out" by sweeping everything under federal authority. If the agencies are interested in developing a meaningful and balanced rule, they must take a more methodical and sensible approach. I have significant concerns with the final rule, and I would encourage Congress to direct the agencies to implement a durable and practical definition of WOTUS.

I appreciate the opportunity to discuss these important issues.

Mr. ROUZER. I thank the gentlelady.

Mr. Williams.

TESTIMONY OF MARK WILLIAMS, ENVIRONMENTAL MANAGER, LUCK COMPANIES, ON BEHALF OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION

Mr. WILLIAMS. Good morning, Chairman Rouzer, Ranking Member Napolitano, and other members of the subcommittee. Thank you for inviting me to testify on behalf of the National Stone, Sand & Gravel Association at this hearing.

NSSGA is the voice of the aggregates industry. We have over 9,000 operations in nearly every congressional district, producing over 2.5 billion tons of material that is the key ingredient to build every home and infrastructure project in the U.S.

My name is Mark Williams. I am the environmental manager at Luck Companies, an aggregate producer in Virginia, North and South Carolina, and Georgia. I have over 40 years of experience in the water treatment industry. I am a Virginia Certified Professional Wetland Delineator since the inception of that program 18 years ago.

In its 100 years, Luck Companies provides aggregates that allow communities across the region to grow and thrive. We support numerous voluntary initiatives that improve waters, like using aggregate materials to restore habitat for the Atlantic sturgeon in the James River, protecting the Chesapeake Bay shoreline, or creating wetlands and other critical habitats, and have even donated a former quarry to Loudoun County in Virginia for future drinking water supplies.

Like all NSSGA members, we go above and beyond the many local, State, and Federal regulations to protect our surrounding environments. Remember, stone, sand, and gravel are used in nearly all building projects, public works projects, roads, highways, bridges, dams, energy projects and airports, as well as environmental purposes, such as treating drinking water, stormwater, and stream restoration.

Unlike other businesses, we are limited to where natural forces have deposited those materials that we use, so, we must engage in careful planning to ensure that every community has access to aggregates. And because of high transportation and environmental

costs, we normally are unable to move the vast amount of aggregates we use over a long distance.

NSSGA members are deeply concerned that EPA's new WOTUS rule will further complicate an already lengthy and burdensome process to establish or access these resources. Today it takes 10 or even 20 years to develop a quarry.

While the new rule is being portrayed as a familiar regulation, it in fact poses more questions than it answers by making it difficult for businesses to plan and hire the workforce necessary to supply those materials. This rule could add millions in costs and delays for supplying new aggregates.

We want to do things the right way, but this unclear rule makes it nearly impossible to know what that right way is. For example, the new rule states ditches are exempt. However, the rule also states that ditches should be included if they move water from one wet area to another jurisdictional region.

It seems to me the purpose of a ditch is to remove water and convey it to another location, and so, the new rule would in fact make all ditches jurisdictional.

Further, the rule comes at a time when our industry is working in overdrive to supply materials needed to build the projects that were authorized by this committee under the Infrastructure Investment and Jobs Act. The delays and additional costs caused by multiple rules and consultations, surveys, reports, and permits processed could lead to the abandonment of aggregates projects. This not only impacts our infrastructure future that hampers supply chains, it will severely harm the ability to produce renewable energy sources.

The finalization of this rule is occurring mere months before the Supreme Court is expected to issue a ruling that will likely change how the definition of WOTUS is determined, once again requiring the agencies to rewrite the rules.

We thank the bipartisan Members of this Congress who have implored the agencies to wait for the SCOTUS ruling to be finalized so aggregates operators are not forced to comprehend another rule change.

In closing, we thank the members of this committee for their time today to hear how the new WOTUS rule will impact the aggregates industry and our Nation.

We share the goals of every member of this committee to find ways to advance infrastructure investments and building projects that improve our communities and deliver economic success for every American.

Unfortunately, with my decades of experience, I feel this rule falls short of that goal at a time when we are seeking to maximize the outcomes of the infrastructure investments provided by Congress.

Thank you. I look forward to answering your questions.

[Mr. Williams' prepared statement follows:]

Prepared Statement of Mark Williams, Environmental Manager, Luck Companies, on behalf of the National Stone, Sand & Gravel Association

AGGREGATES ARE VITAL TO INFRASTRUCTURE AND THE ENVIRONMENT

Chairman Rouzer, Ranking Member Napolitano and members of the Subcommittee, thank you for inviting me to testify on behalf of the National Stone, Sand & Gravel Association (NSSGA) at this hearing.

The National Stone, Sand & Gravel Association is the voice of our nation's aggregates industry, which operates over 9,000 operations and employs over 100,000 people in high-paying jobs to source 2.6 billion tons of aggregates each year that are critical to the supply chain and used to sustain our modern way of life and build our nation's communities and infrastructure.

My name is Mark Williams, and I am the Environmental Manager at Luck Companies, the nation's largest family-owned and operated aggregates company, which has 21 active aggregate operations throughout the southeast from Virginia to Georgia. I have a BS in Biology and have been working in the environmental field for over 35 years. I am a Virginia Certified Professional Wetland Delineator and have been active in laboratory testing, field monitoring and permitting, as well as performing wetland delineations. I have worked at Luck Companies for 17 years and am responsible for permit compliance, environmental training and community engagement. I am the former chair of the NSSGA Environmental Committee and the 2019 recipient of the NSSGA Environmental Leader Award.

Luck Companies was started 100 years ago and remains a family-owned and operated business. We have aggregates operations in Virginia, North Carolina, South Carolina and Georgia. Luck Companies has a long history of providing aggregates for the betterment of the nation, including the DC metro area roads and bridges, the Dulles airport, homes and schools, as well as providing materials used for stream restoration and erosion control. Perhaps you've seen our quarry adjacent to the Manassas Battlefield Park or you've ridden a bike on the W&OD trail that bridges across our quarry in Leesburg. Flying into Atlanta, we operate the quarry that is directly adjacent to the southern runway. We have won national and local awards for conservation, community service and safety. Luck Companies has a Memorandum of Understanding with Loudoun County that we will mine the resource efficiently and completely, and then the quarries will be transferred at no cost to the county to be used for the storage of as much as 29 billion gallons of drinking water for the citizens of Loudoun County, enhancing the growing community's water supply.

Luck Companies supports a number of nonprofit organizations and activities in the communities we operate in and near. For example, we participate in events with the Alliance for the Chesapeake Bay and the James River Association to help improve the water quality of and appreciation for these national treasures. We are Model Level members of the RiverStars program of the Elizabeth River Project. We fund school and trail projects with the Nature Generation, a non-profit that develops programs for Loudoun County Schools. These partnerships have led to such notable collaborative projects as the installation of sturgeon breeding reefs in the James River; creation of a wetlands park in Norfolk Virginia; and the installation of many walking trails in Loudoun and Spotsylvania Counties in Virginia. Another project that we're particularly proud of is the work that was done in collaboration with Virginia Commonwealth University's Rice Rivers Center to study and enhance the life cycle of the endangered Atlantic Sturgeon. Luck Companies donated over 5,000 cubic yards of randomly sized aggregates to be placed in two locations in the James River near Richmond, Virginia. Each location was about the size of a football field and researchers continue to study the fish that are spawning and feeding in this area. Although dozens of sturgeon are captured and tagged each year, the spawning grounds of these enormous fish have not been identified. Hatchlings and juvenile fry have been captured and released, but there have been no eggs found in the river. Luck Companies personnel have been involved in the production of the stone, the delivery to the river locations, the placement and the study of the reef. Aggregate materials are also a major component of the installation of many structures that are necessary for environmental protection. Riprap is used for the protection against erosion from running water, and for the creation of living shorelines in the Chesapeake Bay and its major tributaries. Even larger stone is used for shoreline protection when smaller measures can be washed away by frequent hurricane forces. This armor stone is also used to protect piers, railroad trestles, bridges such as the Chesapeake Bay Bridge Tunnel, and the bases of new windmills that are being installed 27 miles offshore of the Virginia coast.

Like all aggregates operations, Luck Companies is regulated by numerous entities including local and state governments and federal agencies such as the EPA, the Mine Safety and Health Administration, and the U.S. Army Corps of Engineers. Before we begin operations, we must obtain permits to construct and operate our facilities. After we start operations, our facilities are routinely monitored to ensure we are operating in a safe and environmentally responsible manner. Finally, when an operation is no longer productive or needed, we prepare a reclamation plan that will allow the former quarry operation to benefit the community in any number of meaningful ways. We are committed to optimizing our operations with the community in mind to ensure that we are good neighbors.

Aggregates are the chief ingredient in asphalt pavement and concrete and are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. A disruption in the aggregates supply chain can slow or stop these important projects and break crucial links in moving other goods across the U.S. Aggregates are used for many environmental purposes, including treating drinking water and in sewage treatment plants; for erosion control and stream restoration; and in cleaning air emissions from power plants. Biofiltration is a recent innovation where aggregates and organic materials are blended to create a mixture that removes substantial quantities of nitrogen and phosphorus from stormwater runoff, which is a significant benefit to water quality. While Americans take these essential natural materials for granted, they are imperative for construction. Unlike other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we use. There are also competing land uses that can affect the feasibility of any project.

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Due to high product transportation costs, proximity to market is critical; thus, most congressional districts are home to an aggregates operation. Generally, if aggregates are transported outside a 25-mile limit, the cost of the material can increase substantially, in addition to creating higher air-borne emissions. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer.

As the industry that provides the basic material for everything from the roads on which we drive to purifying the water we drink, NSSGA members are deeply concerned that EPA's rushed and unnecessary new WOTUS rule will further complicate an already lengthy and burdensome process. The aggregates industry removes naturally occurring materials from the ground, then crushes and sorts them by size. Hazardous chemicals are not used, produced or discharged during removal or during the processing of aggregates. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as residential development, nature preserves or water supply features.

NSSGA members pride themselves on meeting or exceeding compliance with all pertinent environmental laws and regulations and emphasize sustainable practices. Luck Companies pays very close attention to our resources, particularly water. Careful design of our plants ensures that we maximize the recycling of precipitation and the reuse of all of our water supplies. Our associates live and play near our operations, and environmental stewardship is a key issue for all of us.

THE NEW WOTUS RULE IS CONFUSING & UNNECESSARY

We have been given multiple statements about the proposed rule by EPA. First, it was a simple withdrawal of the 2020 Navigable Waters Protection Act and a return to the pre-2015 regulatory framework. Now it is intended to be a "durable" rule, while at the same time the Supreme Court is considering an important case that could limit or eliminate the Significant Nexus Test, which this new rule is based on. EPA had no reason to rush this rule before the court decision. This is already the fifth rule change that the regulated community and regulators have experienced in the last 10 years, and the court decision could well require a sixth change. This adds to the time for all parties to understand a new rule that may only exist for a few months, which is an unnecessary drain on corporate and government resources.

EPA claims this rule change is needed because so many waters are unprotected, but that is not true: states and local governments have rules that effectively manage these resources, and the pre-2015 regulatory structure is currently in place. Additionally, states and many municipalities regulate any potential negative impacts to stormwater run-off and require detailed stormwater pollution prevention plans. These plans are required for every project, both during construction and operations.

For example, I have a certification from the Commonwealth of Virginia to assess wetlands and water issues that are unique to the state. This is what the Congress intended with the Clean Water Act (CWA): states and local governments are best suited to regulate unique local environments and make land-use decisions that balance economic and environmental benefits. The 2020 rule provided the clarity that regulated companies like mine need to know—what is federally jurisdictional and what is not.

This new rule poses more questions than it answers. For example, the rule includes exemptions for ditches, pits for fill and storage features used for water treatment. Looking closer, however, the conditions that these exemptions must fulfill are nearly impossible to meet in most cases, rendering them useless. For example, the rule says that ditches are exempt, unless they convey water from one wetland area to another that meets the jurisdictional definition. In my mind, the only purpose of a ditch is to convey water from someplace where you don't want it, so doesn't this make every ditch jurisdictional? Luck Companies wants to do things the right way, but this unclear rule makes it nearly impossible to know what the right way is. Clarity is key because operators are at risk of large fines and even jail time under the Clean Water Act.

Before breaking ground, operators must always evaluate whether we are affecting jurisdictional water, which requires consultation with the Corps and often involves hiring a consultant. The delay caused by multiple rules and consultations, surveys, reports and individual wetland permits processed will add significant new costs during the permitting process which would lead to the abandonment of projects that were once considered viable. The aggregates industry requires large land areas to process and remove the extensive quantities of material needed for public works projects. This rule could effectively place many areas "off limits" due to the cost of new permits and/or the mitigation required to offset losses to now regulated "waters," which may be mere depressions in the land, ditches or other features remote from navigable waters, worsening supply chain problems.

Having a clear jurisdictional determination for each site is critical to the aggregates industry. These decisions impact the planning, financing, constructing and operation of aggregates facilities. The CWA 404 "dredge and fill" permitting process and the corresponding states' 401 Certification process is long and costly. Now, we must add a new set of unclear terms that may sweep in waters previously unregulated.

While jurisdictional determinations are good for five years, as an industry we make business decisions to buy or lease properties to extract aggregates for very long terms; planning 15 to 30 years in advance is not uncommon in our industry. The companies in our industry are very concerned that past understandings of what would be jurisdictional will now be subject to additional review. A change in what is considered jurisdictional can have significant impacts on our material reserves, which will affect the life of our facilities and delay the startup of new sites. Ultimately, this change will disrupt the supply of aggregates to our biggest customers, which are government agencies; thus, affecting highway programs, airports and municipal projects.

There is already inefficiency in the current regulatory system. However, adding vague terms and undefined concepts to an already complicated program is not the way to fix the problem. In some cases, this rule could have a negative effect on the environment and safety. Ditches without maintenance can degrade and lead to increased flooding or erosion and sediment issues.

The mitigation for such impacts is also costly, difficult or even impossible to obtain. An expansion of the jurisdictional definition leads to the need for additional mitigation of those impacts. This has already led to a strain on the available mitigation resources for projects that are necessary for existing, approved transportation contracts. Approval of potential new mitigation banks is now estimated at five to nine years, and approval of permits depends on the availability of mitigation credits. Luck Companies has experienced delays that are directly tied to the lack of available credits. The approval of new credits is inevitably delayed, in part due to the outdated 2008 rule. Unlike WOTUS, this rule is in need of an update because mitigation science has expanded greatly since 2008, and an update that allows for banks that are constructing projects that are known to be beneficial should be approved more quickly. Instead of ensuring that this program was running as efficiently as possible before increasing the jurisdiction of WOTUS (and therefore the need for more mitigation banks and projects), this administration has made it more difficult for any projects to proceed, even those that benefit communities and the environment.

EPA FLOUTED THE REGULATORY FLEXIBILITY ACT AND DISREGARDED COSTS

EPA should have undertaken a full evaluation of the effects that this rule will have on small businesses via a Small Business Advocacy Review (SBRFA) Panel. The proposed rule will put small businesses at risk of large daily fines if a permit is required and not obtained, which could wipe out a small business that does not realize a permit is needed for work far from "navigable" water. EPA bypassed the requirements to comply with the Regulatory Flexibility Act and failed to get input from affected small businesses before proposing a rule (see the U.S. Small Business Administration comments on the proposed rule, February 2, 2022).

EPA's economic analysis of this rule does not accurately show what businesses like ours will end up paying, if this rule is finalized. Whenever jurisdiction is expanded, as this rule clearly does, additional features will be determined to be federally jurisdictional, and if impacted, will require replacement, typically at an increased ration, known as mitigation. Additional mitigation required under this rule can cost a new individual aggregates operation or expansion an additional million dollars or more in mitigation, and cause delays. For our business, time is a valuable asset. Any new requirements lead to a long learning curve for both the regulators and the regulated. Just getting a jurisdictional determination can take months and permits can take years; how much longer will it take to break ground with so many vague and undefined terms in this new rule?

The proposed rule has no clear line on what is "in" and what is "out," making it very difficult for our industry and other businesses to plan new projects and make hiring decisions. If it is determined that development of a site will take too long or cost too much in permitting or mitigation, we won't move forward. This means that a whole host of economic activities in a community will not occur, all in the name of protecting a ditch or a farm pond.

Another NSSGA member has described the impacts of fluctuating CWA jurisdictional rules (including the new Rule which may only be in effect for a short time, followed quickly by another based on the possible outcome of *Sackett v EPA*):

> Our business is very capital-intensive and typically viable only if in operation for many decades. Aggregate companies invest in land for future operations based on the quality of the reserves and the proximity to areas of expected population growth. Therefore, changes in the regulations during the permitting process greatly influence the ability to obtain the necessary permits. Finalizing a new WOTUS rule prior to the Supreme Court's decision on the *Sackett* case will create unnecessary hardships for our industry and further delays our ability to supply the much-needed aggregates for our Country's infrastructure. For just one of our properties, we have been trying to get a permit for over six years, and this new rule will just add to the delay, probably by years if this Rule is allowed to go into effect. The Corps of Engineers issued the original Jurisdictional Determination (JD) in late 2016. The cost of evaluating the site and the JD approval was approximately $330,000 and took over two years to complete. Various other environmental studies were being performed and finalized as well during this time period. The updated JD was obtained under the 2020 WOTUS Rule in 2021 at a cost of $30,000. This revised JD process took approximately nine months before a decision was issued. An additional study was also conducted to evaluate the quality and type of each wetland on the site to re-evaluate this site in light of the Army Corps of Engineers policy of not accepting decisions made under the 2020 rule. This additional effort costs approximately $180,000. Total cost to date is $540,000 in the Section 404 permit process alone. With the uncertainty surrounding this new rule and a possible SCOTUS decision that could require yet another rule, we could be looking at tens of thousands of dollars of additional cost and further delay to account for additional study and permitting. Mitigation costs of this site will be in the millions, but we cannot proceed given the uncertainties of the regulatory framework. Any new proposals or changes in the Section 404 requirements will slow down the permitting process and require additional costs and delays.

Taken further, a significant reduction in aggregates production could lead to a shortage of construction aggregate, causing supply chain issues and raising the costs of concrete and hot mix asphalt products for state and federal road building and repair and commercial and residential construction. As material costs increase, supply becomes limited, which will further inflate prices and reduce growth and employment opportunities in our industry. Increases in costs of our materials for public

works would be borne by taxpayers and delay road repairs and other crucial projects.

NSSGA appreciates this opportunity to speak on the devastating effects of a broad expansion of CWA jurisdiction on the aggregates industry. Thank you, Mr. Chairman, and I will be happy to respond to any questions.

Mr. ROUZER. Thank you, sir.

Ms. Bodine.

TESTIMONY OF SUSAN PARKER BODINE, PARTNER, EARTH & WATER LAW LLC

Ms. BODINE. Thank you, Chairman Rouzer, Ranking Member Napolitano, and members of the subcommittee. Thank you for inviting me to testify today on the Biden administration's new waters of the United States rulemaking, the WOTUS rule.

I am currently a partner with the firm Earth & Water Law. I have worked on Clean Water Act issues for my entire career, including while serving as a staff director of this subcommittee a long time ago and as chief counsel for the Senate Environment and Public Works Committee. So, my goal today is to help the subcommittee understand the scope and impact of this new rule.

No one disputes the ecological value of wetlands or the importance of water, whether the wetland abuts a navigable water or is isolated, and whether the water is in a river, if it is rainfall, snowmelt, groundwater. But just because wetlands and water supplies are important does not mean that Congress gave EPA and the Corps of Engineers authority to regulate all water in the Nation under the Clean Water Act.

As a former congressional staffer, I deeply respect the role of Congress in deciding where and when to grant Federal authority. As described in my written statement, in my view, the rule sets up a framework that would allow EPA and the Corps to expand their authority beyond that which was given to them by Congress.

In particular, the rule allows the agencies to claim extremely broad authority over isolated ponds and wetlands that they have not attempted to regulate since the 2001 *SWANCC* decision.

The actual impacts are difficult to quantify because the rule relies on case-by-case determinations. However, past experience, including examples of overreach in my written testimony, suggest that the agencies will aggressively claim authority over both land and water.

When landowners, farmers, and municipalities later challenge that overreach, the agencies will tell the Court that they get deference because they are interpreting their own regulation.

It is clear that the rule was designed to evade judicial review because most of the detail on how it is implemented is in the preamble and in these very lengthy, dense technical background documents. However, the new "significant nexus" test is in rule language and can be challenged on its face.

The regulation says that EPA and the Corps can claim control over any tributary, adjacent wetland, or other lake, pond, stream, or wetland if they determine that it can significantly affect a navigable or interstate water or Territorial sea, including by providing, quote, "habitat and food resources for aquatic species located in one of those waters."

The preamble uses connections between migrating salmon and the upper reaches of a tributary as an example of where this would apply. That is very disingenuous.

If you look at the technical background document, you can see what the Corps and EPA really mean is that they can claim Federal control over water and wetlands because an animal can carry insects or algae on feathers and fur or in their intestines and travel between an isolated water and a navigable water.

Agencies call this dispersal, and what they are really referring to is bird droppings and animal scat. I cannot see how the Supreme Court would ever uphold that as a test for establishing Federal control over land and water.

It clearly falls within the admonition that Justice Breyer recently gave in the *Maui* case, which was a point source case, not a WOTUS case. But he said that the agency should not be regulating, quote, "in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers," close quote.

However, that is not the only example of surprising attempts to expand Federal authority in the rule. As described in my written statement, the rule embraces the concepts that erosional features created by runoff can be considered regulative tributaries; groundwater aquifers can create connections that would support jurisdiction over isolated waters; flows from back-to-back rainstorms can be considered relatively permanent water; and water and wetlands can be called adjacent if they overlay a karst geological formation.

These interpretations will have enormous economic consequences for farmers, landowners, and municipalities. But the Biden administration rule does not even include many of the exclusions that were found in the 2015 WOTUS rule that included similar expansions of Federal authority.

I would be happy to answer any questions.

[Ms. Bodine's prepared statement follows:]

Prepared Statement of Susan Parker Bodine,[1] Partner, Earth & Water Law LLC

Chairman Rouzer, Ranking Member Napolitano, and members of the Subcommittee, thank you for the invitation to testify today on the Biden administration's final rule revising the definition of "Waters of the United States" (WOTUS).[2] I am currently a partner with the firm Earth & Water Law. I have worked on Clean Water Act (CWA) issues for my entire career, including while serving as staff director of this subcommittee and as chief counsel for the Senate Environment and Public Works Committee.

My goal today is to help the Subcommittee understand the scope and impacts of this new rule and clarify some of the statements made by EPA and the Corps in their preamble and background documents.

I want to make three points. First, the history of the CWA is a history of ever-expanding federal regulation through administrative interpretations, without any

[1] Former Senior Counsel and Subcommittee Staff Director, House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response (now Office of Land and Emergency Management); former Chief Counsel, Senate Committee on Environment and Public Works; former Assistant Administrator, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance. This testimony is on behalf of myself, not any organization.

[2] 88 Fed. Reg. 3004 (Jan. 18, 2023).

change in the statute. For this reason, the claims by EPA and the Corps of Engineers (the agencies) that the rule is simply a return to the "pre-2015 regulatory regime"[3] is a myth. Second, it has required the intervention of the courts to push back on agency overreach. Third, the agencies have inaccurately characterized the 2023 WOTUS rule as a codification of Justice Scalia's and Justice Kennedy's opinions in *Rapanos*.[4] Instead, rule is a codification of the agencies' prior overreach and an attempt to get judicial deference for that overreach.

I. THE EVER-EXPANDING CWA JURISDICTION.

No one disputes the ecological value of wetlands or the importance of water, whether the wetland abuts a navigable water or is isolated, and whether water is in a river or is rainfall, snowmelt, or groundwater. But just because wetlands and water supplies are important does not mean that Congress gave EPA and the Corps authority to regulate all water in "the Nation" under the CWA. As a former Congressional staffer, I deeply respect the role of Congress in deciding where and when to grant federal authority.

In 1972, Congress did not tell EPA and the Corps: "do whatever you think is necessary to protect water." Instead, the CWA represents a legislative compromise that carefully prescribes the scope of federal authority. For example, Congress was well aware of the importance of groundwater, but deliberately excluded groundwater from the regulatory provisions of the CWA. Congress was well aware of the ecological importance of wetlands, but as recognized in the 1973 final report of the congressionally chartered National Water Commission, Congress left the regulation of isolated wetlands and waters to the states.[5] Congress was well aware that nonpoint sources contributed to water pollution, but Congress deliberately excluded nonpoint sources from the regulatory authority of the Act. Congress was well aware of the importance of water supplies, but deliberately refrained from regulating water supply in the CWA.

But lack of a grant of authority from Congress has not stopped federal agencies from trying to expand their control. As noted by Justice Scalia in *Rapanos*, the agencies have sought to broaden federal jurisdiction through a series of actions over the course of many years.[6]

In 1973, EPA issued regulations that expanded federal authority to intrastate lakes rivers and streams based on use by interstate travelers, use for fishing for sale in interstate commerce, and use by industries engaging in interstate commerce.[7] This claim of authority was not grounded in Congress' authority over navigation and was called into question by the Supreme Court in *SWANCC*.[8]

In 1977, federal agencies floated the idea that the CWA could be used to regulate groundwater withdrawals and surface water diversions because water quantity is related to water quality.[9] In response, Congress added section 101(g) to the CWA to halt that effort.[10]

In 1977, the Corps expanded its interpretation of the term tributary. Even though the preamble to the Corps' 1975 interim final regulations specified that the upstream limit of jurisdiction is the headwaters or a point where average annual stream flow is five cubic feet per second,[11] the preamble to the Corps' 1977 regulations instead specified that jurisdiction extends to the entire surface tributary system.[12] This expansion of the scope of regulated tributaries was later called into question by the Supreme Court in *Rapanos*.

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[3] 88 Fed. Reg. at 3046.

[4] *Rapanos v. United States*, 547 U.S. 715 (2006).

[5] *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 200–201, 279 (identifying regulation of intrastate, non-navigable water as a gap in federal jurisdiction and recommending state protections).

[6] *Rapanos* at 725 ("Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act.").

[7] 40 C.F.R. 125.1 (1973); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973).

[8] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 171–72 (2001).

[9] *See* 42 Fed. Reg. 36,787, 36,793 (July 15, 1977).

[10] According to its sponsor, section 101(g) reaffirms Congressional intent to use the Federal Water Pollution Control Act to address water pollution only: "This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. . . . 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).

[11] 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

[12] 42 Fed. Reg. at 37,129.

