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Petroleum
Institute



AMERICAN
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COUNCIL



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U.S. Environmental Protection Agency
EPA Docket Center: Office of Water Docket
Attn: EPA-HQ-OW-2021-0602
1200 Pennsylvania Avenue NW
Washington D.C. 20460

Re: The Associations' Response to the Environmental Protection Agency's and Army Corps of Engineers' Proposed Rule to Revise the Definition of "Waters of the United States;" 86 Fed. Reg. 69,372 (Dec. 7, 2021)/EPA-HQ-OW-2021-0602).

Dear Environmental Protection Agency and Army Corps of Engineers:

This letter provides comments from the American Petroleum Institute ("API"), the American Exploration and Production Council ("AXPC"), and the Independent Petroleum Association of America ("IPAA") (collectively, "the Associations") in response to the U.S. Environmental Protection Agency's ("EPA's") and the Army Corps of Engineers' ("Army Corps") (collectively "the Agencies") proposed revision ("Proposed Revision") of the definition of "Waters of the United States" ("WOTUS").¹ While we appreciate the opportunity to provide these comments on the Proposed Revision, we are concerned that the Agencies' Proposed Revision impermissibly departs from the text, structure, and legislative history of the Clean Water Act ("CWA" or "the Act"), and fails to adhere to the jurisprudential guideposts established by the U.S. Supreme Court ("Supreme Court" or "the Court") and other courts. The Proposed Revision is also vague and, if finalized, will be difficult to administer - thereby continuing to prevent landowners and other stakeholders from readily understanding the jurisdictional status of waterbodies on their properties.

The Agencies characterize the Proposed Revision as a modestly tailored version of the "familiar" jurisdictional guidance ("1986 Guidance") that the Agencies had used prior to their 2015 effort to supply a regulatory definition of WOTUS ("2015 WOTUS Rule");² and yet, the changes the Agencies have proposed to apply to the 1986 Guidance alter its scope and applicability so substantially that it can no longer be considered familiar or readily amenable to implementation. Rather, taken as a whole, the Proposed Revision exceeds the Agencies' authority under the Act, fails to reasonably consider jurisprudential precedents and guidelines, and perpetuates several decades of regulatory confusion and uncertainty. Hence, the Associations do not believe that the

¹ 86 Fed. Reg. 69,372 (Dec. 7, 2021)/EPA-HQ-OW-2021-0602).

² 80 Fed. Reg. 37,054 (June 29, 2015).

Agencies can succeed in promulgating a longstanding and durable definition of WOTUS based on the Proposed Revision or the interpretative analysis the Agencies employed in developing it.

Moreover, given the Supreme Court's January 24, 2022 decision to address the jurisdictional reach of the CWA at issue in this Proposed Revision,³ we believe the Agencies should refrain from finalizing the Proposed Revision until after the Supreme Court issues a decision in that case. The ruling in that case is certain to be highly relevant to the Agencies' effort to define WOTUS and therefore will likely need to be incorporated into an updated proposal that will require an entirely new round of review and notice-and-comment procedures.

Nonetheless, as the Agencies have yet to indicate whether they will suspend this rulemaking while the Supreme Court considers the same central question at issue in *Sackett II*, the Associations simply note that the durable rule that the Agencies seek to promulgate can only be achieved by interpreting the CWA consistent with congressional intent and consistent with the guidelines the Supreme Court has established in multiple decisions spanning five decades, and will likely further delineate in *Sackett II*. Accordingly, these comments discuss those statutory limits and existing jurisprudential guidelines in detail before applying them to the specific elements of the Proposed Revision.

³ *Sackett v. Environmental Protection Agency* ("*Sackett II*"), 19-35469 (Certiorari granted January 24, 2022).

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I. SUMMARY OF COMMENTS⁴

The Associations encourage the Agencies to await further guidance from the Supreme Court; or in the alternative, we ask the Agencies to rescind and propose a rule that properly implements the overall objective of the CWA to restore and maintain the integrity of nation's waters that Congress has determined to be regulated as federal waters under its Commerce Clause powers and as tethered by Congress's directive to preserve states' primary authority over land and water resources, and by guideposts provided by the Supreme Court.

The key principles a WOTUS Rule should follow is that it must be protective of the nation's federal waters while providing federal and state regulators a rule that can readily identify the waters they are tasked with protecting; provide the predictability state, tribal, and federal regulators need to ensure that robust programs are in place to specifically protect the various categories of waters; and with significant civil and penalties that can attach for CWA violations, give landowners and others regulatory certainty and due process protections on the requirements for applicability and compliance.

Should the Agencies proceed with rulemaking, we provide detailed comments on guideposts that would aid the Agencies in crafting a legally defensible rule as well as specific recommendations for consideration relating to important longstanding exclusions that provide regulatory certainty and important clarity.

Our key comments are summarized below and discussed more fully in the comment letter.

By giving undue attention to CWA Section 101(a) and viewing CWA Section 101(b) as “subordinate,” the Agencies’ Proposed Revision fails to appropriately consider Congress’ clear intent to preserve and protect states’ primary responsibilities and rights over its land and water sources. We understand and share the Agencies’ commitment to protecting water resources; however, proper weight and deference must be given to the CWA’s objective in Section 101(b) reflecting Congress’ clear intention to preserve and protect states’ primary responsibilities and rights over protecting its land and water sources.

This framework of “cooperative federalism” provides the basis for drawing clear lines on where federal waters end and state and tribal waters begin, thereby allowing each governing entity to do its part in protecting the nation's waters. As such, any definition of WOTUS must also correspond to the relevant Supreme Court case law and accord with the many jurisprudential guidelines provided by the Court. Thus, science can certainly inform the rule but cannot dictate the basis for establishing legally defensible jurisdictional boundaries.

We have a shared interest in developing a WOTUS Rule that is clear, fair, durable, and implementable; and we therefore encourage the Agencies to reconsider its current approach

⁴ Supporting citations are omitted here and provided in the body of the document.

and propose a rule that is focused more on jurisdictional clarity. Here, we find that the Proposed Revision’s case-by-case approach, with subjective and ill-defined standards, fails to deliver jurisdictional certainty for the regulated community. With most of the prior exclusions proposed to be removed from the Proposed Revision, and faced with implementing new tests, states and tribal governments will be burdened with demands on their resources as more case-by-case evaluations are required.

The Agencies represent that these approaches in the Proposed Revision are familiar and simply reflect the pre-2015 regulatory regimes but our analysis find this is not the case. The categories of waters include substantive changes in rule language with two proposed new jurisdictional standards that are overly expansive and not rooted in Supreme Court precedent. The proposed “relatively permanent” and “significant nexus” tests that are the basis of the Agencies’ approaches for determining jurisdictional waters for key categories such as tributaries, other waters, and adjacent wetlands include vague requirements and terms that are left undefined, or where a term such as “significantly affect” is defined, it is overly broad with new factors such as climatological variables. Both the tests would extend federal jurisdiction over and beyond the waterbodies considered by the plurality and concurrence in *Rapanos v. United States* (“*Rapanos*”).

The “relatively permanent” standard would include any relatively permanent, standing or continuously flowing “other water” that has a continuous surface connection to a relatively permanent, non-navigable tributary. Yet, the *Rapanos* plurality clearly requires that a relatively permanent body of water be connected only to a traditional navigable water (“TNW”).

The proposed “significant nexus” standard is remarkable in its unprecedented breadth and scope in that it aggregates functional impacts of to-be-determined “similarly situated waters” “in a region” which would be subject to case-by-case analyses that would undoubtedly require consideration of biological, chemical, or physical connectivity to distant navigable waters. Without any reasonable bounds to the proposed analytical requirements, including no explicit codified exclusions related to ditches or erosional features, the breadth and potential reach of waters potentially subject to federal jurisdiction under the “significant nexus” test is likely to be extensive. With only a handful of limited examples provided in the preamble, regulators and regulated entities will be hard-pressed to readily identify WOTUS, and given the Proposed Revision’s subjective standards, there will likely be myriad of inconsistent and conflicting interpretations amongst the regulators to wade through.

For similar reasons, the Agencies’ proposed interpretation of WOTUS would also likely violate the void-for-vagueness doctrine. This doctrine holds that a law carrying criminal sanctions must be readily understandable by the average person without legal advice. A statute that is unduly vague and so indefinite that the average person can only guess as its meaning undermines the constitutional right to due process. Here, CWA is a strict liability statute and noncompliance with the CWA includes steep criminal penalties. And if the Proposed Revision were finalized, parties would be unable to reliably discern the scope of federal jurisdiction. Moreover, the analyses necessary to access jurisdiction would become extremely challenging and unduly burdensome

given that jurisdiction will be determined based on poorly defined tests, including the aggregation and assessment of multiple “similarly situated” waterbodies throughout an indeterminate but potentially vast geographic area.

In sum, this Proposed Revision promises to expand federal jurisdictional on an unprecedented scale, and in doing so, would sacrifice clear, consistent, and readily observable jurisdictional criteria for uncertain and subjective case-specific analyses. This approach will prove to be untenable from both a legal and practical perspective. We therefore ask the Agencies to reconsider this Proposed Revision, and instead propose a rule that is based on clearly defined categories and terms, and rooted in CWA and past Supreme Court precedent.

As a fundamental error, the Proposed Revision misinterprets *Rapanos* to allow federal jurisdiction to be established using either the plurality’s test OR the test in Justice Kennedy’s concurrence. Should the Agencies proceed with this rulemaking, we instead recommend that the Agencies propose a definition of WOTUS based on points of commonalities between the plurality and the concurrence. In the Proposed Revision, the Agencies announce their intent to assert jurisdiction over non-“foundational waters” that meet either the *Rapanos* plurality’s “relatively permanent” standard or “significant nexus” standard articulated in Justice Kennedy’s concurrence. The Associations strongly disagree with this “either/or” approach to applying the *Rapanos* decision. To begin, this approach overlooks that both the plurality opinion and Justice Kennedy’s concurrence articulated *limits* to the scope of federal jurisdiction under the CWA. By allowing jurisdiction to be asserted under *either* test, the Proposed Revision pays short shrift to *both* tests because the “either/or” approach will produce results that are significantly *broader* than either the plurality or Justice Kennedy’s concurrence would have contemplated had their tests been applied alone. While the Associations believe that the Agencies can propose an approach that reasonably considers Justice Kennedy’s concurrence, we do not believe that the Agencies can do so in a way that unduly elevates the precedential value of a single justice’s views. Instead, like the Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, we believe that the Agencies must primarily rely on the jurisdictional test articulated by the four-justice plurality.

Given our legal assessment that *Marks* precludes the Agencies’ proposed “either/or” approach, our position is that the Agencies may exercise *reasonable* discretion to interpret the CWA in a way that embodies points of common ground between the plurality opinion and Justice Kennedy’s concurrence. To that end, we observe the following points of agreement shared by the five justices who concurred in the judgment:

- The opinions share a common understanding of TNWs as waters that were subject to regulation under the Rivers and Harbors Act (“RHA”) prior to the passage of the CWA. On this interpretation, TNWs are limited to waters that (i) are navigable-in-fact (or are reasonably susceptible to being made so), and (ii) are capable of being used for the transport of goods in interstate commerce, together with other waters.

- Both opinions agree that the word “navigable” in the CWA must be given some effect. Thus, to the extent that WOTUS includes some waters and wetlands that are not navigable-in-fact, those waters must bear a substantial connection to navigable waters.
- Both opinions look to certain intrinsic characteristics, like volume and flow, to determine if non-navigable tributaries are jurisdictional based on linkages to TNWs.
- Both opinions agree that wetlands abutting TNWs may be jurisdictional as long as they possess *both* a regular physical *and* functional connection.
- Both opinions agree that environmental concerns cannot override the statutory text.
- And both opinions agree that WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, highly ephemeral waters, or waters or wetlands that are alongside a drain or ditch.

Our comments on specific categories of waters as proposed are as follows:

TNWs. In response to the Agencies’ request for comment on whether to combine this category with other foundational waters, the Associations recommend combining TNWs and the territorial seas provisions but *not* all interstate waters under a single category of waters. This non-substantive change should help to streamline and simplify the Proposed Revision.

The Associations also recommend that the Agencies amend the definition of TNWs to reflect that: (i) historical use alone is insufficient to demonstrate navigability; and (ii) recreational uses alone do not constitute transport in interstate or foreign commerce.

Interstate Waters/Interstate Wetlands. The Associations urge the Agencies to refrain from including interstate waters as an independent foundational category of WOTUS irrespective of navigability. Such an interpretation impermissibly reads any notion of navigability out of the CWA. Federal jurisdiction under the CWA springs from Congress’ enumerated power to regulate the channels of interstate commerce. Isolated waters and wetlands that bridge state borders are not channels of commerce, and automatically including interstate waters in the definition of WOTUS is inconsistent with the concept of navigability that “Congress had in mind as its authority for enacting the CWA.” Therefore, The Associations believe that interstate, but otherwise isolated and unconnected, waters and wetlands are properly regulated by states and tribes.

Impoundments. The Associations broadly support the Proposed Revision’s inclusion of impoundments as a stand-alone category of WOTUS, but we recommend that the Agencies clarify and limit the scope of this category. The Associations believe that clarifications are necessary because, absent a sufficiently clear definition, many different types of structures and features are susceptible to being improperly construed as “impoundments” subject to federal jurisdiction. Therefore, the Associations recommend that the Agencies define “impoundments” as jurisdictional waters whose movement has been impeded either in whole or in part by a man-made

structure, such as a berm, dam, dike, or other earthwork, not subject to the waste treatment exclusion (or other exclusion which might be written into the rule, such as for artificial lagoons and ponds).

Tributaries. The “either/or” approach for defining and assessing jurisdiction over a tributary is flawed. Additionally, the proposed analyses of tributaries’ “reach” are internally inconsistent, unworkable and impermissibly vague. We also believe that the Agencies must supply a definition of “tributary” that is clear, legally defensible, and one reasonably bounded. While we recognize that defining the term “tributary” is challenging, we believe that it is attainable using the areas of consensus between the *Rapanos* plurality and Justice Kennedy’s concurrence as highlighted above. Of most importance, any definition should exclude ephemeral flows in keeping with the *Rapanos* plurality’s interpretation of the CWA to exclude from federal jurisdiction those “ordinarily dry channels through which water occasionally or intermittently flows.”

Adjacent Wetlands. The Associations agree that wetlands directly abutting TNWs and the territorial seas are within federal jurisdiction. Beyond that, the Agencies rely on the 1986 definition of “adjacent wetlands” without taking into account the subsequent Supreme Court decisions finding that adjoining wetlands are jurisdictional only when “inseparably bound up” with “navigable waters.” Thus, in order to categorically assert federal jurisdiction over wetlands adjacent to navigable waters, the Agencies must interpret “adjacent” to mean “adjoining” or “abutting.” Further, even if the Agencies could reasonably “adjacent wetlands” to include neighboring or physically separated wetlands, they would need to establish a sufficient connection between those wetlands and navigable waters through a process that is far more definitive and robust than that described in the Proposed Revision.

The Proposed Revision’s manner of establishing jurisdiction over wetlands adjacent to tributaries and impoundments is also deeply flawed. Under the “relatively permanent” standard, we find it problematic that the Agencies ignore the *Rapanos* plurality’s “continuous surface connection” requirement for adjacent wetlands because by doing so, the Proposed Revision asserts CWA jurisdiction over far more lands and waters than the plurality opinion would have supported. Similarly, the “significant nexus” standard that the Agencies propose be used to assert jurisdiction over wetlands “adjacent” to impoundments and tributaries bear little resemblance to the assessment Justice Kennedy described in his concurrence or the context in which he urged its use. Indeed, if utilized by the Agencies in the manner described in the Proposed Revision, the resulting jurisdictional determinations would be precisely the type that Justice Kennedy rejected in his concurrence, and four other justices rejected for entirely different reasons. That is, rather than establishing jurisdiction based on the significance of the connection between the jurisdictional water and the wetland under review, the Agencies propose to establish jurisdiction over individual wetlands using the aggregate significance of all wetlands and other waterbodies within some broad but indeterminate area. There is no outer limit or process for determining distance, number of “similarly situated” waters, or scattered distribution of waters, beyond which a waterbody could reasonably be considered outside of federal jurisdiction.

Other Waters. We find the “other” waters category to be vague, not in keeping with the more constrained approach set out in the 1986 regulations, and legally indefensible. We recommend removing this proposed category. The Agencies propose to codify the list of “other waters” from the 1986 regulations as a standalone category, but rather than following the 1986 regulations’ more constrained approach asserting jurisdiction based on whether the use, degradation, or destruction of “other waters” “could affect interstate or foreign commerce,” the Proposed Revision would allow for case-specific assertions of jurisdiction over “other waters” using the Agencies’ “either/or” approach to applying the “relatively permanent” or “significant nexus” standards.¹ Aside from this approach being legally impermissible under the Supreme Court cases, the Agencies appear to suggest no limit to the types or functions of the waterbodies and features that may be considered “other waters.” As drafted, the “other waters” category is simply too vague to meaningfully preclude the Agencies from asserting federal jurisdiction over any type of waterbody at all.

Exclusions are important for providing clarity, regulatory certainty, and predictability in planning for long-term investments in infrastructure. We appreciate the Agencies’ position that they “would expect to implement the proposed rule consistent with longstanding practice, pursuant to which they have generally not asserted jurisdiction over certain other features.” As discussed in the preamble, exclusions date back several decades with provisions provided for excluding certain features in prior rulemakings including the 1986 regulations. The 2015 WOTUS Rule was instrumental in providing clarity by moving from longstanding agency practices that recognized certain waters as excluded to listing those exclusions explicitly in the rule. The NWPR followed suit by retaining these exclusions with some clarifying changes.

We believe that the Agencies’ identification of exclusions as a corollary to the categories of jurisdictional waters can help ensure CWA protections to downstream waters, improve clarity and regulatory certainty, decrease the likelihood of misinterpretation, and overall, facilitate a more administrable, durable, and legally defensible rule.

Now, the Proposed Revision continues the practice by including two longstanding codified exclusions which we support and appreciate. Yet, the Proposed Revision departs from the prior two rulemakings by including other longstanding exclusions as part of non-binding preamble discussion rather than within the proposed regulatory text.

We recommend that the Agencies codify exclusions for waters that the Agencies acknowledge they have never asserted jurisdiction over and do not propose to do so under the Proposed Revision. While preamble language can be helpful, it is not binding regulatory text, and it can be subject to inconsistent and conflicting interpretations and application across regulatory bodies. These waters should be excluded without any further analysis required. In fact, without a codified list on which the regulated community can rely, there is a high likelihood that the Agencies would utilize varying levels of best professional judgement to make jurisdictional determinations for water features that are already considered excluded by the Agencies. This would be unfair, burdensome, and inconsistent with the intent of CWA.

We provide for your consideration the following carefully curated list of exclusions that are consistent with the CWA and informed by relevant Supreme Court decisions. The recommended exclusions for inclusion as rule text are familiar and relied upon by the regulated community and the Agencies to provide regulatory certainty to key CWA programs central to protecting foundational downstream waters.

- **Waste Treatment System.** We support the waste treatment systems exclusion with the following recommendations:
 - We support the “ministerial change” to delete the outdated cross-reference to a definition of ‘cooling ponds’ that no longer exists.
 - We agree with the Agencies’ proposal to delete a sentence in EPA’s NPDES regulations that was suspended by the EPA regarding limitations of the exclusion to certain manmade bodies of waters.
 - We request that the additional proposed comma after “or lagoons” be removed to avoid any unintended consequences of what is represented as a non-substantive change.
 - We appreciate footnote 49 in the preamble referencing the definition of a waste treatment system which is helpful in providing clarification on the applicability and limits of the exclusion.
 - We would ask that the Agencies refrain from adding any additional limiting language to the regulatory text based on unsupported comments.
 - The Agencies’ assertion in the preamble “that the waste treatment system exclusion *is generally available only* to the permittee using the system for the treatment function for which such system was designed” introduces ambiguity, and will invite inconsistent and unduly narrow application of this exclusion amongst Agencies’ staff unless corrected and clarified with contextual examples. Providing illustrative examples as guidance would avoid inconsistent application over systems in which stormwater is comingled with wastewater, as well as situations where operators use a feature, *e.g.*, for wastewater storage/treatment during normal operating conditions, but also rely on that feature’s capacity during heavy precipitation events.
 - We ask that the final rule preamble provide an illustrative list of types of systems that would be covered under this exclusion. Our illustrative list of covered features that we provide for your consideration include:

Structures and features encompassed by this exclusion include but are not limited to: (1) temporary and/or permanent/secondary basins/ponds and conveyance systems for discharges associated with stormwater; (2) biological treatment lagoons with source water from lagoon; (3) cooling water ponds; (4) treatment systems including but not

limited to treatment ponds, equalization ponds, storage ponds or lagoons as related to CWA-regulated waters; (5) secondary containment systems; and (6) CWA-regulated MS4 and component conveyances within such systems.