In 1985, the EPA General Counsel tried to expand EPA's interpretation of the CWA even further by issuing a memorandum stating that "other waters" (not navigable, interstate, tributary, or adjacent) that are used or would be used by migratory birds or endangered species are categorically regulated under the CWA.[13] In 1986, the Corps adopted EPA's expansive interpretation and, in a preamble, claimed that it could presume jurisdiction under the Commerce Clause over isolated, 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.[14]

Under this theory, the Corps could claim jurisdiction over any isolated wetland, pond, or puddle based on its potential use by a migratory bird. As such, it became known as the "Migratory Bird Rule" or the "Glancing Goose" test.[15]

In 1986, the Corps removed an exclusion for ditches from its regulations.[16]

In 2000, in the preamble of its Nationwide Permits, the Corps specified that federal jurisdiction extends to ephemeral flows, if the Corps believes they can see an ordinary high-water mark.[17] This further expansion of the definition of tributary based on an ordinary high-water mark also is questioned by the *Rapanos* case.

In 2008, the Corps issued guidance that allows the Corps to claim jurisdiction over dry land in the arid west based on a 5-to-10-year flood event.[18] Use of the floodplain in lieu of an ordinary high-water mark to expand the definition of a tributary in the arid west is embraced in the 2023 WOTUS Rule.[19]

II. Judicial Push-Back on Claims of Expansive Federal Jurisdiction.

In the last twenty years, the Supreme Court has pushed back four times on broad authority claimed by EPA and the Corps under the CWA.

In the 2001 *SWANCC* decision, the Supreme Court rejected the "Migratory Bird Rule." The Court found 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."[20] Importantly, the Court held that CWA jurisdiction was an exercise of Congress' *authority over navigation*—hence the regulatory reach of the Act protects waters based on their use *as channels of commerce, not use as habitat*. That is why this Committee has jurisdiction over the CWA, not the Committee on Natural Resources.

Concern that the agencies were exceeding their statutory authority reached the Supreme Court again in 2006. In the *Rapanos* case both the plurality opinion, authored by Justice Scalia, and Justice Kennedy's concurring opinion, held that the Corps did not demonstrate that it could regulate wetlands adjacent to a ditch in Michigan. Justice Scalia's opinion held that CWA jurisdiction extended to "relatively permanent" waters and wetlands that abut those waters.[21] Justice Kennedy's opinion held that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[22] Importantly, neither Justice Scalia nor Justice

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[13] Memorandum from Francis S. Blake, EPA General Counsel, to Richard E. Samderson, Acting Assistant Administrator, EPA Office of External Affairs (Sept. 12, 1985).
[14] 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
[15] *See* January 16, 2001, Wall Street Journal, available at http://www.wsj.com/articles/SB979603030985179200
[16] 51 Fed. Reg. at 41,217.
[17] 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).
[18] A Field Guide to the Identification of the Ordinary High-Water Mark (OHWM) in the Arid West Region of the Western United States A Delineation Manual, Robert W. Lichvar and Shawn M. McColley August 2008, at 31–32 (recommending use of a 5-to-10-year precipitation event to establish federal jurisdiction over the entire floodplain).
[19] 88 Fed. Reg. at 3083; Technical Support Document for the Final "Revised Definition of the Waters of the United States" Rule (Dec. 2022), at 165.
[20] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 171–72 (2001).
[21] *Rapanos* at 739, 742.
[22] *Id*. at 759.

Kennedy agreed that finding an ordinary high water mark was sufficient to establish federal jurisdiction.[23]

In 2012, the Supreme Court reviewed EPA's claim that it could order a couple to stop building a house and that the CWA did not allow the couple to challenge that order until EPA brought an enforcement action. In the *Sackett* case, a unanimous Supreme Court disagreed with EPA and held that the administrative order requiring a couple to stop building a house was juridically reviewable.[24] During the oral argument the Justices were appalled by the admission of the Deputy Solicitor General that EPA's claim of jurisdiction was only "initial," EPA believed it could issue an order without doing a sufficient investigation, and if the homeowner wanted to appeal a jurisdictional determination they had to first submit themselves to federal jurisdiction and make a permit application.[25]

In the 2016 *Hawkes* case the Supreme Court held that a landowner could get judicial review of a Corps jurisdictional determination that a peat farm 95 miles from the nearest navigable river was regulated.[26] Tellingly, in his concurring opinion in *Hawkes*, Justice Kennedy, the author of the "significant nexus" test, called the reach of the Act "ominous" and said "[t]he Act . . . continues to raise troubling questions the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[27] On January 24, 2017, following the Court's remand, the District Court for the District of Minnesota found that the record relied on by the Corps to assert jurisdiction in *Hawkes* continued to fail to demonstrate that a peat farm located more than 90 miles from the nearest navigable water was a water of the United States. In the record for that case, the Corps' relied on the same type of connections that would establish jurisdiction under the 2023 WOTUS Rule (the functions of wetlands in providing floodwater storage and in retaining nutrients and sediments, functions of streams and rivers and transport of nutrients and chemicals downstream). The court said that the Corps' reliance on these connections, in the absence of any data on the frequency, volume, and type of actual (not hypothetical) flow from the peat farm to the river, to claim a "significant" nexus was "arbitrary and capricious."[28]

Finally, even though it did not involve the definition of WOTUS, in the recent *Maui* case, Justice Breyer rejected the idea that the CWA would regulate "in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers."[29] Yet, as discussed below, the 2023 Rule's "significant nexus" test would do just that.

III. The 2023 WOTUS Rule and Examples of Overreach That Would be Condoned Under the Rule.

In the 2023 WOTUS Rule (like the 2015 rule) the agencies are trying to codify the authority to expand their jurisdiction with case-by-case determinations by field staff and get judicial deference for those actions. They justify this action by claiming that the rule is implementing both Justice Scalia's and Justice Kennedy's opinions in *Rapanos*.

The final rule is superficially familiar, regulating traditional navigable waters, territorial seas, interstate waters (including interstate wetlands),[30] impoundments, tributaries, and adjacent wetlands. However, for the first time since the 2001

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[23] 547 U.S. at 725 (criticizing the Corps' use of an ordinary high water mark to establish jurisdiction noting that "[t]his interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only 'the presence of litter and debris' ") (plurality opinion); 547 U.S. at 781 (criticizing use of an ordinary high water mark to delineate tributaries because "breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood (J. Kennedy, concurring).

[24] *Sackett v. EPA*, 566 U.S. 120 (2012).

[25] Transcript of oral argument, *Sackett v. United States*, Sup. Ct. No. 10–1062, at 52–53, 58.

[26] *U.S. Army Corps of Eng'rs v. Hawkes Co*., 578 U.S. 590, 598 (2016).

[27] 578 U.S. at 602.

[28] *Hawkes Co., Inc., et al. v. U.S. Army Corps of Engineers*, D. Minn., Civil No. 13–107 Memorandum Opinion and Order, January 24, 2017. The Corps finally gave up trying to regulate the Hawkes peat farm.

[29] *Cty. Of Maui, Hawaii v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

[30] Although the statute does not include interstate waters in its definition of navigable waters, the agencies claim authority over all interstate waters and wetlands with no showing of any connection to navigable waters or territorial seas, citing their general Commerce Clause authority, even though the *SWANCC* case said jurisdiction had to be based on Congress' authority over *navigation*. 88 Fed. Reg. at 3073.

SWANCC decision, under the 2023 WOTUS rule the agencies also will claim jurisdiction over "other waters," *i.e., all other intrastate lakes, ponds, streams, and wetlands* (1) that are relatively permanent and that have a relatively permanent connection to navigable or interstate waters or territorial seas or relatively permanent tributaries, or (2) that the agencies believe significantly affect the chemical, physical, or biological integrity of navigable or interstate waters or territorial seas.

The rule language and, in particular, the guidance provided in the preamble and background documents, encourage the agencies to indulge in the same overreach that has been a concern of farmers, landowners, municipalities, and Congress for many years. The agencies do that by codifying the concept that CWA jurisdiction covers all waters with a "significant nexus" to a navigable water, interstate water, or a territorial sea. This argument is loosely based on Justice Kennedy's *Rapanos* opinion but would codify the practices that concerned Justice Kennedy in both the *Rapanos* and the *Hawkes* cases. The agencies also purport to codify the "relatively permanent" waters standard from Justice Scalia's plurality opinion in *Rapanos*. However, as described below, the 2023 WOTUS rule stretches that standard beyond recognition.

The agencies attempt to assure Congress and the public that regulatory exemptions will protect farmers and landowners. However, their own history of applying those exemptions demonstrates that this assertion is not true.

A. "Relatively Permanent" Test.

Under the final rule a tributary is federally regulated if it is a "relatively permanent, standing or continuously flowing body of water."[31] Wetlands that are adjacent to "relatively permanent" waters and with a "continuous surface connection" to those waters also are federally regulated.[32] Finally all other intrastate lakes, ponds, streams, and wetlands are federally regulated if they are "relatively permanent" and have a "continuous surface connection" to a relatively permanent water.[33] The agencies decide on a case-by-case basis whether a water body is relatively permanent and whether the connection is continuous.

Perhaps concerned that in its forthcoming *Sackett* decision the Supreme Court will disallow use of the "significant nexus" standard to find federal jurisdiction, EPA and the Corps have expanded the "relatively permanent" standard.

Justice Scalia's plurality opinion in *Rapanos* held that the CWA authorized federal control over "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.'"[34] Justice Scalia emphasized that relatively permanent waters do not include tributaries "whose flow is '[c]oming and going at intervals . . . [b]roken, fitful' or 'existing only, or no longer than, a day . . .'"[35] Accordingly, the 2008 Rapanos Guidance (which is now revoked by the 2023 WOTUS Rule) interpreted relatively permanent to mean only those non-navigable tributaries that flowed continuously or that had continuous flow at least seasonally (typically three months).[36] Further, in 2008 EPA and the Corps determined that "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally.[37]

In contrast, in the 2023 WOTUS Rule, water from "back-to-back precipitation events" can be considered relatively permanent flow.[38] Under that interpretation, the agencies could argue that almost any ditch or stormwater control feature in parts of California is a relatively permanent WOTUS as a result of repeated storms.[39]

Under the 2023 WOTUS Rule, the agencies don't even need to observe water to identify a "relatively permanent" tributary, wetland, pond, or puddle. Biological indicators, including the presence of aquatic insects or plant, can be used to determine that a tributary is relatively permanent.[40] An ordinary high-water mark also can

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[31] 33 C.F.R. 328(a)(3)(i).
[32] 33 C.F.R. 328(a)(4)(ii).
[33] 33 C.F.R. 328(a)(5)(i).
[34] *Rapanos*, at 739.
[35] *Rapanos*, at 733.
[36] U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), at 1.
[37] Rapanos Guidance, at 7.
[38] 88 Fed. Reg. at 3086.
[39] *See* Appendix A, Exhibit 1.
[40] 88 Fed. Reg. at 3087–88.

be used to determine that a tributary is relatively permanent even though, as noted above, both Justice Scalia and Justice Kennedy agreed that an ordinary high-water mark was not sufficient to establish CWA jurisdiction.[41]

Further, when regulating a wetland that is adjacent to a relatively permanent water, the regulatory text does not require a relatively permanent hydrological connection. Only the geographic or artificial feature that forms the connection needs to be continuous.[42]

B. "Significant Nexus" Test.

Under the final rule the agencies can regulate a tributary that lacks "relatively permanent" flow if, on a case-by-case basis, EPA or the Corps decide that it "significantly affects the chemical physical, or biological integrity" of a navigable or interstate water or a territorial sea.[43] Adjacent wetlands also can be regulated based on such effects.[44] Finally *all other intrastate lakes, ponds, streams, and wetlands* also are federally regulated if the Corps or EPA determine that they "significantly affect the chemical physical, or biological integrity" of a navigable or interstate water or a territorial sea.[45]

Jurisdiction based on a "significant nexus" to navigable water is not a long-standing agency interpretation of the Act. In 2009, the agencies took the position that the *Rapanos* case severely limited their jurisdiction and encouraged Congress to act.[46] Some members of Congress introduced legislation to remove the term "navigable" from the CWA.[47] After that legislation failed to advance over the course of two Congresses, in 2011 the agencies changed their strategy and developed a draft guidance to reinterpret both the CWA and Justice Kennedy's opinion.[48]

The logic for the new interpretation goes as follows: federal jurisdiction over water is as broad as the objective of the CWA 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"). Continuing the logic: a "significant nexus" to navigable water can be formed by any chemical, physical, or biological connection.

Far from being grounded in Justice Kennedy's *Rapanos* concurrence, this interpretation of the CWA is in fact based on Justice Steven's dissenting opinion and an *amicus* brief he cited in support.[49]

This interpretation is deeply flawed. First, it turns an objective of a law into an operative jurisdictional statement, despite admonitions against doing so by the Supreme Court.[50] Second, it violates a standard canon of statutory interpretation by reading the terms "chemical, physical, and biological integrity" in section 101(a) of the Act to refer to the scope of *waters* to be protected even though in the seven other places where that phrase is used in the Act, it refers to the *level of protection* for the waters that are already subject to the Act.[51] Even Justice Kennedy considered

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[41] *Id*.

[42] *Id*. at 3092, 3117. *See also, id*. at 3096 ("A continuous surface connection is not the same as a continuous surface water connection, by its terms and in effect.")

[43] 33 C.F.R. 328(a)(3)(ii).

[44] 33 C.F.R. 328(a)(4)(iii).

[45] 33 C.F.R. 328(a)(5)(ii).

[46] *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.

[47] The Clean Water Restoration Act (HR 2421 and S. 1870 110th Congress; S. 787 111th Congress).

[48] 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).

[49] *SWANCC*, 531 U.S. at 176 n. 2 (Justice Stevens, dissenting); Brief for Dr. Gene Likens et al. as Amici Curiae in *SWANCC*. This brief was included in the docket for the 2015 WOTUS rule, document no. EPA–HQ–OW–2011–0880–8591.

[50] The Supreme Court has stated, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The *Rapanos* plurality made the same point: "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. . . . It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States." *Rapanos*, 547 U.S. at 755–56 (2006) (Scalia, J., plurality).

[51] *See* 33 U.S.C. § 1362(11), § 1362(15), § 1362(19), § 1314(a)(1)(B), § 1314(b)(1)(A), § 1254(b), and § 1255(d)(3). A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); Antonin Scalia and Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012), at 170 (discussing the "Presumption of Consistent Usage" canon) (hereinafter "Reading Law").

such an interpretation of his "significant nexus" test to be an overreach.[52] Finally, the agencies' legal interpretation takes a term used *once* in the CWA, "Nation's waters," and assumes that this term is equivalent to the term "waters of the United States." That assumption also violates principles of statutory interpretation. Congress is assumed to mean different things when it uses different terms.[53] The "Nation's waters" addressed by the CWA through nonregulatory programs includes waters that are not WOTUS. In fact, the policies and goals listed in section 101(a) include "the national policy that areawide treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State," a provision of the Act that expressly addresses waters that are *not regulated* at the federal level.[54]

To support expanded jurisdiction under the 2023 WOTUS Rule, the agencies now claim that an isolated water can affect the "biological integrity" of a navigable water.[55] The preamble uses anadromous fish, like salmon, to provide an example of biological connections.[56] To understand what the agencies really mean, one has to read the Technical Support Document. That document reveals that the agencies believe they can claim jurisdiction over an isolated water if they determine that birds can fly from the isolated water to a navigable water and leave bird droppings that contain seeds of aquatic plants or they determine that beavers that live in the isolated water can move from the pond to a tributary of a navigable water and leave scat that includes larva of aquatic insects.[57] The agencies call this "dispersal."

The Technical Support Document is replete with examples of "dispersal studies" that purportedly support jurisdiction over isolated waters. These include studies of mammals "that can disperse overland," insects that "hitchhike on birds and mammals from non-floodplain wetlands to the stream network," insects "that are flight-capable," and "frogs, toads, and newts" that "move between streams or rivers and non-floodplain "other waters."[58] The Technical Support Document even cites papers to support the idea that the agencies can assert federal jurisdiction over land and water based on the *hypothesis* that birds transport fairy shrimp to vernal pools.[59] In all, the Technical Support Document uses the word "dispersal" *140 times*.

In the preamble, the agencies repeatedly state that they will not base federal jurisdiction over isolated waters on use of water as habitat by migratory birds. However, this claim is disingenuous. Rather than relying on *use of a water body by a bird*, the Technical Support Document makes it clear that they will assert jurisdiction based on *dispersal of insects and plants by a bird*.

Jurisdiction based on dispersal of biota is likely to become the new "Glancing Goose" test. The Technical Support Document states that: "Biological connections are likely to occur between *most* non-floodplain wetlands and downstream waters through either direct or stepping stone movement of amphibians, invertebrates, reptiles, mammals, and seeds of aquatic plants, including colonization by invasive species."[60] The Technical Support Document further states that "[e]mergent and aquatic vegetation found in non-floodplain 'other waters' disperse downstream by water, wind, and *hitchhiking* on (i.e., adhering to) *migratory* animals" (emphasis added).[61]

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[52] *U.S. Army Corps of Eng'rs v. Hawkes Co*., 578 U.S. at 602 (concurring opinion by Justice Kennedy "point[ing] out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern" and referring to the "ominous reach" of the Act).

[53] Reading Law, at 170 (presumption of consistent usage also means that a material variation in words suggests a variation in meaning).

[54] CWA section 101(a)(5), referring to section 208 of the Act, which encourages the development of plans to address "substantial water quality control problems," including identifying pollution problems associated with nonpoint sources, saltwater intrusion, and pollution of groundwater, all of which fall outside the regulatory reach of the Act. *See* CWA section 208(a)(1) and (b)(2)(F), (I), and (K).

[55] 33 C.F.R. 328.3(c)(6).

[56] 88 Fed. Reg. at 3021.

[57] *See* Technical Support Document, at 209 and studies cited including Figuerola, J., and A.J. Green. 2002. "Dispersal of Aquatic Organisms by Waterbirds: A Review of Past Research and Priorities for Future Studies." *Freshwater Biology* 47:483–494; Figuerola, J., *et al*. 2005. "Invertebrate Eggs Can Fly: Evidence of Waterfowl-Mediated Gene Flow in Aquatic Invertebrates." *American Naturalist* 165:274–280; dispersal capacity of a broad spectrum of aquatic invertebrates via waterbirds," Aquatic Sciences 69:568–574 (2007); and Roscher, J. P., "Alga dispersal by muskrat intestinal contents," Transactions of the American Microscopical Society 86:497–498 (1967).

[58] Technical Support Document, at 212.

[59] Technical Support Document, at 64, 548.

[60] Technical Support Document, at 22.

[61] Technical Support Document, at 209.

The 2023 WOTUS Rule preamble claims its "significant nexus" standard is based on protection of water quality.[62] However, in the 2023 WOTUS Rule *for the first time ever* the agencies claim that they consider the *presence of animals* to be water quality parameters.[63]

Contrary to this novel interpretation of the CWA, there is no basis in the text or history of the CWA to support the idea that federal jurisdiction is based on the movement of animals. Water quality is the presence or absence of *pollution* that impacts the ability of a body of water to meet its designated uses. As stated in section 101(a)(1), water quality "*provides for* the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." It is not the presence or absence of an animal or recreation itself. Despite this fact, the 2023 WOTUS Rule allows the federal government to assert jurisdiction over water based on functions such as "provision of habitat and food resources for aquatic species located in [navigable or interstate waters or territorial seas]."[64]

To support expanded jurisdiction under the 2023 WOTUS Rule, the agencies also claim that an isolated water can affect the integrity of a navigable water by either preventing or contributing water flows.[65] These flows include overland sheet flow spilling from a wetland[66] and contributions to groundwater that later recharges to surface water.[67] They make this claim even though claiming jurisdiction based on water supply functions contravenes section 101(g) of the CWA. Further, in 2015 the Corps' Assistant Secretary of the Army (Civil Works), Jo-Ellen Darcy, responded to written congressional questions stating that: "The Corps has never interpreted groundwater to be jurisdictional water *or a hydrologic connection* because the Clean Water Act (CWA) *does not provide such authority*."[68] Despite the admission that groundwater connections are not a basis for jurisdiction the Technical Support Document for the 2023 WOTUS Rule does just that, finding that "[n]on-floodplain wetlands and open waters are frequently connected to their local and regional aquifers, and hence to the stream networks, through groundwater flows."[69]

The agencies claim that the rule relies on their "extensive experience" in making jurisdictional determinations.[70] However, those claims were thoroughly rebutted by internal Corps of Engineers memoranda repudiating the suggestion that the Corps' experience supports the significant nexus framework of the 2015 Rule, which is repeated in the 2023 WOTUS Rule.[71]

As the agencies admit, they have no experience asserting jurisdiction over intrastate, nonnavigable waters based on "significant nexus."[72]

The Technical Support Document notes that most connections with navigable waters are through biological or groundwater connections."[73] Dispersal of biota and groundwater are likely to become the primary ways EPA and the Corps claim control over private property, even though nothing in the CWA or its legislative history supports this outcome.

C. Expansion of the Concept of "Tributary"

The 2023 WOTUS Rule does not define the term "tributary." Tributaries of navigable or interstate waters or territorial seas or impoundments are regulated.[74] The

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[62] *See* 88 Fed. Reg. at 3034 ("The standard is consistent with the plain language of the Act's objective because it is based upon effects on the water quality of paragraph (a)(1) waters . . .").

[63] *See* Section 12 of the Response to Comments Document, at 46 (describing storage of water and providing habitat for aquatic species as functions that improve water quality).

[64] 33 C.F.R. 328.3(c)(6)(i)(E).

[65] 33 C.F.R. 328.3(c)(6)(i)(A) and (C).

[66] 88 Fed. Reg. at 3094 (discussing water spilling from wetlands).

[67] 88 Fed. Reg. at 3033, 3120 (discussing groundwater recharge from wetlands).

[68] *See* Response to Follow-Up Questions for Written Submission to Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) (June 2, 2015) (emphasis added) (attached).

[69] TSD, at 65 (citations omitted).

[70] The preamble to the final rule makes this claim at least eight times.

[71] *See* April 24, 2015, Memorandum from Lance Wood to MG Peabody (legal analysis); April 24, 2015, memorandum from Jennifer Moyer to MG Peabody (technical analysis), introduced into the record of S. Hrg. 114–203, "Oversight of the Army Corps of Engineers' Participation in the Development of the New Regulatory Definition of "Waters of the United States," before the Senate Environment and Public Works Committee, Sept. 30, 2015, and available at https://www.congress.gov/114/chrg/CHRG-114shrg99458/CHRG-114shrg99458.pdf

[72] 88 Fed. Reg. at 3102–03 (admitting that the agencies have not asserted jurisdiction over isolated waters since the *SWANCC* decision in 2001).

[73] In the studies they reviewed, the agencies found that biological connections are the most common type of connection for all stream types (including ephemeral channels) (Technical Support Document, at 51) and floodplain wetlands and open waters (Technical Support Document, at 52). For isolated waters, the Technical Support Document, found groundwater was the most common basis for finding a connection (Technical Support Document, at 65).

[74] 33 CFR 328.3(a)(3).

preamble states that a tributary is a water body that flows directly or indirectly to one of those waters.[75] On its face, this definition appears to be uncontroversial. However, the preamble makes it clear that a feature on the land can be considered a tributary as long as EPA or the Corps decide they can see an ordinary high-water mark.[76] For example, in 2014 comments on the proposal that became the 2015 WOTUS Rule the State of Tennessee noted that the Corps claimed jurisdiction over a Tennessee farmer's field by claiming erosion from an ephemeral flow was a regulated tributary.[77]

In fact, the 2023 WOTUS Rule goes even further and states that a surface flowpath is not needed.[78] Water also can be considered a tributary even if it no longer is an identifiable hydrographic feature, such as a stream that disappears underground, including through groundwater aquifers in karst geology found below about 20 percent of the United States.[79]

The preamble also gives EPA and the Corps the discretion to decide that a buried stream is a tributary.[80] This language could convert a city sewer into a regulated water of the United States.[81]

Under the rule, the agencies can use aerial photographs, light detection and ranging (LIDAR) date, and even soil surveys to identify a tributary and determine that it is "relatively permanent."[82] This can put landowners in an untenable situation.

For example, in 2014, a farmer in Indiana cleared trees from his property to expand his farming operation. The Corps claimed that this activity destroyed 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 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 2000s. Although the nearest traditional navigable water was 117 miles away and the nearest relatively permanent water feature (Mud Ditch) was a mile and a half away, the Corps ordered the farmer to cease and desist his tree clearing.[83] Under the 2023 WOTUS Rule, the same kind of information can be used to claim that a farm has a "relatively permanent" tributary.

D. Expansion of the Concept of "Adjacency."

Under the 2023 WOTUS rule, adjacency is determined on a case-by-case basis, with no outer boundary. The preamble points out that even if a wetland is more than a few hundred feet from a navigable or interstate water or a territorial sea or an impoundment, or a tributary of any of these waters, EPA and the Corps can still claim a wetland is adjacent based on a surface or shallow subsurface connections, pipes, ditches, or—like tributaries—karst geology.[84]

The Corps has claimed a wetland was adjacent due to the presence of damp soil 12 inches below the surface.[85]

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[75] 88 Fed. Reg. at 3083.

[76] 88 Fed. Reg. at 3116.

[77] See the photo in the Appendix, Exhibit 2, from the Comments of the State of Tennessee, Department of Environment and Conservation on the 2014 proposed WOTUS Rule, document no. EPA–HQ–OW–2011–0880–17074, at 19, available at https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-17074

[78] 88 Fed. Reg. at 3084.

[79] *Id.* at 3083.

[80] 88 Fed. Reg. at 3083.

[81] *See* Hidden Washington: Tiber Creek (describing how Tiber Creek formerly found in Northwest Washington was converted in the 19th century to an underground sewer that discharges to the Anacostia River), available at https://parkviewdc.com/2011/09/08/hidden-washington-tiber-creek/ *See also*, Senator James M. Inhofe, "Your Sewers and Streets Could be Waters of the United States," Municipal Water Leader, Vol. 1, Issue 3, October 2015, at 24, available at https://municipalwaterleader.com/vol-1-iss-3/

[82] 88 Fed. Reg. at 3087 (tributaries generally), 3114 (discussing how to determine a ditch is not excluded).

[83] Testimony submitted by Martin Farms, Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States," May 24, 2016, before the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 See Appendix A, Exhibit 4 for photo.

[84] 88 Fed. Reg. at 3089.