- **Prior Converted Croplands.** We support the Proposed Revision’s continued exclusion of prior converted croplands from jurisdictional waters, and we ask that the Agencies implement it consistent with their longstanding interpretation in the 1993 preamble, including retaining the “abandonment” principle.
- **1986 Exclusions.** We support the specific 1986 preamble exclusions that the Proposed Revision discusses, and we request that, in furtherance of the “return to the familiar and longstanding regulations,” these listed exclusions in the preamble be explicitly codified in the regulatory text. For these features, including certain ditches, that are clearly excluded from jurisdictional waters, requiring individual jurisdictional determinations based on the Agencies’ proposed “relatively permanent” standard or “significant nexus” standard would be an overreach and an unnecessary burden on agency resources.
 - **Artificial Lakes and Ponds.** In reference to the artificial lakes and ponds constructed in the uplands exclusion, we ask that this exclusion be codified, including the following illustrative list of longstanding covered features:

These features should encompass, but not be limited to, industrial features necessary for the safe and efficient operation of a facility, such as water storage ponds, impoundments, conveyances, and other structures used for fire water, utility water, cooling water, process water, or raw water.

- **Ditches.** At a minimum, certain ditches found to be not jurisdictional in the 1986 preamble should be codified as an exclusion. We also recommend and support codified regulatory language that excludes ditches excavated wholly in and draining only uplands, and that do not carry relatively permanent flow of water per the *Rapanos*’ plurality opinion and *Rapanos Guidance*. We also support the Agencies’ position that “consistent with previous practice, wetlands that develop entirely within the confines of a ditch that was excavated in and wholly draining only uplands that does not carry a relatively permanent flow would be considered part of that ditch and generally would not be considered ‘waters of the United States.’”

- **Definition of Upland.** We also recommend the term “upland” to be defined in the rule and used consistently in lieu of dry land and upland being used interchangeably. We recommend for ease the NWPR term:

The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in [paragraph (b) of this section], and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

- **Groundwater and Erosional Features.** We recommend codifying the exclusions for groundwater and swales/erosional features as discussed in the preamble to the Proposed Revision as examples of non-jurisdictional waters.

- **Groundwater.** The Agencies’ footnote 47 clearly states that Agencies “have never interpreted groundwater to be a ‘water of the United States’” and that “the proposed rule makes no change to that longstanding interpretation. As such, this definition should be codified. We suggest the following language from the prior two rulemakings:

Groundwater, including groundwater drained through subsurface drainage systems.

Further, notwithstanding our overall position regarding the flawed “significant nexus standard,” we request the Agencies to remove “shallow subsurface flow” as an example of “Hydrologic Factors” under the definition of “significantly affect.” In the alternative, we ask the Agencies to clarify that the determination of significant nexus does not render the shallow subsurface flow itself a jurisdictional water, but rather only constitutes a conduit for the purpose of establishing jurisdiction of the connected waters in limited circumstances. Adjacency cannot simply be based on a subsurface hydrologic connection to jurisdictional waters but also must be tied to legal thresholds of “adjacency” per Supreme Court rulings.

- **Swales/Erosional Features.** Based on the *Rapanos Guidance*, which has been implemented since 2008 (and codified with

varying language in the 2015 and 2020 rules), the Agencies did not generally assert jurisdiction over non-wetland swales or erosional features including gullies and small washes as characterized by low flow, infrequent, or short duration flow. That practice should be clearly codified in the rule. We also recommend that as guidance, the Agencies provide an illustrative list of swales and erosional features which are clearly not jurisdictional and would not require any additional jurisdictional analysis.

- **Storm water control features and wastewater recycling features.** The Associations recommend codifying the longstanding exclusions related to storm water control features and wastewater recycling features. The NWPR notes that these two features were not explicitly discussed in the 1986 and 1988 preamble language; however, these exclusions clarify the Agencies' longstanding practice is to view stormwater control features that are not constructed within WOTUS as non-jurisdictional; and water reuse and recycling features as not jurisdictional when constructed in uplands or within non-jurisdictional waters. Incorporating such language would add regulatory certainty and support EPA's goals to develop advanced water reuse and wastewater recycling facilities.

Conclusion. Our careful review of the Proposed Revision finds that the Agencies have proposed a rule that will not be durable or legally defensible. The Proposed Revision is inconsistent with the CWA's recognition of states' primacy over their land and waters and fails to accord with an objective application of the Supreme Court's guidelines for interpreting the scope of federal jurisdiction under the Act. As a practical matter, we also find that the Proposed Revision is far too vague and confusing to allow federal jurisdiction to be asserted in a clear, consistent manner using readily observable factors and commonly understood term. We also believe that the basic constitutional right to due process protections requires a definition of WOTUS that reasonably provides fair and predictable notice to the regulated community on waters that may be subject to federal jurisdiction and regulation.

Notwithstanding our overall position, we submit for your consideration guideposts that would aid in crafting a legally defensible rule as well as specific recommendations relating to exclusions that would aid the regulatory community in providing certainty and important clarity.

II. THE ASSOCIATIONS' INTERESTS

API is a national trade association representing nearly 600 member companies involved in all aspects of the natural gas and oil industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers.

The AXPC is a national trade association representing 29 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts which operate in different segments of the energy industry, such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce the natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

IPAA is a national upstream trade association representing thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 91 percent of the nation's oil and natural gas wells. These companies account for 83 percent of America's oil production, 90 percent of its natural gas and natural gas liquids ("NGL") production, and support over 4.5 million American jobs.

The Associations' members have a substantial interest in the scope of federal jurisdiction under the CWA, and particularly in furthering cooperative federalism through an appropriate delineation of the activities subject to National Pollutant Discharge Elimination System ("NPDES") permitting. All segments of the natural gas and oil industry are subject to extensive water permitting and regulatory requirements at both the state and federal levels for activities such as the exploration for and production of natural gas and oil, refining crude oil, transporting natural gas and crude oil or refined product, and operating filling stations. Protecting water resources is important, and the Associations and their members remain committed to working with federal and state regulators to ensure that water resource regulations are protective and administrable.

This commitment is reflected in the Associations long engagement on this important issue. In this and each prior effort to interpret WOTUS, the Associations and their members embraced opportunities to provide constructive insight to the Agencies on the elements of a clear, administrable, and legally sound construction of the CWA. To this end, the Associations have previously submitted comments on their own, jointly, and/or through multi-industry trade coalitions, including the Waters Advocacy Coalition, the Federal Water Quality Coalition and the Federal Stormwater Association.

As with our previous engagement, these comments reflect the Associations' support for the CWA and our interest in having the Act administered in a way that gives meaningful effect to Congress' explicit directive to protect the integrity of water resources through cooperation and coordination with the states. These comments also reflect the Associations' consideration of the Agencies' prior interpretations, the broad guideposts already provided by the Supreme Court, and our shared interest in developing an interpretation of WOTUS that is clear, protective, durable, and legally sound.

III. BACKGROUND ON CWA AND RELEVANT JUDICIAL INTERPRETATIONS

The CWA establishes a host of programs that, together, are designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁵ One element of Congress’s comprehensive strategy is the program to regulate the “discharge of any pollutant,” defined as “any addition of any pollutant to navigable waters from any point source,” except “in compliance with” other provisions of the Act.⁶ The Act in turn defines “navigable waters” to mean “the waters of the United States, including the territorial seas.”⁷

To “discharge” lawfully to navigable waters, a business or person must obtain a permit. EPA and authorized state and tribal governments (if delegated authority) may issue permits for “the discharge of any pollutant.”⁸ The Army Corps and authorized states may issue permits for “the discharge of dredged or fill material.”⁹

The CWA permitting regimes are not the exclusive means of protecting waters under the Act. Founded on principles of cooperative federalism, the CWA recognizes states as the primary permitting and enforcement authorities. The primary role of states was among Congress’ foremost considerations when designing the Act:

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 Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.¹⁰

⁵ 33 U.S.C. § 1251(a); The Act’s provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the states for water quality standards (33 U.S.C. §§ 1311-14), area-wide waste treatment management (33 U.S.C. § 1288), and nonpoint source management (33 U.S.C. §§ 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (33 U.S.C. § 1281); funding to study impacts on water quality (33 U.S.C. § 1251-74); and programs targeting specific types of pollution (*e.g.*, 33 U.S.C. § 1321).

⁶ 33 U.S.C. at § 1311(a), § 1362(12).

⁷ 33 U.S.C. at § 1362(7).

⁸ 33 U.S.C. at § 1342(a).

⁹ 33 U.S.C. at §§ 1344(a), 1344(g) (“CWA Dredge and Fill Program”). Under these provisions, states and tribes may assume administration of this program. To date, two states have assumed administration with plans being implemented through rule development to encourage more states/tribes to assume the CWA Dredge and Fill Program.

¹⁰ 33 U.S.C. at § 1251(b).

Thus, in acquiescence to state sovereignty and the practical recognition that states are best situated to regulate their own resources, the CWA requires EPA to coordinate its water resource protection efforts with the states.¹¹ Waters and wetlands that are outside the definition of WOTUS, and therefore federal jurisdiction, are not left unprotected, but instead are regulated and protected by states, tribes, and localities. In that respect, any overly broad regulatory assertion of federal jurisdiction disturbs the federal-state balance that Congress struck in the CWA and intrudes on states' authority and responsibility to manage their own land and water resources.

In 1974, the Army Corps initially defined WOTUS as waters that “are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”¹² The Army Corps later revised the definition in 1977 to encompass not only traditional navigable waters (“TNWs”), but also adjacent “wetlands” and “[a]ll other waters” the “degradation or destruction of which could affect interstate commerce.”¹³

Although the text of the Agencies' definition of WOTUS remained essentially unchanged for the next 33 years, the Agencies' interpretation of their regulatory definition of WOTUS continued to expand in scope and effect. In three seminal decisions beginning in 1985, the Supreme Court confronted those increasingly broad interpretations and the limits of federal regulatory jurisdiction under the CWA.

a. *United States v. Riverside Bayview Homes (1985) (“Riverside Bayview”)*

In *Riverside Bayview Homes*, the Court considered the Army Corps' assertion of jurisdiction over “low-lying, marshy land” immediately abutting a navigable water on the ground that it was an “adjacent wetland” within the meaning of the Army Corps regulations.¹⁴ The Court addressed the question of whether non-navigable wetlands may be regulated as WOTUS on the basis that they are “adjacent to” and “inseparably bound up” with navigable-in-fact waters because of their “significant effects on water quality and the aquatic ecosystem.”¹⁵ Observing that Congress intended the CWA “to regulate at least some waters that would not be deemed “navigable,”” the Court held that it is “a permissible interpretation of the Act” to conclude that “a wetland that actually abuts on a navigable waterway” falls within the definition of WOTUS.¹⁶

¹¹ 33 U.S.C. at §§ 1251(b), 1251(g).

¹² 39 Fed. Reg. at 12,115, 12,119 (Apr. 3, 1974).

¹³ 42 Fed. Reg. at 37,122, 37,144 (July 19, 1977).

¹⁴ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985).

¹⁵ *Riverside Bayview Homes*, 474 U.S. at 131-135 & n.9. “Navigable-in-fact” waters refer to waters that are presently suitable to commercial navigation.

¹⁶ *Riverside Bayview Homes*, 474 U.S. at 135 (emphasis added).

b. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) (“SWANCC”)

Following *Riverside Bayview*, the Agencies “adopted increasingly broad interpretations” of their regulations, asserting jurisdiction over an ever-growing set of features bearing little or no relation to TNWs.¹⁷ One of those interpretations—the Migratory Bird Rule—was struck down in *SWANCC*.¹⁸

In *SWANCC*, the Army Corps asserted CWA jurisdiction over isolated “seasonally ponded, abandoned gravel mining depressions” because they were “used as habitat by [migratory] birds.”¹⁹ The Army Corps reasoned that this use by migratory birds brought the isolated ponds within the reach of the Commerce Clause. The Supreme Court disagreed and explained that a ruling for the Army Corps would have required the Court “to hold that the jurisdiction of the Army Corps extends to ponds that are not adjacent to open water,” a conclusion that “the text of the statute will not allow.”²⁰ The Court stressed that, while *Riverside Bayview* turned on “the significant nexus” between “wetlands and [the] ‘navigable waters’” they abut, the Migratory Bird Rule asserted jurisdiction over isolated ponds bearing no connection to navigable waters.²¹ According to the Court, that approach impermissibly read the term “navigable” out of the statute, even though navigability was “what Congress had in mind as its authority for enacting the CWA.”²² The Court therefore invalidated the rule.

As noted in the preamble to the Proposed Revision, the *SWANCC* Court expressly limited the reach of the CWA and discussed the constitutional ramifications of the Army Corps’ assertion of federal regulatory jurisdiction.²³ The Court “held that the use of ‘isolated’ nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal authority under the Clean Water Act.”²⁴ The preamble also quotes the Court’s admonition that “[w]here an administrative interpretation of a statute presses against the outer limits of the Congress’ constitutional authority, we expect a clear statement from Congress that it intended that result, and that this is particularly true ‘where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.’”²⁵

¹⁷ *Rapanos v. United States*, 547 U.S. 715, 725 (2006).

¹⁸ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”).

¹⁹ *SWANCC*, 531 U.S. at 162-165 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

²⁰ *SWANCC*, 531 U.S. at 171.

²¹ *SWANCC*, 531 U.S. at 171-172.

²² *SWANCC*, 531 U.S. at 171.

²³ 86 Fed. Reg. at 69,379 (citing *SWANCC*, 531 U.S. at 172-73).

²⁴ 86 Fed. Reg. at 69,379.

²⁵ 86 Fed. Reg. at 69,379 (citing *SWANCC*, 531 U.S. at 172-73).

c. *Rapanos v. United States (2006) (“Rapanos”)*

In *Rapanos*, the Supreme Court’s most recent consideration of this issue, the Court addressed sites containing “sometimes-saturated soil conditions,” located twenty miles from “[t]he nearest body of navigable water.”²⁶ The Army Corps asserted that because these sites were “near ditches or man-made drains that eventually empty into traditional navigable waters” they should be considered “adjacent wetlands” covered by the Act.²⁷

Justice Scalia, writing for a four-Justice plurality,²⁸ rejected the Army Corps’ position because WOTUS include “only relatively permanent, standing or flowing bodies of water” and not “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”²⁹ In going beyond this “commonsense understanding” to classify features like “ephemeral streams” and “dry arroyos” as WOTUS, the Agencies stretched the text of the CWA “beyond parody” to mean “‘Land is Waters.’”³⁰ And wetlands fall within the CWA jurisdiction as adjacent wetlands “only [if they have] 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.”³¹ “[A]n intermittent, physically remote hydrologic connection” to TNWs is not enough under either *Riverside Bayview* or *SWANCC*.³²

Justice Kennedy concurred in the judgment. As he saw it, “the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”³³ When “wetlands’ effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”³⁴ While Justice Kennedy suggested that this test “may” allow for the assertion of jurisdiction over a wetland abutting a major tributary to a TNW, he categorically rejected the idea that “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it” would satisfy his conception of a significant nexus.³⁵ So he suggested that any agency regulation identifying covered tributaries would need to rest on considerations including “volume of flow” and “proximity to navigable

²⁶ *Rapanos*, 547 U.S. at 720.

²⁷ *Rapanos*, 547 U.S. at 729.

²⁸ The plurality opinion was joined by Chief Justice Roberts as well as Justices Thomas and Alito.

²⁹ *Rapanos*, 547 U.S. at 732, 739.

³⁰ *Rapanos*, 547 U.S. at 734.

³¹ *Rapanos*, 547 U.S. at 742.

³² *Rapanos*, 547 U.S. at 742.

³³ *Rapanos*, 547 U.S. at 779.

³⁴ *Rapanos*, 547 U.S. at 780.

³⁵ *Rapanos*, 547 U.S. at 778 (The Act does not reach wetlands alongside “a ditch or drain” that is “remote or insubstantial” just because it “eventually may flow into traditional navigable waters”).

waters” “significant enough” to provide “assurance” that they and “wetlands adjacent to them” perform “important functions for an aquatic system incorporating navigable waters.”³⁶

Taken together, *Rapanos* and *SWANCC* represent the Court’s reluctance to conclude Congress has authorized far-reaching federal regulatory controls over private land use. The Court—then and today—can and will insist that Congress explicitly authorize federal regulatory measures that encroach upon matters traditionally left in states and local hands, such as local land use. In this way, *SWANCC* and *Rapanos* affirm the Court’s federalism “clear statement” rule that disfavors federal regulatory intrusions into matters traditionally regulated by the states and is skeptical of the purported need for a comprehensive federal regulatory scheme over such matters.

d. County of Maui v. Hawaii Wildlife Fund, (2020) (“County of Maui”)

Although it is not a case interpreting the term “WOTUS,” *County of Maui* is highly relevant to, and in fact, extensively referenced in the Proposed Revision.³⁷ In *County of Maui*, the Court considered, not whether certain waterbodies are properly construed as WOTUS under the CWA, but whether certain discharges of pollutants that ultimately reach WOTUS are regulated discharges that require NPDES permits.

The CWA broadly prohibits “the discharge of any pollutant” without an NPDES permit.³⁸ The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”³⁹ The Act obviously also defines “navigable waters” as “waters of the United States, including the territorial seas,”⁴⁰ but the receiving waterbody in *County of Maui* was the Pacific Ocean so its jurisdictional status was not in question. Instead, the Court in *County of Maui* addressed whether point source discharges of pollutants to groundwater or other non-jurisdictional features that migrate to navigable waters constitute an “addition of any pollutant to navigable waters from a point source,”⁴¹ requiring a NPDES permit.

In a 6-3 opinion, a majority of the Supreme Court held that the CWA requires a permit when there is a direct discharge from a point source to navigable waters or when there is an indirect discharge that is the “functional equivalent”⁴² of a direct discharge.⁴³ The Agencies are correct that the

³⁶ *Rapanos*, 547 U.S. at 781.

³⁷ *County of Maui v. Haw. Wildlife Fund*, __U.S.__, 140 S. Ct. 1462, 206 L.Ed.2d. 640 (2020).

³⁸ 33 U.S.C § 1342.

³⁹ 33 U.S.C § 1362.

⁴⁰ 33 U.S.C § 1362(7).

⁴¹ 33 U.S.C § 1362.

⁴² By “functional equivalent” the Court meant the introduction of pollutants to navigable waters by “roughly similar means” to a direct discharge. Considerations cited by the Court included time and distance, nature of the material through which the pollutant travels (for example, subsurface soil or rock), and the extent of dilution and chemical transformation.

⁴³ *County of Maui*, 140 S. Ct. at 1468-1478. Justice Breyer wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Kagan, Sotomayor, and Kavanaugh. Justice Kavanaugh also wrote a

majority opinion in *County of Maui* looked to the CWA’s water quality objective in section 101(a)⁴⁴ to adopt an interpretation of the Act that would prohibit bad actors from evading CWA permitting requirements by simply discharging pollutants to the surface or groundwater a few feet away from a navigable water.⁴⁵ But the Agencies fail to mention that the *County of Maui* majority limited the scope of indirect discharges that could be subject to NPDES permitting under the Act to those indirect discharges that were “functional[ly] equivalent” to direct discharges. The majority did so based on their recognition that the Act’s “purposes” necessarily include the congressionally mandated role of states in regulating groundwater and nonpoint source pollution: “[T]he context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution.”⁴⁶

Thus, the majority suggested that what might otherwise appear to be the “functional equivalent” of a direct discharge is not such if its regulation would result in a significant federal intrusion into traditional state areas of regulation, such as groundwater.⁴⁷ “Congress did not intend the [CWA’s] point source-permitting requirement to provide EPA with such broad authority.”⁴⁸

Further, responding to parties urging the Court to look to CWA section 101(a) to require NPDES permits for any pollutant releases that may migrate to navigable waters, the majority noted that “[v]irtually all water . . . eventually makes its way to navigable water”⁴⁹ and if the CWA’s regulatory reach were coextensive with “the power of modern science” to trace water to a point source, this would lead to “surprising, even bizarre” applications of the CWA.⁵⁰

Further still, although the Supreme Court in *County of Maui* did not address the definition of WOTUS or the scope of federal jurisdiction that can properly be asserted pursuant to the definition of WOTUS, the Court’s references to the *Rapanos* decision are striking. Indeed, each separately authored opinion in *County of Maui* (i.e., Justice Breyer’s six justice majority opinion, Justice Kavanaugh’s concurrence, Justice Thomas and Gorsuch’s dissenting opinion, and Justice Alito’s separate dissent) each favorably reference Justice Scalia’s plurality opinion in *Rapanos*. It is also notable that no opinion in *County of Maui* even mentions Justice Kennedy’s sole concurrence in

concurring opinion. Justice Thomas authored a dissent joined by Justice Gorsuch and Justice Alito authorized a separate dissent.

⁴⁴ “The object in a given scenario will be to advance, in a manner consistent with the statute’s language, the statutory purposes that Congress sought to achieve.” *County of Maui*, 140 S. Ct. at 1476.

⁴⁵ *County of Maui*, 140 S. Ct. at 1473.

⁴⁶ *County of Maui*, 140 S. Ct. at 1470-1471.

⁴⁷ *County of Maui*, 140 S. Ct. at 1470-1471. (referring to “Congress’ basic aim” to regulate “without undermining the States’ longstanding regulatory authority over land and groundwater”); *County of Maui*, 140 S. Ct. at 1470-1471. (highlighting “the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution”); *County of Maui*, 140 S. Ct. at 1477 (“Decisions should not create serious risks . . . of undermining state regulation of groundwater . . .”).

⁴⁸ *County of Maui*, 140 S. Ct. at 1471.

⁴⁹ *County of Maui*, 140 S. Ct. at 1470.

⁵⁰ *County of Maui*, 140 S. Ct. at 1470-1471.

Rapanos; it is particularly notable given the weight the Agencies' ascribe the concurrence in the Proposed Revision. While the Supreme Court's singular focus on the *Rapanos* plurality opinion may not be sufficient to elevate it to binding precedent, the Agencies must take note of the Court's regard for the plurality opinion, and must allow these views to guide their interpretation of WOTUS.

In addition to considering the Supreme Court's treatment of the *Rapanos* plurality in *County of Maui* generally, the Agencies must also consider the specific contexts in which the Court's multiple *County of Maui* opinions referenced the *Rapanos* plurality. For instance, responding to a suggested interpretation of the Act that would require a NPDES permit only if the point source discharges *directly* into a jurisdictional water,⁵¹ the majority in *County of Maui* held:

As the plurality correctly noted in *Rapanos v. United States*, the statute here does not say "directly" from or "immediately" from. Indeed, the expansive language of the provision— any addition from any point source— strongly suggests its scope is not so limited.⁵²

Thus, the majority opinion in *County of Maui* is predicated on the justices' recognition that non-jurisdictional waterbodies and other features can carry pollutants from point sources to navigable waters and that these intermediate waters remain non-jurisdictional even if they function to carry pollutants into navigable waters through their direct connection to those navigable waters. Had the majority in *County of Maui* viewed these intermediate channels between point sources and navigable waters as WOTUS, they would not have needed to adopt the *Rapanos* plurality's interpretation that point sources need not directly convey pollutants to navigable waters. If the intermittent channels to navigable waters were WOTUS, the point source discharges would be direct, and the requirement to obtain a NPDES permit would be uncontroverted.

Thus, implicit within the majority opinion in *County of Maui* is that waters with pollutant-conveying connections to navigable waters are not WOTUS. While we can conclude from the majority opinion that these intermediate channels are not WOTUS, only the *Rapanos* plurality opinion cited by the majority in *County of Maui* provides an indication of what these intermediate channels are. According to the *Rapanos* plurality,

the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.' The Act defines 'point source' as 'any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.' It also defines 'discharge of a pollutant' as

⁵¹ The Associations use the terms "jurisdictional water" and "jurisdictional waters" to mean waters subject to federal jurisdiction under the CWA.

⁵² *County of Maui*, 140 S. Ct. at 1475 (internal citations omitted).

‘any addition of any pollutant to navigable waters from any point source.’ The definitions thus conceive of ‘point sources’ and ‘navigable waters’ as separate and distinct categories. The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping. The separate classification of ‘ditch[es], channel[s], and conduit[s]’—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not ‘waters of the United States.’⁵³

While the majority opinion in *County of Maui* implicitly followed the *Rapanos* plurality’s interpretation of the CWA to exclude intermittent channels and conveyances from the definition of WOTUS, Justice Kavanaugh explicitly described the relevance of the *Rapanos* plurality opinion to the *County of Maui* decision. According to Justice Kavanaugh, “[t]he Court’s interpretation of the Clean Water Act regarding pollution ‘from’ point sources adheres to the interpretation set forth in Justice Scalia’s plurality opinion in *Rapanos* . . .”⁵⁴ Thus, discharges to intermittent channels that naturally wash pollutants downstream to jurisdictional waters are not exempt from NPDES permitting even if those intermittent channel cannot be construed as WOTUS. The majority opinion in *County of Maui* adheres to Justice Scalia’s analysis in *Rapanos* on that issue.⁵⁵

IV. ISSUES WITH PROPOSED REVISION’S INTERPRETATION OF ACT AND CONSIDERATION OF CASE LAW

In the subsections that follow, the Associations describe certain areas of concern we identified with the Proposed Revision’s interpretation of the CWA and consideration of the applicable case law. We hope the Agencies will meaningfully consider these views as they evaluate whether to finalize the Proposed Revision and more broadly, as the Agencies assess how they can promulgate a durable and defensible definition of WOTUS. To that end, and in consideration of the extensive litigation that has followed each of the Agencies’ prior efforts to define WOTUS, the Associations herein provide an overview of standards under which rules like the Proposed Revision are reviewed.

To begin, the Administrative Procedure Act (“APA”) governs the manner under which federal agency actions are promulgated and reviewed.⁵⁶ For those statutes, like the CWA, that do not contain their own standards for reviewing regulations promulgated pursuant to the statute, the APA provides that “[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”⁵⁷ On the other

⁵³ *Rapanos*, 547 U.S. at 735.

⁵⁴ *County of Maui*, 140 S. Ct. at 1478.

⁵⁵ *County of Maui*, 140 S. Ct. at 1478.

⁵⁶ 5 U.S.C. § 551 *et seq.*

⁵⁷ 5 U.S.C. § 706.

hand, “[a]n agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.”⁵⁸

Of particular relevance here, this recital of “*Chevron* deference” underpinned the Supreme Court’s three primary decisions on the Agencies’ efforts to define WOTUS. The Supreme Court’s unanimous decision in *Riverside Bayview* to uphold the Agencies’ discretion to interpret WOTUS to delineate the often blurry line dividing waters subject to federal jurisdiction and dry land was based on *Chevron* deference.⁵⁹ Conversely, disagreement over the outer limits of *Chevron* deference led to the split decision in *SWANCC* and the *Rapanos* plurality. These decisions provide important and relevant guidance on the bounds of the EPA’s regulatory discretion, and they should serve as guides to the Agencies here.

In *SWANCC*, the majority and minority disagreed whether it violated Congress’ express intent to interpret WOTUS to include isolated wetlands that may be used by migratory birds.⁶⁰ The majority in *SWANCC* held that courts should not defer to agencies when an “administrative interpretation of a statute invokes the outer limits of Congress’ power,” absent a clear indication from Congress that it intended that result.⁶¹ As the Court further noted, “This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power.”⁶²

After the Agencies adopted a WOTUS interpretation based on an improbably narrow construction of *SWANCC*, it was again the justices’ profound disagreement over the extent of agency authority that led to the decision in *Rapanos*.⁶³ As Chief Justice Roberts explained in his concurrence, the Agencies’ persistent interpretation of WOTUS to include water with “any connection” to navigable water reflected a knowing decision to sacrifice legal and regulatory certainty in favor of spurious jurisdictional objectives:

Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially

⁵⁸ *Riverside Bayview*, 474 U.S. 121, 131.

⁵⁹ See *Riverside Bayview*, 474 U.S. 121.

⁶⁰ See *SWANCC*, 531 U.S. 159.

⁶¹ *SWANCC*, 531 U.S. at 172 (citations omitted).

⁶² *SWANCC*, 531 U.S. at 173.

⁶³ See *Rapanos*, 547 U.S. 715.

boundless view of the scope of its power. The upshot today is another defeat for the agency.⁶⁴

Chief Justice Robert's concurrence provides clear guidance – the courts will defer to an agency interpretation of WOTUS that reflects a plausible reading of the text and structure of the Act, earnest consideration of the Supreme Court's interpretive guideposts, and a reasonably restrained jurisdictional objective. If this Administration's goal is to promulgate a durable definition of WOTUS, we urge the Agencies to heed this admonition and meaningfully consider whether the Proposed Revision appropriately fits within the “room to operate” described by Chief Justice Roberts or whether it persists in testing the outer bounds of the Agencies' authority under the CWA.

a. The Agencies cannot invoke the CWA's objectives as a means to justify ignoring the limits and specific means Congress imposed in pursuing those objectives

The statutory interpretation that the Agencies utilized in developing the Proposed Revision is predicated on the “significant weight” that the Agencies accord the statutory objective in CWA section 101(a) “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”⁶⁵ According to the Agencies,

the prominently placed and single expression of the Act's overarching objective in section 101(a) merits greater weight in the agencies' decision-making than one of the four Congressional policies expressed in section 101 which, while important, appear subordinate to the objective—particularly given the statutory text and structure.⁶⁶

The “one of the four Congressional objectives” mentioned above refers to Congress' admonition in section 101(b) that the CWA be implemented and interpreted to:

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 Act.⁶⁷

Although the Agencies disregard the remaining section 101 policy objectives as unrelated to cooperative federalism, the important role of states is reflected in two additional overarching

⁶⁴ *Rapanos*, 547 U.S. at 758.

⁶⁵ 86 Fed. Reg. at 69,402 (quoting 33 U.S.C. § 1251(a)).

⁶⁶ 86 Fed. Reg. at 69,401 – 69,402.

⁶⁷ 33 U.S.C. § 1251(a).

policy objectives;⁶⁸ section 101(e) directs EPA to coordinate with states in facilitating public participation in the development, revision, and enforcement of any provision under the Act,⁶⁹ and section 101(g) expressly preserves states' exclusive authority to allocate quantities of water within their jurisdiction.⁷⁰ By expressly referencing the critical role of states throughout multiple of the CWA's overarching objectives, Congress demonstrated the importance of considering cooperative federalism in implementing and interpreting the CWA.

It is therefore curious that the Agencies dismiss the cooperative federalism objectives in section 101(b) as subordinate to the water quality objectives in section 101(a). To begin, we are aware of no canon of statutory construction that permits an inference whereby the first listed objective is afforded greater weight and consideration than all subsequent objectives. Rather than speculating about the importance Congress ascribed to the various section 101 objectives based on their order, or looking for the overarching statutory purpose in any single subsection, the Agencies should give a fair construction of the entire statute, giving effect to every part, each clause helping the other.

While the Associations recognize that Congress' recital of its objectives in enacting a statute can be useful in interpreting ambiguous provisions elsewhere in the statute, the Agencies should have heeded the "whole-text canon," which requires consideration of the entire text so as to give effect to every part,⁷¹ as well as the "surplusage canon," which commands the interpreter to give effect to every word and every provision of a text.⁷² Had the Agencies read section 101's objectives in harmony with each other as these canons command, they would have recognized, as the plurality did in *Rapanos*, that "[c]lean water is not the only purpose of the [CWA]. So is the preservation of primary state responsibility for ordinary land-use decisions."⁷³

Cooperative federalism thus cannot be credibly dismissed as a subordinate consideration under the CWA. Because it is co-equal to the Act's water quality objective, and the Agencies cannot justify the Proposed Revision's jurisdictional reach through assertions that their jurisdictional interests are justified by water quality concerns. Undue reliance on a single statutory purpose is the "last resort of extravagant interpretation," because Congress does not "pursue[] its purpose at all

⁶⁸ 86 Fed. Reg. at 69,401.

⁶⁹ 33 U.S.C. § 1251(e).

⁷⁰ 33 U.S.C. § 1251(g).

⁷¹ See Scalia & Garner, 167-69 ("The Supreme Court of the United States has said that statutory construction is a 'holistic endeavor,' and the same is true of construing any document.") (citation omitted).

⁷² See Scalia & Garner, at 174 ("A provision that seems to the court unjust or unfortunate . . . must nonetheless be given effect. As Chief Justice Marshall explained: 'It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.'") (citing *Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819)).

⁷³ *Rapanos*, 547 U.S. at 755-56 (plurality op.) (citing 33 U.S.C. § 1251(b)); see also *SWANCC*, 531 U.S. at 174; see also *County of Maui*, 140 S. Ct. at 1476, see also *McCreary Cnty. Ky. v. ACLU of Ky.*, 545 U.S. 844, 861-62 (2005) (noting how courts should consider purpose in construing a statute)

costs.”⁷⁴ Indeed, it “frustrates rather than effectuates legislative intent to simplistically assume that whatever furthers the state’s primary objective must be the law.”⁷⁵

The Agencies are, of course, correct that Congress sought to protect navigable waters with the CWA,⁷⁶ but it also imposed several textual limitations on the regulatory means to reach that goal. Had it wished to do so, Congress could have prohibited all unpermitted discharges of all pollutants to all waters. Yet it did not go so far. Instead, Congress chose to prohibit only the discharge of pollutants to “navigable waters from any *point source*.”⁷⁷ Thus, Congress did not pursue its stated goal “at all costs,” because the CWA precludes federal regulation over non-navigable-water pollution and over nonpoint-source pollution. It left those matters to the states.

Moreover, as discussed above, the Supreme Court’s “precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of Government over private property.”⁷⁸ The CWA is bereft of language demonstrating congressional intent that the federal government claim jurisdiction to the preclusion of states.⁷⁹ In fact, the CWA does contain a clear statement in section 101(b) that points the other way—permitting federal involvement but ultimately respecting the paramount role of the States in water management. Congress included this language in order to assuage States’ concerns that the CWA would become a “federal takeover” of water management and pollution control.⁸⁰ To that

⁷⁴ *Rapanos v. United States*, 547 U.S. at 752, 126 S. Ct. 2208 (plurality op.); see also *Henson v. Santander Consumer USA, Inc.*, 1317 S. Ct. 1718, 1725 198 L. Ed. 2d 177, 582 US __ (2017) (“Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs. For these reasons and more besides we will not presume with petitioners that any result consistent with their account of the statute’s overarching goal must be the law but will presume more modestly instead that the legislature says what it means and means what it says.”) (cleaned up); see also *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4 (1994) (judges “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the purpose of those purposes.”).

⁷⁵ *Norfolk S. R. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)).

⁷⁶ 33 U.S.C. § 1251(a).

⁷⁷ 33 U.S.C. § 1362(12)(A) (emphasis added).

⁷⁸ *Alabama Ass’n of Realtors v. Dep’t of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (rejecting as unlawful the Centers for Disease Control and Prevention’s imposition of a nationwide moratorium on tenant evictions because it “intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.”); *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849-50 (2020) (rejecting construction of Mineral Leasing Act that would have converted thousands of acres of private and state-owned land to national-park land).

⁷⁹ See *Rapanos*, 547 U.S. at 738 (plurality op.) (explaining that “the phrase ‘the waters of the United States’ hardly qualifies” as a sufficiently clear statement of an intent to abrogate state authority.”).

⁸⁰ See Ryan P. Murphy, *Did We Miss the Boat? The Clean Water Act and Sustainability*, 47 U. RICH. L. REV. 1267, 1275 (2013); see also *S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370, 386 (2006) (“[The CWA] provides for a system that respects the States’ concerns.”). And Congress went beyond a mere statement of purpose; a “strong current of federalism” runs throughout the statute. *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); accord *Am. Paper Inst. Inc. v. EPA*, 890 F.2d 869, 873 (7th Cir. 1989) (“[N]umerous courts have recognized the primacy of state and local enforcement of water pollution controls as a theme that resounds throughout the history of the Act.” (cleaned up)).

end, Congress allowed many key decisions, such as whether a permit should issue under the National Pollution Discharge Elimination System, to remain in the hands of the States,⁸¹ and also “preserve[d] state regulation of groundwater and other nonpoint sources of pollution.”⁸²

The Supreme Court has repeatedly affirmed that federalism is baked into the definition of WOTUS. Congress tied the definition of WOTUS to “navigable waters”; that phrase, in turn, shows “what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁸³ With section 101(b), Congress repudiated any intent to bring “virtually all planning of the development and use of land and water resources by the States under federal control.”⁸⁴ So, while the Agencies should still consider water quality objectives in section 101(a) alongside the cooperative federalism mandate in section 101(b) under the “whole-text canon,” which requires consideration of the entire text so as to give effect to every part,⁸⁵ section 101(b) remains far more relevant to defining WOTUS than section 101(a).

By defining WOTUS, the Agencies are essentially determining the extent of their own jurisdiction, distinguishing waters under federal regulation from land and water features under state or tribal regulation. The definition of WOTUS is not an effluent limit or standard, the proper stringency of which could potentially be informed by consideration of the Act’s section 101(a) water quality objective. Defining WOTUS does not address the question of *whether* to regulate water quality; it only implicates the question of *who* will regulate water quality. Of the various objectives in section 101, the section 101(b) cooperative federalism objective is plainly the most relevant to the jurisdictional questions that are inseparably bound up in the definition of WOTUS.

In sum, section 101(b) represents Congress’ clear statement of the proper balance between federal and state power under the CWA. As oft-cited and important as the water quality objective in section 101(a) may be, it does not provide “exceedingly clear language” reflecting Congress’ intent that the Agencies may upend the Act’s cooperative federalism framework by simply invoking water quality concerns.

⁸¹ 33 U.S.C. § 1342(b). Indeed, the Supreme Court has observed that addressing water quality “fall[s] within a State’s legitimate legislative business, and the Clean Water Act provides for a system that respects the State’s concerns.” *SD Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 386 (2006) (citing 33 U.S.C. §§ 1251(b); 1256(a); 1370).

⁸² *County of Maui*, 140 S. Ct. 1462, 1476; 33 U.S.C. §§ 1311(a), 1362(12).

⁸³ *SWANCC*, 531 U.S. at 172.

⁸⁴ *Rapanos*, 547 U.S. at 737 (plurality op.) (cleaned up).

⁸⁵ See Scalia & Garner, 167-69 (“The Supreme Court of the United States has said that statutory construction is a ‘holistic endeavor,’ and the same is true of construing any document.”) (citation omitted).

1. Preserving state and tribal jurisdiction over water resources does not adversely impact water quality

In the preceding section, the Associations explained that the Agencies cannot ignore the CWA’s express jurisdictional limits or mandated framework for cooperative federalism by simply invoking water quality concerns. Here, we explain why claims of more expansive federal jurisdiction fail to promote, and likely undermine, water quality.

To begin, the Proposed Revision incorrectly suggests that “substantially fewer waters are *protected* by the Clean Water Act under the NWPR compared to previous rules and practices.”⁸⁶ Although it may be true that the NWPR reduced the scope of waterbodies subject to federal jurisdiction, the Agencies improperly conflate federal jurisdiction with environmental protection. Permitting states and tribes to exercise jurisdiction over certain waterbodies, as the CWA requires, does not consign those waters to inevitable degradation under regulatory regimes that are indifferent to water quality. To the contrary, the CWA expressly states that by relegating jurisdiction over certain waterbodies to states or tribes, the Agencies are entrusting those waters to the entities with the “primary responsibility[y] and right[] . . . to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”⁸⁷

The Agencies simply have no basis to conclude that waters outside of federal jurisdiction are unregulated. Indeed, in addition to expressly recognizing the primary role of states and tribes, Congress specifically designed the CWA to promote and support state and tribal efforts to protect water quality.

In furtherance of the primary role Congress ascribed to states and tribes, the CWA provides both technical and financial assistance to states and tribes to improve the nation’s water quality. These programs are not specifically limited to waters qualifying as “WOTUS” and include:

- Grants for research to improve pollution control methods and/or prevent discharges from sewers carrying stormwater;⁸⁸
- Grants to improve waste treatment methods and water purification;⁸⁹
- Grants for research to improve treatment and pollution control for both point and nonpoint sources in river basins;⁹⁰

⁸⁶ 86 Fed. Reg. at 69,413 (emphasis added).

⁸⁷ 33 U.S.C. § 1251(a).

⁸⁸ 33 U.S.C. § 105(a)(1).

⁸⁹ 33 U.S.C. § 1255(a)(2).

⁹⁰ 33 U.S.C. § 1255(b).

- Grants for research and demonstration projects by industry for water pollution prevention;⁹¹
- Programs for the development of waste treatment and management methods, including identifying and measuring pollutants' effects;⁹²
- Grants for research projects to prevent and reduce pollution from agriculture and rural sewage areas, in consultation with the Secretary of Agriculture;⁹³ and,
- Programs managing the Great Lakes⁹⁴, Chesapeake Bay⁹⁵, Long Island Sound⁹⁶, and Lake Champlain.⁹⁷

The framework discussed above is implemented in various specific programs, including:

- CWA sections 208 and 303(e): As part of EPA's water quality management plan, 303(e) specifically requires states to incorporate the nonpoint source elements of the plans states had to develop under section 208, incorporating nonpoint source controls into each state's planning process for all navigable waters.
- Impaired Waters and Total Maximum Daily Load ("TMDL") Program: Under CWA Section 305(b), states prepare and submit biennial state water quality assessment reports, documenting progress toward meeting water quality standards in state waters. Under CWA Section 303(d), states identify waters that are impaired, or in danger of becoming so, to then develop and implement plans to bring these waters into compliance with water quality standards. A state develops an EPA-approved TMDL to cap the amount of a specific pollutant that may be discharged to that water.⁹⁸
- National Nonpoint Source Program: EPA guides and grants funding to states implementing nonpoint source programs, including technical and financial assistance, education, training, watershed project, etc.⁹⁹

In addition to the programs above, other federal statutes, including the Safe Drinking Water Act ("SDWA") and the Resource Conservation and Recovery Act ("RCRA") help to protect aquatic resources through state implemented programs.¹⁰⁰ The SDWA establishes state programs to protect Underground Sources of Drinking Water ("USDWs") by regulating public water systems.

⁹¹ 33 U.S.C. § 1255(c).

⁹² 33 U.S.C. § 1255(d).

⁹³ 33 U.S.C. § 1255(e).

⁹⁴ 33 U.S.C. § 1268.

⁹⁵ 33 U.S.C. § 1267.

⁹⁶ 33 U.S.C. § 1269.

⁹⁷ 33 U.S.C. § 1270.

⁹⁸ 33 U.S.C. § 1313(d).

⁹⁹ 33 U.S.C. § 1329.

¹⁰⁰ 33 U.S.C. § 1321(j)(1)(C).

RCRA defines solid and hazardous waste, authorizes EPA to set standards for waste-generating facilities, and authorizes EPA to set standards for disposal facilities accepting municipal solid waste.