[85] *See* Testimony submitted by Valerie Wilkinson, Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States,"

Continued

The Corps has claimed wetlands are adjacent based on ruts formed by a log skidder.[86]

The Corps has claimed that a puddle is an adjacent wetland based on tire ruts. 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. 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.[87]

The agencies plan to use aerial photos to identify wetlands that it may consider adjacent.[88] That can lead to abuses as well. In 2015, the Corps claimed that lichen covered rock outcroppings were wetlands based on a review of an aerial photograph.[89]

Finally, EPA and the Corps will consider a wetland to be adjacent even if there is no surface or subsurface connection to a jurisdictional water based by inferring that the wetland is close enough to have an impact on an aquatic ecosystem.[90]

E. Erosion of Exemptions.

In the preamble of the 2023 WOTUS Rule, the agencies repeatedly say that farmers are exempt from CWA permitting under section 404(f)(1) of the statute. This claim is disingenuous. Section 404(f)(2) allows the agencies to require permits for discharges into navigable waters for a new use that reduces the waters' flow or circulation or reach. The agencies have interpreted that "recapture" provision so broadly that one court called it an administrative repeal."[91]

In 2013, the Corps issued a "cease and desist" order to Subcommittee member Congressman John Duarte claiming that he needed a CWA 404 permit to plow a field on his farm. The Corps claimed that the field contained wetlands and plowing caused the mounded soil next to the furrows to dry out, calling those mounds "mini mountain ranges," "uplands," and "dry land."[92] According to the Corps, notwithstanding section 404(f) of the CWA, plowing is not exempt because it converts wetlands to uplands.

In 2015, the Corps claimed that changing use of a field from alfalfa to orchards was a change and therefore was not an exempt normal farming activity.[93]

The 2023 WOTUS Rule also greatly reduces the scope of the long-standing exemption for prior converted cropland. This exemption was included in the regulatory definition of WOTUS in 1993. The preamble of that rule stated that an area would lose its status as prior converted cropland if the cropland is "abandoned," meaning that crop production ceases and the area reverts to a wetland state. Specifically, the preamble to the 1993 regulations stated that prior converted cropland that now meets wetland criteria will be considered abandoned unless "once in every five years it has been used for the production of an agricultural commodity, or the area has been

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May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

[86] Testimony of Gary W. Perkins, Hearing on "Inconsistent Regulation of Wetlands and Other Waters," Before the Committee on Transportation and Infrastructure, Water Resources and Environment Subcommittee, Mar. 30, 2004, 108th Congress (GPO Serial No. 108–58).

[87] Response to Questions for the Record submitted by Don Parrish, Case Study 1, Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66 *See* Appendix A, Exhibit 6.

[88] 88 Fed. Reg. at 3094.

[89] Response to Questions for the Record submitted by Don Parrish, Case Study 9, Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

[90] 88 Fed. Reg. at 3089.

[91] *See* Memorandum and Order, United States v. County of Steams, Civ. 3–89–616 (D. Minn. March 15, 1990), at 18.

[92] *See* "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," Sept. 20, 2016, available at https://www.epw.senate.gov/public/__cache/files/9/9/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/1C09C14A8FD18AB786684EB1E6538262.wotus-committee-report-final1.pdf and the photograph in Appendix Exhibit 4.

[93] Response to Questions for the Record submitted by Don Parrish, Case Study 7, Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States," May 20, 2016, available at https://www.epw.senate.gov/public/index.cfm/hearings?ID=3F9479F7-CA54-44B6-A202-631D86380A66

used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production."[94] In 2005, the Corps attempted to change that interpretation for its field staff in a memorandum, replacing the "abandonment" test with a change of use test. The District Court for the Southern District of Florida set aside that memorandum as a spurious rulemaking that violated the Administrative Procedure Act.[95] Notwithstanding the Corps' attempt to change the definition of prior converted cropland, EPA continued to use the abandonment test until now.[96] Thus, the 2023 WOTUS Rule is a change from "pre-2015 practice," despite claims to the contrary, which will result in costs to farmers. The agencies recognize this in their Economic Analysis although they claim they cannot quantify the costs.[97] In comments on the proposal that led to the 2023 WOTUS Rule, the agriculture community estimated that the cost could be *billions*.[98]

The 2023 WOTUS Rule also raises the specter of CWA regulation of rice fields. The 2015 WOTUS rule expressly excluded flooded rice fields in the regulatory text and they would not have been jurisdictional under the 2020 rule. However, the 2023 WOTUS Rule exempts flooded rice fields only if they are used *exclusively* for purposes such as rice growing.[99] This "exclusive use" limitation ignores the fact that many rice farmers lease their fields to duck hunters and obtain another source of revenue. The preamble to the 2023 WOTUS Rule says the agencies will not claim jurisdiction over a rice field if it is being used by waterfowl or other wildlife but says nothing about use by duck hunters.[100]

Finally, the 2023 WOTUS Rule fails to exclude stormwater control features, wastewater recycling basins, and groundwater recharge basins even though those features were excluded from the 2015 rule and would not have been swept in by the 2020 rule.

The 2023 WOTUS Rule gives EPA and the Corps extensive tools to claim control over land, creating uncertainty for and imposing burdens on landowners, farmers, and municipalities across the United States.

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[94] 88 Fed. Reg. at 3106–07.

[95] *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010). The Corps followed the directive of the court only in the area subject to the court's jurisdiction. 88 Fed. Reg. at 3107.

[96] Economic Analysis, at 49–50.

[97] *Id*.

[98] 88 Fed. Reg. at 3109.

[99] 33 CFR 328.3(b)(5).

[100] 88 Fed. Reg. at 3116.

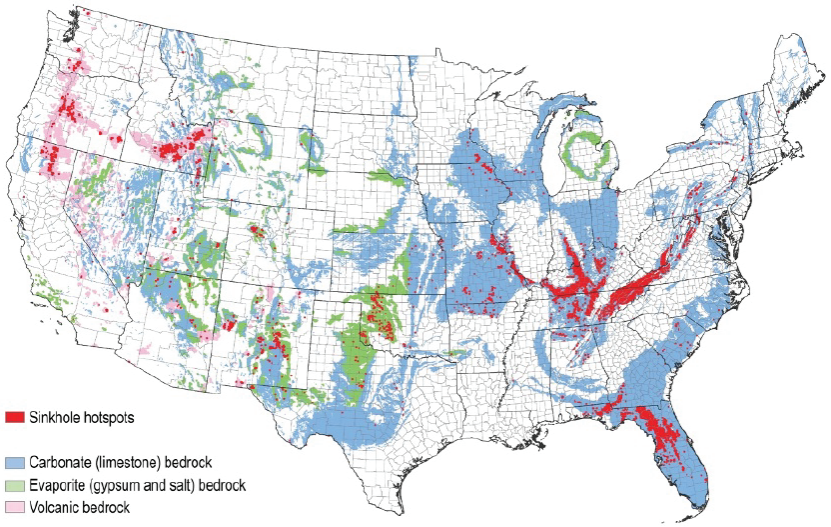
APPENDIX A

EXHIBIT 1: Back-to-back storms.

Windsor, California, Jan. 9, 2023.

EXHIBIT 2: Tennessee farmer's field identified as WOTUS by the Corps in

EXHIBIT 3: Karst Map of the Conterminous United States—2020

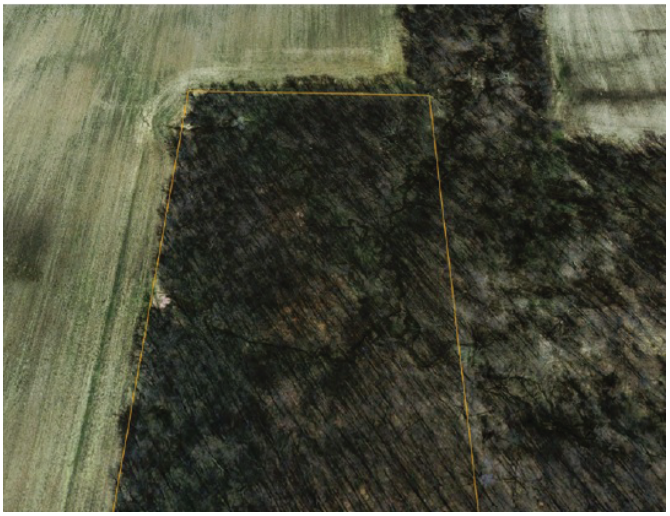


United States Geological Survey at https://www.usgs.gov/mission-areas/water-resources/science/karst-aquifers

EXHIBIT 4: Photograph of Congressman Duarte's field.

Photograph from U.S. Department of Justice, Expert Team Rebuttal Report, Duarte Nursery, Inc. et al. *U.S. Army Corps of Engineers/United States v. Duarte Nursery, Inc. et al.*, No. 2:13-cv-02095, Document 244-4, filed Aug. 15, 2016.

EXHIBIT 5: Martin's Farm



Before clearing

After clearing.

EXHIBIT 6: Tire ruts that the Corps claimed were jurisdictional wetlands.

Mr. ROUZER. I thank the gentlewoman.

Mr. Owen, you are now recognized.

Mr. OWEN. Thank you, Chairman Rouzer, Ranking Member Napolitano, I appreciate the opportunity to speak today.

Mr. ROUZER. I don't think your mic is on.

Mr. OWEN. Oh, the mic is not on.

Mr. ROUZER. And if you can pull that microphone closer to you.

Mr. OWEN. Yes, I will do that.

Mr. ROUZER. There you go.

TESTIMONY OF DAVE OWEN, HARRY D. SUNDERLAND PROFESSOR OF LAW AND FACULTY DIRECTOR OF SCHOLARLY PUBLICATIONS, UNIVERSITY OF CALIFORNIA COLLEGE OF LAW, SAN FRANCISCO

Mr. OWEN. Thank you, Chairman Rouzer, Ranking Member Napolitano, and Ranking Member Larsen, for the opportunity to speak with you today.

In my testimony, I am going to explain how the 2022 waters of the United States rule is better for water quality, better for the economy, better for States, and a better interpretation of statutory text.

Protecting water quality is the point of the Clean Water Act. Through years of research, scientists have concluded that we cannot have water quality in our rivers, lakes, and seas if we do not protect the smaller streams and wetlands that feed those rivers, lakes, and seas. Those small streams and wetlands are as impor-

tant to larger waterways as our capillaries are to our pulmonary system or as a tree's leaves and roots are to its trunk.

Despite that importance, the 2020 rule would have eliminated Clean Water Act protection from most of the Nation's small wetlands and streams. The 2020 rule never tried to explain how this change would be better for water quality nor could it.

The 2022 rule restores those protections, and it does so by establishing familiar standards that date back to 1975 and have been elaborated in detail since 1986. This will improve water quality across the Nation.

Next, economics.

Because the new rule makes environmental sense, it also makes economic sense. Water quality is valuable. Hunting, fishing, and often tourism require clean water. Clean water is an important input for many manufacturing processes. Everyone needs clean water to drink. But drinking water treatment is expensive, and it is more expensive if the source water is dirtier.

An honest appraisal of the economic benefits of cleaner water should have been part of the 2020 rule. It was not. Instead, the previous rule's economic analysis pretended that some well-known benefits did not exist, claimed inaccurately that others could not be measured, and premised its analysis on some demonstrably fallacious assumptions, like, for example, an assumption that States would simply backfill whatever protections the Federal Government withdrew.

The whole rule was based on sleight-of-hand accounting, with that accounting designed to hide millions of dollars in costs to the American public.

The new rule fixes these problems. Through a good faith accounting, it explains that restored benefits will produce hundreds of millions of dollars in benefits. Adopting this rule was the economically responsible thing to do.

The new rule also supports States. This might be a sort of surprising claim because the Clean Water Act's detractors typically claim to be on the side of State power, but that claim misunderstands how Clean Water Act federalism actually works.

The Clean Water Act was designed to address major problems that States could not address on their own. States have no authority over pollution sources beyond their borders. And polluting industries will play States against each other, creating a race to the bottom and seeking the weakest possible form of regulation.

Sorry, I am missing a couple pages here.

In fact, however, the Clean Water Act was designed to respond to these State challenges by empowering States in multiple ways.

So, the first key way in which it empowers States is again by allowing them to participate in every program that is part of the statute. In addition, it allows States to comment on permits from upstream sources. And it finally allows, through section 401, States to assert power over the Federal Government.

In other words, section 401 gives States the ability to condition permits issued by the Federal Government in ways that are protective of State water quality. That is a huge benefit that would be taken away if the scope of Clean Water Act jurisdiction shrinks.

Finally, the rule does a better job with statutory text. The key text that we are interpreting here is the waters of the United States. Under any plausible reading of that text, it would include aquatic features that have water and that are permanently present. That includes streams, that includes wetlands, that includes ponds, even if they don't have a permanent connection to some larger water body.

The new rule respects that text, and in contrast the previous rule mangles statutory text by creating some strange distinctions between waters that are covered and waters that are not.

So, in summary, the new rule is a better interpretation of statutory text, it is better for the economy, it is better for States, and, most importantly, it is better for water quality.

I look forward to your questions. Thank you.

[Mr. Owen's prepared statement follows:]

Prepared Statement of Dave Owen, Harry D. Sunderland Professor of Law and Faculty Director of Scholarly Publications, University of California College of Law, San Francisco

I. INTRODUCTION

Last year was the 50th anniversary of the passage of the Federal Water Pollution Control Act, which we now refer to as the Clean Water Act. That anniversary was an occasion to celebrate the act's extraordinary achievements—achievements we also ought to be celebrating here today.

Around the nation, rivers that once were open sewers now are treasured community resources, even as this nation has experienced sustained economic growth.[1] It is not hard to understand why popular support for water quality protections remains so strong.[2]

But protecting these achievements, and fulfilling the Clean Water Act's promise, will require continued support from this Congress, as well as continued implementation efforts by the United States Army Corps of Engineers (Army Corps) and the U.S. Environmental Protection Agency (EPA).

Protecting water quality remains a work in progress. Thousands of waterways remain impaired, imposing huge costs on the nation. We are much better off than we were in 1972, but we are still far from making our waters fishable and swimmable.[3]

For reasons I will explain in more detail, the 2022 Army Corps and EPA rule interpreting the statutory phrase "the waters of the United States" is crucial to protecting the progress we have made and to turning the additional promise of the Clean Water Act into reality.

The rule is necessary to protect water quality. It is consistent with the Clean Water Act's text and with decades of nearly uninterrupted agency interpretations and practice. It makes economic sense. And it is also necessary because the regulation it replaces—a rule promulgated in 2020 under the previous administration—was at odds with statutory text, water quality protection, rational economics, and its own stated justifications.

I am the Harry D. Sunderland Professor at the University of California College of Law, San Francisco, where I teach classes in environmental law, water law, and statutory interpretation and administrative law. I have worked in the environmental field for my entire career, first as a consultant helping regulated businesses

[1] 50 Years after the Clean Water Act—Gauging Progress, U.S. Govt. Accountability Office, October 17, 2022, https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress.

[2] Americans Strongly Support Environmental Protections in the Clean Water Act, Walton Family Foundation, September 20, 2022, https://www.waltonfamilyfoundation.org/learning/access-and-availability-to-clean-water-is-a-concern-nationwide ("The poll found strong support among Americans for the Clean Water Act, with 75% in favor of protecting more waters and wetlands. It also showed Americans strongly prefer the federal government, through the Environmental Protection Agency, to maintain water standards in the country.").

[3] 50 Years after the Clean Water Act—Gauging Progress, U.S. Govt. Accountability Office, October 17, 2022, https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress.

comply with environmental laws and then as a water lawyer and law professor.[4] Most of my research focuses on water resource management, and several of my research papers focus specifically on implementation of the Clean Water Act by the Army Corps and EPA.[5] I also have spent much of my research career trying to understand, often through conversations with regulators and regulated-entity attorneys, how regulators and regulated communities work together to promote environmental protection and economic development.[6]

II. Statutory Text

Our governance system requires that agencies take actions consistent with their statutory mandates. The 2022 EPA/Army Corps rule respects that responsibility. The preceding regulation did not.

Each rule tries to explain the meaning of the statutory phrase "the waters of the United States."[7] The two rules differ primarily in their application of that phrase to aquatic features, like streams, wetlands, and ponds, that lack continuous surface-water connections to larger waterways. The 2020 rule would have excluded most of those aquatic features. The 2022 rule would include those features, so long as protecting them has "sufficient nexus"—in other words, a genuine connection—to maintaining water quality in what we refer to as "navigable-in-fact" waterways.[8]

Statutory interpretation is supposed to start with the ordinary meaning of the text,[9] and as a matter of textual reading, the former rule's demand for continuous surface connections to navigable-in-fact waterways does not make sense. In normal, everyday speech, a pond, swamp, or stream counts as "waters" regardless of the average flow level in its outlet or the fact that it might come and go with the seasons.[10] If someone tells you, "There are no waters on this land," you would not expect to encounter a pond, stream, or wetland. And if you did encounter such a feature, you certainly would not say, "Well, it's not actually a body of water because the outlet might dry up in July." Normal speech does not even hint at the tortured linguistic distinctions of the 2020 rule. In contrast, everyday language is consistent with a definition that includes the nation's intermittent streams and disconnected wetlands as part of "the waters of the United States." They are waters, and they are of the United States.

The 2022 rule's interpretation also is historically grounded. In 1975, the Army Corps issued regulations interpreting Clean Water Act jurisdiction as extending to "the entire length of rivers and streams," bringing its interpretation in line with a position EPA had asserted several years earlier.[11] In 1977, the Army Corps finalized those rules.[12] For the next four decades, both agencies consistently maintained that interpretation of their jurisdiction. Only under the Trump administration did they purport to discover a narrower mandate in the statute. Meanwhile, Congress twice enacted significant amendments to the Clean Water Act, both times choosing to

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[4] These comments draw on that previous work, and they also draw in places on text I have written for amicus briefs submitted on behalf of members of Congress.

[5] *See* Little Streams and Legal Transformations, 2017 Utah L. Rev. 1; Regional Federal Administration, 63 UCLA L. Rev. 58 (2016).

[6] *See, e.g.* The Negotiable Implementation of Environmental Law, 75 Stan. L. Rev. 137 (2023); Consultants, the Environment, and the Law, 61 Ariz. L. Rev. 823 (2019); Critical Habitat and the Challenge of Regulating Small Harms, 64 Florida L. Rev. 141 (2012); Urbanization, Water Quality, and the Regulated Landscape, 82 U. Colo. L. Rev. 431 (2011); *see also* Todd Aagaard, Dave Owen & Justin Pidot, Practicing Environmental Law (2nd ed. 2021).

[7] 33 U.S.C. § 1362(7).

[8] The test comes from Justice Kennedy's opinion in Rapanos v. United States, 547 U.S. 715 (2006). Because the four dissenting justices also would also have supported finding jurisdiction for any water with a significant nexus to water quality in navigable-in-fact waters, Justice Kennedy's opinion has held controlling weight for waters to which it applies.

[9] *See* FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning.") (internal quotation marks omitted).

[10] *See, e.g.*, Porter v. Armstrong, 39 S.E. 799, 799 (N.C. 1901) (referring to "the waters" of a swamp); Com. v. Reed, 34 Pa. 275 (1859) (same). Outside of legal speech, the same conventions exist. The Bible, for example, repeatedly refers to "the waters" of springs without mentioning whether those springs had continuous surface connections to navigable-in-fact waters. *E.g.* Judges 5:19 (referring to "the waters of Meggido").

[11] Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 15, 1975).

[12] Regulatory Programs of the Army Corps of Engineers, 42 Fed. Reg. 37,122, 31,129 (July 19, 1977).

leave these jurisdictional interpretations intact—as it also did in the many years it chose to leave the Clean Water Act alone.[13]

The 2022 regulations therefore are not doing something novel or unfamiliar. They are simply clarifying long-established standards and correcting a historical anomaly.

III. Water Quality and a Scientific Basis

Congress chose the Clean Water Act's name for a reason. The central purpose of the Clean Water Act, as repeatedly stated by Congress, is to protect water quality, and Congress clearly expected that protection to be grounded in scientific knowledge. The statute opens by declaring, "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's Waters."[14] The statute's opening section also states that water quality regulation must provide for "the protection and propagation of fish, shellfish, and wildlife" and "provide[] for recreation," all of which requires understanding, through science, the conditions upon which fish, shellfish, wildlife, and recreation depend, and the relationships between those conditions and water pollution.[15] Any lawful regulation interpreting the term "waters of the United States" must respect this text and must be crafted to advance this central statutory purpose.[16]

The 2020 rule made no pretense of honoring that purpose. The agencies did not even try to explain how their new rule would improve water quality. They also made almost no effort to grapple with the extensive scientific studies they had previously compiled, or with the huge body of scientific literature upon which those studies drew. Indeed, they did not even try to gather information on the numbers of streams and wetlands that would lose protection. When asked for that information by members of Congress, a political appointee candidly admitted that the agencies did not know.[17]

If the 2020 rule had taken water-quality science seriously, it would have acknowledged how important protecting wetlands and small streams is to protecting water quality everywhere. The agencies' earlier studies and the supporting scientific literature explain in great detail how protecting even the smallest tributaries—including intermittent and ephemeral tributaries and wetlands that lack direct surface connections to nearby waters—is essential to protecting water quality in larger waterways.[18] Small tributaries and wetlands absorb nutrients, limiting toxic and costly algae blooms in downstream waterways.[19] They capture and store floodwaters, sustaining navigability and protecting people who live or work downstream.[20] They nurture fish and wildlife, sustaining the food webs that make rivers fishable—and that support popular human activities like hunting and birdwatching.[21]

In short, the scientific literature demonstrates that small wetlands and streams are as essential to a river system as leaves are to a tree.[22] The 2020 rule simply ignored that importance.

The 2022 rule, with its emphasis on water quality connections, appropriately respects the importance of science. This time around, the agencies have quantified the areas that would retain protection. Likewise, they have explained, at length, how scientific research informs their choices about the geographic scope of Clean Water

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[13] Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566 (1977); see Sam Kalen, Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands, 69 N.D. L. Rev. 873, 881–86 (1993).

[14] 33 U.S.C. § 1251(a).

[15] 33 U.S.C. § 1251(a)(2).

[16] *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43, 49 (1983) (finding that an agency's rule was arbitrary and capricious when it failed to consider options consistent with the intent of the underlying statutory scheme)

[17] Hearing before the Subcommittee on Water Resources and the Environment of the Committee on Transportation and Infrastructure, September 18, 2019, pp 16–17 (Sept. 18, 2019), *available at* https://www.govinfo.gov/content/pkg/CHRG-116hhrg40826/pdf/CHRG-116hhrg40826.pdf.

[18] *See* Dave Owen, Little Streams and Legal Transformations, 2017 Utah L. Rev. 1, 6–11 (summarizing this literature).

[19] *See* Richard B. Alexander et al., Dynamic Modeling of Nitrogen Losses in River Networks Unravels the Coupled Effects of Hydrologic and Biogeochemical Processes, 93 Biogeochemistry 91, 110 (2009)

[20] See Comm. On Reducing Stormwater Discharge Contributions to Water Pollution, Nat'l Research Council, Urban Stormwater Management in the United States 166–70 (2009) (describing flooding impacts).

[21] See Judy L. Meyer et al., The Contribution of Headwater Streams to Biodiversity in River Networks, 43 J. Am. Water Resources Ass'n 86 (2007).

[22] U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence 2–14 (2015).

Act protection. They have respected, rather than ignored, their mandate from Congress.

IV. The 2022 Regulations Make Economic Sense

Because it makes environmental sense, the 2022 rule also makes economic sense. The 2020 rule did not, and indeed, the previous administration went to great lengths to hide just how much its rule would cost America.[23] That should be of great concern to this Congress, which is appropriately focused on the nation's economy. It also is a major legal reason why the 2020 rule needed to be replaced. Regulations must be informed by careful economic analyses, not by sleight of hand.

The 2022 rule recognizes the obvious: water quality is economically valuable. Improved water quality raises home values.[24] Many economic activities directly depend on clean water and on protection of the physical integrity of streams and wetlands. Hunting, fishing, and boating are all large industries—as well as activities that bring many Americans the difficult-to-quantify happiness that comes from recreating outside.

Many other businesses depend on quality water as an industrial input. A notorious recent example captures this importance: in 2012, when the City of Flint switched to a dirtier water supply, a General Motors plant dealt with months of operational problems and finally had to find a new water source.[25] Additionally, every business in the nation has employees who need to drink.

Dirty water also poses huge financial burdens on public water suppliers and the customers they serve.[26] Water treatment is expensive, and it becomes more expensive if the water source has more contaminants.[27] Preventing pollution is usually much cheaper than cleaning it up, but if the Clean Water Act does not apply, and pollution prevention does not occur, the public can get stuck with big bills.

As other researchers have explained in detail, the 2020 rule pretended that many of these benefits didn't exist. A study by the Institute for Policy Integrity (at NYU Law School) provides a succinct summary of the previous rule's analytical failings:

> [T]hese analyses suffer from severe methodological flaws. And correcting the analyses would very likely show that the rollbacks are net costly to society, depriving the public of potentially billions of dollars in annual forgone benefits. The agencies' flaws fall into several broad categories.
>
> First, the agencies leave out most of the harmful impacts from their cost-benefit analyses—including impacts on safe drinking water, flooding, and habitats for aquatic and endangered species—claiming false helplessness in the face of data gaps. Second, though the agencies monetize the impact of the rollbacks on wetlands that will be lost, their analysis arbitrarily excludes most of the relevant forgone benefits. For example, they arbitrarily limit their calculations to the benefits of protecting wetlands inside a state only, ignoring the well-recognized benefits that people derive from waters outside of their state. Moreover, the agencies erroneously limit the benefits that in-state residents derive from wetlands protection, through an arbitrary assumption that allows them to undervalue the per-acre benefits and through ignoring the unique local benefits that wetlands provide. The agencies also make the unsupported assumption that states will choose to fill the regulatory gap left after the rollbacks—despite the lack of any federal mandate to do so and the fact that many states have recently demonstrated antipathy to additional clean-water regulation. And third, the agencies overvalue the cost savings of the rules.[28]

Even with all this sleight of hand, the agencies still could not say that their calculations showed a net benefit to society. Instead, they simply speculated that such a benefit might occur.

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[23] *See* David A. Keiser et al, Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS) 4–6 (2020), https://cb4388c0-f641-4b7b-a3ad-281c0e6f8e88.filesusr.com/ugd/669644_5aa4f5f0493a4902a3aaed117bd92aef.pdf.

[24] *See, e.g.*, See Lynne Y. Lewis et al., Dams, Dam Removal and River Restoration: A Hedonic Property Value Analysis, 26 Contemp. Econ. Pol'y 175, 185 (2008)

[25] *See* Mike Colias, How GM Saved Itself from Flint Water Crisis, Automotive News, January 31, 2016.

[26] *See* Margo Pollans, Drinking Water Protection and Agricultural Exceptionalism, 77 Ohio St. L.J. 1195 (2016).