SDWA programs include:

- Underground Injection Control (“UIC”) Programs: Authorizes state-enforced UIC programs to protect underground sources of drinking water from these injections.¹⁰¹
- Sole Source Aquifer Demonstration Program: State program protecting wellhead areas around public water system wells. If a state’s program was established and EPA-approved by 1989, EPA covers between 50 and 90 percent of the implementation costs.¹⁰²
- State Groundwater Protection Grants: Under this program, EPA may make 50 percent grants to states to develop programs protecting the state’s groundwater.¹⁰³
- Source Water Protection Programs: EPA publishes guidance for states to implement Source Water Assessment Programs defining boundaries of the areas from which systems receive water and determining susceptibility to contamination.¹⁰⁴

RCRA programs include:¹⁰⁵

- Hazardous Waste: Though EPA has primary responsibility to implement this program, states can implement their own hazardous waste management programs that are authorized by EPA and at least as stringent as the federal program.
- Solid Waste: State and local governments are the primary planning, regulating, and implementing entities to manage non-hazardous solid waste.¹⁰⁶
- Citizen Suits and Imminent Hazard Provisions: States and citizen suits enforce¹⁰⁷ open dumping prohibitions specified under the Sanitary Landfill Regulations.¹⁰⁸
- Underground Storage Tank Compliance Act: EPA and states receiving funding under Subtitle I must conduct compliance inspections of all USTs at least once every three years. States must comply with EPA guidance.

¹⁰¹ 42 U.S.C. § 1421.

¹⁰² 42 U.S.C. § 1428.

¹⁰³ 42 U.S.C. § 1429.

¹⁰⁴ 42 U.S.C. § 1453.

¹⁰⁵ See 42 U.S.C. § 6903(27).

¹⁰⁶ See EPA’s “Hazardous Waste: RCRA Subtitle D” website at <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview>

¹⁰⁷ 42 U.S.C. § 6972.

¹⁰⁸ 40 C.F.R. § 257.

- Coastal Zone Reauthorization Amendments of 1990 (“CZMA”): As enacted in 1972,¹⁰⁹ the statute provided states with incentive-based planning programs to regulate water and land use and development contributing to impairment of coastal waters. When reauthorized in 1990,¹¹⁰ CZMA created the Coastal Nonpoint Pollution Control Program to target polluted runoff to these waters.

The jurisdiction and authority described above is not only available to states and tribes, it is actually used by those entities. Recognizing the ability of states to regulate their own waters, EPA has delegated to nearly every state broad permitting and enforcement authority over discharges to WOTUS through the NPDES permit system, pretreatment program, and general permitting program.¹¹¹ State authority to implement these programs is not delegated freely—it is earned through the development of programs that EPA reviews and determines to be adequately protective. In fact, many state permitting programs are considered more stringent or restrictive than federal permitting programs and criteria.

Nor does EPA delegate this authority forever—EPA retains broad discretion to withdraw state NPDES permitting authority if EPA believes that that a state’s permitting program is insufficiently protective. Significantly, even though activists have petitioned EPA many times to withdraw the Agency’s delegation of authority to various states, EPA has never done so. Thus, in the context of NPDES permitting as well, EPA unquestionably recognizes that states are already capable stewards of water quality and proven partners in furtherance of the CWA’s objectives.

The Agencies’ suggestion that states and tribes “did not fill the regulatory gap left by the NWPR” is therefore misleading and misplaced.¹¹² As the Agencies elsewhere acknowledge, states and tribes institute environmental and water resource protections through laws and regulations, both of which take some time to revise.¹¹³

The NWPR was published on April 21, 2020,¹¹⁴ and like the Agencies’ prior efforts to define WOTUS, was immediately challenged in multiple courts.¹¹⁵ To this day, there remain 14 WOTUS-related challenges pending in courts around the country, including challenges to the 2015 WOTUS Rule, the 2019 repeal of that rule, the 2020 NWPR, and the Ninth Circuit’s interpretation in *Sackett II* that the Supreme Court just decided to review and consider.¹¹⁶ Given the uncertainty

¹⁰⁹ 16 U.S.C. § 1452(1).

¹¹⁰ 16 U.S.C. § 1455b.

¹¹¹ See <https://www.epa.gov/npdes/npdes-state-program-information>. (last visited 1/26/2022).

¹¹² 86 Fed. Reg. at 69,415.

¹¹³ 86 Fed. Reg. at 69,415.

¹¹⁴ 85 Fed. Reg. 22,250.

¹¹⁵ See 86 Fed. Reg. at 69,382.

¹¹⁶ *Pascua Yaqui Tribe v. EPA*, No. 20–00266 (D. Ariz.); *Colorado v. EPA*, No. 20–01461 (D. Colo.); *Am. Exploration & Mining Ass’n v. EPA*, No. 16– 01279 (D.D.C.); *Envtl. Integrity Project v. Regan*, No. 20–01734 (D.D.C.); *S.E. Stormwater Ass’n v. EPA*, No. 15–00579 (N.D. Fla.); *S.E. Legal Found. v. EPA*, No. 15–02488 (N.D. Ga.); *Chesapeake Bay Found. v. Regan*, Nos. 20–1063 & 20–1064 (D. Md.); *Navajo Nation v. Regan*, No. 20–00602

about the breadth of federal jurisdiction inherent in these many challenges, it is unsurprising that some states and tribes have declined to invest resources in statutory or regulatory processes to address waterbodies that may or may not fall under their jurisdiction. Moreover, just nine months after publication of the NWPR, and on his first day in office, President Biden called for a review of the NWPR, thereby signaling to states, tribes, and other stakeholders that the new administration would not continue to implement the rule.¹¹⁷

Therefore, given the profound legal and political uncertainty regarding the scope of federal jurisdiction described in the NWPR, the Agencies have no basis to conclude that the lack of new state and tribal laws and regulations reflects that states and tribes are unwilling to take steps to protect waters outside of federal jurisdiction. Like the Agencies' stated interest in a durable WOTUS rule, many states and tribes were simply waiting for a modest level of clarity about the scope of federal jurisdiction under the CWA. The Proposed Revision, now the third rule redefining federal CWA jurisdiction issued in just the past six years, fails to deliver the jurisdiction certainty that many states and tribes seek, but rather leaves them feeling the Agencies are simply moving the definition of federal jurisdiction from pillar to post.

Indeed, if the Agencies are truly intent on defining WOTUS consistent with the CWA's water quality objective in section 101(a), they should rescind the Proposed Revision and promulgate a rule that is focused more on jurisdictional clarity and less on the baseless assumption that waters outside of federal jurisdiction are unregulated. A definition of WOTUS that clarifies the lines between state and federal jurisdiction will facilitate state regulatory decisions with respect to waters readily identifiable as outside federal jurisdiction and will preserve agency resources for actual environmental protection.

The Proposed Revision's approach to defining WOTUS will not provide states and tribes this necessary clarity and predictability because the proposed case-by-case approach, subjective and ill-defined standards for aggregating the functional impacts of "similarly situated waters" "in a region", and required analyses of biological, chemical, or physical connectivity to distant navigable waters¹¹⁸ will not allow those entities to readily and confidently identify or bound those areas of the landscape under their jurisdiction.

The Proposed Revision may provide the Agencies a framework for asserting federal jurisdiction on an unprecedented scale, but by doing so it will continue to blur jurisdictional lines and sacrifice clear, consistent, and readily observable jurisdictional criteria for uncertain and subjective case-specific analyses. When jurisdiction over a waterbody is clear, the entities tasked with protecting that waterbody are similarly clear about their mandate. When jurisdiction over a waterbody is

(D.N.M.); *N.M. Cattle Growers' Ass'n v. EPA*, No. 19-00988 (D.N.M.); *North Dakota v. EPA*, No. 15-00059 (D.N.D.); *Ohio v. EPA*, No. 15-02467 (S.D. Ohio); *Or. Cattlemen's Ass'n v. EPA*, No. 19-00564 (D. Or.); *S.C. Coastal Conservation League v. Regan*, No. 19-03006 (D.S.C.); *Puget Soundkeeper All. v. EPA*, No. 20-00950 (W.D. Wash.); *Wash. Cattlemen's Ass'n v. EPA*, No. 19-00569 (W.D. Wash.).

¹¹⁷ Executive Order 13990, 86 FR 7037 (January 25, 2021).

¹¹⁸ See 86 Fed. Reg. at 69,430.

unclear, it can fall into a jurisdictional no-mans-land rife with bureaucratic maneuvering, poor accountability, and few opportunities for federal-state cooperation.

Burdensome and unpredictable analyses and case-specific inquiries cannot be implemented without devoting significant federal and state resources as well as private party resources. Given the inherent limitations on agency resources and the basic principle of opportunity costs, resources spent on jurisdictional line drawing are resources not spent on environmental protection—particularly where, as here, the delineation is between entities that are equally committed to protecting water resources.

Similarly, when landowners, industrial users, and others in the regulated community can readily discern the entity with jurisdiction over a waterbody, they can readily take appropriate actions to obtain the necessary permits. Faced with jurisdictional uncertainty, important projects—including projects that promote and protect water quality—may be substantially delayed or altogether abandoned.

In these respects, and many others, the CWA’s section 101(a) water quality objective is best accomplished through clear jurisdictional boundaries that promote administrative accountability and which can be administered in a way that preserves resources for actual environmental protection.

b. The Proposed Revision misconstrues the *Rapanos* plurality opinion and its relatively permanent standard

The Agencies’ reading of the “relatively permanent” standard completely misconstrues the plurality opinion. Emphasizing the significance of the statutory term “navigable,” the *Rapanos* plurality determined that “waters of the United States” include “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.”¹¹⁹ The plurality distinguished these “relatively permanent waters” from “ordinarily dry channels through which water occasionally or intermittently flows . . . transitory puddles . . . ephemeral flows of water . . . storm sewers and culverts . . . man-made drainage ditches, and dry arroyos in the middle of the desert.”¹²⁰ According to the plurality’s understanding, even the “least substantial of the definition’s terms, namely ‘streams,’ connotes a continuous flow of water in a permanent channel . . .” and “[u]nder no rational interpretation are typically dry channels” considered permanent waters.”¹²¹

Thus, under the plurality opinion, asserting jurisdiction over a non-navigable water (other than a wetland) requires that the water be permanent, standing or continuously flowing” *and* connected to a “traditional interstate navigable water[.]”¹²² Applying this interpretation to wetlands, the

¹¹⁹ *Rapanos*, 547 U.S. at 739 (citation omitted) (plurality opinion) (internal citations and quotations omitted).

¹²⁰ *Rapanos*, 547 U.S. at 733-34 (plurality opinion).

¹²¹ *Rapanos*, 547 U.S. at 733, 735 (plurality opinion).

¹²² *Rapanos*, 547 U.S. at 742 (plurality opinion).

plurality concluded that “*only* 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 [CWA].”¹²³ On the other hand, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters.”¹²⁴ Thus, the plurality set forth two requirements that must be met for an *adjacent* wetland to be covered by the CWA:

first, . . . the adjacent channel [must] contain[] a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, . . . the wetland [must] ha[ve] a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.¹²⁵

The plurality’s use of the term “traditional interstate navigable waters” makes clear that it would have found jurisdiction over a non-navigable water if (and only if): (1) the waterbody is relatively permanent, standing, or continuously flowing; and (2) the waterbody has a continuous surface connection to waters that are navigable-in-fact (or readily susceptible of being rendered navigable) and which are used in interstate commerce (*i.e.*, TNWs).

Thus, the plurality applies a two-part test for determining whether a non-jurisdictional waterbody can be considered a WOTUS. In the first step, the Agencies must establish that the otherwise non-jurisdictional water is relatively permanent, standing, or continuously flowing. If the waterbody is not relatively permanent, standing, or continuously flowing, it is not a WOTUS. If the waterbody in question is determined to be relatively permanent, standing, or continuously flowing, then, under the second step of the plurality test, the Agencies must establish that the relatively permanent, standing, or continuously flowing waterbody has a continuous surface connection to WOTUS. If such a continuous surface connection exists, the otherwise non-jurisdictional (relatively permanent, standing, or continuously flowing) waterbody may be considered a WOTUS. If no such connection exists, the waterbody is not WOTUS – even if it is relatively permanent, standing, or continuously flowing.

The Agencies’ interpretation of the “relatively permanent” standard, however, improperly collapses the plurality’s two-part test into one. For instance, in the preamble to the Proposed Revision, the Agencies state that “the ‘relatively permanent standard’ means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.”¹²⁶

Under this construal of the “relatively permanent” standard, the Agencies could seemingly assert jurisdiction over a category of waters that are *either* “relatively permanent, standing or

¹²³ *Rapanos*, 547 U.S. at 742 (plurality opinion).

¹²⁴ *Rapanos*, 547 U.S. at 742 (plurality opinion).

¹²⁵ *Rapanos*, 547 U.S. at 742 (plurality opinion).

¹²⁶ 86 Fed. Reg. at 69,373.

continuously flowing” or which have a “continuous surface connection” to relatively permanent, standing or continuously flowing waters. This construction in no way reflects the “relatively permanent” standard articulated by the *Rapanos* plurality.

The *Rapanos* plurality would extend federal jurisdiction over otherwise non-jurisdictional waters only if those waters were *both* “relatively permanent, standing or continuously flowing” *and* linked to TNWs through a “continuous surface connection.” Thus, the *Rapanos* plurality’s “relatively permanent” standard would only extend federal jurisdiction over the following waters:

- Relatively permanent waterbodies with a continuous surface connection to TNWs;
- Standing waterbodies with a continuous surface connection to TNWs; and,
- Continuously flowing waterbodies with a continuous surface connection to TNWs.

The Proposed Revision, however, would seemingly assert federal jurisdiction over:

- Relatively permanent waterbodies;
- Standing waterbodies;
- Continuously flowing waterbodies; and,
- Waterbodies with a “continuous surface connection” to relatively permanent, standing or continuously flowing waters.

This construal of the “relatively permanent” standard errs in multiple respects. For one, by treating “continuously connected” waters as a separate category of waters within the “relatively permanent” standard, the Agencies improperly inflate the universe of covered waterbodies from three to four.

The more pernicious impact of treating “continuously connected” waters as a separate category, however, is that it removes the *Rapanos* plurality’s requirement that relatively permanent, standing, or continuously flowing waterbodies be continuously connected to TNWs. Indeed, the Agencies’ erroneous new proposed “continuously connected” category of waters does not even require a continuous surface connection to TNWs. According to the Agencies’ “relatively permanent” standard, federal jurisdiction can extend to any waterbody that has a continuous surface connection to any other relatively permanent, standing, or continuously flowing waterbody. To be clear, this means that the Agencies’ proposed variant of the “relatively permanent” standard requires *no consideration of any connection* to TNWs. While the *Rapanos* plurality and Justice Kennedy disagreed about whether the connections to TNWs could be surface or subsurface, or continuous or intermittent, neither would allow jurisdiction to be asserted over a waterbody without some consideration of the substantiality of the connection to TNWs. Thus, the

Agencies’ proposed “relatively permanent” standard conflicts with both the plurality and Justice Kennedy’s concurrence.

The Agencies’ proposed “relatively permanent” standard also conflicts with *SWANCC* because it reads the term “navigable” out of the statute, even though navigability was “what Congress had in mind as its authority for enacting the CWA.”¹²⁷ Indeed, the Agencies’ proposed “relatively permanent” test would extend federal jurisdiction over remote, isolated, and unconnected waterbodies so long as those waterbodies were relatively permanent, standing, continuously flowing or connected to the same. Such an interpretation is plainly impermissible under the CWA, and all Supreme Court case law interpreting the Act.

The Agencies further misconstrue the “relatively permanent” standard by eliminating its hallmark—namely, that the waters in question be “permanent.” For instance, the Proposed Revision asserts that a waterbody may be construed as “relatively permanent” if it has “continuous flow at least seasonally (e.g., typically three months).”¹²⁸ The Agencies cite footnote 5 of the plurality opinion, which, according to their *Rapanos* Guidance, “explain[s] that ‘relatively permanent’ does not necessarily exclude waters ‘that might dry up in extraordinary circumstances such as drought’ or ‘seasonal rivers, which contain continuous flow during some months of the year, but no flow during dry months.’”¹²⁹ This is a *non sequitur*. A statement that “seasonal” waters are “not necessarily excluded” does not mean that all waters that flow “seasonally” are necessarily included.¹³⁰

Even more troubling, the Agencies have deleted from their quotation of the plurality opinion the very example the plurality used to explain what it meant by a “seasonal river”—*i.e.*, “the 290-day, continuously flowing stream postulated by Justice Stevens’ dissent.”¹³¹ As a result, the plurality’s 290-day example of a “seasonal river” was truncated in the Proposed Revision to 90 days—200 days fewer than the flow the plurality suggested might be jurisdictional. Moreover, using 90 days of flow to define a water as “relatively” permanent is utterly at odds with the plurality’s observation that “[c]ommon sense and common usage distinguish between a wash and a seasonal river.”¹³² In other words, the Agencies have set forth an interpretation of the relatively permanent

¹²⁷ *SWANCC*, 531 U.S. at 171.

¹²⁸ 86 Fed. Reg. at 69,436 (emphasis added).

¹²⁹ 86 Fed. Reg. at 69,434-35.

¹³⁰ The Agencies’ misapprehension of the plurality’s opinion is not limited to the term “permanent.” The *Rapanos* Guidance correctly observes that the plurality requires that wetlands have a “continuous surface connection” to relatively permanent waters, and then retreats to the unsupported conclusion that “[a] continuous surface connection does not require surface water to be continuously present . . .” 86 Fed. Reg. at 69,435 (citing *Rapanos Guidance* at 7, n.28).

¹³¹ *Rapanos*, 547 U.S. at 733 n.5 (plurality opinion).

¹³² *Rapanos*, 547 U.S. at 733 n.5 (plurality opinion). In previous comments, the Associations indicated that they could support assertions of federal jurisdiction based on “intermittent flows” of less than 290 days per year, but did so as part of an effort to reasonably incorporate the views expressed by both the *Rapanos* plurality and Justice Kennedy. A

standard that can allow jurisdiction over a wide range of non-permanent waters that are essentially ephemeral, such as streams that are dry most of the year. And again, the Agencies would extend federal jurisdiction over these ephemeral features without even considering whether they were connected to TNWs. The plurality would never have countenanced an interpretation of WOTUS that would reach such waters. Indeed, this is exactly the “essentially boundless view of the scope of [the Agencies’] power” that Chief Justice Roberts denounced in his *Rapanos* concurrence.¹³³

c. The Proposed Revision misinterprets Justice Kennedy’s “significant nexus” test for federal jurisdiction

In addition to establishing federal jurisdiction over waterbodies through their version of the “relatively permanent” standard espoused by the *Rapanos* plurality, the Agencies propose to assert jurisdiction under a “significant nexus” test they ascribe to Justice Kennedy’s concurrence in *Rapanos*.¹³⁴ Setting aside the important threshold question of whether the Agencies can permissibly assert federal jurisdiction using an analytical framework favored by a single justice in the fractured *Rapanos* decision,¹³⁵ the jurisdictional test outlined in the Proposed Revision bears little resemblance to the framework Justice Kennedy described. Indeed, its use would not serve to identify reasonable endpoints to the scope of federal jurisdiction under the CWA, as Justice Kennedy intended.

While Justice Kennedy disagreed with the precise manner in which the plurality interpreted the term “navigable waters,” he fully shared the plurality’s intent to interpret the Act to generally reject jurisdictional assertions based on connections that “are speculative or insubstantial.”¹³⁶ Thus, the “significant nexus” test that the Agencies herein propose to use in a way that would allow exceptionally broad assertions of federal jurisdiction was in fact intended by Justice Kennedy to prevent those “speculative or insubstantial,” assertions of jurisdiction that are “outside the zone fairly encompassed by the statutory term ‘navigable waters.’”¹³⁷ Indeed, the Agencies’ proposed variant of the “significant nexus” test seemingly allows federal jurisdiction to extend to the same remote waterbodies that Justice Kennedy would have excluded from jurisdiction as “little more

direct application of the *Rapanos* plurality opinion, however, would surely not permit the Agencies to assert jurisdiction over waters as ephemeral as those described in the Proposed Revision.

¹³³ *Rapanos*, 547 U.S. at 733 n.5 (plurality opinion). Needless to say, the Agencies’ misinterpretation of the *Rapanos* plurality deserves no deference, otherwise “a judicial declaration of the law’s meaning in a case or controversy before it is not ‘authoritative,’ . . . but is instead subject to revision by a politically accountable branch of government.” *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring).

¹³⁴ 86 Fed. Reg. at 69,395.

¹³⁵ See Section IV.d. below, discussing the propriety of approaches to applying Supreme Court opinions which, like *Rapanos*, lack a majority opinion.