[27] *See* David Sedlak, Water 4.0 (2014).

[28] Bethany Davis Noll et al., Beneath the Surface: The Concealed Costs of the Clean Water Rule Rollback (2020).

On the other side of the ledger, the costs of protecting wetlands and streams tend to be greatly overstated. The subset of businesses that objects to Clean Water Act regulations typically argues that the law shuts down productive activities and that perceived ambiguities in the scope of Clean Water Act coverage create crippling uncertainty.

But the former claim ignores the flexibility available to property owners through permitting processes. In many places, the presence of protected streams or wetlands does not prevent construction; instead, the property can be developed in a different way that avoids the wetlands or streams. That avoidance will benefit the people who ultimately use the site; their houses or businesses will not be constructed in places that routinely flood.[29]

And if avoidance is not possible, property owners may use compensatory mitigation—which means compensating for on-site impacts by protecting or restoring similar streams or wetlands in a different place—to proceed with their project.[30] The result can be economic development *and* enhanced environmental protection, with each occurring in places where they make the most sense. A secondary result is the growth and sustenance of industries devoted to finding ways to accommodate both development and environmental protection.[31]

The latter claim ignores the many ways property owners can find out about the scope of Clean Water Act coverage. The Army Corps publishes a detailed manual explaining how to identify waters subject to regulatory coverage.[32] An extensive environmental consulting industry can help landowners identify protected aquatic features.[33] In fact, consultants had done just that in some of the most prominent Clean Water Act controversies. John Rapanos, for example, was warned that there were protected wetlands on his properties, and he chose to destroy those wetlands in open defiance of the law, not because he was ignorant of the Clean Water Act's applicability.[34]

Additionally, if landowners do not want to pay for consultants or want a second opinion, they can ask the Army Corps for a jurisdictional determination—a service the agency provides for free.

The 2022 rule, which is accompanied by detailed and careful economic studies, reveals just how egregious the flaws in the 2020 economic analysis were. After considering the many benefits the 2020 rule pretended were nonexistent, the 2022 economic analysis finds that the new rule is likely to produce between $854 million and $1.97 billion in net benefits.[35] These numbers are inexact, of course, and the 2022 economic analysis acknowledges these uncertainties.[36] But the overall point of the analysis is clear. The 2022 rule will save lots of money and deliver significant benefits to people all across the country.

V. Protecting State Authority

An additional major failing of the 2020 rule was its misunderstanding of state roles in Clean Water Act implementation. This failing was ironic, for the previous administration claimed that federalism was the central justification for its regulatory changes. But it got Clean Water Act federalism completely wrong.

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[29] Construction techniques can protect houses and buildings from floodwaters, but usually just by pushing the water somewhere else. It still will come down from the sky and go somewhere. That means filling in streams and wetlands—which, even if they are ephemeral, are places that predictably flood—almost inevitably means putting people's property, and perhaps their lives, at risk.

[30] *See* Palmer Hough & Morgan Robertson, *Mitigation Under Section 404 of the Clean Water Act: Where It Comes from, What It Means*, 17 Wetlands Ecology & Mgmt. 15 (2009)

[31] *See* National Environmental Banking Association, https://environmentalbanking.org/.

[32] U.S. Army Corps of Engineers, Corps of Engineers Wetlands Delineation Manual (1987), https://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf.

[33] *See* Dave Owen, Consultants, the Environment, and the Law, 61 Ariz. L. Rev. 823 (2019).

[34] *See* Rapanos v. United States, 547 U.S. 715, 763 (2006) (Kennedy, J. concurring). As Justice Kennedy summarizes:

Informed that the site included between 48 and 58 acres of wetlands, Rapanos allegedly threatened to "destroy" the consultant unless he eradicated all traces of his report. Rapanos then ordered $350,000-worth of earthmoving and landclearing work that filled in 22 of the 64 wetlands acres on the Salzburg site. He did so without a permit and despite receiving cease-and-desist orders from state officials and the EPA. At the Hines Road and Pine River sites, construction work—again conducted in violation of state and federal compliance orders—altered an additional 17 and 15 wetlands acres, respectively.

Id.

[35] U.S. Environmental Protection Agency and Department of the Army, Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule xvi (2022).

[36] *Id*.

The Clean Water Act is designed to empower states by helping them work with the federal government to protect their water quality. It was not designed to let states turn polluters loose. The act, in other words, seeks to empower states—and in fact does so—but it empowers them to clean up waterways, not to leave them dirty. Because the 2020 rule misunderstood this basic principle, it would have undermined state power.

The Clean Water Act is built on cooperative federalism. In this system, states are crucially important as partners in working toward the shared national goal of water quality protection. That system was a deliberate choice. Congress knew that water pollution does not respect state boundaries and that in the absence of statutory coverage, states would be unable to protect themselves from pollution flowing from further upstream. Congress also knew that polluting industries would play states against each other, seeking favorable treatment. As Minnesota Governor Wendell Anderson explained, in testimony quoted by multiple members:

> Every governor in the country knows what is the greatest political barrier to effective pollution control. It is the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment. It is the practice of playing off one State against the other.[37]

Congress also knew that state employees were ready to work on improving water quality and could tailor water quality programs to local needs, which meant they could be valuable partners in improving the nation's water quality—if they had federal mandates and support. Members repeatedly stressed the important roles states would play in implementing the regulatory regime, and the basic concept was to "engage[] all levels of government . . . in a concerted national effort to cleanse our water."[38]

The 2020 rule misunderstood all of this. Its misunderstanding began, ironically, with the very text it chose to selectively emphasize. They 2020 rule's preamble relied heavily—in fact, nearly exclusively—on Clean Water Act section 101(b), which states, in relevant part,

> 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.[39]

This language clearly emphasizes the importance of states. But it expresses Congress's desire for the states to be heavily involved in protecting waters that *are* subject to Clean Water Act jurisdiction. It says nothing about excluding a class of aquatic features from that protection or about turning states loose to authorize pollution.

Other language of section 101 also indicates that the purpose of state involvement was to restrain water pollution, not protect polluters. Section 101(b) itself begins by noting the "responsibilities and rights of States to prevent, reduce, and eliminate water pollution."[40] And in section 101(a)—indeed, in the very first words of the statute—Congress emphasized that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[41] It then listed seven specific national policies, all focused on improving water quality.

The text therefore makes the goal of section 101(b) crystal clear. Congress was enlisting the states in pursuit of the crucial national goal of protecting water quality. It was not trying to limit the scope of the Clean Water Act's coverage.

Section 101 is not the only Clean Water Act section that demonstrates Congress's intent that states be key participants in the project of achieving national water quality goals. This emphasis on state participation is particularly salient in the act's key permitting programs. Clean Water Act section 402, which authorizes the National Pollutant Discharge Elimination System (NPDES) permitting program, authorizes delegation of permitting authority to state agencies.[42] Nearly every state

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[37] A Legislative History of the Water Pollution Control Amendments of 1972 152 (1972) (Statement of Rep. Reuss).
[38] *Id.* at 218 (Statement of Sen. Eagleton).
[39] 33 U.S.C. § 1251(b) (parentheses in original).
[40] 33 U.S.C. 1251(b).
[41] 33 U.S.C. 1251(a).
[42] 33 U.S.C. § 1342.

in the country has taken up this invitation, and NPDES permitting now is largely handled at the state level.[43]

Similarly, Clean Water Act section 404, which creates the permitting program for discharges of dredged or fill material, authorizes delegation of permitting authority (except for a subset of waters reserved for federal permitting authority) to state agencies, but it does not give states the option to exempt waters from regulatory protection.[44]

The theme of all these sections, and many others, is that Congress valued state involvement, and it expected that state involvement to be directed toward the national project of restoring the nation's waters.

These and other provisions of the Clean Water Act also reflect a second theme of section 101(b), which is empowering the states to go *further* than the federal government in protecting water quality, even where that meant giving states power over the federal government. One of the clearest authorizations for these efforts comes from section 401, which authorizes states to issue water quality certifications for projects involving federally licensed discharges.[45] Section 401 gives states authority to require additional steps, beyond those already imposed by federal agencies, to protect state water quality.[46]

Section 401 reflects a broader theme. As Justice John Paul Stevens once pointedly noted, "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards."[47] Likewise, section 1365(e) preserves state common law protections, and section 1370 allows additional state regulation as long as it is not "less stringent" than federal requirements.[48] And section 404, which tends to be at the center of jurisdictional controversies, similarly preserves state authority to regulate above and beyond federal requirements, even when that state regulation constrains federal activities.[49]

For decades, states have acted in reliance on these federal commitments.[50] Clean Water Act implementation has honored Congress's blueprint for substantial state roles in advancing water quality, while also preserving states' ability to be partners in water quality protection and to manage land and water resources. Indeed, because many of these partnerships depend on federal Clean Water Act jurisdiction, the NWPR would actually have undermined state authority.

In practice, states do take the lead in implementing nearly every key part of the statute. They adopt water quality standards.[51] They draft water pollution budgets and engage in continuing planning processes.[52] Nearly every state holds delegated authority to issue NPDES permits.[53] And while only three states (Florida, Michigan, and New Jersey) have elected to hold delegated authority to issue section 404 permits, states influence those permits in a variety of ways. Using their authority under section 401, states routinely work with the Army Corps' district offices to

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[43] *See* EPA, NPDES State Program Information, https://www.epa.gov/npdes/npdes-state-program-information.

[44] 33 U.S.C. § 1344(e).

[45] 33 U.S.C. § 1341. In 2020, EPA issued a final rule drastically curtailing the scope of states' section 401 certification authority, while baldly asserting that its restrictions "neither diminish[] nor undermine[] cooperative federalism." Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210, 42226 (2020). The position embodied in these two rulemakings—that federalism carries outcome-determinative importance when states want to authorize water pollution and is irrelevant when the states seek to protect their waterways—turns the core objective of the Clean Water Act on its head. *See* 33 U.S.C. 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[46] 33 U.S.C. § 1341.

[47] *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (Stephens, J. concurring) (citing 33 U.S.C. § 1311(b)(1)(C)).

[48] See 33 U.S.C. §§ 1365(e), 1370.

[49] 33 U.S.C. § 1344(t).

[50] For a general summary of state programs, see Association of State Wetlands Managers, Status and Trends Report on State Wetlands Programs in the United States (2015), https://www.nawm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf.

[51] *See* EPA, State-Specific Water Quality Standards Effective under the Clean Water Act (CWA), https://www.epa.gov/wqs-tech/state-specific-water-quality-standardseffective-under-clean-water-act-cwa (last visited October 6, 2020).

[52] *See* EPA, Impaired Waters and TMDLs, https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls (last visited October 6, 2020).

[53] EPA, NPDES State Program Information, https://www.epa.gov/npdes/npdes-state-program-information.

craft the terms of section 404 permits, and they also work with the Corps to implement compensatory mitigation programs.[54]

State involvement, in short, pervades every part of Clean Water Act implementation, and state implementation of that authority is often intertwined with and supported by federal efforts and contingent upon waters falling within Clean Water Act jurisdiction. Consequently, unless states enact new legislation and appropriate additional funds, many of these state programs would shrink if Clean Water Act jurisdiction were narrowed.

Importantly, there are many other ways in which the Clean Water Act leaves state authority intact. Even if a waterway is subject to federal jurisdiction, states still retain primary responsibility for allocating water rights in that waterway.[55] If the waterway is navigable-in-fact—and thus unquestionably subject to Clean Water Act jurisdiction—the state in which it is located still owns its streambed.[56] Similarly, so long as streams or wetlands are not on federally owned land, states and local governments retain their land use authority over those streams and wetlands and surrounding uplands. Nor is there *de facto* preemption of that authority. If states or local governments want to authorize development in areas with jurisdictional aquatic features, they generally can, and they routinely do so; the Corps issues tens of thousands of fill permits every year, and permit denials are exceedingly rare.[57]

In short, federal and state authority routinely and productively coexist and support each other, just as the Clean Water Act's drafters hoped and intended they would. The 2020 regulations would have undermined those partnerships—and would have done so in the false guise of protecting states. The 2022 regulations place those partnerships back on their traditional foundations, so that states, the federal government, and the people of the United States may benefit.

* * * * *

In summary, the new Clean Water Act "waters of the United States" regulations should be welcomed by this Congress. They are consistent with the statute, governing legal authority, decades of tradition, and the preferences of the American public. They are consistent with extensive scientific research emphasizing the importance of streams and wetlands—even small ones—to water quality throughout our nation. They will help sustain and restore traditional, and successful, partnerships between federal and state governments. And they will save the American public hundreds of millions of dollars.

This new rule is not a complete solution to the water quality challenges facing the United States, and we have much more work to do if we are to fulfill the Clean Water Act's promise and end widespread impairment of our waterways. But the new rule is an important step in the right direction.

Mr. ROUZER. I thank the gentleman. I thank all the witnesses again for their great testimony.

We will now move into Member questions, and I will recognize myself for 5 minutes.

Ms. Bodine, I noted in your testimony you state that back-to-back rainstorms can be considered, quote, "relatively permanent flow." What would that mean for California after its recent storms or for my home State of North Carolina after a hurricane?

Ms. BODINE. Thank you, Chairman Rouzer.

I was very surprised when I read that in the preamble. What is clear is that the agencies are trying to expand the "relatively permanent" test because they are worried that the *Sackett* case will in fact get rid of the "significant nexus" test.

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[54] *See* Dave Owen, *Regional Federal Administration*, 63 UCLA. L. Rev. 58, 98–99, 115 (2016).

[55] *See generally* Barton H. Thompson et al., Legal Control of Water Resources (6th ed. 2018) (describing, over hundreds of pages, the doctrines states use to allocate waters from waterways subject to Clean Water Act jurisdiction)

[56] *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589 (2012) (describing "[t]he rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters").

[57] *See* Ryan W. Taylor, Federalism of Wetlands 88 (2013) ("During the time of this study, the USACE approved an average of 86,427 permits per year."); Dave Owen, *Little Streams and Legal Transformations*, 2017 Utah L. Rev. 1, 41 (quoting an experienced state water-quality regulator, who observed that "there is no stopping things, with very, very, very limited exceptions").

And so, it has language in there about what would be considered relatively permanent—and remember, that would be automatically regulated—and included flows from back-to-back rainstorms as an example.

That would mean that water that covered the landscape because of multiple rainstorms and then ended up moving across the landscape could be considered a relatively permanent flow.

I think that is ludicrous, but the fact that they put that as an example in there was deeply troubling.

Mr. ROUZER. Mr. Hawkins, can you speak to how overregulation and broad scope interpretations like "significant nexus" gives firepower to radical environmentalists, and trial lawyers in particular, and how it creates an easy path to stall or shut down family farms and animal agriculture in North Carolina, Missouri, and across the country.

Mr. HAWKINS. Thank you for the question, Mr. Chairman.

I would say, if I could use one word to describe how my fellow farmers and ranchers feel, it is "overwhelmed." We feel like this new rule essentially shifts the burden of proof back to us rather than the agencies. It is almost a notion that we are guilty until proven innocent.

And while folks talk about the exemptions that agriculturists had, the reality is I wouldn't be testifying today if those longstanding exemptions were tight enough that we weren't having farmers embroiled in litigation, not just in Missouri but all around the country.

So, as you look at an expansive definition of WOTUS and the potential for more features to fall under Federal regulatory control, our farmers have to be concerned about the citizen suit provisions and what that could mean in challenging normal, everyday practices.

They have every right to be concerned about future investment in their farming operations and have to second-guess whether putting in place that conservation practice or building that structure or investing in that building is worth it if you are going to be embroiled in redtape in a potentially years' long process.

So, overwhelmed with the uncertainty that comes with an expansive rule, Mr. Chairman, that would summarize how our farmers feel.

Mr. ROUZER. Ms. Huey, everybody wants affordable housing. You hear that talked about all over. I certainly hear it back home. Why can't we have more affordable housing when the prices are skyrocketing left and right? How would this affect affordable housing?

Ms. HUEY. Thank you for the question. We talked about the 6- to 12-month delay in the jurisdictional determination. That is where our project just sits, and we continue to make interest payments.

As a small business owner, that is how I make a living, is building homes. I can't absorb all those regulatory costs. I have to pass it on to the home buyer.

As I said earlier, for every $1,000 increase in a median-priced home, and that is about $412,000, that is 117,000 families that it prices out of the market. And right now, about 87.5 million people cannot afford a median-priced home.

Thank you.

Mr. ROUZER. Mr. Williams, in your testimony you indicated that ditches can be regulated in practice under the new WOTUS rule, but the agencies say they will be exempt. What do you think is leading to this confusion?

Mr. WILLIAMS. We have had many different rules over the years. Sometimes ditches are exempt, sometimes they are included.

The current rule states that any ditch that has flowing water or conveys water from one area to another becomes jurisdictional. This has a big effect on properties that have agricultural fields, for example, or even residential areas where ditches are currently included, and it effects our ability to permit areas like that, it causes lengthy delays. And we will continue to look for ways in which we can get those permits and reduce our mitigation costs for those.

Mr. ROUZER. I thank the panelists. My time has expired.

I now recognize my good friend from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

I ask unanimous consent to insert in the record public comments by the Metropolitan Water District of Southern California and public comments from different attorneys general, especially the California attorney general and various other attorneys general, supporting the Biden Clean Water Rule.

Mr. ROUZER. Without objection.

[The information follows:]

Letter of February 7, 2022, to Ms. Damaris Christensen, Oceans, Wetlands and Communities Division, Office of Water, Environmental Protection Agency, and Ms. Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, from Jennifer Harriger, Manager, Environmental Planning Section, Metropolitan Water District of Southern California, Submitted for the Record by Hon. Grace F. Napolitano

FEBRUARY 7, 2022.

SUBMITTED ELECTRONICALLY
https://www.regulations.gov

Ms. DAMARIS CHRISTENSEN,
Oceans, Wetlands and Communities Division,
Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

Ms. STACEY JENSEN,
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DEAR MS. CHRISTENSEN AND MS. JENSEN:

Docket ID No. EPA–HQ–OW–2021–0602 Revised Definition of "Waters of the United States"

The Metropolitan Water District of Southern California (Metropolitan) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA) and the Department of the Army's (collectively, Agencies) proposed rule, Revised Definition of "Waters of the United States" (Proposed Rule). It is Metropolitan's understanding that the Agencies intend to revise the definition of "waters of the United States" (WOTUS) using two rulemakings—(1) a foundational rule to restore longstanding protections (Part I), and (2) an anticipated second rule (Part II) that builds on that regulatory foundation; and that the Proposed Rule is only Part I of this rulemaking process. (86 Fed. Reg. 69372, 69374 (Dec. 7, 2021.)

Metropolitan supports the Agencies' Proposed Rule that puts back into place the pre-2015 definition of "WOTUS," updated to reflect consideration of Supreme Court decisions. As the Agencies expressly recognize, the objective of the Clean Water Act

(CWA) to protect water quality must be considered when defining "WOTUS." (86 Fed. Reg. at 69387.) The definition of WOTUS is central to the implementation of the CWA and has significant implications for Metropolitan's day-to-day operations and source water protection efforts.

After carefully reviewing the Proposed Rule, Metropolitan respectfully submits the following comments:

1. Support for the Pre-2015 Definition of WOTUS;
2. Support for Recent Supreme Court Decisions;
   a. Any tributary that contributes a significant volume of flow to another WOTUS should be covered under the CWA
   b. Functional equivalency is an important concept to protect the Nation's waterways
3. Additional Supreme Court Findings Not Reflected in the Proposed Rule;
   c. Metropolitan requests that the Agencies clarify that artificial water supply infrastructure is excluded from the definition of WOTUS, consistent with Justice Scalia's plurality opinion in *Rapanos v. United States* [1];
   d. If the Agencies add an exclusion for water supply and delivery facilities and infrastructure, Metropolitan requests that the Agencies clarify that such an exclusion would not affect the applicability of the Water Transfers Rule to water transfers from one WOTUS to another WOTUS via water supply infrastructure.
4. Request Clarification of Part II of Rulemaking Process.

A. BACKGROUND

Metropolitan is a regional water wholesaler that delivers water to 26 member agencies, which in turn, directly or through their sub-agencies, provide water to nearly 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties. Metropolitan imports water from the Colorado River and northern California and is the largest distributor of treated drinking water in the United States. To supply southern California with reliable and safe water, Metropolitan owns and operates an extensive water system including the Colorado River Aqueduct, 15 hydroelectric facilities, 9 open-water reservoirs, 830 miles of large-scale pipes, and 5 water treatment plants.

As a steward of southern California's imported water supply, Metropolitan supports CWA amendments and regulations that protect current and future water quality for both surface water bodies and groundwater basins that serve as drinking water sources. The watersheds for Metropolitan's water sources span California and the Colorado River Basin, which includes the states of Wyoming, Utah, Colorado, Arizona, Nevada, and New Mexico. Protection of these source waters and watersheds is of paramount importance. As such, any potential for source water degradation through insufficient oversight in areas proximate to rivers and tributaries is an issue of concern.

Metropolitan strongly supports the stated objectives of the CWA to restore and maintain the quality of the Nation's waters while respecting the primary responsibilities and rights of states and tribes over their land and water resources. In this regard, Metropolitan appreciates that the Agencies realize they must consider the CWA's principal objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in interpreting the scope of the statutory term "waters of the United States." (86 Fed. Reg. 69387.) Furthermore, "as the text and structure of the Act, supported by legislative history and Supreme Court decisions, make clear—chemical, physical and biological integrity refers to water quality." (*Id*.) In the comments below, Metropolitan asks the Agencies to clarify a few areas and to continue to ensure the protection of sources of drinking water in the new rule.

B. COMMENTS ON THE PROPOSED RULE

1. Support for the Pre-2015 Definition of WOTUS

The Proposed Rule retains the familiar categories of waters in the 1986 regulations—traditional navigable waters, interstate waters, "other waters," impoundments, tributaries, the territorial seas, and adjacent wetlands—while proposing to add, where appropriate, a requirement that waters also meet either the significant

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[1] *See Rapanos v. United States*, 547 U.S. 715, 736 n.7 (2006) ("highly artificial, manufactured, enclosed conveyance systems … and the 'mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents' … likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water") (some citations omitted).

nexus standard or the relatively permanent standard. (86 Fed. Reg. at 69387.) In general, Metropolitan agrees with the Agencies that returning to the pre-2015 definition of WOTUS provides "a known and familiar framework for co-regulators and stakeholders." (86 Fed. Reg. at 69374; *see also id*. at 69404–06.) For example, Metropolitan relies on *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States* (ERDC/CRREL TR–08–12, Lichvar and McColley 2008) to discern the physical limits of non-wetland aquatic resources, as well as the EPA's and Army Corps' *Rapanos* Guidance [2] to determine potential federal jurisdiction. Also, the Agencies have over a decade of nationwide experience in making decisions regarding jurisdiction under the 1986 regulations consistent with the relatively permanent standard and the significant nexus standard as interpreted by the *Rapanos* Guidance. (86 Fed. Reg. at 69405.) Thus, because the Proposed Rule "reflects consideration of the agencies' experience and expertise, as well as updates in implementation tools and resources, it is familiar and implementable." (86 Fed. Reg. at 69374.)

More specifically, Metropolitan supports the pre-2015 practice of identifying jurisdictional tributaries through physical indicators, specifically: (1) indicators of ordinary high water mark (OHWM), and (2) connectivity to a traditional navigable waterway. First, the regulations identify the factors to be applied to identify the OHWM, defined in 33 CFR Part 328.3, and these regulations have been further explained in the Regulatory Guidance Letter (RGL) 05–05 (December 7, 2005) (RGL 05–05). Metropolitan understands that under the Proposed Rule, the Agencies will apply the regulations, RGL 05–05, and applicable OHWM delineation manuals and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide. (86 Fed. Reg. at 69437 (citing *Rapanos* Guidance at 10–11, n. 36.)) Second, in the *Rapanos* Guidance, the Agencies identify numerous functions provided by tributaries and wetlands that are relevant to the significant nexus determination. (86 Fed. Reg. at 69437.)

In comparison, the Navigable Waters Protection Rule's (NWPR's) and the Clean Water Rule's reliance on alternative characteristics—including flow regime, watershed size, landscape position, or distance from a navigable waterway—are not relevant characteristics of jurisdictional tributaries. In addition, Metropolitan agrees with the Agencies that key elements of the NWPR's definition of tributary were very difficult to implement. (86 Fed. Reg. at 69422.) For these reasons, Metropolitan supports the pre-2015 practice of identifying jurisdictional tributaries through physical indicators.

2. Support for Recent Supreme Court Decisions

a. A Tributary that Contributes a Significant Volume of Flow to Another WOTUS Should Be Covered Under the CWA

As explained above, the watersheds for Metropolitan's water sources span California and the Colorado River Basin. Protection of these source waters and watersheds is critical to the health and welfare of the residents of southern California and will support Metropolitan's and other western water agencies' efforts to provide reliable and affordable high-quality water in the western United States. As a regional water provider with source water originating in multiple jurisdictions, Metropolitan highly values the protection of the quality of its source waters.

Metropolitan believes that any tributary that contributes a significant volume of flow—whether it is ephemeral, intermittent, or perennial, and whether the flow is contributed above the surface or transmitted through waters located below the surface—to another WOTUS should be covered under the CWA. As the Agencies previously recognized, "an ephemeral feature may constitute a point source that discharges pollutants to a 'water of the United States.'" (84 Fed. Reg. 4154, 4176 (Feb. 14, 2009) (citing *Rapanos v. United States*, 547 U.S. at 743–44 (Scalia, J., plurality)).

b. Functional Equivalency is an Important Concept to Protect the Nation's Waterways

Metropolitan supports the Supreme Court's ruling in *County of Maui v. Hawaii Wildlife Fund* that found a CWA permit is required when a point source pollutant discharged to groundwater has the same functional equivalency as a direct discharge to a navigable water. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020). The Supreme Court set forth seven factors that help determine functional equivalency: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering

[2] "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," EPA and Army Corps, December 2, 2008.

the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, and (7) the degree to which the pollution (at that point) has maintained its specific identity." (*County of Maui*, 140 S. Ct. 1462, 1476 (April 23, 2020).) This ruling is consistent with Metropolitan's previous comments on Docket ID Number: EPA–HQ–OW–2018–0063—Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to Surface Water, as well as previous CWA guidance by EPA (66 Fed. Reg. 2960, 3017 (Jan. 12, 2001)).