¹³⁶ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

¹³⁷ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*.”¹³⁸

1. The Agencies' proposed construction of the “significant nexus” test

Under the Proposed Revision's adaptation of the “significant nexus” test, the Agencies would assert federal jurisdiction over otherwise non-jurisdictional waters that “significantly affect” “the chemical, physical, or biological integrity of” a traditional navigable water, interstate water, or the territorial seas.¹³⁹ In evaluating whether tributaries, wetlands, or “other waters” “significantly affect” “the chemical, physical, or biological integrity of” a traditional navigable water, interstate water, or the territorial seas, the Agencies would allow those otherwise non-jurisdictional waters to be assessed “either alone, or in combination with other similarly situated waters in the region, based on the function the evaluated waters perform.”¹⁴⁰

The Proposed Revision does not state how the Agencies propose to assert jurisdiction over a discrete waterbody based on the presumed cumulative effect of many waterbodies. Nor do the Agencies explain or constrain what it means for a waterbody to be “similarly situated” or “in the region.” Instead, the Proposed Revision suggests a range of options for defining these terms, each of which hint at the capacious breadth of federal jurisdiction that the Agencies would assert under their “significant nexus” approach.¹⁴¹

For instance, the Agencies evidently contemplate asserting jurisdiction over individual waterbodies based on the aggregate impacts of all waters within a watershed given that they include watersheds as among their options for defining the “region.”¹⁴² The Proposed Revision states that, “[i]f the watershed draining to the traditional navigable water, interstate water, or territorial sea is too large, the watershed could be evaluated at a subwatershed scale,”¹⁴³ but offers no indication of how the Agencies or other parties might determine that a watershed is “too large.” This unexplained “too large” standard is precisely the sort of vague and subjective metric that obscures the breadth of the jurisdictional reach the Agencies' may seek to assert under the Proposed Revision. Indeed, in reality, the Agencies provide no standard at all to guide or limit the scale of these aggregated assessment. Absent any reasonable and objective limit on the geographic scale that the Agencies can use when aggregating impacts from multiple waterbodies, these Agencies' aggregated impact assessments will surely be challenged in court as arbitrary and capricious determinations, thereby compromising the durability of the Proposed Revisions.

¹³⁸ *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring).

¹³⁹ 86 Fed. Reg. at 69,430. The Agencies define “significantly affect” to mean a “more than speculative or insubstantial effects on the chemical, physical, or biological integrity of” these waters. (86 Fed. Reg. at 69,449).

¹⁴⁰ 86 Fed. Reg. at 69,430.

¹⁴¹ 86 Fed. Reg. at 69,437 – 69,440.

¹⁴² 86 Fed. Reg. at 69,439.

¹⁴³ 86 Fed. Reg. at 69,439.

Further, a watershed basis is not the agency's only proposed option for defining "region." More problematic is the agency's proposed definition of "region" as "...an ecoregion which serves as a spatial framework for the research, assessment, management, and monitoring of ecosystems and ecosystem components. Ecoregions are areas where ecosystems...are generally similar." EPA's nutrient criteria, for example, divide the ENTIRE NATION into just 14 ecoregions. Doing so here would be a massive expansion federal jurisdiction, far beyond what Kennedy envisioned.

The "functions" that the Agencies would evaluate in determining whether an otherwise non-jurisdictional waterbody "significantly affects" a traditional navigable water, interstate water, or the territorial seas are similarly unspecified. But the list of functions potentially performed by the evaluated waters (*e.g.*, nutrient recycling; provision of habitat for aquatic species that also live in foundational waters; pollutant trapping; retention and attenuation of floodwaters and runoff) reflects once again the Agencies' expansive view of the ecological ties necessary to establish federal jurisdiction over otherwise non-jurisdictional waters.¹⁴⁴

The Proposed Revision indicates that the Agencies will consider these varied functions in consideration with factors such as: (i) distance from a WOTUS; (ii) distance from a traditional navigable water, territorial sea, or interstate water; (iii) hydrologic factors, including shallow subsurface flow; (iv) the size, density, and/or number of waters that have been determined to be similarly situated; and, (v) climatological variables such as temperature, rainfall, and snowpack.¹⁴⁵ While the Agencies provide this non-inclusive list of factors, they offer no insight into how these factors are to be applied. Thus, absent any guidelines or limiting language, the Agencies effectively claim unlimited discretion to assert jurisdiction based on consideration of these broad factors, and landowners will be left to guess as how far that jurisdiction may reach. Here again, the questionable legality of these vague and malleable factors compromises the durability of the Proposed Revisions.

When applying these factors to tributaries, the Agencies suggest they may do so based on "the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)".¹⁴⁶ Under this approach, wetlands that are broadly viewed as adjacent to any point along a tributary's reach would also be analyzed under the Agencies' proposed "significant nexus" standard.¹⁴⁷

The Agencies are even less clear about how to consider "other waters" under "significant nexus" test because the Agencies have not previously attempted to assert jurisdiction over this specific "other waters" category based on their "significant nexus."¹⁴⁸ However, given the sheer number of different types of waterbodies encompassed within the proposed "other waters" category,¹⁴⁹ the

¹⁴⁴ 86 Fed. Reg. at 69,437-38, 69,431.

¹⁴⁵ 86 Fed. Reg. at 69,449.

¹⁴⁶ 86 Fed. Reg. at 69,437.

¹⁴⁷ 86 Fed. Reg. at 69,437.

¹⁴⁸ 86 Fed. Reg. at 69,440.

¹⁴⁹ 86 Fed. Reg. at 69,418.

Agencies' proposal to consider "other waters" under their "significant nexus" framework will undoubtedly result in a considerable expansion of the scope of federal jurisdiction. Indeed, it is hard to discern any limit to federal jurisdiction under the Agencies' proposal to consider the aggregate effects of all "similarly situated" waterbodies within indeterminate, but potentially vast, regions. This is not Justice Kennedy's "significant nexus" test, and it is not a permissible construction of the CWA.

2. The Agencies' construction of Justice Kennedy's "significant nexus" test is impermissible

The Proposed Revision's construction of the "significant nexus" is impermissible because the Agencies are applying it in a way the Kennedy concurrence already rejected and the text of the CWA will not allow.

As a threshold matter, the Agencies profoundly expand the "significant nexus" test by proposing to apply it to categories of waters other than wetlands. The test described in Justice Kennedy's concurrence applied only to wetlands based on Justice Kennedy's finding that "[w]etlands possess the requisite nexus . . . if the *wetlands*, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters."¹⁵⁰ While this articulation of the "significant nexus" standard is from Justice Kennedy's concurrence in *Rapanos*, the genesis of the "significant nexus" standard comes from *Riverside Bayview*, which also considered the jurisdictional status of a wetland.¹⁵¹

In *Riverside Bayview*, a unanimous Court upheld the Corps' jurisdiction over wetlands abutting navigable-in-fact waterways.¹⁵² As the *SWANCC* Court later explained, "[i]t was the significant nexus between the *wetlands* and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."¹⁵³ Justice Kennedy adopted this phrase in his concurring opinion in *Rapanos* and used it, consistent with the Court's previous decisions, as a basis for examining whether *wetlands* adjacent to non-navigable tributaries are jurisdictional. Justice Kennedy advised that his significant nexus analysis be used when Agencies "seek[] to regulate *wetlands* based on adjacency to non-navigable tributaries."¹⁵⁴

Thus, Justice Kennedy's "significant nexus" test reflects his measure of the substantiality of the connection between a wetland and a navigable water. He applied the test in *Rapanos* to a wetland adjacent to a non-navigable water, but the "significant nexus" test remained exclusively focused on the substantiality of the linkage between a wetland and a navigable water. Justice Kennedy never instructed the Agencies to apply his significant nexus test to non-wetland waters.

¹⁵⁰ *Rapanos* 547 U.S. at 780 (emphasis added).

¹⁵¹ *Riverside Bayview*, 474 U.S. at 121.

¹⁵² *Riverside Bayview*, 474 U.S. at 121.

¹⁵³ *SWANCC*, 531 U.S. at 167 (emphasis added).

¹⁵⁴ *Rapanos*, 547 U.S. at 782 (emphasis added).

The Ninth Circuit concurred in this reading of Justice Kennedy’s concurrence, explaining that:

Rapanos, like *Riverside Bayview*, concerned the scope of the Corps’ authority to regulate adjacent *wetlands* . . . No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.¹⁵⁵

Justice Kennedy applied his “significant nexus” test specifically with respect to the wetland/navigable water relationship because, on the one hand, Justice Kennedy viewed “wetlands [] as ‘integral parts of the aquatic environment,’”¹⁵⁶ and on the other hand, because he believed that the statutory term “navigable” must “be given some importance.”¹⁵⁷

The Proposed Revision does not adequately explain how or why tributaries and “other waters” serve the same integral role as wetlands such that they should be considered under Justice Kennedy’s wetland-specific “significant nexus” test. Nor do the Agencies explain how their construal of the “significant nexus” test to allow jurisdiction to be asserted over a remote waterbody that alone shares no significant nexus with a navigable water accords with Justice Kennedy’s unwavering focus on navigability or the CWA’s focus on the same.

“Statutory interpretation, as [the Supreme Court] always say[s], begins with the text,”¹⁵⁸ and the text “must, if possible, be construed in such fashion that every word has some operative effect.”¹⁵⁹ Here, the CWA grants the Agencies jurisdiction over “navigable waters,”¹⁶⁰ which in turn are defined as “the waters of the United States.”¹⁶¹ “Congress’ separate definitional use of the phrase ‘waters of the United States’ [does not] constitute[] a basis for reading the term ‘navigable waters’ out of the statute.”¹⁶² Although “the word ‘navigable’ in the statute” may have “limited effect,” it does not have “no effect whatever.”¹⁶³ On the contrary, the phrase “navigable waters” demonstrates “what Congress had in mind as its authority for enacting the CWA”: its “commerce power over navigation” and therefore “over waters that were or had been navigable in fact or which could reasonably be so made.”¹⁶⁴

¹⁵⁵ *San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700, 707 (9th Cir. 2007) (rejecting argument that the Supreme Court has held that the CWA protects all waterbodies with a significant nexus to navigable waters).

¹⁵⁶ *Rapanos*, 547 U.S. at 779.

¹⁵⁷ *Rapanos*, 547 U.S. at 778-79 (emphasis added).

¹⁵⁸ *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016).

¹⁵⁹ *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

¹⁶⁰ 33 U.S.C. § 1311(a).

¹⁶¹ 33 U.S.C. § 1362(7).

¹⁶² *SWANCC*, 531 U.S. at 172 (2001).

¹⁶³ *SWANCC*, 531 U.S. at 172-73 (quoting *Riverside Bayview*, 474 U.S. at 133 (1985)).

¹⁶⁴ *SWANCC*, 531 U.S. at 168 n.3, 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)); see *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

Justice Kennedy agreed that “the word ‘navigable’” must “be given some importance” and emphasized that if jurisdiction over wetlands is to be based on a “significant nexus” test, the nexus must be to “navigable waters in the traditional sense.”¹⁶⁵ If the word “navigable” is to have any meaning, he explained, the CWA cannot be understood to “permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, which eventually may flow into traditional navigable waters.”¹⁶⁶

The Proposed Revision ignores this warning. The potential reach of the Agencies’ proposed construction of the “significant nexus” test is vast, covering countless miles of previously unregulated features and potentially sweeping in many isolated, often dry, land features, whether or not their individual “effects on water quality are speculative or insubstantial.”¹⁶⁷ The Agencies therefore have no basis in existing precedent to extend Justice Kennedy’s significant nexus test to tributaries, adjacent non-wetlands, and other waters.

3. The Proposed Revision’s construction of the “significant nexus” test impermissibly affords the Agencies standardless discretion to assert nearly limitless jurisdiction

As it is presently constructed, the Agencies’ “significant nexus” standard supplies no meaningful standard at all for asserting federal jurisdiction. While the Agencies suggest that their proposed “significant nexus” standard would allow them to discern those connections to navigable waters are significant from those that are “speculative” or “insubstantial,”¹⁶⁸ the proposed framework leaves the Agencies tremendous latitude to drive every conclusion toward a finding of significance.

Whereas an evaluation of the effect of a single waterbody would reasonably narrow the analysis and allow for stakeholder engagement that would reduce the prospect of automatically defaulting to a finding of significance, the Agencies need not restrain their evaluation to a single waterbody under their proposed framework. Under the Agencies’ construction of the “significant nexus” test, the Agencies can consider the cumulative effects of many waterbodies of any type throughout a potentially vast geographic area. And the Agencies alone determine the number and type of waterbodies to consider, as well as the geographic area in which to find those waterbodies. While the Proposed Revision solicits comments on potential standards applicable to determining the number of waterbodies and the scale of the review area, it is difficult to envision any standards capable of rectifying a framework that measures the subjective value of something – anything – that the Agencies alone can define and redefine.

And if the Agencies’ broad discretion to define the features they wish to measure did not preordain a finding of “significance,” their proposed framework affords them exceptional leeway to find

¹⁶⁵ *Rapanos*, 547 U.S. at 778-79 (emphasis added).

¹⁶⁶ *Rapanos*, 547 U.S. at 778.

¹⁶⁷ *Rapanos*, 547 U.S. at 780 (Kennedy, J.).

¹⁶⁸ 86 Fed. Reg. at 69,449. Note that the Agencies propose to include “interstate waters” as among the traditional navigable water from which significance must be determined. In Section V.b., however, the Associations explain that, absent use in commerce, interstate waters are not categorically jurisdictional. That conclusion applies equally here.

significance based on any number of loosely defined ecological functions that are considered under five vaguely worded factors. Therefore, even if the Agencies ultimately provided more concrete standards for any or all of the forgoing discretionary judgments, it is difficult to envision a scenario in which an agency wishing to assert jurisdiction over an area would be precluded from doing so. The bias to finding significance is intrinsic to the proposed framework itself. The Agencies' propose "significant nexus" test cannot discern significance in the manner Justice Kennedy instructed.

To be clear, the Associations are not herein suggesting that the Agencies proposed this construal of the "significant nexus" test to manipulate jurisdictional determinations, but we urge the Agencies to be cognizant that the Federal Register preamble that lays out this approach contains a lengthy recital of the Agencies' belief that more expansive federal jurisdiction equates to better environmental protection.¹⁶⁹ As a matter of policy and public confidence, the Agencies' widely recognized interest in asserting broader jurisdiction counsels strongly against adopting a test for establishing jurisdiction that the Agencies are so free to maneuver.

Indeed, as discussed further in Section IV.e. below, the need for a clear, objective, and transparent process for asserting jurisdiction is all the more critical in light of the legal consequences that follow many jurisdictional determinations. The CWA is a criminal statute with substantial penalties for noncompliance. And a jurisdictional determination can render an action that was perfectly legal one day a federal crime on another day. Thus, the means by which the Agencies assert jurisdiction must be clear, objective, and discernable.

The landowners that are at risk of criminal liability should be able to use the tools the Agency provides to discern the scope of federal jurisdiction as readily as the Agencies and with consistent results. The "significant nexus" framework that the Agencies propose does not allow for this result. And because it requires subjective inputs that only the Agencies can provide, no measure of revision or refinement will allow this framework to be utilized by anyone other than the Agencies.

In furtherance of those concerns, the Associations herein provide a few specific examples of concerns with aspects of the Agencies' proposed "significant nexus" test.

Reach and Aggregation: The Agencies' proposal to allow "significance" to be established based on aggregate impacts of multitudes of minor waterbodies and ordinarily dry features is plainly inconsistent with Justice Kennedy's "significant nexus" approach, to say nothing of the plurality opinion. For instance, the Agencies propose to assert jurisdiction reach-by-reach—*i.e.*, extending jurisdiction farther and farther upstream *not* because those upstream segments or their adjacent wetlands independently contain the requisite nexus, but rather because they are part of a reach whose downstream confluence is determined to have a "significant nexus" to a traditional

¹⁶⁹ See 86 Fed. Reg. at 69,413.

navigable water or to exhibit the characteristics of a relatively permanent water.¹⁷⁰ This application of the “significant nexus” test cannot be reconciled with Justice Kennedy’s belief that federal jurisdiction does not extend to remote, insubstantial, or minor flows.¹⁷¹

Moreover, when Justice Kennedy advised that distance, quantity, and regularity of flow were important considerations in a “significant nexus” analysis, he was referring to the test to establish jurisdiction for a *particular* wetland.¹⁷² Indeed, Justice Kennedy’s “significant nexus” test is nonsensical as applied to indeterminate *groups* of waterbodies because this aggregate approach would allow the test he viewed as a *restraint* on overly expansive jurisdiction to be used by the Agencies to assert jurisdiction over the same remote and isolated waterbodies he intended to exclude.

“Similarly Situated Lands in the Region”: The Agencies’ proposed “significant nexus” framework would also allow the Agencies to assess the cumulative significance of “similarly situated” “waters that are providing common, or similar, functions for downstream waters.”¹⁷³ Moreover, the Agencies propose to interpret “similarly situated” to allow for cumulative assessment of widely different types of waterbodies (*e.g.*, tributaries, wetlands, any number of “other waters”).¹⁷⁴

As we noted previously, this proposed application of the “significant nexus” test overlooks that Justice Kennedy expressly and purposely established that test for wetlands. And as applied “in the region” as the Agencies propose, the “similarly situated” approach would implicate a breadth of jurisdiction so vast it would render Justice Kennedy’s “significant nexus” test unrecognizable to him.

Indeed, the proposed approach to aggregating the effects of similarly situated waters in a region could easily subsume and render meaningless all other means of asserting jurisdiction. Responding to a similar approach in the proposal for the 2015 WOTUS rule, EPA’s Science Advisory Board (“SAB”) Panel recognized that the watershed of a navigable water could drain “significant portions of a single State”—undoubtedly, such a large area would, in the aggregate, have an effect on the downstream water.¹⁷⁵

¹⁷⁰ 86 Fed. Reg. at 69,439.

¹⁷¹ *Rapanos*, 547 U.S. at 778-79.

¹⁷² *Rapanos*, 547 U.S. at 784-87.

¹⁷³ 86 Fed. Reg. at 69,439.

¹⁷⁴ 86 Fed. Reg. at 69,439.

¹⁷⁵ SAB, Panel for the Review of the EPA Water Body Connectivity Report, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 44 (Oct. 17, 2014), https://sab.epa.gov/ords/sab/f?p=100:0:15122631311167:APPLICATION_PROCESS=DOWNLOAD_FILE:::FILE_ID:1381 (“SAB Panel Review of Connectivity Report”).

As the Supreme Court noted in *County of Maui*, “[v]irtually all water . . . eventually makes its way to navigable water.”¹⁷⁶ And importantly, the Court raised this common sense notion in overturning the Ninth Circuit’s ruling that would have allowed the assertion of federal jurisdiction based only on the technical capability to trace a hydrological path to navigable waters.¹⁷⁷ The same commonsense approach applies here.

The Agencies’ task is to assess jurisdiction based on consideration of the text and structure of the CWA, not advances in the hydrologic sciences. While scientific understanding may play some role in assessing jurisdiction, the Agencies’ proposal to assess “significance” by aggregating impacts from waterbodies of all types and on increasingly expansive geographic scales is a policy-driven framework that compels a level of subjectivity that cannot be reconciled with the rigor and objectivity necessitated by the scientific method. Indeed, in reviewing a similar approach in the 2015 WOTUS rule, EPA’s SAB Panel expressed concern with the Agencies’ vague conception of “significant.”¹⁷⁸

Chemical, Physical, and Biological Effects: The Agencies’ proposed “significant nexus” standard also misapplies Justice Kennedy’s requirement that a significant nexus be demonstrated through “chemical, physical, *and* biological” effects on navigable waters. As they did in the 2015 WOTUS Rule, the Agencies changed this requirement to “chemical, physical, *or* biological effects.”¹⁷⁹ In doing so, the Agencies not only misconstrue Justice Kennedy’s concurrence, they misquote the Act, which also states “chemical, physical, *and* biological.”¹⁸⁰

While this change is subtle, it is evidently purposeful (given the same error in the 2015 WOTUS Rule), and potentially quite meaningful. This proposed change seemingly removes the requirement that jurisdictional assertions be based on finding three different impacts on jurisdictional water (chemical, physical, and biological), and replaces it with a much lower bar that only requires a demonstration of one of these types of impacts. Although it is difficult to precisely assess the jurisdictional impact of this change, it appears to be a clear, but unacknowledged, attempt to reduce the evidentiary burden necessary to assert federal jurisdiction.

¹⁷⁶ *County of Maui*, 140 S. Ct. at 1470.

¹⁷⁷ *County of Maui*, 140 S. Ct. at 1470.

¹⁷⁸ SAB, Panel for the Review of the EPA Water Body Connectivity Report, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001 (Oct. 17, 2014) (“SAB Panel Review of Connectivity Report”); *See also* SAB Panel Review of Connectivity Report, Exhibit 5 at 11 (“It would be useful to provide examples of the various dimensions of connectivity that are most appropriately quantified, ways to construct connectivity metrics (*e.g.*, retrospective or prospective analyses, model simulations, spatial analyses), and the scientific methodological, and technical advances most needed to understand and estimate connectivity.”).

¹⁷⁹ 80 Fed. Reg. at 37,206.

¹⁸⁰ 33 U.S.C. § 1251(a) (emphasis added).

d. **The Proposed Revision misinterprets *Rapanos* to allow federal jurisdiction to be established using either the plurality’s test or the test in Justice Kennedy’s concurrence**

In the Proposed Revision, the Agencies announce their intent to assert jurisdiction over non-“foundational waters” that meet either the *Rapanos* plurality’s “relatively permanent” standard or “significant nexus” standard articulated in Justice Kennedy’s concurrence.¹⁸¹ The Associations strongly disagree with this “either/or” approach to applying the *Rapanos* decision.

To begin, the Agencies’ “either/or” approach to applying the *Rapanos* decision compounds, rather than cabins, the pernicious impact of the Agencies’ misreading of both the plurality’s “relatively permanent” standard and Justice Kennedy’s “significant nexus” test. The Associations’ concerns with these aspects of the Agencies’ interpretation of *Rapanos* are explained in the preceding subsections. In this subsection, we explain why the Agencies’ proposal to assert federal jurisdiction over waters that meet either test reflects an arbitrary and impermissible application of the reasoning underlying the *Rapanos* decision.