Metropolitan believes that subjecting the above features to CWA permitting is consistent with the text, structure, and purpose of the CWA. The CWA's objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) The Agencies have the authority to permit such releases, and CWA permitting is the best way to protect the chemical, physical, and biological integrity of source water quality, such as in the Colorado River Basin states. Furthermore, Metropolitan appreciates the Agencies' recognition that "[c]onsistent with the Supreme Court's opinion in *Maui*, a rule defining 'waters of the United States' must consider its effects on the chemical, physical, and biological integrity of the Nation's waters. And—as the text and structure of the Act, supported by legislative history and Supreme Court decisions, make clear—chemical, physical, and biological integrity refers to water quality." (86 Fed. Reg. at 69407.) The development of a Proposed Rule that protects source water quality is of paramount importance to Metropolitan.

3. Additional Supreme Court Findings Not Reflected in the Proposed Rule

a. Artificial water supply infrastructure should be excluded from the definition of WOTUS, consistent with Justice Scalia's plurality opinion in Rapanos v. United States

Metropolitan requests that the Agencies provide a separate, clear exclusion for water supply and delivery facilities and infrastructure. Adding an express exclusion for water supply and delivery facilities and infrastructure would further the Agencies' goal of providing greater clarity over which waters are and are not regulated under the CWA, would simplify the jurisdictional determination process, and would be consistent with the purpose of the CWA and the Agencies' interpretation of the CWA and Supreme Court precedent. (*See* 86 Fed. Reg. at 69424 (the longstanding exclusions for prior converted cropland and waste treatment systems from the WOTUS definition "provide important clarity"); *see also* 85 Fed. Reg. 22250, 22317–18 (Apr. 21, 2020).)

Public water supply and delivery facilities and infrastructure should be excluded from regulation under WOTUS, similar to the exclusion provided for waste treatment systems. (*See* 85 Fed. Reg. at 22324—recognizing the importance of water reuse and recycling "particularly in the arid West where water supplies can be limited and droughts can exacerbate supply issues," the Agencies excluded water reuse and wastewater recycling structures constructed or excavated in upland or non-jurisdictional waters.) Waste treatment systems treat waters to remove contaminants to allow that water to be discharged to the ground for groundwater recharge and other beneficial uses. The longstanding practice of the Agencies has been to exclude these facilities from regulation under the CWA. (86 Fed. Reg. at 69424.)

Public water systems typically divert waters from a WOTUS into a water system that conveys, stores, treats, and delivers water to residential, agricultural, and industrial users. This water has value, and the costs to treat water to drinkable standards are high. Generally, public water agencies are extremely protective of the quality of water in their systems and spend a large amount of money to protect water quality both in the system and in source waters. Excluding these systems from regulation as a WOTUS will not result in a degradation of water quality. Conversely, regulating public water systems will result in increased costs for permitting and compliance and may subject public water systems to separate and conflicting regulations when these agencies try to comply with federal and state drinking water requirements, as well as CWA requirements.

When clean water is delivered to water agency customers, those users then subject that water to various residential, agricultural, and industrial uses. Wastewaters from those uses are delivered to wastewater recycling agencies, where the water is treated and then reused or released. If excluding waste treatment systems from the definition of WOTUS is consistent with the goals of the CWA, then surely excluding public water systems that supply clean water to users before the wastewater is generated should be excluded for the same reasons.

Accordingly, Metropolitan requests that the Agencies provide a clear exclusion for artificial drinking water supply and delivery facilities and infrastructure. Similar to the exclusion for waste treatment systems which includes treatment ponds or la-

goons (86 Fed. Reg. at 69449 (proposed revised 33 C.F.R. § 328.3(a)(8))), an exclusion for drinking water supply infrastructure should include all components which are necessary for the supply, transportation, storage treatment, and delivery of drinking water, including canals, siphons, pipelines, reservoirs, groundwater basins, dewatering structures, water treatment plants, and pumping plants. Adding this exclusion would further the Agencies' goal of providing greater clarity over which waters are and are not regulated under the CWA and would simplify the jurisdiction issue. (*See* 86 Fed. Reg. at 69424; 85 Fed. Reg. at 22317–18.) Excluding water supply infrastructure would also be consistent with the Agencies' view that "features that move water (particularly in the arid West) that do not eventually reconnect into a tributary or other jurisdictional water would not be jurisdictional. . . ." (84 Fed. Reg. at 4195.)

Furthermore, artificial water supply infrastructure features are regulated under a number of other federal laws, including the federal Safe Drinking Water Act. Also, requiring water agencies to maintain water stored in an artificial reservoir or canal at water quality levels equal to natural water bodies, or to obtain dredge and fill permits to perform maintenance work in an artificial canal, does not further the purposes of the CWA. Lastly, excluding water supply infrastructure is consistent with case law that certain waters and features are not subject to the CWA. *See, e.g., Rapanos v. United States*, 547 U.S. 715, 736 n.7 (2006) ("highly artificial, manufactured, enclosed conveyance systems—such as 'sewage treatment plants,' . . . and the 'mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents' of the city of Knoxville's 'system of waterworks,' *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 27, 26 S. Ct. 224, 50 L. Ed. 353, 3 Ohio L. Rep. 572 (1906)—likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water") (some citations omitted).

b. Clarify That The Water Transfers Rule Will Continue To Apply To Water Transfers Through Water Supply Infrastructure

If the Agencies add an exclusion for water supply and delivery facilities and infrastructure, Metropolitan requests that the Agencies clarify that such an exclusion would not affect the applicability of the Water Transfers Rule to water transfers from one WOTUS to another WOTUS via water supply infrastructure. Under the Water Transfers Rule, water transfers are exempt from the requirements of obtaining a permit under Section 402 unless pollutants are introduced by the water transfer activity itself to the water being transferred. (40 C.F.R. § 122.3(i).) "Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." (40 C.F.R. § 122.3(i).) Typical water transfers "route water through tunnels, channels, and/or natural stream water features, and either pump or passively direct it for uses such as providing *public water supply*, irrigation, power generation, flood control, and environmental restoration." (73 Fed. Reg. 33697, 33698 (June 13, 2008). (Emphasis added.)

As EPA has noted, "Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law." (73 Fed. Reg. at 33702.) In fact, "[m]any large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins." (*Id.*, at 33698.) On January 18, 2017, the Second Circuit upheld the Water Transfers Rule as a "reasonable construction of the Clean Water Act supported by a reasoned explanation." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 533 (2nd Cir. 2017), *cert. denied*, 138 S. Ct. 1164 (2018). In the Preamble to the Proposed Rule, the Agencies state that the Proposed Rule "would not affect the existing statutory or regulatory exemptions or exclusions from section 402 NPDES permitting requirements, such as . . . the status of water transfers." (86 Fed. Reg. at 69416.) Accordingly, Metropolitan asks the Agencies to clarify that the Water Transfers Rule—which is essential for the social and economic health of the arid West where water sources are often located far away from where the water is ultimately used—will continue to apply to water transfers from one WOTUS to another WOTUS via water supply infrastructure, even if water supply infrastructure is excluded from the definition of WOTUS. If portions of Metropolitan's drinking water infrastructure were to be considered WOTUS, expensive, complex, and time-consuming CWA permits could be required, except if the Water Transfers Rule applied.

4. Request Clarification of Part II of Rulemaking Process

Metropolitan requests that the Agencies clarify the process and substance of Part II of the WOTUS rulemaking process. The Agencies state in the Preamble to the Proposed Rule that they "anticipate developing another rule that builds upon the

regulatory foundation of this rule with the benefit of additional stakeholder engagement and which could, among many issues, consider more categorical approaches to jurisdiction." (86 Fed. Reg. at 69399.) It is unclear at this point what other issues would remain and what additional regulations would be needed after Part I of this rulemaking process to better restore the chemical, physical, and biological integrity of the Nation's waterways.

Also, over the past several years, the definition of "waters of the United States" has changed each time there has been a new Administration, and every new definition has been challenged with litigation. As a result, Metropolitan asks the Agencies to adopt a rule in 2022 that: (1) reduces or eliminates the uncertainty that led to the past decade of debate over WOTUS; (2) accommodates regional hydrologic, geologic, and geographic differences where warranted and appropriate; and (3) strikes a balance that preserves the environmental values identified in the CWA while allowing for regulatory certainty and the timely and cost-effective investment in infrastructure needed to meet local water supply and treatment needs.

C. CONCLUSION

The definition of WOTUS is critical to the implementation of the CWA. How WOTUS is defined has significant implications for Metropolitan's day-to-day operations, as well as source water protection efforts. Metropolitan requests that the Agencies: (1) clarify that water supply infrastructure is excluded from the definition of WOTUS; and (2) continue to ensure the protection of source water quality.

We appreciate having the opportunity to provide input to this process. If you have any comments or questions, please contact Sean Carlson.

Very truly yours,

JENNIFER HARRIGER,
Manager, Environmental Planning Section,
Metropolitan Water District of Southern California.

Letter of February 7, 2022, to the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers from Attorneys General of California, New York, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Mexico, North Carolina, Oregon, Vermont, Washington, Wisconsin, the District of Columbia, the City of New York, and the California State Water Resources Control Board, Submitted for the Record by Hon. Grace F. Napolitano

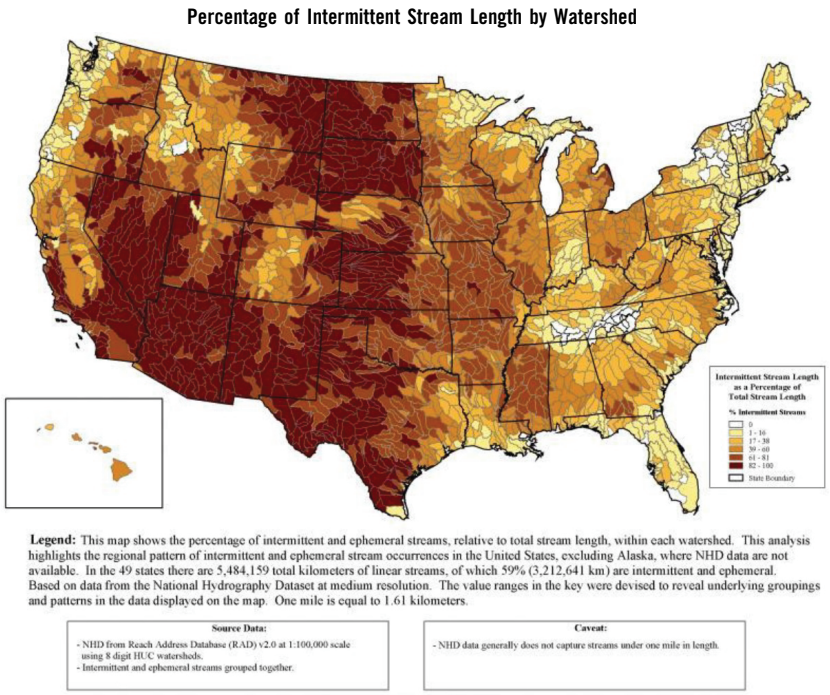
The 22-page letter is retained in committee files and is available online at https://oag.ca.gov/system/files/attachments/press-docs/WOTUS%20Rule%20States%27%20Comment%20Letter__02072022.pdf.

Mrs. NAPOLITANO. I also ask unanimous consent to include in the record the latest map produced by EPA that shows the areas of the country that depend on ephemeral and intermittent streams for their drinking water.

Mr. ROUZER. Without objection.

[The information follows:]

Map Showing Percentage of Intermittent Stream Length by Watershed, Submitted for the Record by Hon. Grace F. Napolitano



Mrs. NAPOLITANO. As shown above, you can tell where all the drought is where the ephemeral and intermittent streams meet which are affected most.

Mr. Owen, many California residents and farmers receive water that starts as ephemeral or intermittent streams. Over the past month, the West has experienced extensive storms that have temporarily replenished these streams, but are unlikely to resolve the long-term drought.

As the Southern California MWD and California's attorney general have stated in the comments just submitted for the record, source waters must be protected by the Clean Water Act or else families, businesses, and farmers will bear the costs of cleaning the water before it is suitable for drinking, swimmable, or usable.

Can you discuss how important it is for water agencies and water users to have protection of their water sources, and what effects they face if their waters are not protected?

Mr. OWEN. Yes. There are two main effects that come from failing to protect source waters. One is a loss of water supply. If you fill in source waters, then often you are filling in areas where water infiltrates, seeps into the ground, and then back into surface waterways, or from which it flows into larger waterways.

That water instead moves off the landscape much more quickly as a flood, which is obviously damaging, but it also means that later on, when things dry out and we need more water, it is not

there. And so, that forces water suppliers to go in search for additional water, which can be very costly if they can find it.

The other effect is a loss of water quality. That is because pollution flows downstream. And so, as we put pollutants in source waters, which is what we are discussing doing today, some of that pollution will migrate downstream.

We also lose the pollution control ability of source waters. So, smaller waterways are very, very effective at taking some nutrients out of waterways. When those nutrients move downstream, we tend to get blue-green algae blooms, which are toxic, which can again shut down water supplies.

So, all of this means that when we don't protect source waters, we are essentially giving up a significant part of our water supply and water treatment infrastructure. And then we just have to spend more money further downstream in order to replace the infrastructure we have let go, and those costs are passed on to consumers.

Mrs. NAPOLITANO. Thank you, sir.

Mr. Owen, during the Trump administration, efforts were made to roll back the protections under section 401 of the Clean Water Act which allow States and Tribes to protect State water resources.

Can you discuss the importance of strong section 401 protections and how that might be impacted by Trump's "dirty water rule"?

Mr. OWEN. Yes. So, I think section 401 is one of the least appreciated and most important parts of the statute. As I explained earlier, section 401 is key to the Clean Water Act giving States power to protect their water quality and power over the Federal Government. And during the Trump administration, the administration proposed rules that were specifically designed to gut section 401 authority and limit State power.

I think that gives the lie to the claim that this is all about protecting States or that it is significantly about protecting States. That was not the motivation.

If you combine a loss of authority under section 401 with a loss of the scope of jurisdiction under the Clean Water Act more generally, that is a one-two gut punch to State power to protect water quality, because it means not only do the States have less influence where jurisdiction exists, but they also less ability to protect themselves from activities authorized by the Federal Government.

Mrs. NAPOLITANO. Thank you, Chairman Rouzer. I yield back, sir.

Mr. ROUZER. Mr. Webster, you are recognized for 5 minutes.

Mr. WEBSTER OF FLORIDA. Thank you, Mr. Chair.

Mr. Hawkins, you, I think, mentioned in your testimony that there were advantages, and one of those advantages was low-lying areas in a field would collect water. And could you explain how those are advantages?

Mr. HAWKINS. Congressman, can you repeat the last part of your question?

Mr. WEBSTER OF FLORIDA. Could you explain how having low-lying areas in a field that collect water in a storm or something are—actually I think you used the word "advantage." So, how are they advantaged by that?

Mr. HAWKINS. Well, as I think about agriculture as a whole, as I think about my own State of Missouri, something we are blessed with is certainly diversity in agriculture. And we farm or ranch where we do because we have access to water.

And as I think through this rule, every farmer or rancher has to think about the features that they have on their property and question whether all of a sudden now they are potentially jurisdictional and therefore fall under the authority of the EPA and the Corps.

As we talk about features, truly what comes back to my mind, Congressman, is uncertainty, regulatory uncertainty as to the responsibility that comes along with those features.

As I hear from our farmers, as they have questions because of the length and the scope of this rule when they read terms like "similarly situated," "in the region," "material influence," when they say, "What do I need to do?" I can't in good faith ask them to go to one of our six district Corps offices in the State without first consulting with legal counsel or an environmental expert to walk them through the potential ramifications and what happens as they look at continuing to invest in their property and ultimately put more conservation on the ground.

So, that is what comes to mind. Whether it is a low-lying area, a ditch or anything, our farmers and ranchers across the country are a mesh of all of these features. And truly they are blessings when we think about access to water and ultimately our ability to produce food, fiber, and renewable fuel.

Ultimately this is what it is about for us, Congressman. It is about continuing to use the resources with which we have been blessed and are truly the envy of the world.

So, let's take a commonsense approach to this, and that is what our farmers have asked for a long time. We want clean water because we need clean water for our families and for our livestock, but we also need clear rules.

Thank you.

Mr. WEBSTER OF FLORIDA. Thank you for that answer.

Several years ago, we had a joint hearing with the Committee on Transportation and Infrastructure and the Senate Committee on Environment and Public Works and others after the Supreme Court had ruled the definition to be unconstitutional.

At that time, the Army Corps of Engineers and the EPA, I believe, had joined up to do a new rule, which was similar or maybe even more oppressive than the one that was there. Now I am hearing that they are teaming up again.

Why do you think that is?

Mr. HAWKINS. Was that directed to me again, Congressman?

Mr. WEBSTER OF FLORIDA. Yes.

Mr. HAWKINS. Well, I would just say, as I think back to the 2015 rule, I guess one thing that was certain is that there was the broadest expansion of the Clean Water Act arguably that we had seen since its inception in 1972.

What is different about this approach? I would describe it as regulatory creep, regulatory creep in the sense that it is going to come in a case-by-case determination across the landscape, whether that is in Missouri, California, you name it.

So, I still think the end results will be the same in terms of more dry land under the jurisdiction of the Federal agencies, but it is going to happen over time, case by case, and ultimately a regulatory creep that is going to happen across the United States landscape.

Mr. WEBSTER OF FLORIDA. Thank you very much. That is a great definition: regulatory creep. So, thank you for bringing that up, too.

Mr. Chairman, I yield back.

Mr. ROUZER. The gentleman yields back.

I now recognize Mr. Larsen.

Mr. LARSEN OF WASHINGTON. Thank you, Mr. Chair. Some questions for the panelists.

I am not a lawyer. I presume, Mr. Williams, Ms. Huey, and Mr. Hawkins, you are not lawyers as well. So, we can maybe talk at that level. But I do want your opinion on the law.

First, from Mr. Hawkins. And maybe you don't have one. Maybe the Farm Bureau has an opinion on whether or not you expect the Supreme Court to write a new test in the *Sackett* case if the Government loses and the proponents win. What is your expectation?

Mr. HAWKINS. OK. Well, I would certainly hope that we——

Mr. LARSEN OF WASHINGTON [interrupting]. I am not asking what you hope.

Mr. HAWKINS. I think that the arguments that the American Farm Bureau, that the Sackett family have put forward, are very compelling arguments. I would say that.

Mr. LARSEN OF WASHINGTON. Do you expect, though, that the Supreme Court will write a new test? They could decide for *Sackett* and not write a test. They could write a new test. If they don't write a test, we have uncertainty. If they do write a test, you don't know what it is, and I don't know what it is, and that sounds like uncertainty.

Mr. HAWKINS. It is uncertainty. That is why we have said no SCOTUS before WOTUS—or no WOTUS before SCOTUS. Sorry. I got it backwards.

Mr. LARSEN OF WASHINGTON. I understood what you meant.

Ms. Huey, so, the same question for the homebuilders, what the position on that is. What do you expect if *Sackett*—if the proponents win, what do you expect?

Ms. HUEY. Well, I would still love to hope. But——

Mr. LARSEN OF WASHINGTON [interrupting]. We are in the hope business up here, but we have to actually make decisions sometimes based on what we know and what we don't know.

Ms. HUEY. Yes, sir. I agree with my colleague. It is the uncertainty that is the problem for us.

I deal with codes and everything in construction that gives me a clear guideline for how to build a house.

Mr. LARSEN OF WASHINGTON. Yes, sure.

Ms. HUEY. But this does not. We need the certainty and the clear rules.

Mr. LARSEN OF WASHINGTON. And I don't mean to interrupt you or talk over you. But if you don't get a test out of the Supreme Court if the proponents win, then you don't have a test, and we are left with uncertainty.

Ms. HUEY. Uncertainty, yes, sir.

Mr. LARSEN OF WASHINGTON. That is kind of the point I am getting at. I mean, arguing about certainty really doesn't fly.

Mr. Williams, we talked yesterday, so I kind of teed you up a little bit on this. Do the Sand & Gravel folks have a view on that?

Mr. WILLIAMS. We believe the Supreme Court will be able to offer a clear definition of what is jurisdictional, help us to create that line that says: What is relatively permanent? What is not under Federal jurisdiction but should be under State jurisdiction?

Mr. LARSEN OF WASHINGTON. As clear as Scalia and Kennedy did in 2000 and whatever it was?

Mr. WILLIAMS. We believe they can come up with a clearer definition this time around.

Mr. LARSEN OF WASHINGTON. OK. Thanks. I am making my point. You guys get it. I am making my point on this one.

Mr. Owen, is it a fair assessment—I am thinking through about this issue—kind of leaving it to the States to fill the gap when the Trump-era rule came out, to fill a gap on clean water. It doesn't sound like that happened. Is it a fair assessment that there is little evidence the States had uniformly to come in to fill the gaps created by the Trump-era rule?

Mr. OWEN. So, there have been some moves in a few States to fill gaps, but no across-the-board movement, nothing close to it. And it is understandable. Like, it is essentially an unfunded mandate for States to come up with water quality programs to backfill what the Federal Government had been doing, or at least an unfunded request because they don't have to do it.

And the States don't have the resources. They have been relying, in many cases, on a partnership with the Federal Government to protect waters and not developing their own programs. And so, it is not an easy thing for them to do, and we shouldn't be surprised that they don't do it.

Mr. LARSEN OF WASHINGTON. Yes. Look, as a former county council member, I am not—I mean, I support the Clean Water Act. I support clean water. I support having the EPA involved. But I also understand that there is a frustration with uncertainty, and I am just saying—thinking back when I was on the county council trying to make some decisions as a local elected about what is certain and what is not certain on land use.

I mean, I get what you are going through. I am not arguing that houses aren't great, and food isn't great, and we don't need sand and gravel. I am not making those arguments at all.

I am just concerned that we are not going to get what anyone wants out of the Supreme Court because I just don't know—unless they become an activist Supreme Court—which I presume we don't want out of the Supreme Court, I thought that they weren't supposed to be activists—and they move forward and write a test.

And so, I just think we are headed towards a more uncertain future.

And with that, I have no time to yield back.

Mr. ROUZER. Mr. Babin.

Dr. BABIN. Yes, sir. Thank you very much, Mr. Chairman.

And I want to thank all the witnesses for being here today as well.

Unfortunately, over the last few decades, we have watched the Obama and Biden administrations use WOTUS and its definition basically as a political football used to punish farmers, the energy industry, builders and contractors who rely on water, and prop up lawyers racking up legal fees. Bigger Government, confusion, and redtape, that is what this administration seems to see as an end goal to WOTUS.

The rule was released as the U.S. Supreme Court prepares, as we speak, to decide a case, as we have heard today, *Sackett* v. *EPA*, which will provide more clarity on the issue. I am very disappointed that EPA has moved ahead with its final rule while the Supreme Court will soon render a decision on this matter.

And we can hope, and we can expect, and on and on. But the fact of the matter is, the Supreme Court will make a ruling. And this ruling could negate major elements of this WOTUS rule and will create even more uncertainty for farmers.

Unfortunately, the new WOTUS rule, once again, gives the Federal Government sweeping authority over private lands, and this isn't what clean water regulations were intended to do originally. This new rule is vague, it creates uncertainty for America's farmers, even if they are miles from the nearest navigable waters.

As a result of all this, you have seen members of the agriculture community rally and legally challenge this rule. Republicans strongly support this.

Mr. Hawkins of the Missouri Farm Bureau, sir, this is your question. You have made some great points with your comments and some of your answers today. If there is one takeaway that you would like the members of the committee and the folks watching at home to take away from this hearing today, please, what would it be?

Mr. HAWKINS. Well, Congressman, thank you for the question.

If I can talk personally, as a farmer and a father, there is nothing more that I want to do than bring my kids home to the farm. And as I plan for the future, everything that I am doing is about trying to hopefully instill a work ethic and a passion for my kids that they love production agriculture and want to become the sixth generation.

Right now, we are investing our own dollars in putting in an intensive grazing system. This is the first time my family has actually contracted with the USDA to do something like this, to put more conservation on the ground. We already do conservation, but in this case we put our own dollars on the line to cost-share through the Environmental Quality Incentives Program.

As I think about this, we are doing it because it is the right thing to do, to better steward the forage that we have and to better steward our water resources, ultimately produce healthy cattle as we think about how we rotate those animals. And it is all about stewardship.

As I think about this rule, though, I have to question, how is that going to impact going forward my ability to do more conservation on the ground or to construct facilities on the ground and how I manage my livestock? And then it begs the question: Why? Why would my kids want to do it if they see their father embroiled in redtape with the Government?

And so, truly, Congressman, as I think about this, I implore you to help us help those who are going to come behind us, because that is truly why I am here. It is about helping the next generation of those who are going to produce food, fiber, and fuel for this country.

Dr. BABIN. Absolutely. And I really appreciate that honest answer.

Still a minute left, if any of the other witnesses would like to chime in on that.

Mr. WILLIAMS. I would be glad to.

Dr. BABIN. Yes, sir. Mr. Williams.

Mr. WILLIAMS. Congress has provided an immense amount of funding for infrastructure. The aggregates industry wants to be the provider and get those projects done, get those projects on the ground. And if we have delays that come from wetland permitting and other delays that are required by this entire process, all of that just makes these projects last longer and perhaps we can't even get our permits to open a new facility.

So, our dream is to get to work and be able to get our permits when we need them.

Dr. BABIN. Absolutely.

Mr. Chairman, I am almost out of time. So, I will yield back. Thank you.

Mr. BOST [presiding]. And the gentleman yields back.

The gentleman, Mr. Garamendi, is recognized.

Mr. GARAMENDI. Thank you.

Mr. Hawkins, I wasn't going to ask you a question, but in your response to Mr. Babin you very well articulated my own personal situation. I am a rancher. Our ranch is in a conservation easement.

My question to you, as you talked about the future and about your ranch and your love of it, how would you write the law or the regulations to protect the waters that are on your ranch and adjacent and probably flowing into larger streams? How would you write it?

Mr. HAWKINS. Thank you for the question. And thank you for your ranching background and what you have contributed through the years as well.

I would say, what our farmers and ranchers appreciated about the Navigable Waters Protection Rule was that, for the first time since 1972, that there were actual bright lines. And we in Missouri are very comfortable with the regulatory authority within our Department of Natural Resources and the example of cooperative federalism that we see under the Clean Water Act.

We have a citizen-led commission, the Clean Water Commission in the State, that is essentially a sounding board and an oversight mechanism as the Clean Water Act and the State-accompanying laws and regulations are implemented.

So, I would say, in our example, we have a process that works. And so, the bright lines under the NWPR were what were appreciated because, for the first time, we actually felt certainty.

I would also add, Congressman, that outside of the scope of the Clean Water Act, we in Missouri have shown time and time again that we are willing to go above and beyond to put practices on the ground that ultimately preserve soil and improve water quality.