To be sure, it is difficult to discern from the fractured *Rapanos* decision a single prevailing view that can guide the Agencies toward a lawful interpretation of the scope of federal jurisdiction under the CWA. But the difficulty inherent in reconciling the plurality opinion and Justice Kennedy’s concurrence does not permit the Agencies to disregard the reasoning of both.

The Agencies’ proposed “either/or” approach does just that because it ignores that the plurality opinion and Kennedy concurrence articulated *limits* to the scope of federal jurisdiction under the CWA, albeit through different tests. By allowing jurisdiction to be asserted under *either* test it pays short shrift to *both* tests because the “either/or” approach will produce results that are significantly *broader* than either the plurality or Kennedy’s concurrence applied alone would countenance.

Indeed, in applying the either/or approach, the Proposed Revision would effectively adopt Justice Stevens’ dissenting opinion.

I assume that Justice Kennedy’s approach will be controlling in most cases because it treats more of the Nation’s waters as within the Corps’ jurisdiction, but in the unlikely event that the plurality’s test is met but Justice Kennedy’s is not, courts should also uphold the Corps’ jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.¹⁸²

As discussed below, while there may be different ways to discern an implicit consensus from the fractured *Rapanos* decision, selecting the above view that was rejected by a majority of justices is simply not defensible. Therefore, given the fundamental legal flaws with the “either/or” approach,

¹⁸¹ See 86 Fed. Reg. at 69,373.

¹⁸² *Rapanos*, 547 U.S. at 810 n.14 (dissent).

The Associations strongly urge the Agencies to instead identify the limited common ground between Justice Kennedy’s and the plurality’s conceptions of jurisdiction and propose an approach that attempts to reconcile the two opinions and while remaining cognizant to the concerns expressed in both. While the Associations believe that the Agencies can propose an approach that reasonably considers Justice Kennedy’s concurrence, we do not believe that the Agencies can do so in a way that unduly elevates the precedential value of a single justice’s views. Instead, like the Supreme Court in *County of Maui*, we believe that the Agencies must primarily rely on the jurisdictional test articulated by the four-justice plurality.

1. Framework for analyzing *Rapanos*

The framework for assessing the precedential force of a Supreme Court decision lacking a majority opinion is set forth in *Marks v. United States* (“*Marks*”):¹⁸³

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.¹⁸⁴

This rule “only works in instances where ‘one opinion can meaningfully be regarded as narrower than another,’” and “that narrow opinion is the common denominator representing the position approved by at least five justices.”¹⁸⁵ Thus, when “one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic.”¹⁸⁶

This is particularly true as applied to *Rapanos* because neither the plurality nor the concurrence can be fairly characterized as a “logical subset” of the other and there is no “common denominator” that stands for a position implicitly approved by both the plurality and Justice Kennedy.¹⁸⁷ The plurality explicitly rejected Justice Kennedy’s “significant nexus” standard as no standard at all and also rejected the atextual reasoning the standard is based on.¹⁸⁸ In declaring that the concurrence “invite[s] [the agency] to try the same expansive reading” of the Act as before, the

¹⁸³ *Marks*, 430 U.S. at 188 (1977).

¹⁸⁴ *Marks*, 430 U.S. at 193.

¹⁸⁵ *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)).

¹⁸⁶ *King v. Palmer*, 950 F.2d at 782 (D.C. Cir. 1991).

¹⁸⁷ *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (“*Marks* is workable—one opinion can be meaningfully regarded as ‘narrower’ than another – only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.”).

¹⁸⁸ *Rapanos*, 547 U.S. at 753-757 (noting that Justice Kennedy’s opinion “leaves the Act’s ‘text’ and ‘structure’ virtually unaddressed, and rests its case upon an interpretation of the phrase ‘significant nexus’, which appears in one of our opinions.”) (cleaned up).

Justices in the plurality certainly did not appear to believe that the concurrence formed a narrow jurisdictional subset of the plurality's own opinion.¹⁸⁹

Justice Kennedy, in turn, rejected the plurality's reasoning, criticizing it for thwarting the "purpose" of the CWA.¹⁹⁰ Justice Kennedy also opined that under the plurality's test for reasonably permanent waters, "[t]he merest trickle, if continuous," could be subject to federal jurisdiction, even though it may not be significant for downstream water quality.¹⁹¹

Because neither the plurality opinion nor Kennedy concurrence is a logical subset of the other, no combination of these opinions from *Rapanos* constitutes a binding and controlling rationale under *Marks*. Nonetheless, while the *Marks* framework cannot conclusively direct the Agencies as to those precise aspects of *Rapanos* on which they *must* rely, *Marks* does provide clear direction on the aspects of the *Rapanos* decision on which the Agencies *cannot* rely.

The courts of appeals generally agree that "under *Marks*, the positions of those Justices who dissented from the judgment are not counted in trying to discern a governing holding from divided opinions."¹⁹² This "makes sense" because, "by definition, the dissenters have disagreed with both the plurality and any concurring Justice on the outcome of the case, so by definition, the dissenters have disagreed with the plurality and the concurrence on how the governing standard applies."¹⁹³ Thus, the courts have understood that *Marks* itself "instructs lower courts . . . to ignore dissents" when determining the holding of a divided Supreme Court decision.¹⁹⁴

2. The Agencies' proposed "either/or" approach invokes, rather than ignores, Justice Stevens' dissent

Justice Stevens and three other justices dissented in *Rapanos* because they viewed the scope of federal jurisdiction under the CWA as far more expansive than the scope espoused by either the plurality or Justice Kennedy. Consequently, the dissenting justices disagreed with both the plurality's invocation of the "relatively permanent standard" to limit federal jurisdiction as well as jurisdictional limit Justice Kennedy would impose through the "significant nexus standard." In the view of the dissenting justices, federal jurisdiction under the CWA extends further than the breadth contemplated by either the "relatively permanent standard" or the "significant nexus

¹⁸⁹ *Rapanos*, 547 U.S. at 756 n.15.

¹⁹⁰ *Rapanos*, 547 U.S. at 769-770, 776-778.

¹⁹¹ *Rapanos*, 547 U.S. at 769.

¹⁹² *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014).

¹⁹³ *Am. Cyanamid Co.*, 760 F.3d at 620.

¹⁹⁴ *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009). *E.g.*, *King*, 950 F.2d at 783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

standard.”¹⁹⁵ As such, the dissenting view in *Rapanos* was that the government could “prove jurisdiction under either test.”¹⁹⁶

This dissenting opinion, which was obviously not shared by the plurality or Justice Kennedy, is exactly the position that the Agencies propose to adopt here through their “either/or” application of the “relatively permanent” and “significant nexus” tests, and it is therefore a direct contravention of the *Marks* framework urged by the Supreme Court.¹⁹⁷ A dissenting opinion is necessarily one that has been rejected by a majority of the Supreme Court; it therefore cannot impose a mandate of any kind. Indeed, the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) has already held as much.¹⁹⁸

According to the Eleventh Circuit, “*Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented.”¹⁹⁹ To the contrary, “[i]t would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an ‘either/or’ test, whereby CWA jurisdiction would exist when either Justice Scalia’s test or Justice Kennedy’s test is satisfied.”²⁰⁰

Thus, while *Marks* framework cannot readily reconcile the fractured *Rapanos* decision and yield a single controlling rationale, the *Marks* framework plainly precludes the Agencies from basing their Proposed Revision on the dissenting views necessarily rejected by the majority of justices in *Rapanos*. In order to improve the legality and durability of the Agencies’ definition of WOTUS, the Agencies should abandon their “either/or” approach to asserting jurisdiction under the Act and instead craft a definition of WOTUS based on those points on which the *Rapanos* plurality and Justice Kennedy agreed.

3. Because *Marks* precludes the Agencies’ proposed “either/or” approach, the Agencies should craft a definition of WOTUS based on the points of agreement between the plurality and the concurrence

As the foregoing discussion shows, under a fair application of *Marks*, there is no controlling opinion in *Rapanos*. Consequently, while the *Marks* framework precludes the Agencies from implementing the dissent in *Rapanos* in contravention with the views of the majority of justices, the Agencies may exercise *reasonable* discretion to interpret the CWA in a way that embodies points of common ground between the plurality opinion and the Kennedy concurrence. To that

¹⁹⁵ *Rapanos*, 547 U.S. at 808.

¹⁹⁶ *Rapanos*, 547 U.S. at 810 n.14.

¹⁹⁷ See, e.g., *Planned Parenthood of Indiana & Kentucky, Inc. v. Box*, 991 F.3d 740, 744-45 (7th Cir. 2021) (“Dissenting opinions do not count in the *Marks* assessment.”) (collecting cases).

¹⁹⁸ *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

¹⁹⁹ *Robison*, 505 F.3d at 1221 (11th Cir. 2007).

²⁰⁰ *Robison*, 505 F.3d at 1221 (11th Cir. 2007).

end, we observe the following points of agreement shared by the five Justices who concurred in the judgment:

- The opinions share a common understanding of TNWs as waters that were subject to regulation under the Rivers and Harbors Act (“RHA”) prior to the passage of the CWA.²⁰¹ On this interpretation, TNWs are limited to waters that (i) are navigable-in-fact (or are reasonably susceptible to being made so), and (ii) are capable of being used for the transport of goods in interstate commerce, together with other waters.
- Both opinions agree that the word “navigable” in the CWA must be given some effect.²⁰² Thus, to the extent that WOTUS includes some waters and wetlands that are not navigable-in-fact, those waters must bear a substantial connection to navigable waters.²⁰³
- Both opinions look to certain intrinsic characteristics, like volume and flow, to determine if non-navigable tributaries are jurisdictional based on linkages to traditionally navigable waters.²⁰⁴
- Both opinions agree that wetlands abutting TNWs may be jurisdictional as long as they possess *both* a regular physical *and* functional connection.²⁰⁵
- Both opinions agree that environmental concerns cannot override the statutory text.²⁰⁶
- And both opinions agree that WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, highly ephemeral waters, or waters or wetlands that are alongside a drain or ditch.²⁰⁷

²⁰¹ See *Rapanos*, 547 U.S. at 723 (plurality, citing *The Daniel Ball*, 77 U.S. 557 (1871), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)); *Rapanos*, 547 U.S. id. at 760-61 (Kennedy, J., concurring, and citing same).

²⁰² *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); See *Rapanos*, 547 U.S. at 731 (plurality).

²⁰³ *Rapanos*, 547 U.S. at 739, 742 (plurality); *Rapanos*, 547 U.S. at 784-85 (Kennedy, J.).

²⁰⁴ *Rapanos*, 547 U.S. at 733-34 (plurality); *Rapanos*, 547 U.S. at 778-81 (Kennedy, J.).

²⁰⁵ *Rapanos*, 547 U.S. at 739, 742 (plurality); *Rapanos*, 547 U.S. at 778-81 (Kennedy, J.).

²⁰⁶ *Rapanos*, 547 U.S. at 745-46 (plurality); *Rapanos*, 547 U.S. at 778 (Kennedy, J.).

²⁰⁷ *Rapanos*, 547 U.S. at 733-34, 742 (plurality); *Rapanos*, 547 U.S. at 778, 778-91 (Kennedy, J.). These waters simply lack the requisite characteristics to pass constitutional muster. 547 U.S. at 781 (Kennedy, J., concurring); see *Rapanos*, 547 U.S. at 778-781 (identifying “volume of flow” and “proximity” as relevant factors and ruling out jurisdiction over features with a “remote,” “insubstantial,” or “speculative” effect on navigable waters) (Kennedy, J.); *Rapanos*, 547 U.S. at 733-734 (jurisdiction reaches “continuously present, fixed bodies of water”; “intermittent or ephemeral flow” of the sort found in “drainage ditches,” “storm sewers and culverts,” and “dry arroyos” is insufficient) (plurality); *Rapanos*, 547 U.S. at 742 (wetlands with “an intermittent, physically remote hydrologic connection” to jurisdictional waters lack a “significant nexus”) (plurality).

e. The Agencies' interpretation of WOTUS would likely violate the void-for-vagueness doctrine

The Agencies' interpretation of WOTUS would likely violate the void-for-vagueness doctrine, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."²⁰⁸ Put more succinctly, the doctrine holds that a law carrying criminal sanctions must be readily understandable by the average person without legal advice. A statute that is unduly vague, and so indefinite that the average person can only guess as its meaning, "is no law at all."²⁰⁹

The void-for-vagueness doctrine also guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of government officials, prosecutors, juries, and judges.²¹⁰ In that sense, the doctrine is a corollary of the separation of powers, which requires that Congress, rather than the executive or the executive or judicial branch, define what conduct is sanctionable, and what is not.²¹¹

Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them.²¹²

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.²¹³

Here, the penal statute is the CWA. A determination that a body of water qualifies as WOTUS not only triggers the CWA's permitting requirements and exposes a party to substantial administrative and civil liability, but also potential criminal prosecution for the unpermitted

²⁰⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

²⁰⁹ *United States v. Davis*, 139 US 2319, 2324 (2019); *see generally*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing how "vague laws offend several important values," including providing a person of ordinary intelligence a reasonable opportunity to know what is prohibited and act accordingly, preventing arbitrary and discriminatory application and enforcement, and inhibiting the exercise of basic constitutional freedoms).

²¹⁰ *See Kolender*, 461 U.S. at 357-58. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

²¹¹ *Kolender*, 461 U.S. at 358, n.7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

²¹² *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *See Collins v. Kentucky*, 234 U.S. 634, 638 (1914).

²¹³ *Kolender*, 461 U.S. at 357, 103 S.Ct. 1855; *see also United States v. Lovern*, 590 F.3d 1095, 1103 (10th Cir. 2009) (*quoting Colautti v. Franklin*, 439 U.S. 379, 390 (1979)) ("Elemental to our concept of due process is the assurance that criminal laws must 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and those that fail this test are treated as no laws at all: they are 'void for vagueness.'").

discharge of a pollutant. With respect to criminal prosecution, negligent violations of the CWA are punishable under the statute by a fine of up to \$25,000 *per day* of violation, by imprisonment for not more than one year, or by both, with doubled penalties available for a repeat offender.²¹⁴ Knowing violations of the Act are punished even more harshly.²¹⁵ Criminal sanctions are not merely theoretically possible under the Act; they are aggressively pursued. The Department of Justice has not hesitated to bring criminal prosecutions for CWA violations, even under the ordinary negligence standard.²¹⁶

While the CWA’s objective—improving and preserving water quality of the nation’s navigable waters—is laudable and uncontroversial, the Agencies’ extremely broad interpretation of “navigable waters” to include remote and ordinarily dry features no common person would understand to be WOTUS is not so uncontroversial. When seeing the term, most people would imagine a stream, river, or lake, all of which are permanently wet and all of which can be used for transportation, fishing, swimming, and similar activities. But the Agencies do not interpret that term the way that most people would. Instead, to the Agencies, an area can be a WOTUS even if it is rarely wet. Learning that a patch of dry land is WOTUS simply because it can hold water at some point, however ephemerally, is jarring to most people.

What is more, the CWA “imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities”²¹⁷ (e.g., building homes) that are unlike the ones that gave rise to the CWA (e.g. dumping pollutants into a stream) and in places that the average person would find it implausible to believe are WOTUS (e.g., areas miles away from water). Most people find it confusing—or downright bizarre—that they must obtain a CWA permit to construct a home when the area to be developed is miles away from what is ordinarily understood to be a body of water. On top of that, the exorbitant cost and delays attendant

²¹⁴ 33 U.S.C. § 1319(c)(1). The maximum permissible penalties are doubled for a repeat offender. 33 U.S.C. § 1319(c)(1). The CWA initially authorized a per-day civil penalty up to \$25,000, but Congress subsequently mandated the EPA to adjust the maximum penalty for inflation. 28 U.S.C. § 2461. The current maximum per-day penalty is \$51,570. 85 Fed. Reg. 83,818 (Dec. 23, 2020).

²¹⁵ 33 U.S.C. § 1319(c)(2). Again, the maximum possible penalties are doubled for a repeat offender. 33 U.S.C. § 1319(c)(2).

²¹⁶ See 33 U.S.C. § 1319(c)(1); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). In the *Hanousek* case, the government, consistent with other decisions of the Ninth Circuit, argued that the discharge of pollutants, prohibited by the CWA, was a “public welfare offense.” Because Hanousek was, according to the government, working in a heavily regulated business that was a threat to community safety, he was *presumed* to know all of the obligations impose upon him by the CWA, and thus precluded from challenging his conviction on the ground that he did not know of his obligation not to act negligently.

²¹⁷ Justice Thomas and Sandra Day O’Connor thought that the expansive use of criminal sanctions in what was, essentially, a simple negligence tort, merited review. As Justice Thomas wrote, rejecting the application of the public welfare doctrine to Hanousek’s activity: “[T]o determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in ‘responsible relation to a public danger.’” *United States v. Hanousek*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of *certiorari*) (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)).

on obtaining an individual permit—more than \$271,000 and 788 days by the Supreme Court’s reckoning—make obtaining a CWA permit hardly straightforward for the average person.²¹⁸ An interpretation of WOTUS that creates such an obligation is utterly insufficient to provide the fair notice that due process demands.²¹⁹

The Associations are raising this issue not just based on our members’ concerns over the Proposed Revision’s constitutionality but based on their practical interests as well. We believe that the vast majority of companies want to comply with the law and have intense interest in understanding what the law requires so that they can do what is necessary to comply. Currently, companies dutifully implement CWA compliance programs without any real insight into what any given EPA or Army Corps enforcement officer will view as reasonable or sufficient. They design and implement measures to reduce the risk of discharging dredge or fill material into WOTUS, but as Justice Alito shrewdly observed, “if property owners begin to construct a home on a lot the Agency thinks possesses the requisite wetness, the property owners are at the Agency’s mercy.”²²⁰ In the five decades that the CWA has been law, Congress has done nothing to resolve the critical ambiguity in the phrase “WOTUS,” and the Agencies, relying largely on informal guidance, have not provided the requisite clarity and predictability that due process demands. As a result, “the precise reach of the Act remains unclear” to this day.²²¹

That manifest jurisdictional uncertainty would not be remedied, and in fact would be compounded by the Agencies’ proposed framework for assessing jurisdiction through case-by-case application of subjective standards and undefined terms. A reasonable understanding of the federal government’s jurisdictional reach is unattainable enough when based solely on invisible subsurface connections to far off navigable waters. Reliably discerning the Agencies’ reach becomes altogether impossible when jurisdiction is based on the poorly defined effects of an unknowable amalgamation of multiple waterbodies throughout an indeterminate but potentially vast geographic area. No amount of regulatory sophistication, hydrological expertise, or access to technical data or equipment can allow a private party to reasonably and confidently adjudge the jurisdictional status of an individual waterbody under the Agencies’ proposed “significant nexus” framework. The complete opacity of this framework would therefore subject countless companies and landowners to “crushing” criminal consequences for engaging in otherwise innocent activities.²²²

Finally, it is hornbook law that, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such

²¹⁸ *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807, 1812 (2016).

²¹⁹ Because violations of the CWA carry criminal penalties, the rule of lenity, which interprets ambiguous statutory provisions in favor of the criminal defendant, casts even more doubt on the legality of the Agencies’ interpretation.

²²⁰ See *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

²²¹ *Sackett v. EPA*, 566 U.S. at 132.

²²² It is telling ten years after *Rapanos*, Justice Kennedy, whose interpretation of WOTUS is so integral to the Proposed Revision, observed that “the reach and systemic consequences of the [CWA] remain a cause for concern.” *Hawkes Co.*, 136 S. Ct. 1807, 1816 (Kennedy, J., concurring).

problems,”²²³ and the Supreme Court itself has taken this approach when interpreting the CWA and WOTUS.²²⁴ These due process concerns are at the heart of the Supreme Court’s decision in *Hawkes, Sackett*, and the clearer understanding of federal jurisdiction that the Court seemingly intends to provide the Sacketts and all others in deciding to review *Sackett II*. Although this rule represents a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch, it applies with full force to agency interpretations of ambiguous statutes as well. As it now stands, however, the Proposed Revision is vulnerable to attacks for vagueness, and whether the Agencies’ interpretation of WOTUS comports with basic due process principles will be one of the many issues to be decided by the federal courts in future lawsuits. There is, therefore, little to be lost and much to be gained if the Agencies attempt to cure the vagueness issues plaguing the Proposed Revision.

V. COMMENTS ON PROPOSED CATEGORIES OF WOTUS

- a. **The Associations recommend that the Agencies combine traditionally navigable waters and the territorial seas provisions but *not* all interstate waters under a single category of waters and we recommend certain clarifications to the definition of traditionally navigable waters**

The Proposed Revision would retain the provision in the Agencies’ 1986 definition of WOTUS that asserts federal jurisdiction over “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”²²⁵ The Agencies refer to these waters collectively as “traditional navigable waters” or “TNWs” for short. Although the NWPR also maintained the 1986 definition, it consolidated the categories of traditional navigable waters and the territorial seas into a single paragraph in order to streamline the regulatory text.²²⁶ Now, however, the Agencies have proposed to keep these provisions separate, as in the 1986 regulations, in order to avoid potential “confusion” regarding the consistency of the Proposed Revision with the 1986 changes, and to obviate the need to make corresponding changes to cross references to, and the numbering of, other provisions.²²⁷

The Agencies seek comment on whether it would be useful to consolidate the TNWs, interstate waters, and territorial seas provisions into one provision.²²⁸ As explained in further detail in section V.b. below, the Associations support an interpretation of WOTUS that excludes from federal jurisdiction those waters that cross state lines but otherwise satisfy no other jurisdictional element. In other words, interstate waters are not *per se* subject to federal jurisdiction simply

²²³ *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988)).

²²⁴ *SWANCC*, 531 U.S. at 174 (“We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation[.]”).

²²⁵ See 86 Fed. Reg. at 69,416 (citing 33 CFR 328.2(a)(1) (2014); 40 CFR 122.2 (2014); 40 CFR 230.3(s)(1) (2014)). These waters are often referred to as “traditional navigable waters.”

²²⁶ 85 Fed. Reg. at 22,280 (Apr. 21, 2020).

²²⁷ See 86 Fed. Reg. at 69,416

²²⁸ 86 Fed. Reg. at 69,416.

because they cross a state line. Accordingly, the Association recommends combining TNWs and the territorial seas provisions (but *not* all interstate waters) under a single category of waters, as this non-substantive change should help to streamline and simplify the Proposed Revision.

The Associations also recommend that the Agencies amend the definition of TNWs to reflect that: (i) historical use alone is insufficient to demonstrate navigability; and (ii) recreational uses alone do not constitute transport in interstate or foreign commerce. Our reasons for these recommendations are set forth below in sections V.a.2 and V.a.3.

1. Support combining TNWs and territorial seas as one category of WOTUS

Combining TNWs and territorial seas into a single category is logical because these two types of waters are the only types of waters that are explicitly referenced in the operative sections of the CWA. The scope of federal jurisdiction under the CWA is limited to discharges to “navigable waters,” and the only waterbodies specifically identified within the CWA’s definition of “navigable waters” are “territorial seas.”²²⁹ The definition’s other, “broad, somewhat ambiguous, but nonetheless limiting” phrase, “waters of the United States,”²³⁰ demands a degree of analysis and interpretation that justifies setting apart these two CWA-referenced water types from waters over which the Agencies are asserting jurisdiction based on their interpretation of the phrase “WOTUS.” In fact, because these two types of waters share substantially the same basis for inclusion within the Proposed Revision (*i.e.*, explicit reference in the CWA), we believe that combining these waters in one category makes the rule clearer and easier to administer.

2. Historic use alone is insufficient to demonstrate navigability or define a water as a TNW

The Agencies propose to retain the definition of TNW used in the 1986 regulations and the NWPR, which includes waters that were “used in the past” for “interstate or foreign commerce.”²³¹ Asserting jurisdiction based solely on historic use in commerce, however, obscures the intended meaning of TNWs and perpetuates an overly inclusive definition of TNWs that is inconsistent with the CWA and applicable case law. The Associations believe that a more reasonable reading of the CWA and case law affirms that a waterbody’s past use to transport goods in interstate or foreign commerce does not alone cause a waterbody to be forever classified as a TNW subject to federal jurisdiction.

Our interpretation is based on consideration of a number of different elements. To begin with, the CWA authorizes the states to administer their own Dredge and Fill Program, and references as “navigable waters:”

. . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate

²²⁹ 33 U.S.C. § 1362(7). The CWA also specifically defines “territorial seas” at 33 U.S.C. § 1362(8).

²³⁰ *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

²³¹ 86 Fed. Reg. at 69,416 (quoting 33 CFR 328.3(a)(1) (2014); 40 CFR 122.2 (2014); 40 CFR 230.3(s)(1) (2014)).

or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto. . .²³²

The Supreme Court justices agreed in *Riverside Bayview*, *SWANCC*, and *Rapanos* that this phrase in section 404(g)(1)²³³ of the Act indicated that Congress intended “navigable waters,” and therefore the section 502(7)²³⁴ definition of “navigable waters” as WOTUS, to extend federal jurisdiction to some waters that are not navigable in the traditional sense.²³⁵ The majority and minority in *SWANCC* also agreed that the CWA Dredge and Fill Program remains ambiguous “because it does not indicate precisely how far Congress considered federal jurisdiction to extend.”²³⁶ However, the conspicuous omission of “past use” from section 404(g)(1) indicates that Congress did not intend the Act to assert federal jurisdiction over waters based solely on historic use in commerce. While The Associations acknowledge that the phrase “navigable waters” in the Act reflects congressional intent to extend federal jurisdiction over some waters that are not navigable in the traditional sense, the Agencies’ discretion to interpret WOTUS to include certain non-navigable waters does not extend so far as to allow the Agencies to overlook the jurisdictional limits that Congress actually drafted into the CWA.

The Agencies similarly lack sufficient discretion to interpret “waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce,” as including purely historic uses when applied to section 502(7). The Associations are not suggesting that the Agencies are unconditionally compelled to interpret “navigable waters” in section 502(7) precisely as Congress defined that same term in section 404(g)(1). We believe the Agencies are afforded a measure of discretion in interpreting these terms; however, this discretion is limited by the “Presumption of Consistent Usage,” which states that “[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”²³⁷

The Agencies’ obligation to harmonize their interpretation of the same term in the same statute is particularly apparent here because, not only do section 502(7) and section 404(g)(1) use the same term (navigable waters), they use the term for precisely the same purpose—to define the scope of federal jurisdiction. In section 404(g)(1), Congress identified the “navigable waters” that could be administered through *state* “dredge-and-fill” permit programs and those “navigable waters” that

²³² 33 U.S.C. § 1344(g)(1).

²³³ 33 U.S.C § 1344(g)(1).

²³⁴ 33 U.S.C § 1362(7).

²³⁵ See *Riverside Bayview*, 474 U.S. at 132; *SWANCC*, 531 U.S. at 167, 171, 188-189; *Rapanos*, 547 U.S. at 731, 767-768.

²³⁶ *SWANCC*, 531 U.S. at 189.

²³⁷ Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* at 170 (2012). See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, (2000) (it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”)

must be administered through *federal* programs. Again, while Congress did not clearly delineate the “other” navigable waters that are within the jurisdictional purview of the states, it explicitly circumscribed federal jurisdiction under the CWA to those “waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.”²³⁸

It is perhaps possible that Congress intended the term “navigable waters” to have a different meaning in section 502(7), but the Proposed Revision offers no evidence of this intent—certainly not evidence sufficient to overcome the Act’s definition of the term in section 404(g)(1) or the presumption that a word or phrase should retain the same meaning throughout a text.²³⁹ Indeed, when the term “navigable waters” is viewed in light of “what Congress had in mind as its authority for enacting the CWA,”²⁴⁰ it is all the more evident that the Agencies may lack discretion to alter the definition in section 404(g)(1) to include historic use in interstate or foreign commerce.

The illogic of basing jurisdictional assertions purely on historic uses becomes more apparent and unsound when applied to other types of waters. For instance, the Agencies do not propose to assert, nor could they lawfully assert, federal jurisdiction over dry land that previously held a pond or was traversed by a stream. The same logic should apply here as well.²⁴¹

As the *SWANCC* majority noted, nothing in the CWA or its legislative history “signifies that Congress intended to exert anything more than its commerce power over navigation.”²⁴² To the extent the phrase “commerce power over navigation” is unclear, it is readily understood by looking to the CWA’s predecessor statute, the RHA, and the case law that established the test for “navigability” as the term was used in the RHA. Being the product of its era, the RHA was primarily focused on discharges of refuse that could obstruct and impede navigation, but it did for the first time make it unlawful to discharge “into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.”²⁴³ All subsequent statutory federal water pollution controls spring from these modest restrictions in the RHA.

Of significance here are the 1972 Amendments to the Federal Water Pollution Control Act (“FWPCA”),²⁴⁴ which are now referred to as the CWA. While the CWA has been amended multiple times since 1972, the FWPCA represents Congress’s initial shift from merely mandating

²³⁸ 33 U.S.C. § 1344(g)(1).

²³⁹ Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* at 170, 172 (“The presumption of consistent usage applies when different sections of an act or code are at issue.”).

²⁴⁰ *SWANCC*, 531 U.S. at 172.

²⁴¹ Moreover, as with many of the other factors and metrics that the Agencies’ broadly identify as relevant to jurisdictional determinations, the Agencies suggest no temporal limit to past use. Landowners are left to guess how far into the past these proposed inquiries into former uses must extend.

²⁴² *SWANCC*, 531 U.S. at 181 (citations omitted).

²⁴³ 33 U.S.C. § 407.

²⁴⁴ Public Law 95-217 (1977).

the control of pollutants that can obstruct shipping to prohibiting discharges of pollutants in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁴⁵ The 1972 Amendments are also significant here because they are the amendments through which Congress first applied this new pollution control regime to “navigable waters,” which it defined as “waters of the United States and the territorial seas.” Viewing the CWA in this context, it is more apparent that while the 1972 Amendments represented a “total restructuring” of Congress’s pollution reduction goals and tools, they did not completely sever the jurisdictional reach delineated by the RHA. To this day, the breadth of federal jurisdiction continues to be tethered to Congress’s authority to regulate navigable waters under the RHA and other statutes.

As the case law on the RHA and other statutes explains, federal jurisdiction over navigable waters comes from Congress’ authority under the Commerce Clause to regulate the “channels of interstate commerce” under the Commerce Clause.²⁴⁶ As noted by the Supreme Court in *SWANCC*, nothing in the CWA’s legislative history indicates that “Congress intended to exert anything more than its commerce power over navigation.”²⁴⁷ While the Supreme Court determined that, in enacting the CWA, Congress likely intended to assert jurisdiction over “at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term,”²⁴⁸ the Court “also emphasized . . . that the qualifier ‘navigable’ is not devoid of significance.”²⁴⁹

The “classical understanding” of the term “navigable” is best articulated by the Supreme Court in *The Daniel Ball v. United States* (“*The Daniel Ball*”):²⁵⁰

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.²⁵¹

²⁴⁵ 33 U.S.C. § 1251(a).

²⁴⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *See also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the “channels of interstate commerce” as one of the three areas of congressional authority under the Commerce Clause).

²⁴⁷ *SWANCC*, 531 U.S. at 168 n.3.

²⁴⁸ *Riverside Bayview*, 474 U.S. at 133; *see also SWANCC*, 531 U.S. at 167.

²⁴⁹ *Rapanos*, 547 U.S. at 731; *see also SWANCC*, 531 U.S. at 172.

²⁵⁰ *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871).

²⁵¹ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871)

Following its decision in *The Daniel Ball*, the Supreme Court delivered numerous other decisions illuminating the concept of navigability and explaining how “navigable” waters could encompass more than the navigable-in-fact waters described in *The Daniel Ball*. In 1874, the Supreme Court ruled:

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.²⁵²

In 1921, the Court clarified that a waterway need not be continuously navigable; it is navigable even if it has “occasional natural obstructions or portages” and even if it is not navigable “at all seasons . . . or at all stages of the water.”²⁵³ And, in 1926, the Supreme Court helpfully summed up its previous rulings on navigability:

The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.²⁵⁴

Later decisions by the Court further clarified that waters may be deemed navigable even if they are merely susceptible to use in the transport of, as opposed to actually used in commercial transport.²⁵⁵ Further, the Court deemed “irrelevant” to the question of navigability the fact that a water was used for hauling of animals by ranchers rather than for the transportation of “waterborne freight.”²⁵⁶ The Court said, “[t]he lake was used as a highway and that is the gist of the federal test.”²⁵⁷

While each of these decisions supply detail and nuance to the classical understanding of the term “navigable,” they are all premised on a forward-looking analysis of the present or potential use of waters for the transport of interstate or foreign commerce. None of these decisions, or the Supreme Court’s determinations of navigability therein, were predicated on a water’s prior use in

²⁵² *The Montello*, 87 U.S. 430, 441-42 (1874).

²⁵³ *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921).

²⁵⁴ *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (citations omitted).

²⁵⁵ *U.S. v. Utah*, 283 U.S. 64 (1931); see also *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

²⁵⁶ *Utah v. United States*, 403 U.S. 9, 11 (1971).

²⁵⁷ *Utah v. United States*, 403 U.S. at 11.

navigation. In most respects, the Court’s unwavering focus on present and future navigability is unsurprising because Congress’ power to regulate navigable waters is predicated on Congress’s power to regulate the *ongoing channels* of interstate and foreign commerce. This same predicate underlies the federal jurisdiction claimed by the CWA.

Given the Agencies’ stated interest in promulgating a clear, durable, and legally supportable definition of WOTUS, the Associations believe the Agencies should also reexamine the conclusions contained in the “U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, ‘Traditional Navigable Waters’” (“Appendix D”). In reexamining Appendix D, the Agencies should remain mindful of the *SWANCC* majority’s view of Congress’ “commerce power over navigation” and assert federal jurisdiction over only those waters that are actually used today to transport in interstate commerce. The Agencies should therefore also affirmatively decline to extend federal jurisdiction to waters based solely on historic transport of interstate or foreign commerce. Waters that once conveyed, but no longer convey or are capable of conveying interstate or foreign commerce are not within Congress’ present “commerce power over navigation,” and therefore do not forever remain “navigable waters” for purposes of asserting federal jurisdiction under the CWA.

This interpretation of “navigability” is not only consistent with the statute and the views of the *SWANCC* majority, it is far clearer and more administrable. Jurisdiction based on present and potential future use in commercial transport can largely be determined using widely available, easily understood, and relatively incontrovertible information—not time-consuming reviews of historic uses that are often incomplete or inconclusive.

Moreover, because the Proposed Revision’s unsupported assertion of jurisdiction over waters previously used in commercial transport appears based at least in part on Appendix D, the Associations respectfully recommend that the Agencies rescind Appendix D and any erroneous conclusions that the Agencies previously attributed to Appendix D.²⁵⁸ In lieu of Appendix D and

²⁵⁸ Appendix D also cites two appellate court decisions as part of its interpretation of navigability. Both of these cases are consistent with the Supreme Court case law and the Associations’ interpretations discussed herein. More importantly, neither of these cases stands for the proposition that “navigability” can be determined based solely on past use in commercial transport. The first case involved an interpretation of the Federal Power Act (“FPA”), which defines “navigable waters” as “those parts of streams . . . which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . .” 16 U.S.C. § 796(8). See *FPL Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002). Given the FPA’s definition of navigable waters, the Court’s decision was unsurprisingly based on a forward-looking analysis of present and potential future navigability. As the Court noted, “The question before this Court is whether the Stream, with the presence of the Union Gas Project and the flow created when there is generation, is presently navigable . . . not whether the Stream was navigable prior to the Project’s construction.” *FPL Energy*, 287 F.3d at 1156. (citations omitted). “[J]ust because a body of water has not been used for commercial use does not mean that it is not susceptible to commercial use.” *FPL Energy*, 287 F.3d at 1157. (citations omitted). The second case involved an examination of navigability in order to determine if certain waters passed to Alaska at statehood or were properly conveyed to the regional tribal corporation. *Alaska v. Ahtna*, 891 F. 2d 1401 (9th Cir. 1989). While the Court

any prior conclusions that the Agencies drew from Appendix D, the Agencies should rely directly on the Supreme Court case law cited above as the primary source for assessing their present “commerce power over navigation.”²⁵⁹

3. Recreational uses alone do not constitute transport in interstate or foreign commerce

Congress used the phrase “waters of the United States” to set a meaningful, constitutional boundary: it “is a jurisdictional element, connecting the Clean Water Act to Congresses Commerce Clause powers.”²⁶⁰ But a common-sense understanding of “recreation” cannot reasonably support federal jurisdiction. Rather, it permits the federal government to extend its reach to all manner of land and water features that have no traditional ties to navigable waters and, thus, interstate commerce. Implementing agencies could therefore cite recreational use to rationalize their assertion of jurisdiction in almost any case, commerce-related or not. Yet, “we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.”²⁶¹

As with the Agencies’ continued assertion that waters are navigable if they were ever used to transport goods in interstate or foreign commerce, the Associations believe that the Agencies should revisit their prior assertion that recreational use of a waterbody is a commercial activity sufficient to render the water navigable and establish federal jurisdiction. Recreational activities cannot reasonably be construed as the transportation of goods in interstate or foreign commerce.

None of the Supreme Court cases discussed in the previous subsection remotely suggest that a water could be deemed navigable, and therefore within federal jurisdiction, based on potential use for any vaguely commercial activity that could conceivably impact interstate or foreign commerce. In fact, in all of these cases, the Supreme Court explicitly based their determinations of navigability on the waters’ present suitability or potential future use to transport goods in interstate or foreign commerce.

So too with Appendix D; every Supreme Court case cited in Appendix D demonstrates that the Court’s navigability determinations were relegated to “highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water;”²⁶² or “customary modes of trade and travel on water;”²⁶³ waters susceptible “to use as . . . highway[s]

did in fact look at prior uses of the water, it did so in order to determine the water’s susceptibility to future commercial uses. *Alaska v. Ahtna*, 891 F.2d at 1404.

²⁵⁹ If the Agencies decline to rescind Appendix D, the Associations believe the Agencies must at least significantly amend and update Appendix D to conform to the Supreme Court’s interpretation of the commerce power over navigation that Congress intended to assert through the CWA.

²⁶⁰ *United States v. Lucero*, 989 F.3d 1088, 1095 (9th Cir. 2021).

²⁶¹ *Rapanos*, 547 U.S. at 78.

²⁶² *The Daniel Ball*, 77 U.S. at 563.

²⁶³ *The Montello*, 87 U.S. 441-42.

of commerce;”²⁶⁴ or “commercial navigation.”²⁶⁵ While it did not matter whether the “transport” consisted of a rancher bringing cattle to market or a freighter carrying hundreds of containers—every one of the Supreme Court’s tests of navigability was predicated on transport in interstate or foreign commerce.²⁶⁶

As such, as demonstrated by the same case law cited in Appendix D, there is no legal basis to regard as TNWs those waterways that are merely used in commerce rather than *used for the transportation of goods* in interstate commerce. The Associations therefore recommend that the Agencies reassess their assertion of federal jurisdiction based on the potential recreational use of waters. Not only would such an interpretation better accord with Supreme Court jurisprudence, it would also make the scope of federal jurisdiction clearer and more predictable. While the actions that constitute commercial transport can be reasonably ascertained and are generally confined to commonly-held and easily understood notions of transportation, the universe of actions that could constitute “recreation” in a jurisdictional determination are far more unpredictable.

b. The Associations urge the Agencies to refrain from including interstate waters as an independent foundational category of WOTUS

The Agencies’ Proposed Revision interprets the CWA to categorically extend federal jurisdiction over all interstate waters “regardless of their navigability.”²⁶⁷ But, as explained above, federal jurisdiction under the CWA springs from Congress’ enumerated power to regulate the channels of interstate commerce. Isolated waters and wetlands that bridge state borders are not channels of commerce, and automatically including interstate waters in the definition of WOTUS is inconsistent with the concept of navigability that “Congress had in mind as its authority for enacting the CWA.”²⁶⁸ Therefore, the Associations believe that interstate, but otherwise isolated and unconnected, waters and wetlands are properly regulated by states and tribes.²⁶⁹

The Commerce Clause authorizes Congress to regulate the “channels of interstate commerce,” the “instrumentalities of interstate commerce or persons and things in interstate commerce” and “those activities having a *substantial relation* to interstate commerce.”²⁷⁰ Waters do not acquire this commercial effect simply because they may straddle a state border. For example, many isolated waters (*i.e.*, wetlands, ponds, or swales) that cross state lines “ha[ve] nothing to do with

²⁶⁴ *U.S. v. Utah*, at 81-83.

²⁶⁵ *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. at 416.

²⁶⁶ *Utah v. United States*, 403 U.S. at 11.

²⁶⁷ 86 Fed. Reg. at 69,417, 69,418 (“[A]ll rivers, lakes, or waters that flow across or form part of, state boundaries ... need not meet the relatively permanent or significant nexus standard.... Interstate waters may be streams, lakes or ponds, or wetlands.”).

²⁶⁸ *SWANCC*, 531 U.S. at 167.

²⁶⁹ See *SWANCC*, 531 U.S. at 159, 172, 174 (declining to interpret § 404(a)’s scope to include nonnavigable, isolated, intrastate waters because such an assertion of jurisdiction would significantly impinge upon the State’s traditional and primary power over water and land use).

²⁷⁰ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

‘commerce’ or any sort any sort of economic enterprise, however broadly one might define those terms.”²⁷¹ Nor is the assertion of jurisdiction over such waters “an *essential* part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁷²

In the Proposed Revision, the Agencies assert that the statutory predecessor to the CWA - the 1948 FWPCA - “explicitly protected interstate waters independent of their navigability.”²⁷³ While the Agencies are correct insofar as the 1948 FWPCA references “interstate waters” without reference to navigability, they gloss over the fact that Congress amended the FWPCA in 1961 to encompass “interstate or navigable waters,”²⁷⁴ and amended the Act again in 1972 to bring forth the current definition of “navigable waters” as WOTUS.²⁷⁵

Thus, while a decades-old version of the CWA’s predecessor statute referenced “interstate waters,” “the version at issue here . . . is the current one – from which Congress removed any mention of [the disputed term].”²⁷⁶ “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”²⁷⁷ The “real and substantial effect” of Congress’ purposeful replacement of the Act’s references to “interstate waters” with “navigable waters,” was to define federal jurisdiction under the CWA consistent with “its commerce power over navigation.”²⁷⁸

The U.S. District Court for the Southern District of Georgia (“Southern District of Georgia”) reached the same conclusion in remanding the 2015 WOTUS Rule.²⁷⁹ The court reasoned that “the inclusion of all interstate waters in the definition of ‘waters of the United States,’ regardless of navigability, extends the Agencies’ jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA.”²⁸⁰

The Associations agree with this reasoning and therefore urge the Agencies to refrain from including interstate waters as an independent category of WOTUS irrespective of navigability. Such in interpretation impermissibly reads any notion of navigability out of the CWA. Further, absent interstate commerce, regulation of interstate waters is contrary to Congress’s intent in cooperative federalism, as discussed in detail earlier in these comments. That the waters straddle

²⁷¹ *Lopez*, 514 U.S. at 561.