Since the mid-1980s, we have had in place a sales tax, the one-tenth cent sales tax, half of which goes to State parks, the other to soil and water conservation. That has been reapproved overwhelmingly by Missouri in every decade since because it has proven—proven—to improve parks, but more importantly, it is helping us save soil and improve water quality by helping cost-share with farmers to do more on the ground.

That is what this is about, truly, for us. We have shown that we care about clean water, and we put our money out there every day to access these resources to do more.

Mr. GARAMENDI. I appreciate that. But we are in the business of writing law. We have gone—what do we call it? Let's say we write, we rescind, and we repeat. That is what we have done for the last almost 40 years now.

And it seems to me that we are going to have to have some clarity here in the law; otherwise, we are going to continue to write, rescind, and repeat.

And what my question to you and really to all of the witnesses and to ourselves is: What should the law say? How do we provide clarity so that we don't go through this unending process—apparently unending process?

I don't know the answer. But it seems to me that we have the responsibility of answering that question, that is to provide the clarity in the law itself to the extent that—well, far more extensive than the present situation. Otherwise, it is going to be back and forth forever as the shifting winds of Congress and the Presidency happen, and it will.

I search for that. And I really challenge myself. How would I write it? What would I actually put in the law so that there would be clarity? I understand the clarity and the necessity for it. I have got ponds that I know eventually drain into a river, and I am going: Hmm, how does this affect me? Don't know the answer, but we have got to search for that answer.

And, Mr. Graves, your resolution would prevent us—would prevent any further action until we wrote the law.

I yield back.

Mr. BOST. Mr. Burlison.

Mr. BURLISON. Thank you, Mr. Chairman.

Mr. Owen, I wanted to ask you, I heard previously you had mentioned that States really can't shoulder the burden of some of this responsibility, that only the Federal Government has the resources to do that.

I was puzzled by that because that is not, from my experience, the case. From our State's perspective, the EPA is really leaning on the State to do all of the work and shoulder all of the burden in enforcing their regulations.

Mr. OWEN. Let me clarify the answer.

What I am saying is it is very hard for States to do it alone, in the same way that, as you just mentioned, it is really hard for the Federal Government to do it alone.

And the system set up by the Clean Water Act is designed to be a partnership within areas where there is Federal jurisdiction under the statute, but that there is also State authority.

And I think the other point I would make is that that partnership has generally worked really well, where you have Federal authority delegated to States, States acting with Federal support, and all working on a joint project of trying to advance water quality.

And so, the fear I was expressing is that, when the Federal Government pulls back, the partnership goes away. And now the States still have the authority to act, but that would mean, in some cases, enacting new legislation, staffing up the effort, gaining experience.

And so, that is challenging. That is where the difficulty lies.

Mr. BURLISON. So, certainly you can understand that the water issues in the Midwest are different than the issues in your State of California.

Do you feel that the Federal Government creating a one-size-fits-all solution is appropriate, or do you believe that the States should have more control?

Mr. OWEN. So, I think calling it a one-size-fits-all solution is not quite right because there is some flexibility in the regulatory language that allows it to be adapted to the different circumstances of different places.

That flexibility also leaves more room for interpretation, which is I think the fear that we are hearing from the rest of the panel.

Mr. BURLISON. Certainly you have heard from some of the testimony from the farming community of the impact that they have. Do you sympathize or understand or share any of those concerns? Have you ever been on a farm or worked on a farm, tried to produce food to feed anyone?

Mr. OWEN. So, I have tried to produce food. I have gardened. I am bad at it. So, it was not a very successful effort, but I have made the attempt. And I have spent time on farms. I have not been employed on one ever.

So, to your question, do I sympathize? Absolutely. Absolutely. I think everybody on this panel would agree that water quality is important. I think everyone on this panel would agree that economic development is important. And everybody would agree that producing food, that producing housing, that all of these things really matter.

Mr. BURLISON. Thank you. Thank you, Mr. Owen.

Mr. Hawkins, I appreciate you being here today. I wanted to get an idea. Whenever I was campaigning, I heard everywhere the impact of the supply chain on farming, the impact of energy costs, fertilizer costs, the impact of fuel costs.

I think my question to you is, is this the appropriate time to saddle the farming community with these regulations?

Mr. HAWKINS. Well, Congressman, thank you. Thank you for the question.

I would say there is never a good time to saddle agriculture or any sector of the economy with uncertain regulatory requirements.

Congressman, as we think through this issue, as we think through the regulatory process alone, if a farmer is subject to a permit and must go through it, that is one thing. There are costs associated with that permit, of hiring the experts that are needed to help get you through the process. There are costs associated with mitigation. And there are costs associated with the time that it

takes to ultimately see your project through fruition on the farm as a result of the permit.

I would also say you have the uncertainty that is associated with compliance and the threat of potential civil or criminal penalties.

Mr. BURLISON. I understand the cost can be anywhere from $10,900 to $2.4 million.

Mr. HAWKINS. That is a lot of money, Congressman.

Mr. BURLISON. Right. The impact of a Missouri farming family—what are the average size of the family farms or the farming operations in Missouri?

Mr. HAWKINS. Yes. So, the average size farm in Missouri would be about 300 acres. But, again, Missouri, we kind of represent the diversity of American agriculture. We do everything but really citrus and sugar.

Mr. BURLISON. Yes.

Mr. HAWKINS. But we truly are a melting pot when it comes to just diversity of production.

Mr. BURLISON. So, I would imagine, I mean, that would be a huge impact to any family farm.

Thank you. My time has expired.

Mr. DUARTE [presiding]. Thank you, Mr. Burlison.

Mrs. Sykes, I will recognize you for 5 minutes.

Mrs. SYKES. Thank you, Mr. Chair.

Thank you to the panel for your presentations today.

I want to bring our conversation back to water quality, because essentially that is what we are talking about. And I am going to direct this first question to you, Mr. Owen.

We just talked a bit about an issue in my district where people who can access well water—I know that is not necessarily our jurisdiction today—but the impact that it has on not accessing clean, potable water and what that means to your life and to a community's quality of life.

So, could you talk just a little bit or provide some suggestions on how we can best add to clean water protections, somewhat to my colleague's conversation of what specifically could we do? What are the specific suggestions you have for us as we contemplate this rule and future legislation?

Mr. OWEN. I think the first suggestion is that, in order to protect clean water, we have to protect our rivers, our lakes, our streams, but also our smaller wetlands, our smaller streams, even the ephemeral ones. We cannot get the clean water that we want without protecting that natural infrastructure.

That is a starting point. That is a foundation. It is not a complete answer to the question.

Within that protection, there are a number of things we can do. I mean, the reality is that a lot of the water pollution that we have in this country comes from agriculture. In terms of the density of pollution from a particular area, it is higher in urban areas. But we have so much agricultural production, that is so much of our land, that that is where a lot of water quality impacts come from.

And so, we have to find ways, whether it is through the kind of incentive programs that were described before, through regulation of nonpoint source runoff, through increased State effort. But that

is a huge—I mean, particularly for your State of Ohio, where that is a primary source of pollution in Lake Erie, that is a huge focus.

I would say the other area where we need to do a tremendous amount of work is with urban stormwater because, again, that is a major source of pollution. It is also a potential water supply, especially in arid areas. And it is a challenging, difficult issue because it is expensive for cities to deal with.

So, those are general answers. I would be happy to follow up with more specifics. But I think that is a starting point.

Mrs. SYKES. Thank you, Mr. Owen.

And I am going to direct my next set of questions to Mr. Hawkins.

And I know you are getting a lot of attention today, but it goes to show how important agriculture is. It is the number one industry in Ohio, and we rely upon you, and we thank all of the members, all of your members of the Farm Bureau across the country, for what you do to feed us and allow us to live.

But to the point of what Mr. Owen said, a lot of pollution is attributed to agriculture. And a couple years ago, we had some algal blooms in Lake Erie which prohibited access to drinking water, again, impacting the quality of life of people who rely upon the beautiful Great Lakes for drinking water.

So, we are going to deal with the farm bill. I know that is not this committee, but everyone is still talking about the farm bill. And I am sure we are going to hear conversations around agriculture, runoff, what you all are or are not doing to help us keep our clean water clean.

So, I am asking you, what is your understanding of the normal farming activities exemption to the Clean Water Act, and do you agree that these activities are generally exempt from Clean Water Act permitting regardless of their jurisdiction of this rule?

Mr. HAWKINS. OK. Thank you, Congresswoman. And, again, thank you. I appreciate Ohio Farm Bureau a great deal. They have been mentors to me through the years in my Farm Bureau career. And so, just a couple of thoughts initially.

One, nonpoint sources are excluded, obviously, from the Clean Water Act. And as I think specifically to the issue that you raised in Ohio, I think it is a prime example of cooperative federalism at work when the agriculture community worked with the State legislature and regulators to come up with a solution and put tools in the toolbox for Ohio farmers that worked. It didn't necessitate a heavy hand out of Washington, DC, to solve a problem. It was Ohioans coming together for an Ohio-focused solution.

And that is what I have learned from my colleagues as we have internal conversations within Farm Bureau, learning from other States about what works as we put tools in the toolbox for farmers.

And I would just implore this committee—I appreciate you recognizing that you all are going to be involved in writing a farm bill this year, and there will be a lot of discussion about the conservation title. And I would implore you all to focus on working lands and make sure that farmers and ranchers have the tools that they need.

Because guess what? If you make the programs workable, if you cut redtape, my fellow farmers and ranchers will raise their hand

and walk through the door of their USDA office and say they want to put more conservation on the ground.

So, I would encourage you, keep that in mind. Make these programs workable for those who are working hard to produce food, fiber, and fuel.

Mr. ROUZER [presiding]. The gentlelady's time has expired.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Ms. Bodine, with my Baptist upbringing, I just got to add an amen to that opening statement. Thank you.

There are multiple new terms used in the Biden rule, such as "regional," "shallow surface," "significant effects," and "shallow aquifer management," that appear throughout this remarkably long preamble. And it is in a variety of contexts.

Now, what do these new terms do? And do they simplify or clarify or expedite the WOTUS process, or do they add more confusion to it?

Ms. BODINE. Thank you for that question.

The terms, as you point out, are vague. Most of the explanation is in the preamble, and everything is case by case. It depends on the individual Corps field staff person, the individual EPA inspector. That is the person who gets to decide what the rule means.

And the landowner is at their mercy to a great extent because of the fact that if there is a project that wants to go forward, people want clarity. They want certainty. And at some times, they need to actually put themselves under the jurisdiction of the Corps just to get a jurisdictional determination in a timely way. So, it gives enormous authority to the field staff on a case-by-case basis.

Mr. COLLINS. Thank you.

Ms. Huey, I am also a small businessman. My wife and I, 30 years ago, we started our own business and grew it. And so, I know firsthand how conducting business in an environment where regulations change every 2 to 4 years make it hard to stay in business. Matter of fact, I have seen a lot of small businesses go out of business due to rules and regs imposed on them. Either that, or they have to sell out to someone else to continue for their employees to have a job.

And like you, Mr. Hawkins, I love what I do. And I have often said out there in the past several years that my kids don't have the same opportunity that I had, and that is to start and grow a business. And the reason is, in most cases, it is because there is some overreach by the Federal Government, by some bureaucrat out there making regulations, and who, in most cases, doesn't have a clue what they are regulating.

So, Ms. Huey, I would like for you, if you could, speak on the final rule and the uncertainty that it contains and just how it is impacting your members, please.

Ms. HUEY. It makes it very difficult when I have a homeowner call me or a potential client call me and want me to walk a piece of property with them that they bought to build their dream home, and I see water standing on the property that I and my colleagues don't know what to do with.

We have to walk back and say: I don't know what I can do with this. We are going to have to wait. We are going to have to go

through the testing, through the process, and see if you can even build on this lot. That is for my colleagues all across the country.

We deal with regulations every day. Every day is a new challenge in our business. And you have to like challenges. We are not saying that we don't need regulation in our industry. We are just saying that we need to work together to come up with exactly what works for all Americans, for all properties.

Mr. COLLINS. Thank you.

Thank you, Mr. Chairman. That is all I have, and I yield back.

Mr. ROUZER. Mr. Huffman is recognized for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman.

There has been a lot of talk about the need for certainty and reducing litigation. It would be easy to forget, listening to some of this debate, that before the Obama administration waded into this difficult, fraught exercise of defining the waters of the United States, there was incredible uncertainty. There was incredible conflict and litigation. That is why the Supreme Court waded in and confused us a little more with their different standards and tests.

So, I think it is important that we remember that it wasn't Democratic rulemakings that created this problem with litigation and uncertainty. It was to some degree the lack of clarity and the lack of rulemakings, and to some extent, the inherent challenge of defining something as tricky as waters of the United States if we are trying to protect water quality throughout the United States.

It would also be easy to forget, listening to some of this debate, that the Clean Water Act is about protecting clean water and that clean water is really, really important. It has been, in some cases, made into a bit of a bogeyman. It has been trivialized. It has been ridiculed, almost demonized by some terms of this debate.

But remember how we got here. We had rivers that would catch fire, and we couldn't put them out, because, in many cases, the pollution that had been dumped right into that river, some of that came from tributaries upstream.

We had Lake Erie and other water bodies that were written off as dead, as unable to support fish life, because of all the pollution. Again, not because of stuff discharged directly into Lake Erie, but things that were discharged further upstream into tributaries and other water bodies that connect.

So, clean water matters. And this Clean Water Act is important. People throughout this country deserve clean water, and they value clean water.

And I think they are, frankly, if they are paying attention, pretty alarmed when you see proposals that would roll back protection for 70 percent of the rivers, 50 percent of the wetlands that have had that protection for the last 50 years. That is extreme. That is troubling. And so, that is an important part of our context here.

Mr. Owen, I appreciate your discussion of the importance of protecting headwater streams in unconnected wetlands, intermittent, ephemeral water bodies, all of which would dramatically lose protection under the Trump administration's "dirty water rule". And you discussed also how this contributes to toxic, costly algal blooms and other problems in downstream waters.

I appreciate the fact that you drew our attention to the Clean Water Act's opening section, which states that water quality regu-

lation must provide for the protection and propagation of fish, shellfish, and wildlife, as well as provide for recreation. This wasn't just about navigation. Navigable waters was the jurisdictional hook that got us into the important challenge of protecting water quality throughout the United States.

So, could you talk a little bit more about why it is important that the Clean Water Act exists to support popular human activities like hunting and bird-watching, fish and wildlife values, and why that should matter to all of us?

Mr. OWEN. I think I would mostly say amen to the question. I think these things are obviously tremendously important. Water is—we all drink it. We all recreate with it. The public overwhelmingly wants stronger water quality protection.

And, in fact, to bring this back to what we have been discussing before, I would highlight one other thing, which is that, when we talk about constructing things in places that are wetlands or are ephemeral streams, we are talking about construction in places that flood. We are talking about building homes in places that flood.

And in addition to the water quality impacts of it, it is also a dangerous thing to do and a costly thing to do, because the Federal Government may ultimately be on the hook for the flood insurance payments.

And so, I think it is important to keep that piece of the context here as well, that the Clean Water Act is not only protecting our water quality, it is also protecting us from making costly mistakes of building in places that are prone to flooding.

Mr. HUFFMAN. What about the protection of groundwater? In California, everybody knows we are very concerned about the availability of water. In some years, 40 percent of our water supply can come from groundwater. Entire communities have lost groundwater due to pollution. And that didn't come from—it did come from groundwater plumes, but eventually, that pollution traces back to surface water pollution.

Why is it important that everyone care about groundwater when we talk about this issue?

Mr. OWEN. Because a lot—I see the time is almost up—because a lot of groundwater starts as surface water. So, what happens at the surface gets into the ground and gets into our drinking water.

Mr. HUFFMAN. Thank you. I yield back.

Mr. ROUZER. Mr. Van Orden, you are recognized.

Mr. VAN ORDEN. Thank you, Mr. Chairman.

It was brought up during our testimony today that, unfortunately, some of the pollution that is in water comes from agriculture. I would like to remind everyone here that all food also comes from agriculture.

I am not going to mince words. This bill would be more aptly named "Woke us," as it is mostly confusing, partially nonsensical, not based in science, and will cause many more negative, unintended consequences than I believe the Biden administration has contemplated.

Under this new "Woke us" rule, about 85 percent of the waterways in my congressional district will be subject to EPA oversight.

In some places in my district, it would actually harm the environment, and I am going to tell you exactly why.

Several of my farmers are pioneers in environmental stewardship. What they started to do is they were collecting the runoff from agriculture in these ponds that they dug. And so, what happens is the phosphates and nitrates settle to the bottom. Then they are able to recycle the water, and they can also recycle some of these nitrates and phosphates, which lowers your input cost, which is killing everybody. So, they partially recycle that, and again, it lowers the cost for everybody across the board.

So, if "Woke us" goes into effect, these farmers will stop these practices, as their ponds will become navigable waterways and subject to draconian Federal regulations. And what this means is that all of these ag byproducts will actually enter the watersheds and wind up in the Mississippi River. That is the exact opposite intended consequence of this foolish regulation.

We are concerned with the disappearance of small family farms who are just getting by due to skyrocketing costs, yet you appear to be advocating—this rule appears to be advocating for adding additional costs to their operations.

So, Mr. Owen, you said that you have been to farms before. I have got boots in my office that have manure on them from a small family farm. And my first question to you is, when is the last time you stepped in manure on a small family farm?

Mr. OWEN. This isn't the last time, but even though I grew up in the suburbs, we were the one house in the Boston suburb that got regular deliveries of horse manure for my mother's garden.

Mr. VAN ORDEN. All right.

Mr. OWEN. So, I grew up not only stepping in that manure, but offending the entire neighborhood with the smell.

Mr. VAN ORDEN. Great. And how old are you now, Mr. Owen?

Mr. OWEN. What is that?

Mr. VAN ORDEN. How old are you now?

Mr. OWEN. I am 48 now.

Mr. VAN ORDEN. How old were you then?

Mr. OWEN. That was when I was a kid. More recently——

Mr. VAN ORDEN [interrupting]. OK. So, 30 to 40 years ago is the answer to that question.

Mr. OWEN. No, it is more recent than that.

Mr. VAN ORDEN. Mr. Owen?

Mr. OWEN. But next question.

Mr. VAN ORDEN. So, here is your next question. How many family farmers, township chairmen, and county board supervisors did you personally speak to about the economic effect that this is going to have on their villages, their townships, and their farms? How many did you personally speak to before you prepared yourself to come here to testify about the awesome economic and environmental effect of this foolish rule?

Mr. OWEN. In preparing this testimony, I did not speak to anyone.

Mr. VAN ORDEN. OK. That is my concern, Mr. Owen, is that we have a bunch of nameless bureaucrats who are trying to apply a 4,000-mile screwdriver to fix a problem that they can't even see.

So, when we have people that are deciding the fates of our family farmers without firsthand knowledge, they are actually degrading the ability of them to produce food for the world. And that is shameful. And we have got to stop it.

So, I am going to encourage you and the rest of your folks to get out there and talk to these farmers. Go to the township meetings. Ask them how it is going to affect them. It is going to destroy family farming. And I am not willing to stand by and let that happen.

With that, I yield back.

Mr. ROUZER. The gentleman yields.

Mr. OWEN. May I respond to that, or is——

Mr. ROUZER [interrupting]. The gentleman has yielded back.

Mr. OWEN. OK.

Mr. ROUZER. Ms. Brownley is recognized.

Ms. BROWNLEY. Thank you, Mr. Chairman.

Mr. Owen, would you like to respond to the last comment?

Mr. OWEN. I would tell you first off that I have spent, in multiple research projects, lots of time talking to farmers about the impacts of regulatory programs. I did not talk to them in preparing this specific testimony.

The other thing that I would say is that I have also spent many years interviewing the agency staff who interview this and other programs. They generally are in field offices, so, they are closer to the areas. They typically are people who grew up in those specific areas.

And for them, what they have told me is, having a sense of understanding of the community, being able to get out and see farms, or since that is not usually who they are regulating, see development sites, is really important to them as well.

And so, I think it is important to give the bureaucrats some credit here for the efforts that they have made to try to understand the people that they are regulating.

Ms. BROWNLEY. Mr. Owen, my question to you is, you mentioned that the requirement to obtain a clean water permit does not necessarily prohibit development and that the property owners have use of compensatory mitigation. Could you elaborate on this option?

Mr. OWEN. Yes. So, if an area is declared to be jurisdictional, that does not mean it is off limits for development. The Army Corps will typically ask the landowner: Can you avoid development in this area? And if they can, then they will prefer that. And if they can minimize impacts, they are, again, asked to do that.

But if neither of those things are possible and the project still wants to go forward, you can get a permit, and coupled with that permit is a requirement to purchase compensatory mitigation, which basically means restoring environmental conditions in some other time or place.

If it is done well, it can be a win-win, because you can get development where you want and you can also get protection in places where it is desired. And, in fact, a number of counties in California have done proactive planning to try to streamline approval processes and make this possible. They are good examples of how that can be done well.

One other thing I would say to that point is, in the written testimony there are some concerns about the cost of compensatory miti-

gation. Part of the reason for that cost is because the compensatory mitigation industry has had so much uncertainty because of uncertainty about whether regulatory restrictions would apply. If that industry has more stability, it will likely have more investment, and in the long term, that should bring costs down.

Ms. BROWNLEY. Very good.

So, in reference to certainty, and we have talked—and uncertainty, as we have talked a lot about in this hearing so far—and Mr. Garamendi sort of alluded to this in his line of questioning. But if the Congressional Review Act proposed by the chairman passes that disapproves the waters of the United States rule, what would be the practical effect? And do you think it would repeal and create regulatory certainty or more uncertainty?

Mr. OWEN. The short-term effect would be probably more uncertainty, although I think we are even uncertain about the uncertainty at this point.

Ms. BROWNLEY. Yes.

Mr. OWEN. And the reason for that is that, right now, the regulatory regime that is in place because the implementation of the Trump rule was enjoined is very similar to what this particular rule would create. So, in the short term, it would not really change much of anything at all.

In the long term, the Congressional Review Act prohibits a rule being adopted that is substantially the same, which is a phrase that courts really have not interpreted very much. We don't have much of a sense of what that means.

So, that means the long-term consequences for future rulemaking and for responses to future court decisions would be really hard to predict. So, I don't think that is a path to certainty.

Ms. BROWNLEY. Thank you.

And I just have a little bit of time left. But you also noted in your testimony that the Trump administration's 2020 failed to use proper economic analysis. Can you elaborate on that a bit?

Mr. OWEN. Yes. So, to properly analyze the value of Clean Water Act protections, you need to look not just at the impacts upon regulated industries—and those exist, they are real—but also at the benefits that people get both through avoided costs of treating water, through avoided need to provide new water supplies, through avoided flood impacts, but also through things like hunting, fishing. You need to quantify those benefits as well and weigh them against the costs.

And the Trump administration's approach was essentially to do an arm wave at the benefits and say either we can't calculate them or we don't think they exist. And the upshot of that was that you had a very, very imbalanced analysis.

Ms. BROWNLEY. Thank you so much.

And, Mr. Chairman, I yield back.

Mr. ROUZER. I thank the gentlelady.

Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman.

I will tell you one thing. If Congress was writing this legislation now the way there are folks trying to interpret—Army Corps of Engineers, EPA—there is no chance it would pass Congress, certainly back in the 1970s nor now, because people would be calling for the

heads of the Members of Congress voting for such a far-reaching, overreaching piece of legislation.

So, here we are. Something that was passed in the 1970s that has been interpreted and reinterpreted more recently in the Obama era under WOTUS went very far-reaching to mean that human-built drainage ditches and agricultural irrigation ditches are now under the scope.

We see areas that want to regulate water running off your roof into a rain barrel, saying you can't keep that rain barrel water without some kind of permit because it belongs to someone else.

It seems the scope has expanded so much that no drop of water anywhere doesn't belong to the United States.

So, let's talk about home building for just a little bit. And I also want to touch, too, that the Army Corps is holding up a project in my district for 3 years because it is about a half a mile from a river.

So, hearing Mr. Owen mention that one of the test questions is: Can you avoid building this building, building this project? Can you avoid it? Well, no. I own this piece of land right here. Private property. I want to build my building here, not have somebody ask me if I can avoid building it. I need it to store my equipment in or build whatever it is.

So, I want to come to Ms. Huey.

Ms. Huey, you mentioned in your testimony, there are basically two tests, I think as you put it, when you go to build a house or housing project. One was stormwater runoff. What was the second one? There were two pieces in line before we even get to water quality.

Ms. HUEY. Oh, I am sorry. You are talking about the fill material?

Mr. LAMALFA. Pardon?

Ms. HUEY. Fill material.

Mr. LAMALFA. Is that it? OK. All right. So, there were two pieces you would have to certify before you can get going on a project there on fill material, right?

Mr. OWEN. I think it was that you were subject to 404 and then also stormwater controls.

Ms. HUEY. Yes. Thank you.

Mr. LAMALFA. OK. 404. All right. Thank you for that.

So, you have already got a big lift in order to build any kind of housing project with those.

What are the timelines to get through those two types of permits to build housing?

Ms. HUEY. In my area in Alabama, it takes several years to get through those processes.

Mr. LAMALFA. Several years?

Ms. HUEY. Yes. And then there are even more layers after that.

Once the development starts, we have—in Alabama, it is the Alabama Department of Environmental Management that we have to go through, and then the municipalities that come through every month and make a list of things that we need to correct, from silt fence to, if we've got a pile of dirt that we have moved, that it needs to be seeded and hayed, and if it is not—if we don't get it taken care of in a couple of days or a week or so.

And that is when we have three detention ponds on a piece of property as well. Those detention ponds, for a subdivision I was in about 4 or 5 years ago, let the water out in an 18-inch pipe. And now in a development that I am somewhat involved in, we have to hold the water on the property for 24 hours, stormwater, before it is released.

Mr. LAMALFA. And so, what is the process of having to build the retaining ponds? Do you have to get permits for that? Because I know farmers and ranchers do, and sometimes they can't obtain those because you are somehow changing the watershed. How is that for you?

Ms. HUEY. Right. We used to fill out the forms to do that. Now we have to hire an environmental consultant, and that could be $5,000 to $10,000. The detention pond itself costs about $100,000 on the project that I am working on now.

Mr. LAMALFA. To make a retention pond in order to do what they want to do so no silt gets away?

Ms. HUEY. Yes, sir.

Mr. LAMALFA. Because this is primarily about silt. When we are talking about pollutants, you seem to have plenty of regulations on how to use ag chemicals, farm chemicals, other things that are in a factory setting that are—someone is regulating all of that effluent of what is coming off there.

So, when I hear talk of that 50 percent of it is agriculture, what we are really talking about is silt. And so, if you go to any river upstream of agriculture after a heavy amount of rain, you see an awful lot of brown water coming down the rivers that isn't the fault of a farmer somewhere.

And also, you see that up in my district in northern California, if they are successful with their extremism of tearing out some hydroelectric dams we need for electricity, we are going to release at least 20 million cubic yards of silt down the river.

Now, silt is bad for gold mining and all that sort of thing, bad for fish or turbidity, except we had a high-ranking official at a recent hearing say, well, the river is very starved for silt.

So, I am wondering what the hell anybody is supposed to do, how any farmer, how any homeowner is supposed to figure out how to navigate this when it takes so long to get a permit to build a pond or anything else. Three years. Three years for this farmer in my district who wanted to build a building that he can't avoid building.

I yield back, Mr. Chairman.

Mr. ROUZER. The gentleman's time has expired.

Mr. Stanton, you are recognized.

Mr. STANTON. Thank you very much, Mr. Chairman.

Water is a precious resource. It must be protected. In no place does water matter more than in my home State of Arizona; 3.2 million people in Arizona receive their drinking water from systems that rely at least in part on intermittent, ephemeral, or headwater streams.

As we grapple with the impacts of climate change and the worst drought in 1,200 years, safeguarding these waters is top of mind for many Arizonans.

Across the country, water bodies vary from State and region to region, and so, how waters of the United States is defined to account for these differences is very, very important.

In Arizona, more than 90 percent of our stream-miles are ephemeral, meaning they only flow during heavy rains. While these streams flow for only a brief period of time, they play a very key role in the arid Southwest, protecting water quality, recharging our groundwater, and carrying floodwaters and sediment flows to protect property.

Mr. Owen, how does the rule account for regional differences in areas like in the arid Southwest that have high concentrations of ephemeral streams?

Mr. OWEN. I would say the most important way it accounts for them is by extending protection to not all of those ephemeral streams, but the streams that have significant connections to water quality in larger waterways. And in a landscape like Arizona, that is going to be many of those waterways.

Mr. STANTON. How does the treatment of ephemeral streams under this rule compare to those issued during the Obama and Trump administrations?

Mr. OWEN. Let me step back a little bit further.

I think you often hear that we have been having dueling rulemakings and huge shifts. I disagree with that perspective to some degree. I think that the Trump administration rule was in fact a massive shift.

Other than that, we have had a lot of continuity in terms of the scope of jurisdiction, really dating back, not just to 1986, but to 1975.

So, the Biden administration rule is, I think, not that different from what was done under the Obama administration before or after 2015, but it is also very similar to what was done under the W. Bush administration, the Reagan administration, the first Bush administration, and the Carter administration, and towards the end of the Ford administration. So, there is a lot of continuity there. And the Trump rule, for a couple years, was the outlier.

Mr. STANTON. Thank you.

I have a question for Mr. Williams.

As you heard from previous testimony by Mr. Owen, these ephemeral streams were not protected under the previous rule advanced by the Trump administration, and there are challenges in some States to adding their own protections.

So, where do you think we can find common ground on this issue to ensure your industry has clarity and certainty for the work you do, yet broader protections for these important streams?

Mr. WILLIAMS. We are certainly in favor of broader clarity. We have been searching for that. I have been working in the wetlands industry for 23 years now, and I have been out in the field with some of our project managers. I have had great experience in that, and I have a hard time deciding what is ephemeral and what is relatively permanent water. We have been looking for kind of a bright line in the sand of what that could be.

Our industry is in favor of clean water. We need the aggregates products to clean water. Sand is part of biofiltration and water treatment. The ephemeral channels are a pollution issue, whether

nutrients get into that channel or not, and this WOTUS rule is more of a construction issue. It is, where are we allowed to excavate or fill ephemeral channels? And that is more construction than it is any pollutant issue that we are concerned of.

Mr. STANTON. The same question for Mr. Owen.

Common ground. Ensuring the industry has clarity and certainty, yet provide for broader protections for streams as I have described in Arizona.

Mr. OWEN. So, I think the honest answer is, this is going to be hard. And it is going to be hard because, no matter what standard we adopt—and this was true of the Trump rule as well as the more recent rule—drawing lines between water and land can be tricky where you have seasonal features. And it is really particularly hard in a place like Arizona where those features can go from dry for very long periods of time to torrential amounts of water moving through.

And so, I think we all agree that certainty would be really desirable. I think in this particular setting, the only ways to get the level of certainty that industry is hoping for—and reasonably hoping for—but the only ways to get that would be to say, essentially, everything is jurisdictional or nothing is.

In between, you are going to have hard, long-drawn problems. And I think the best way to approach those is to say: Well, what are we trying to accomplish here? We are trying to protect water quality and honor the text of the statute. And if that does not produce perfect certainty or even high levels of certainty, that may just be something we have to live with, unfortunately.

Mr. STANTON. Thank you. I will submit my other questions in writing. I will yield back.

Mr. ROUZER. The gentleman yields back.

Mr. Duarte.

Mr. DUARTE. Hello, and thank you.

I am a farmer. We talked a lot about case-by-case analysis of Clean Water Act delineations, determinations. This is one time I am very thankful to be the presenter right before lunch, because we all should look at my case very acutely and reflect upon our food system here in America.

I planted wheat in a wheat field in 2011 that had been planted to wheat many, many times before and had wheat base acreage by the FSA determined across the entire property, 450 acres. Across the property were several streams that we did not farm for practical reasons as well as—just for practical reasons alone, you don't farm streams. You can't get crop out of them.

But it also had vernal pools, the largest of which wasn't an acre, the smallest of which was 16 square feet. All of them were determined to have been jurisdictional wetlands under WOTUS. These had all been farmed through the section 404 permit process. The compromise made was clearly stated that plowing shall never be a discharge, and soil shall never be a pollutant.

But nonetheless, my family and I were prosecuted robustly by the Army Corps of Engineers and the Department of Justice. The American Farm Bureau literally put up the Duarte defense account. I believe I recall meeting Ms. Bodine somewhere in the proc-

ess here in the Capitol. And it became very much a flash point for American farmers and Clean Water Act jurisdictions.

At the end of the day, having tilled 4 to 7 inches deep, wetlands, features as small as 16 square feet, no larger than an acre, that had been planted many times before, I had the Department of Justice threatening me and suggesting to a judge, Federal judge, that my family be fined $28 to $40 million in penalties and restoration and mitigation costs.

The Obama rule, when it came out, the Farm Bureau took a look at it and started analyzing it and mapping it nationwide. Some States were 95 percent jurisdictional wetlands of their total surface area under the Obama WOTUS. Now we are talking about case-by-case analysis by field agents.

Well, Mr. Hawkins mentioned that he works for the FSA, the USDA, the NRCS, many local agencies that are fully staffed within his county to help guide and comply with environmental and farming regulations as well as improve practices and enhance conservation on his farm and throughout his county. Throughout Missouri, for that matter.

In my case—we mentioned, Mr. Owen, your vision of an Army Corps of Engineers local field agent, having grown up in the area and being familiar with what was going on.

Well, my field agent grew up in southern California. He had a five-county territory that he was set to serve. He thought I was tilling the ground 30 inches deep, by his own deposition. That turned out to be in fact 4 to 7 inches deep. When I asked him to come to the field and take a look, he didn't have time and didn't respond.

When they sent me a cease and desist order the following February, we requested a hearing and were kicked up to enforcement. We then went to the Pacific Legal Foundation, who saw the cease and desist order as a fairly dire offense to our Fifth Amendment due process rights, since we simply wanted to harvest our wheat and couldn't get direction as to whether that would be permitted or not under the cease and desist order, and we were supported in the Federal court until a retaliatory case was filed against us for destruction of wetlands.

So, I recite that, and I just want to make sure that we are on record that this is anything but a small nuisance or a small threat to American farmers.

Mr. Hawkins, I will yield back to you for what little balance of time I have left and invite you to give comments. If you don't, then Ms. Bodine may.

Mr. HAWKINS. Well, Congressman, thank you for your story, your leadership through the years, your example, that, unfortunately, is an illustration of what we have seen across the country, including the example I shared earlier.

Right now we have a group of farmers who are working and have been working for almost 20 years in Missouri to save soil from being sloughed off along their creeks. They truly just want to save soil and improve water quality.

We are undergoing a pilot project now and the regulatory officials say it may by 2025 before they can reach a decision on how to proceed with said pilot project.

Meanwhile, we are losing soil, and farmers just want to use rock to secure those banks and use a commonsense, affordable solution that they believe should be workable. That is just another example.

And I guess to your point, Congressman, I would just say, what you described illustrates and begs the question for those who are going to follow us of whether they want to come home to the farm or what you have experienced may be the deciding factor for mom and dad, or grandma and grandpa to decide to exit the business altogether.

Mr. DUARTE. Thank you.

Mr. ROUZER. The gentleman's time has expired.

The gentleman, Mr. Carter, is recognized.

Mr. CARTER OF LOUISIANA. Thank you very much.

Mr. Owen, in Louisiana one of the biggest challenges we face is in our coastal restoration. Our State has the highest rate of wetland loss in the country, with the State accounting for nearly 80 percent of the Nation's total coastal wetland loss.

To that end, officials across the State are working with stakeholders and Federal agencies to consider diversion projects that may help restore our coasts.

The problem is that the seafood industry says that these projects will hurt the fish and wildlife and the base of the Mississippi Delta.

What steps might you recommend to be considered when weighing the needs of our coast and our bustling fishing industry?

Mr. OWEN. So, I don't want to get too deep into the weeds because the answers to any question like this are going to be specific to a particular landscape. But based on what I know of Louisiana, I would suggest a couple of things.

First, I would suggest that Louisiana is an excellent case study in the importance of the subject we are talking about today. And that is both because of the amount of pollution that comes down the Mississippi River to Louisiana from other States, much of which could be contained more effectively with better protection of source water.

So, returning to our theme today, I think Louisiana has suffered more than probably any other State from the Clean Water Act not going as far as it needs to, not protecting as much.

The second piece is on your specific question of how to balance the needs of the shrimping industry and the fishing industry with the desire to restore wetlands.

Again, to the extent that you can limit other strains on those wetlands, which could include things like oil and gas activities that are affecting those wetlands, causing dredge and fill, again section 404 of the Clean Water Act provides a protective mechanism.

That doesn't get at the heart of your question, which is: How do you balance restoration with the needs of the fishing communities? And the most specific answer I think is that I think you try to find common ground, reduce strains that affect both, and then try to do what you can to balance.

Mr. CARTER OF LOUISIANA. So, you mean you don't have a magic wand for it?

Mr. OWEN. I do not have a magic wand for you, no.

Mr. CARTER OF LOUISIANA. You don't have a magic wand. I didn't think you would.

Do you see the WOTUS rules as helping facilitate to trend our State action and protect our water bodies?

Mr. OWEN. Yes, absolutely, because protecting wetlands from fill is very important, especially to a place like Louisiana where the wetlands are so important to the ecology. And then again also because this gives you protection that you cannot provide on your own from pollution issues coming at you from upstream States.

Mr. CARTER OF LOUISIANA. Critically important.

Mr. Hawkins, as the existential threat of climate change grows, one of the results is increased risk of flooding. Baton Rouge, in my district, suffered one of the worst floods in history in 2016. The community was devastated and needed help in rebuilding.

Unfortunately, instead of bringing peace, the National Flood Insurance Program has only served to keep too many of my constituents up at night worrying.

As a member of the Farm Bureau, would you please explain how the NFIP has hurt your industry?

Mr. HAWKINS. Well, thank you for the question, Congressman. And honestly, to do it justice, I will supply a response in writing if you will so that maybe we can get into those issues.

But I would just say, historically, Missouri farmers, ranchers, landowners, certainly we sympathize and empathize with our fellow farmers, ranchers, and the residents of Louisiana.

We experience flooding along the Missouri and Mississippi Rivers it seems like every few years. And so, certainly floods present not just challenges at the time but ongoing challenges from a recovery standpoint, particularly for us in agriculture when we repair levees and try to restore farmland to its pre-flood condition.

So, the detailed response we will get back to you with you and your staff. Thank you.

Mr. CARTER OF LOUISIANA. Thank you very much.

And, Mr. Owen, could you likewise give a detailed response to the question that I referred to you as well?

Mr. OWEN. Yes, but likewise I would also prefer to do so in writing rather than spontaneously.

Mr. CARTER OF LOUISIANA. That is what I was referring to, would you likewise do it in writing?

I yield back. Thank you.

Mr. ROUZER. The gentlemen yields back.

I now recognize Mr. Owens for 5 minutes.

Representative OWENS OF UTAH. Thank you, Mr. Chair. I would like to yield my time to Mr. Duarte.

Mr. DUARTE. Thank you, Congressman.

So, another topic. The Army Corps of Engineers in my district, Merced County is included, just had a river levee break and flood out a grammar school, an elementary school, in a town of many farm workers and lower income residents for the second time in 5 years.

Mr. Hawkins, is the Army Corps of Engineers, in your opinion, competent in their primary responsibilities of flood control, levee maintenance? And are they prepared and staffed to take on the additional responsibilities of regulating every farm in America down

to its last mud puddle or, in your case, riprap installation along a drainage?

Mr. HAWKINS. Congressman, thank you for the question.

I would say within Missouri, we have had a longstanding, let's say, open conversation with the Army Corps of Engineers, from the local issue I raised about just the movement of gravel to secure and slow soil erosion to how the Missouri River is managed.

Unfortunately, with what we have seen in Missouri—and Chairman Graves knows this all too well—we have seen the Endangered Species Act essentially used as the trump card to help dictate to the Army Corps of Engineers its management decisions for systems like the Missouri River.

So, that has long been the frustration for our farmers and landowners, is that they feel like the ESA is used as the trump card and the species are put above people.

Mr. DUARTE. Thank you very much.

We had the exact same situation. We had rivers and ditches that needed to be drained. The irrigation districts locally were very willing to put the resources into providing the backhoe and the excavator and draining them. The Army Corps couldn't issue a permit because Fish and Wildlife wouldn't permit the permit. It went back and forth for years.

Meanwhile, these families are flooded, they are throwing their couches, their belongings, their clothing into dumpsters parked along the street, they are being hauled away to the city dump. FEMA is out there making very meager offerings of support to help these families reestablish and balance their books and get on with their lives.

They will be stripping their drywall, their carpets, and rebuilding significant amounts of their houses simply because Fish and Wildlife and the Army Corps of Engineers couldn't get it together to perform their core responsibilities and functions.

So, thank you. There is more similar than different.

Ms. Bodine, I know you have been at these types of issues for quite a while. We are sitting here on the precipice of not only a Supreme Court WOTUS decision coming down that should give us clarity on what is the significant nexus that has been, in my opinion, manipulated by the agencies, but also *Chevron* deference cases coming down this year.

And I would like you to walk us through what we can expect and how some clarity may come in this year's Supreme Court sessions.

Ms. BODINE. Thank you, Congressman.

So, I actually reread the oral argument from the second case, I think, yesterday. The issue presented to the Court was whether or not there was a significant nexus to a stream that was actually north of the Sacketts' property, in fact, across the road from the Sacketts' property.

Mr. DUARTE. It was an adjacency issue, but yes.

Ms. BODINE. But it was adjacent not to the lake but to a stream, which was actually a ditch that flowed to a stream.

Mr. DUARTE. Yes.

Ms. BODINE. But in that case the Justices were troubled, and this includes Justice Sotomayor and Justice Kagan, by the "significant nexus" test.

The Deputy Solicitor General presented an argument that the "significant nexus" test was really about hydrology, which is very disingenuous because, as I spoke earlier and in my written testimony, it is much, much broader than that, includes these biological connections.

So, I actually would suggest and perhaps anticipate that the Justices will not uphold a "significant nexus" test. The question then is what else, and I think that was questions other people have raised. And that I don't know. But I thought that they were deeply troubled by the "significant nexus" test in that case.

Mr. DUARTE. So, in this window of time when we have a new rule put before us that may not be supported by the Supreme Court, the most efficient thing right now would be to exercise our responsibilities under the Congressional Review Act, set this aside, and wait for clarity to come down from the Supreme Court.

I also would like to ask, and maybe in a future session I will, can we make a deal anymore? In 1972, we sat down with the agencies on the other side of the aisle, and we created the Clean Water Act. And we have serious limitations on what those authorities were that have been greatly eroded by the agencies. Will we be able to solve the next problem?

Mr. ROUZER. The gentleman's time has expired.

Mr. Williams is recognized.

Representative WILLIAMS OF NEW YORK. Thank you, Mr. Chairman.

I am just going to rapid fire a few questions and comments. And if you could keep your answers brief, it will make sense, I hope.

Mr. Hawkins, my wife and I also started a farm. We are members of the New York Farm Bureau. And we live in a beautiful place that has Skaneateles Lake, one of the cleanest lakes in the world. In fact, it provides the drinking water for the city of Syracuse untreated, and it is one of the few in our country to do so.

It is surrounded by farms and it is surrounded by homes. And the Farm Bureau in our State has been critical to working with farmers to implement those things, to keep that water pure, and it is a great success story. I know those farmers; I have toured their farms. I have seen the investment that they have labored under.

I just want to move on, though, to Mr. Williams, no relation.

You are familiar with the TCLP test? And in a very brief way, can you describe how you use TCLP in your mines?

Mr. WILLIAMS. A TCLP is a toxic characteristic. So, soils and other potentially hazardous materials are analyzed to see if they have things like mercury or arsenic or if they have cyanide or if they are going to affect groundwater in a long-term situation.

Representative WILLIAMS OF NEW YORK. Right. Passing TCLP is one of the key features of being able to release water back into the environment or if it has to undergo further treatment.

I spent a lot of time around acid mine drainage in the mining industry looking at novel new technologies to treat that water. And so, that is why I know about TCLP. But thank you for that explanation, because it is really important.

And, Ms. Bodine, you are an expert regulator and have spent a career in regulating issues. Based on the testimony today and of

course of your own study and understanding, are you concerned that the proposed wording of this rule would open the way for very selective prosecution, for great discretion to be applied by EPA Administrators on who and when and what to prosecute? Because, as many of you, in fact all of have you testified, there is a great deal of uncertainty and vagueness in the language of the law.

Are you concerned that this rule could open up that kind of prosecution?

Ms. BODINE. Yes, I am, because it is a case-by-case determination.

Representative WILLIAMS OF NEW YORK. That is right.

Ms. BODINE. I would point out that the GAO looked at this issue back in 2004 and found out that there were just vastly inconsistent interpretations of what was Clean Water Act jurisdiction by different Corps districts across the country.

The examples I put in my testimony, which included Congressman Duarte's experience, also showed how individual field agents can make decisions that would be considered very extreme, but it is difficult for the landowner to push back.

Representative WILLIAMS OF NEW YORK. Thank you.

Mr. Owen, one question for you.

Have you ever read "The Gulag Archipelago"? Are you familiar with that work?

Mr. OWEN. I have not read it.

Representative WILLIAMS OF NEW YORK. I recommend it to you. It is an excellent work. I am just going to read a few quotes and then I will conclude my time here.

"Nothing is easier than stamping your foot and shouting: 'That's mine!' It is immeasurably harder to proclaim: 'You may live as you please.'" I think that echoes, really, much of the testimony here.

It goes on to say, "Unlimited power in the hands of limited people always leads to cruelty." And I think if you listen to the farmers and builders and even the mines, you will hear that concern.

The last quote I will share with you is that, "You only have power over people as long as you don't take everything away from them. But when you've robbed a man of everything, he's no longer in your power—he's free again."

And I share that with you because I will close with a quote often attributed to Joseph Stalin's head of secret police. "Show me the man and I'll show you the crime." And I believe that is what this rule leads to in the hands of the EPA regulators.

I yield back, sir.

Mr. ROUZER. The gentleman's time has expired.

Mr. Massie is recognized.

Mr. MASSIE. I thank Mr. Rouzer for yielding me 5 minutes.

Ms. Bodine, in Kentucky when we build ponds on our farms, there is this miraculous thing that always happens. You can go 500 feet up on top of your hill and dig a pond and within a few months there will be frogs in it, there will be snapping turtles. And these snapping turtles ostensibly should be 500 feet lower. We know frogs can climb.

And then within a year or two, even though you have not stocked the pond, you end up with fish in it. It is sort of a miracle of life,

and it is one of the reasons I would say farmers are the greenest people on the planet, because we love building ponds.

Can you describe—I was actually surprised, but it does feel like "Groundhog Day," I think we were here 8 years ago or 10 years ago with the WOTUS ruling that expanded things, that now there is another attempt to expand. But can you talk about this effort to increase the jurisdiction of the Federal Government into isolated waters and how they are using the life that just generates in these ponds as a nexus?

Ms. BODINE. Yes, thank you. And that is the "significant nexus" test.

As I pointed out earlier, the Supreme Court in 2001 called into question whether there was jurisdiction over isolated waters. And since then neither EPA or the Corps have tried to regulate them.

This rule tries to reinvigorate that authority, using a "significant nexus" test which isn't just water pollution, water quality, it is not even just water, it is literally moving biota, whether it is larva or plants, from one location, like your pond, to another, by an animal, and that that is enough of a nexus to bring a pond into jurisdiction—if it is not exempt.

Now, there is an exemption for farm ponds built wholly in uplands, but it would be burden on you to show what was there before you built your pond. And, again, having to meet that burden would be quite difficult.

Mr. MASSIE. Besides fish and frogs, we always get cattails, and we are not always happy about that.

But life just spreads, like you said. And I think it would be dangerous to put it on the burden of the landowner to say that he had a farming nexus to avoid this wildlife nexus that the Federal Government seems to be trying to create here.

I appreciate you flagging that for us.

Ms. Huey, I am particularly taken by your testimony because I am in a growing district, there is a lot of need for housing, particularly affordable housing for people that work. For instance, in our Amazon facility, we have an Amazon hub in our district, and the homebuilders, there is literally nowhere they could put 20 houses together.

Now, you might be able to go find a place where you could put one or two houses and not run afoul of some Federal nexus, but there is almost nowhere left in northern Kentucky where you could put 20 houses without getting into this issue.

Can you talk about—my homebuilders right now are facing inflation, supply chain issues, and higher interest rates, and that all goes on the homeowner, whether it is a first home for somebody who is just trying to get their family started or whether it is low- or moderate-income housing, multifamily dwellings.

Can you talk about how these regulations add to the cost of that type of housing?

Ms. HUEY. Certainly I can. And I think you named everything except workforce. We have workforce challenges.

Mr. MASSIE. We are working on that. We have got an internship program.

Ms. HUEY. That is wonderful.

So, yes, we are dealing with all that. And it costs more money because it takes more time to build houses. All the regulations and the increases during COVID that we experienced, with fuel surcharges and just the increase in material——

Mr. MASSIE [interrupting]. How long can it add to a project?

Ms. HUEY. For me, a custom home that I build, it is about 3,200, 3,500 square feet, it would take about 8 months. It is taking me almost 12 months now. For some first-time home buyers, the builder in my area, they could build a house in 4 months. It is taking him 8 months.

So, the process takes longer. There is more interest we have to pay. People have to wait longer, so, they are paying more rent in their apartments before they can move in if they are first-time home buyers. And it is just a domino effect all across the board.

Mr. MASSIE. One of the issues we run up against, because I am in a tristate area, is disparate decisions depending on which Corps you are in or division or which State.

Do you see that as a problem across the Nation, is disparate application of these laws?

Ms. HUEY. Are you talking about with the Corps? Is that what you said?

Mr. MASSIE. Well, the WOTUS ruling and the regulations that trickle from that.

Can she answer? Mr. Chairman, can she answer the question?

Mr. ROUZER. The gentleman's time has expired.

Mr. MASSIE. Wow, he is quick with the gavel. But I will take a Republican chairman over a Democratic chairman.

Mr. ROUZER. I treat everybody fairly.

Mr. Ezell.

Mr. EZELL. Thank you very much, Mr. Chairman.

We have heard today how constantly changing, overreaching regulations confuse hard-working farmers and landowners. It is also clear that a lack of certainty leads to higher costs and delays for essential infrastructure projects.

Mr. Williams, the aggregates industry plays an important role in building our Nation's infrastructure. What happens to mitigation cost when your business is forced to work with a new jurisdictional definition?

Mr. WILLIAMS. When the jurisdictional definition is expanded and we have to find other ways to mitigate for a project, that increases cost and time delays. It is a multifaceted answer.

If mitigation credits are available nearby, we can purchase those credits. But frequently there are no longer mitigation credits in that area, so then we have to come up with other ways to mitigate for the project.

We have one project in South Carolina where we had to build our own wetlands there because there were not mitigation projects available.

Another cause could be that the cost just becomes astronomical. We had a particular project that we looked at under the 2020 rule that had about 1,800 feet of jurisdiction and maybe 2 acres of wetlands under that rule. But under an expanded rule, it became almost 8,000 feet of streams and about 8 acres of wetlands because of the ditches present on a former agricultural project. That made

the mitigation costs rise from $780,000 for the first definition to $3.8 million for the second definition. So, that is over four times more or over $3 million more just for that one project.

Mr. EZELL. Thank you.

I would also like to discuss a key issue before the Supreme Court, the legality of the "significant nexus" test.

How does the "significant nexus" test expand Federal jurisdiction over waters? What will happen if the Supreme Court limits the scope of significant nexus?

Mr. WILLIAMS. When we look at significant nexus, we have a couple of different definitions already when we were using that definition 10 years ago and actually under the regime that we are in now, because the vacated rule from Trump. The significant nexus said if it affected the physical, chemical, and biological integrity of the jurisdictional water.

And they have now inserted the word "or" instead of the word "and". And so, we have to, if it affects any of those certain things, we have had a number of moments of testimony today about how ludicrous that might be for bird feathers or other things that have been discussed.

So, it has a significant effect on what could be jurisdictional and how that affects our projects.

Mr. EZELL. Thank you.

Ms. Huey, you mentioned the same "significant nexus" test in your testimony as well. How would the current rule affect real estate development?

Ms. HUEY. It would dramatically affect home building in our industry.

For the "significant nexus" test, I use a simple example or I thought of a simple example yesterday. I have got a customer who wanted me to put a fence up for them, they've got a puppy and wanted to put a fence up.

They have a ditch beside their house, only gets water when it rains. Do we have to go through the "significant nexus" test just to put a fence up? That is what we are looking at with the test.

Mr. EZELL. Thank you very much.

Mr. Chairman, I yield back.

Mr. ROUZER. The gentleman yields back.

Mrs. González-Colón.

Mrs. GONZÁLEZ-COLÓN. Thank you, Mr. Chairman.

I think all of us are aware, share an awareness of the importance of protecting our water resources and making sure that we can have the necessary economic activity without causing harm to waters that everybody depends on. I am coming from an island, I can tell you about that.

At the same time, many of us are aware of the challenges that we are facing when needing to engage in, for example, recovery of infrastructure and agriculture production after disasters. That is my own experience, when compliance with regulations becomes confusing due to the changes in guidance.

This is why it is important that the rules about protecting waters are stable and consistent and, of course, clearly focused on the congressional intent of the Clean Water Act.

For my district in Puerto Rico, as an island beset by tropical storms, it is a constant struggle to make sure that the necessary work for prevention and mitigation of floods or shore erosion or for even protection of public-private properties near bodies of water and for protection of the drinking water supplies, once approved, can begin and be completed as planned promptly. And this will change all of that.

And we have received large amounts of Federal funding for mitigation, but very often we find that the local entities, who are a critical part of this effort, like the municipalities, State agencies, the nonprofit organizations, cannot start to do the work until permits and authorizations are processed and for which requirements sometimes aren't clear or change from one administration to the other one while the work is halfway through.

And that is our current situation. We have got thousands of projects, federally funded projects. And this is the case of Puerto Rico. But the same thing happens in natural disasters all across the Nation. How is this new ruling going to affect the cost of all those Federal projects, the permitting process as well?

So, I think consistency and clarity is critical to make sure they are implemented well and achieve the intent of the legislator. And in this case, the waters of the United States rules, Congress delegated that power in the Army Corps of Engineers and EPA.

The two agencies are recognized for their high technical expertise. But even they have to face changes in direction that can make their own work even harder.

So, in that sense, when I am hearing all the different stakeholders and how this affects them, and particularly in the agriculture sector and the homebuilder sector, this is a very important one for me since all of our States and Territories find themselves needing more affordable housing.

My question will be: How will this affect directly all the Federal reconstruction projects that are underway right now?

Ms. HUEY. Thank you for the question, Congresswoman.

I had the opportunity to visit Puerto Rico, beautiful Puerto Rico twice this past year, and I had meetings with the homebuilders there.

There are extreme challenges with rebuilding. And having to do the "significant nexus" test and everything, it just delays the process and makes it a lot more expensive.

There is no affordable housing right now, in my opinion, with all the regulations that are coming down. I want affordable housing for everyone. I want home ownership, the American Dream, for everyone. But the affordability is a crisis in America.

Mrs. GONZÁLEZ-COLÓN. You visited the island, so, you know how instability in this rulemaking will impede the development or redevelopment of safe, affordable housing. In our case, we don't have any more space to build.

And when I saw Ms. Parker Bodine, you included in your presentation a map of locations of karst geology, and almost all Florida, large parts of Missouri and Texas, are included there.

And what does that mean for farm ponds, isolated wetlands that are in those areas, because we do have the same situation in Puerto Rico, and we cannot move them.

So, what is going to be the effect of this ruling in those karst geology areas? Ms. Bodine?

Ms. BODINE. I am sorry? What will be the effect on . . . ?

Mrs. GONZÁLEZ-COLÓN. On all areas——

Ms. BODINE [interrupting]. In the karst areas, yes.

Mrs. GONZÁLEZ-COLÓN [continuing]. For farm ponds.

Ms. BODINE. So, the new rule identifies karst, which karst geology would mean that there is fractured bedrock and water flowing through it, that is a basis for creating jurisdiction, calling something adjacent. So, it would vastly increase the waters that would be regulated.

Mrs. GONZÁLEZ-COLÓN. Thank you. I yield back.

Mr. ROUZER. The gentlelady's time has expired.

I will note that any question that you want to provide additional answers to or supplement your answer to, the record will be open, and you can do that at that time. I know 5 minutes is a short period with a complicated topic such as this, and so, I just want to make sure you are aware. Any question that was asked of you where you want to add to your answer, you certainly have that opportunity to do so in writing.

Seeing no other Member that has not already been recognized, this concludes our hearing for today. I would like to thank each of the witnesses for your testimony—very good testimony, I might add.

And I ask unanimous consent that the record of today's hearing remain open until such time as our witnesses have provided answers to any questions that may be submitted to them in writing.

Without objection, so ordered.

I also ask unanimous consent that the record remain open for 15 days for any additional comments and information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection, so ordered.

The subcommittee stands adjourned.

[Whereupon, at 12:33 p.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Letter of February 17, 2023, to Hon. Sam Graves, Chairman, and Hon. Rick Larsen, Ranking Member, Committee on Transportation and Infrastructure, and Hon. David Rouzer, Chairman, and Hon. Grace F. Napolitano, Ranking Member, Subcommittee on Water Resources and Environment, from the American Sportfishing Association et al., Submitted for the Record by Hon. Grace F. Napolitano

FEBRUARY 17, 2023.

The Honorable SAM GRAVES,
Chair,
House Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515–6256.

The Honorable DAVID ROUZER,
Chair,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, H2–585 Ford House Office Building, Washington, DC 20515–6256.

The Honorable RICK LARSEN,
Ranking Member,
House Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515–6256.

The Honorable GRACE F. NAPOLITANO,
Ranking Member,
House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, H2–585 Ford House Office Building, Washington, DC 20515–6256.

Re: Letter for the Record, House Subcommittee on Water Resources and Environment, February 8, 2023 Hearing, "Stakeholder Perspectives on the Impacts of the Biden Administration's Water of the United States (WOTUS) Rule."

CHAIRMAN GRAVES, RANKING MEMBER LARSEN, SUBCOMMITTEE CHAIRMAN ROUZER, AND SUBCOMMITTEE RANKING MEMBER NAPOLITANO:

The below-signed members of the hunting and fishing community submit this letter for the record in connection with your hearing on stakeholders' perspectives on the Clean Water Act and its implementation by the U.S. EPA ("EPA") and U.S. Army Corps of Engineers ("USACE"), specifically the agencies' recent publication of their "Revised Definition of 'Waters of the United States'" rule ("the Revised Definition Rule").

Our members and supporters live and work across the country, spanning urban and rural areas, and they include small business owners, farmers, ranchers, and many other diverse livelihoods. Our members have in common personal connections with their nearby streams and rivers. They care deeply about the health of the nation's waterways and our responsibility to steward water resources for future generations.

Our members have supported the revised "Waters of the United States" definition because it meets the purpose of the Clean Water Act, which is to make our waters healthy, fishable, and swimmable. The Revised Definition Rule is rooted in sound science and ensures protection of small streams and wetlands that provide clean water not just for fisheries but also for farmers, businesses, and communities. Hunters and anglers have been consistent defenders of the Clean Water Act, and we write today in support of the Revised Definition Rule.

1. The Revised Definition Rule reflects approaches under the Reagan and Bush II Administrations.

The Revised Definition Rule is a return to approaches for EPA and USACE used prior to the 2015 Obama rule. The agencies' rule limits the application of a 1986 Reagan-era interpretation with an approach almost identical to the 2008 guidance issued under the President George W. Bush Administration, which has been the basis for agency decisions for most of the past 15 years.

Although narrower than the 2015 Clean Water Rule, the Revised Definition Rule is well within the limits identified in Supreme Court precedent, relies on solid science, and draws on the agencies' experience and technical expertise. The agencies have long made site-specific jurisdictional determinations under the Clean Water Act, under both Republican and Democratic administrations. The Revised Definition Rule restores the long-standing requirement to obtain a 404 Permit for disturbance to many headwater streams and wetlands under the case-by-case agency analysis that had been reversed by the 2020 Navigable Waters Protection Rule.

2. Farmers and Ranchers have clarity and certainty under the Revised Definition Rule.

Routine farming and ranching activities are protected from permitting under the Revised Definition Rule. Because the Clean Water Act itself exempts from permitting routine, ongoing farming and ranching activities, these important economic activities are protected under the Revised Definition Rule. Farming, ranching, and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices are all exempt from 404 permitting under Section 404(f)(1)(A) of the Clean Water Act.[1] The Revised Definition Rule recognizes that American agriculture fulfills a vitally important public need and ensures that the agricultural exemptions are appropriately implemented.

3. The Revised Definition Rule protects sustainable economic activity.

With the adoption of the Revised Definition Rule, the agencies also restored the important economic driver of healthy waters that includes the outdoor recreation economy, anglers, hunters, boaters, swimmers, other outdoor enthusiasts, commercial fisheries and the fishing industry. For example, in 2021, an estimated 52.4 million Americans fished[2] and over 30 million Americans hunted.[3] Nationwide, outdoor recreation accounts for 1.9 percent of gross domestic product, supporting the employment of 4.5 million Americans.[4]

CONCLUSION

The undersigned members of the hunting and fishing community commend the EPA and ACOE for taking a significant step forward with a revised definition that is in line with the objectives of the Clean Water Act and is based on a compelling scientific and technical record. We submit this written testimony for the record in support of the Revised Definition Rule and urge the Subcommittee to ensure that accurate information about the Rule is conveyed in the public discourse of the Rule, particularly about the Rule's clear protections for America's farmers and ranchers.

Sincerely,

AMERICAN SPORTFISHING ASSOCIATION.
IZAAK WALTON LEAGUE OF AMERICA.
NATIONAL WILDLIFE FEDERATION.
THEODORE ROOSEVELT CONSERVATION PARTNERSHIP.
TROUT UNLIMITED.

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[1] Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities, United States Environmental Protection Agency and United States Department of the Army, (May 3, 1990), available at: https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities (last visited on February 7, 2023).

[2] Recreational Boating and Fishing Federation, https://www.takemefishing.org/getmedia/155fcbd1-716a-41e5-ad5b-1450b76b9162/2022-Special-Report-on-Fishing.pdf (accessed on February 17, 2023).

[3] Council to Advance Hunting and Shooting Sports, https://cahss.org/our-research/2022-special-report-on-hunting-and-the-shooting-sports (accessed on February 17, 2023).

[4] Outdoor Recreation Roundtable, https://recreationroundtable.org/economic-impact/ (accessed on February 17, 2023).

APPENDIX

QUESTION FROM HON. GREG STANTON TO GARRETT HAWKINS, PRESIDENT, MISSOURI FARM BUREAU

Question 1. In your opinion, is this rule broader or narrower in scope than the 2008 Bush Guidance as it was applied following the Supreme Court decisions in *SWANCC* and *Rapanos*? If broader, please explain specifically how it is broader and what waters under the rule are new compared to the 2008 guidance.

ANSWER. The Biden Administration's rulemaking is broader than the 2008 Bush Guidance that was released after the *SWANCC* and *Rapanos* decision. I can provide a few examples in the preamble that indicate that this is an expansion in scope.

Interpretation of the Relatively Permanent Test: The final rule makes the relatively permanent standard *more expansive compared to the Rapanos Guidance*, which used the concept of continuous flow for at least one season (typically three months) as a benchmark. The final rule abandons the seasonal concept and does not use any bright line tests (days, weeks, or months). Relatively permanent tributaries have *flowing or standing water year-round or continuously during certain times of the year*. Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. This subtle change will greatly expand what areas the agencies can assert jurisdiction over, within every category, using the relatively permanent test.

Conversely, because the relatively permanent standard is broader than the approach described in the 2008 guidance some of the exemptions will become narrower. For example, the ditch exclusion appears identical to the exclusion in the 2008 guidance however, as it is applied under this new interpretation of the relatively permanent test—the exclusion becomes far harder to apply.

Adjacent Wetlands Category: The agencies interpret continuous surface connection to mean a physical connection that does not need to be a continuous hydrologic connection.

Under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they are separated from a relatively permanent impoundment of a tributary by a natural berm, bank, dune, or similar natural landform so long as that break does not sever a continuous surface connection and provides evidence of a continuous surface connection. This is broader than the 2008 Guidance, which used to equate continuous surface connection with directly abutting and not separated by a berm, dike, or similar feature.

Scope of Significant Nexus Test: Under the 2008 Rule, the agencies applied the test to a specific reach of a tributary plus wetlands adjacent to that reach. The new rule applies a broader catchment approach. The agencies would start by identifying where a specific reach flows into a higher order stream. But rather than looking just at that reach and its adjacent wetlands, the agencies would look at the combined effect of all lower order tributaries upstream of that point plus all wetlands adjacent to those lower order tributaries.

(A)(5) Category: This category was not even mentioned in the 2008 guidance. The 2008 guidance focuses only on applying the significant nexus test to a specific tributary reach plus its adjacent wetlands, and it says nothing about how to apply the test to waters outside of the tributary system. The new rule applies the significant nexus test to this category, and even though the agencies say they will "generally" evaluate whether such waters meet the test on an individual basis, the rule on its face allows the agencies to consider whether waters "alone or in combination with similarly situated [(a)(5)] waters in the region" meet the significant nexus test.

Several key terms and concepts are vague, lack definitions, or are contradictory: While this certainly existed in the 2008 guidance, the key terms used to apply the significant nexus test are incredibly vague. Terms like "in the region," "similarly situated," and "significantly affect" were poorly defined then, and remain ambiguous

now. Failing to provide these definitions gives the agencies the latitude to assert jurisdictional however they please. Landowners and small businesses will be forced to hire costly consultants and attorneys to determine whether their property has WOTUS and required federal permits.

QUESTION FROM HON. GREG STANTON TO ALICIA HUEY, CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS

Question 1. In your opinion, is this rule broader or narrower in scope than the 2008 Bush Guidance as it was applied following the Supreme Court decisions in *SWANCC* and *Rapanos*? If broader, please explain specifically how it is broader and what waters under the rule are new compared to the 2008 guidance.

ANSWER. Representative Stanton, thank you for your question regarding the difference between the Revised Definition of waters of the United States (2023 Rule)[1] and the 2008 Rapanos Guidance (Guidance)[2]. In short, the 2023 Rule and its heavy reliance upon the problematic significant nexus test are far broader than the Guidance. I'll provide a few examples below—

- The agencies' interpretation of the relatively permanent test is clearly more expansive than under the Guidance. Importantly, the agencies' interpretation of the relatively permanent test is intentionally more expansive than under the Guidance, resulting in more ephemeral features being jurisdictional while eroding the utility of the 2023 Rule's exclusions for ditches. Specifically, under the 2023 Rule, the agencies flatly reject their own approach under the Guidance that had described relatively permanent tributaries as having either year-round flow or at least seasonal flow (described as possessing water at least three months during a given year).[3] [4]

  The agencies refuse to provide any limitations or clarify what constitutes relatively permanent flow in the final rule or preamble. Leaving the interpretation of this undefined term completely at the discretion of federal regulators ensures inconsistent and conflicting interpretations in the field. Instead of attempting to provide any clarity, the final rule's preamble is littered with conflicting descriptions of what might constitute a relatively permanent flow. Examples include tributaries or even human-made ditches that contain flow only in response to water diversions or even the discharge of treated effluent.[5] Abandoning the description of relatively permanent flows used in the Guidance undermines the ditch exclusion and significantly expands federal jurisdiction compared to the pre-2015 regulatory regime. Elsewhere within the final rule's preamble, the agencies claim that some ephemeral tributaries that possess water only briefly and directly respond to a rainfall event do not constitute relatively permanent flow. However, elsewhere in the preamble, the agencies claim instances where tributaries or ditches containing flow from "concentrated back-to-back precipitation events" represent relatively permanent flow.[6]

- The 2023 Rule dramatically expands the use of the significant nexus tests by applying it to 3 out of the 5 final rule's jurisdictional categories. By comparison, the Guidance limited the use of the significant nexus test to only certain reaches of tributaries and only those wetlands that were directly adjacent to those specific portions of those same tributaries.[7] [8] Further, the 2023 Rule's (a)(5) jurisdictional category was not even contemplated by the agencies under the Guidance because it did not assert jurisdiction over any feature outside a tributary system.

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[1] 88 Fed. Reg. §3004 (January 18, 2023)

[2] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (December 2, 2008), Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*. Retrieved March 13, 2023, from https://www.epa.gov/sites/default/files/2016-02/documents/cwa__jurisdiction__following__rapanos120208.pdf.

[3] 88 Fed. Reg. §3085 (January 18, 2023)

[4] *Id*., page 7

[5] 88 Fed. Reg. §3085 (January 18, 2023)

[6] 88 Fed. Reg. §3086 (January 18, 2023)

[7] 88 Fed. Reg. §3142 (January 18, 2023)

[8] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, (December 2, 2008), Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*. Page 8. Retrieved March 13, 2023, from https://www.epa.gov/sites/default/files/2016-02/documents/cwa__jurisdiction__following__rapanos120208.pdf

The 2023 Rule's approach for conducting a significant nexus test on an (a)(5) feature creates confusion over the geographic size of the area subject to the significant nexus analysis. Specifically, the 2023 Rule's regulatory text includes the phrase, "either alone or in combination with similarly situated waters in the region.[9] Thus, the regulatory text clearly allows federal regulators to aggerate otherwise isolated (a)(5) features when performing significant nexus tests. Meanwhile, the rule's preamble contradicts the regulatory text by claiming significant nexus analyses performed on (a)(5) features will be done individually on a case-by-case basis. By establishing a rule where the preamble contradicts the regulatory text, which approach might the agencies ultimately take?

Beyond this regulatory confusion created by the rule's approach for conducting significant nexus tests on an (a)(5) feature, the agencies acknowledged that under the pre-2015 regulatory regime, they have never asserted jurisdiction over a feature now covered under the final rule's (a)(5) jurisdictional category.[10] Especially following the U.S. Supreme Court's (2001) SWANCC ruling that expressly rejected the agencies' assertion of jurisdiction over identical isolated ponds and wetlands under the repealed migratory bird rule. Thus the 2023 Rule's approach for applying the significant nexus test over otherwise nonnavigable, isolated, and ephemeral features under the 2023 Rule's (a)(5) jurisdictional category is clearly broader than the agencies' pre-2015 practices.

The final rule defines "significantly affect" as "a material influence on the chemical, physical or biological integrity" of a WOTUS.[11] Through the significant nexus test, federal regulators will determine the jurisdictional status of a water based on its functions and factors. Federal agency staff will consider the following: contribution to flow; trapping, transformation, filtering and transport of materials, including nutrients, sediment and other pollutants; retention and attenuation of floodwaters and runoff; modulation of temperature in waters; provision of habitat and food resources for aquatic species located in waters; the distance from a WOTUS; hydrologic features, such as the frequency, duration, magnitude, timing and rate of hydrologic connections, including shallow subsurface flow; the size, density or numbers of waters that have been determined to be similarly situated; landscape position and geomorphology; climatology variables such as temperature, rainfall, and snowpack.[12] The agencies fail to describe the necessary impacts before claiming jurisdiction over any feature. In contrast, the Guidance established the significant nexus test to consider: volume, duration and frequency of flow, including consideration of certain physical characteristics of the tributary; proximity to the traditional navigable water; the size of the watershed; average annual rainfall; average annual winter snowpack; the potential of tributaries to carry pollutants and flood waters to a TNW; provision of aquatic habitat that supports a TNW; the potential of wetlands to trap and filter pollutants or store flood waters; maintenance of water quality in TNW.[13] The agencies are expanding what they seek to determine "material influence" and significant nexus impacts on a WOTUS.

The crux of the issue is that instead of issuing a final rule that is so reliant upon the significant nexus test to capture otherwise non-navigable, isolated, and ephemeral features as jurisdictional, the agencies should have waited until the Supreme Court issues its ruling in *Sackett v. EPA* to learn if the significant nexus is even legal under the CWA. The Court's ruling under Sackett will clearly determine the legality of the significant nexus test, a crucial part of the final rule. Instead, the agencies have decided to implement this final rule before the Court issues a ruling under Sackett. By doing so, the agencies are not only creating additional bureaucratic and project delays but also directly raising housing costs when the nation is already experiencing a housing affordability crisis. Should the agencies not provide any further guidance on how the significant nexus and relatively permanent standards will be applied in the field, regulated landowners and their paid consultants, must simply interpret and reinterpret ambiguous descriptions contained within the rule's preamble. Lastly, please review the testimony submitted by Frank Murphy on behalf of NAHB to the U.S. Small Business Committee on March 8, 2023, on the

[9] 88 Fed. Reg. §3142 (January 18, 2023)
[10] 88 Fed. Reg. §3103 (January 18, 2023)
[11] 88. Fed. Reg. §3067 (January 18, 2023)
[12] 88. Fed. Reg. §3120 (January 18, 2023)
[13] *Id*., page 8

impacts the 2023 Rule will have on small businesses and the complications of the significant nexus test.[14]

QUESTION FROM HON. GREG STANTON TO DAVE OWEN, HARRY D. SUNDERLAND PROFESSOR OF LAW AND FACULTY DIRECTOR OF SCHOLARLY PUBLICATIONS, UNIVERSITY OF CALIFORNIA COLLEGE OF LAW, SAN FRANCISCO

Question 1. In your opinion, is this rule broader or narrower in scope than the 2008 Bush Guidance as it was applied following the Supreme Court decisions in *SWANCC* and *Rapanos*? If broader, please explain specifically how it is broader and what waters under the rule are new compared to the 2008 guidance.

ANSWER. The 2022 rule is almost identical in scope to the 2008 guidance document, both as that 2008 guidance was written and as it was applied. Both the 2022 rule and the 2008 guidance use Justice Kennedy's significant nexus test and Justice Scalia's continuous surface connection test as alternative standards for establishing jurisdiction, and both extend jurisdiction to adjacent wetlands. Both define the significant nexus test in the same basic terms (which are consistent with the Clean Water Act's definition of water quality), and thus treat hydrologic and ecological connections as relevant to the significant nexus analysis. Both treat as jurisdictional ditches that are built in or functionally replace natural waterways. Both also include traditional exemptions for prior converted cropland, stormwater-control features, and short-term flow features like swales and erosional gullies.

The two documents are not the same, but the differences are generally in the depth of explanation rather than the scope of coverage. For example, the 2022 rule specifically exempts a wider variety of features and activities from Clean Water Act coverage. These exemptions generally are not new; they have been part of regulatory practice for decades. But the 2022 rule makes them more explicit than the 2008 guidance did. Likewise, because it is a much longer document, the 2022 rule's preamble provides more explanation of the reasons for inclusion or exclusion of specific features. But, again, these are just differences of explanation. The scope of coverage is the same.

Because of the variety of features to which the 2022 rule and the 2008 guidance apply, the similarities between the systems might be easiest to see in tabular form, and the table below summarizes the consistency.

[14] *Small Business Perspectives on the Impacts of the Biden Administrations Waters of the United States (WOTUS) Rule*: Hearing before the House Committee on Small Business, 118th Cong. (2023) (testimony of Frank Murphy)

Aquatic Feature or Activity	Treatment, 2008 Guidance	Treatment, 2022 Rule
Traditional navigable waters	Jurisdictional	Jurisdictional.
Interstate waters	Not explicitly mentioned but treated as jurisdictional.	Jurisdictional.
Wetlands adjacent to navigable waters	Jurisdictional (even if a man-made barrier exists between the wetland and the navigable waters).	Jurisdictional (even if a man-made barrier exists between the wetland and the navigable waters).
Non-navigable tributaries with relatively permanent surface connections to navigable waters.	Jurisdictional	Jurisdictional.
Wetlands abutting jurisdictional but non-navigable tributaries.	Jurisdictional	Jurisdictional.
Non-navigable tributaries that lack relatively permanent connections to navigable waters.	Jurisdictional only if protection of the tributary has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.	Jurisdictional only if protection of the tributary has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.
Wetlands adjacent to tributaries that lack relatively permanent connections to navigable waters.	Jurisdictional only if protection of the wetland has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.	Jurisdictional only if protection of the wetland has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.
Wetlands adjacent to but not directly abutting permanent, nonnavigable waters.	Jurisdictional only if protection of the wetland has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.	Jurisdictional only if protection of the wetland has a significant nexus (individually or in combination with other similar features) to water quality in navigable-in-fact waters.
Ditches constructed wholly in uplands and with non-permanent flow.	Non-jurisdictional	Non-jurisdictional.
Ditches that are constructed in or that replace natural stream flows.	Jurisdictional, if the ditch meets the relatively permanent surface connection or significant nexus test.	Jurisdictional, if the ditch meets the relatively permanent surface connection or significant nexus test.
Swales or erosional features with only occasional flow.	Non-jurisdictional	Non-jurisdictional.
Prior converted cropland	Non-jurisdictional	Non-jurisdictional.
Artificially irrigated areas that would revert to dry land if irrigation ceased.	Not explicitly mentioned but generally treated as nonjurisdictional.	Non-jurisdictional.
Artificial lakes and ponds created in dry land and used for purposes like stock watering, irrigation, settling basins, or rice growing.	Not explicitly mentioned but generally treated as nonjurisdictional.	Non-jurisdictional.
Pits and other temporary features created during construction.	Not explicitly mentioned but generally treated as nonjurisdictional.	Non-jurisdictional.

QUESTION FROM HON. TROY A. CARTER TO DAVE OWEN, HARRY D. SUNDERLAND PROFESSOR OF LAW AND FACULTY DIRECTOR OF SCHOLARLY PUBLICATIONS, UNIVERSITY OF CALIFORNIA COLLEGE OF LAW, SAN FRANCISCO

Question 1. Mr. Owen, do you see the Biden administration's WOTUS rules as helping to facilitate the current trend of state action being taken to protect our waterways?

ANSWER. The Biden Administration's WOTUS rules will help facilitate state protection of waterways. They will do so in several ways.

First, by retaining the traditional geographic reach of the Clean Water Act, the rules will retain the traditional geographic scope of state programs designed to implement the Clean Water Act. Almost all states implement key parts of the statute, including the National Pollutant Discharge Elimination System, which is the statute's most important permitting program, and many states have chosen to make state regulatory jurisdiction consistent with the scope of the federal statute. That means that if federal jurisdiction shrinks, state jurisdiction shrinks with it—unless the state revises its statutes and individually pursues programs that it previously implemented with collaboration and support from the federal government.

Shrinking the scope of jurisdiction would undermine state authority in other ways. For example, states would lose important authority under Clean Water Act section 401. Section 401 allows states to condition federal authorization for any activity involving a discharge upon compliance with state laws protecting water quality. In other words, it gives states authority to make sure the federal government does not harm state waters without state permission. States routinely use this authority, particularly with respect to permits issued by the US Army Corps of Engineers. But section 401 authority only reaches as far as the Clean Water Act reaches. If the scope of the Act's protections becomes narrower, states will lose much of their authority under section 401.

Both of these examples capture a broader point. Because so much of Clean Water Act implementation is done by the states, and because the Clean Water Act protects water quality, retaining the traditional geographic scope of Clean Water Act coverage means retaining and supporting traditional state water quality protection. Those protections will benefit not just the states in which the protective activity occurs, but also every downstream state.

I hope you find these responses helpful, and please do not hesitate to contact me if I can be of additional assistance.

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