²⁷² *Lopez*, 514 U.S. at 561 (emphasis added).

²⁷³ 86 Fed. Reg. at 69,417.

²⁷⁴ Pub. L. No. 87-88, 75 Stat. 204, 208 (1961).

²⁷⁵ 33 U.S.C. § 1362(7).

²⁷⁶ *Intel Corp. Inv. Policy Committee v. Sulyma*, 140 S. Ct. 768, 779 (Supreme Court 2020).

²⁷⁷ *United States v. Quality Stores, Inc.*, 572 U.S. ___, ___, 134 S.Ct. 1395, 1401, 188 L.Ed.2d 413 (2014).

²⁷⁸ *SWANCC*, 531 U.S. at 168 n.3.

²⁷⁹ *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019).

²⁸⁰ *Georgia v. Wheeler*, 418 F. Supp. 3d at 1359.

a border in no way obviates this point; indeed, many waters are regulated by interstate commissions rather than the Agencies.

c. **The Associations find the other waters category to be vague, not in keeping with the more constrained approach set out in the 1986 regulations, and legally indefensible**

The Agencies propose to codify the list of “other waters” from the 1986 regulations as a standalone category, but rather than following the 1986 regulations’ more constrained approach asserting jurisdiction based on whether the use, degradation, or destruction of “other waters” “could affect interstate or foreign commerce,” the Proposed Revision would allow for case-specific assertions of jurisdiction over “other waters” using the Agencies’ “either/or” approach to applying the “relatively permanent” or “significant nexus” standards.²⁸¹ The Associations’ concerns with the proposed “either/or” approach and the Agencies’ conception of both of the standards used in that approach are discussed in Section V.d., and need not be repeated here. Instead, the Associations herein describe certain additional concerns specifically attributable to the Agencies’ proposed “other waters” category.

In addition to the legal concerns the Associations already articulated with the proposed “either/or” approach or the standards encompassed within that approach, the “other waters” category presents unique legal concerns as well. To begin, while the Proposed Revision and the 1986 regulations offer examples of “other waters,” the universe of waterbodies and types are not so limited.²⁸² The proposed “other waters” basically consists of all other waterbody types not elsewhere categorized or excluded under the Proposed Revision.²⁸³ This indeterminate catch-all category of “other waters” may include ordinarily dry features, “fairly distant” wetlands, and myriad other waters in “relative isolation from the stream network.”²⁸⁴

Indeed, the Agencies suggest no limit to the types or functions of the waterbodies and features that may be considered “other waters.” No ordinary landowner could reasonably guess whether a feature present on their land was encompassed within the proposed “other waters” category, much less assess, for example whether its functions (alone or in conjunction with indeterminate other waterbodies within “a region”) include “storage and mitigation of peak flows, natural filtration by biochemical uptake and/or breakdown of contaminants, [or] aquifer recharge that contributes to the baseflow in downstream waters.”²⁸⁵ Nor could ordinary landowners surmise whether their “other water” was connected to distant navigable waters via, for example, “shallow subsurface connections, deeper groundwater connections, biological connections, or spillage.”²⁸⁶

²⁸¹ 86 Fed. Reg. at 69,418.

²⁸² 86 Fed. Reg. at 69,393.

²⁸³ 86 Fed. Reg. at 69,393.

²⁸⁴ 86 Fed. Reg. at 69,393.

²⁸⁵ 86 Fed. Reg. at 69,393.

²⁸⁶ 86 Fed. Reg. at 69,393.

As such, whether purposeful or not, the “other waters” category is too vague to meaningfully preclude the Agencies from asserting federal jurisdiction over any type of waterbody at all. While the ambiguity of the “other waters” category would likely provide a valuable jurisdictional hedge for the Agencies, it will be tremendously detrimental to landowners who wish to understand the jurisdictional status of their property. The “other waters” category does not federal jurisdiction to be discerned “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁸⁷ This proposed category should therefore be rescinded as void-for-vagueness.

Further, applying the “relatively permanent” standard to “other waters” allows for far more attenuated and speculative assertions of jurisdiction than other categories of water. While the Associations have concerns about the significant concerns about the jurisdictional reach that the Agencies could assert based on other categories of waters’ insubstantial and tenuous connections to navigable waters, the Agencies propose to assert federal jurisdiction over waterbodies in the “other waters” category based on no clear connection to navigable water at all. For example, the Proposed Revision would extend federal jurisdiction to any relatively permanent, standing or continuously flowing “other water” that has a continuous surface connection to a relatively permanent, *non-navigable* tributary²⁸⁸ of a *non-navigable* interstate water or wetland.²⁸⁹ This application of the “relatively permanent” test cannot be reconciled with the *Rapanos* plurality’s requirement that “a relatively permanent body of water [be] connected to traditional interstate navigable waters.”²⁹⁰

Determining jurisdiction over “other waters” is also problematic under the Agencies’ proposed “significant nexus” test. Setting aside the inapplicability of that test for anything other than wetlands, the specific applicability of the “significant nexus” test to “other waters” runs afoul of *SWANCC* because it would allow jurisdiction to be asserted over the same isolated, intrastate, non-navigable ponds that the *SWANCC* majority expressly held to be outside of federal jurisdiction.²⁹¹

For instance, in the context of offering “generalizations” about the functions this indeterminate class of “other waters” can provide to downstream waters, the Proposed Revision asserts that isolated “other waters” can provide these functions even without a connection to downstream waters.²⁹² In fact, the Proposed Revision suggests that isolated “other waters” provide functional benefits to downstream waters *because* of their lack of a connection to those waters.

Sometimes it is their relative isolation from the stream network (*e.g.*, lack of a hydrologic surface connection) that contributes to the important effect that they have downstream; for example, depression non-floodplain wetlands lacking

²⁸⁷ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

²⁸⁸ (a)(5)(i) water.

²⁸⁹ 86 Fed. Reg. at 69,449-50 (proposed 33 C.F.R. § 328.3(a)(3)(i) & 40 C.F.R. § 120.2(a)(3)(i)).

²⁹⁰ *Rapanos*, 547 U.S. at 742.

²⁹¹ *See SWANCC*, 531 U.S. at 168 & 174.

²⁹² 86 Fed. Reg. at 69,393 (emphasis added).

surface outlets can function individually and cumulatively to retain and transform nutrients, retain sediment, **provide habitat**, and reduce or attenuate downstream flooding, depending on site-specific conditions such as landscape characteristics (*e.g.*, slope of the terrain, permeability of the soils).²⁹³

Thus, the Agencies' proposed approach to "other waters" would seemingly allow them to assert jurisdiction over unconnected and isolated waters based on ecological functions wholly within the isolated waterbody, including "provid[ing] habitat."²⁹⁴ This is the exact same jurisdictional claim the Corps asserted in the Migratory Bird Rule, which the Supreme Court flatly rejected in *SWANCC*. According to the *SWANCC* majority, asserting jurisdiction over these isolated ponds would effectively read the term "navigable" out of the Act and strip it of any independent significance.²⁹⁵

The *SWANCC* holding was not based on consideration of ecological factors; the *SWANCC* majority judged these ponds to be outside of federal jurisdiction based solely on their lack of proximity to navigable waters.²⁹⁶ Nor was the *SWANCC* holding based on a particular type of waterbody or the specific Migratory Bird Rule on which the Corps relied to assert jurisdiction. The *SWANCC* majority ruled the way they did based on the large distance between the waterbodies in question and navigable waters, which the majority judged to be more than sufficient to show a lack of connection. Thus, the *SWANCC* decision fully precludes the Agencies from asserting jurisdiction over "other waters" in the manner contemplated in the Agencies' proposed "significant nexus" standard.

Further, even setting aside the relevance of distance to the *SWANCC* decision, the Agencies' proposed "significant nexus" test is impermissibly vague and incapable of precise and consistent delineation. It would also allow federal jurisdiction to be asserted for more expansively than Congress allowed in the CWA. Indeed, the Agencies propose to claim jurisdiction over "other waters" that alone, or in combination with similarly situated waters, significantly affect chemical, physical, or biological integrity of commerce waters, interstate waters, or territorial seas. Yet, as elsewhere discussed in these comments, the Proposed Revision provides no reasonable basis to determine when waters are "similarly situated," or "in the region," or when they exhibit ecological functions that may significantly affect "other waters." Absent objective standards and clear limits for these key factors, the Agencies ability to contrive an assertion of federal jurisdiction appears to be unbounded – particularly as applied to the catch-all "other waters" category. The CWA simply cannot be interpreted to permit such a broad, subjective, and malleable framework for asserting federal jurisdiction.

²⁹³ 86 Fed. Reg. at 69,393.

²⁹⁴ 86 Fed. Reg. at 69,393.

²⁹⁵ *SWANCC*, 531 U.S. at 172.

²⁹⁶ *SWANCC*, 531 U.S. at 174.

Thus, the application of the proposed “significant nexus” test to the “other waters” category presents the very same “significant constitutional [and federalism] questions” that the Supreme Court warned about in *SWANCC*.²⁹⁷ On this fact alone, the Agencies should rescind the “other waters” category.

d. The Associations broadly support the Proposed Revision’s inclusion of impoundments as a stand-alone category of WOTUS, but we recommend that the Agencies clarify and limit the scope of this category

The Associations broadly support the Proposed Revision’s inclusion of impoundments as a stand-alone category of WOTUS, but we recommend that the Agencies clarify and limit the scope of this category. The Associations believe these recommendations are necessary because, absent a sufficiently clear definition, many different types of structures and features are susceptible to being improperly construed as “impoundments” subject to federal jurisdiction. Therefore, the Associations recommend that the Agencies define “impoundments” as jurisdictional waters whose movement has been impeded either in whole or in part by a man-made structure, such as a berm, dam, dike, or other earthwork, not subject to the waste treatment exclusion (or other exclusion which might be written into the rule, such as for artificial lagoons and ponds). A reasonably clear and consistent definition of “impoundments” is particularly important in the context of the Proposed Revision because the Agencies propose to assert jurisdiction over impoundments of tributaries and wetlands adjacent to impoundments.²⁹⁸

The Associations do not agree that the existence of an impoundment, in and of itself, provides a basis for asserting jurisdiction over an otherwise non-jurisdictional waterbody. The Proposed Revision, however, would appear to assert jurisdiction in this manner.

For instance, the proposed definition of “tributaries” that fall within federal jurisdiction appears to include “relatively permanent, standing, or continuously flowing” tributaries to impoundments.²⁹⁹ Under such an interpretation, a relatively permanent tributary that would not otherwise be subject to federal jurisdiction because it does not connect to TNW or the territorial seas would be subject to federal jurisdiction simply because it is impounded. And because the Proposed Revision would assert federal jurisdiction over wetlands adjacent to tributaries and impoundments that do not connect to TNWs,³⁰⁰ the Proposed Revision appears to allow the Agencies to assert federal jurisdiction over unconnected wetlands as well.

Neither of these jurisdictional assertions is based on any connection with, or relationship to TNWs or the territorial seas. Rather, the Agencies appear to propose to assert jurisdiction based solely

²⁹⁷ *SWANCC*, 531 U.S. at 172, 174.

²⁹⁸ 86 Fed. Reg. at 69,240.

²⁹⁹ See proposed text of 40 C.F.R. § 120.2(a)(4) and (a)(5)(i) at 86 Fed. Reg. 69,450.

³⁰⁰ See proposed text of 40 C.F.R. § 120.2(a)(4) and (a)(7)(ii) at 86 Fed. Reg. 69,450.

on the presence of a relatively permanent impoundment. No credible reading of the CWA or the applicable case law supports the Agencies' assertion of jurisdiction in this context.

While the various Supreme Court justices have rarely articulated the same threshold for determining when to extend federal jurisdiction to non-navigable water, every justice who has rendered an opinion in one of the WOTUS cases has understood that the extension of federal jurisdiction from navigable waters to non-navigable waters is based on the potential for movement of water (and pollution) from the non-navigable water to the navigable water. No justice has suggested that non-navigable waters can be brought under federal jurisdiction because non-navigable waters may be polluted by WOTUS.

Moreover, in addition to being generally inconsistent with the CWA and the entire body of Supreme Court jurisprudence on WOTUS, this interpretation is specifically and expressly controverted by the plurality opinion in *Rapanos*, which supplies the “relatively permanent standard” the Agencies purport to reference in these provisions. The *Rapanos* plurality did not suggest that the CWA provided the federal government jurisdiction over all “relatively permanent, standing, or continuously flowing” waters. Rather, the *Rapanos* plurality stated that an otherwise non-jurisdictional water could become jurisdictional only if its connection to a TNW was “relatively permanent, standing, or continuously flowing.”³⁰¹ Indeed, “an intermittent, physically remote hydrologic connection” to TNWs is not even sufficient under either *Riverside Bayview* or *SWANCC*.³⁰²

The Agencies seemingly recognized the essentiality of asserting jurisdiction based on some connection to TNWs, as least with respect to “other waters,” which they exclude from the categories of waters that are subject to federal jurisdiction when impounded.³⁰³ The same reasoning applies to the tributaries and wetlands described above. Absent a sufficient connection to TNWs or the territorial seas; tributaries, adjacent wetlands, and “other waters” are not subject to federal jurisdiction and do not become so when impounded.

Therefore, while the Associations generally support including impoundments as a category of WOTUS (if clearly defined), that category cannot include waters lacking a sufficient connection to TNWs or the territorial seas. That is an impermissible construction of the CWA and applicable Supreme Court jurisprudence. We therefore strongly urge the Agencies to rescind the proposed “impoundments” category or significantly revise its scope.

³⁰¹ *Rapanos*, 547 U.S. at 742.

³⁰² *Rapanos*, 547 U.S. at 742.

³⁰³ 86 Fed. Reg. at 69,420.

- e. **The Associations find that the proposed “either/or” approach for determining a tributary is flawed and the proposed analysis of tributaries’ “reach” is inconsistent, unworkable, and impermissibly expansive; and we recommend the Agencies reconsider its current proposed approach with a definition of a tributary in keeping with Supreme Court guideposts**

As with other categories of waters identified in the Proposed Revision, the Agencies propose to establish jurisdiction over tributaries of traditional navigable waters, impoundments, and territorial seas under the “either/or” approach that allows the Agencies to assert jurisdiction under the Agencies’ versions of either the “relatively permanent” standard or the significant nexus standard. The Associations’ concerns with the proposed “either/or” approach and the Agencies’ conception of both of the standards used in that approach are discussed in Section IV, and need not be repeated here.

Instead, the Associations herein explain why the Agencies cannot reasonably assert jurisdiction over tributaries that they seem incapable of defining. We also discuss our concerns with the inconsistent and expansive way the Proposed Revision analyzes tributaries’ “reach” for purposes of asserting jurisdiction.

1. **The Agencies must define “tributaries”**

Given the expansive scope of federal jurisdiction the Agencies propose to assert over tributaries themselves, as well as wetlands, impoundments, and “other waters” based on their relation to tributaries, it is inexplicable that “the agencies are not proposing a definition in this rule.”³⁰⁴ More so, given the Agencies’ explanation that a regulatory definition of “tributaries” is not necessary because “the agencies have decades of experience implementing the 1986 regulations,”³⁰⁵ which also contain no definition of “tributaries.”

One would presume that the Agencies’ decades of experience asserting jurisdiction over, and regulating, tributaries would allow them to readily draft a regulatory definition that could be used in a rulemaking as important as this one. The Agencies’ decision to refrain from providing a regulatory definition for a waterbody they claim “decades of experience” defining therefore implies that the Agencies’ already have a conception of the term “tributary” that they are simply withholding from this rulemaking.

Rather than belabor the important practical and legal consequences of notice-and-comment rulemaking under the APA, we simply note the undeniable impermissibility of shielding key regulatory definitions from a rulemaking such as this. If the Agencies have a definition of “tributaries” that they intend to utilize to assert jurisdiction pursuant to this Proposed Revision, they are compelled to provide it. And if the Agencies have no single fixed definition of the

³⁰⁴ 86 Fed. Reg. at 69,422.

³⁰⁵ 86 Fed. Reg. at 69,422.

tributaries over which they intend to assert jurisdiction through this Proposed Revision, they are obligated to say so.

The Associations recognize that the Agencies' previous attempts to provide a regulatory definition for "tributaries" have drawn significant challenges in regulatory and legal proceedings, but the prospect of critiques or divergent opinions remains a poor justification for refraining from defining a term that is central to this rulemaking, each prior effort to define WOTUS, and multiple Supreme Court decisions examining WOTUS.

The present absence of a definition of "tributary" from the Agencies proposal to assert federal jurisdiction over and regulate tributaries is precisely the type of claim of standardless discretion that offends the void-for-vagueness doctrine. Moreover, providing a definition of "tributary" is all the more urgent given the Agencies' proposed assertion of jurisdiction over ephemeral waters. Delineation between a land feature and a tributary therefore becomes essential to determining jurisdiction. At a minimum, a tributary should be defined, as it was in previous rules, by its bed, banks, and ordinary high water mark.

To be sure, the Associations and many others opposed the definition of "tributaries" that the Agencies promulgated in the 2015 WOTUS Rule because we viewed it as unworkable and impermissibly vague. But allowing tributaries to remain undefined in the Proposed Revision will only serve to make the Agencies' jurisdictional determinations over tributaries more vague and impermissible. Leaving "tributaries" undefined is certainly not a tactic in service to a durable definition of WOTUS.

2. The proposed analysis of tributaries' "reach" is inconsistent, unworkable, and impermissibly expansive

Under the Proposed Revision, an as-yet undefined tributary includes "the entire reach of the stream that is of the same order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." ³⁰⁶ The Agencies propose to apply this approach to tributaries in both the "relatively permanent" standard and "significant nexus" standard.

Under the proposed "significant nexus" standard, Agencies could extend federal jurisdiction far upstream in a tributary or series of interconnected tributaries simply because those upstream portions are part of the same overall waterway or stream network, the downstream reach of which formed a confluence that the Agencies determined to have a "significant nexus" to a traditionally navigable water, interstate water, or territorial sea. ³⁰⁷ As such, the Agencies propose to assert jurisdiction of these uppermost reaches of potentially distinct waterbodies in a stream network irrespective of whether they are independently assessed to have the necessary nexus to navigable waters. Instead, the Agencies propose to improperly presume jurisdiction over the uppermost

³⁰⁶ 86 Fed. Reg. at 69,435 (relatively permanent); 86 Fed. Reg. at 69,437 (significant nexus).

³⁰⁷ 86 Fed. Reg. at 69,437.

reaches of a tributary's entire stream network based solely of a significant nexus determination focused on the maximum flow associated with the lowermost reach of a single tributary. Presuming federal jurisdiction extends well into the vanishingly small headwaters of every water system without any consideration of the "significant nexus" between those uppermost reaches and TNWs is inconsistent with Justice Kennedy's concurrence, directly controverted by the *Rapanos* plurality, and at odds with the text and structure of the Act.

Application of the Agencies' proposed reach analysis to the "relatively permanent standard" is similarly problematic. In the context of the "relatively permanent" standard, if the downstream point of confluence is determined to be unrepresentative of the entire reach of the tributary, the "flow regime that best characterizes the entire tributary [will be] used."³⁰⁸ Other than identifying the relative lengths of segments with differing flow regimes as "[a] primary factor" in characterizing the flow of an entire tributary, the Proposed Revision offers no guidance on how this assessment would be accomplished.³⁰⁹ Thus, here again, the Proposed Revision's lack of any objective, measurable criteria provides landowners no reasonable basis for discerning which waters are subject to federal jurisdiction and regulation.

This proposed "reach" analysis finds no purchase under either the *Rapanos* plurality opinion or Justice Kennedy's concurrence because the Agencies propose to assert jurisdiction over these uppermost reaches of an unlimited daisy chain of waters in a stream system irrespective of whether those different segments or streams share a relatively permanent surface connection to navigable waters and without ever examining whether those reaches share a significant nexus with navigable waters. Justice Kennedy categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a significant nexus.³¹⁰ Indeed, the "intermittent, physically remote connection" to navigable waters allowed for under this proposed "reach" analysis would not be sufficient even under either *Riverside Bayview* or *SWANCC*.³¹¹

Moreover, the proposed "reach" approach is as unworkable as it is unlawful. Consider, for instance, how a project proponent would attempt to conduct a reach analysis to determine whether a tributary is subject to federal regulation. In many cases, the reach-wide analysis will extend well beyond the limits of a project area, but because the Agencies' proposed "reach" analysis does not make any distinction between lands that a project proponent owns or has access to, conducting the analysis will require a proponent to obtain and document detailed information about the entire reach of an attenuated stream network that may stretch for many miles downstream and upstream from the project, as well as all adjacent wetlands—which may not be owned by or accessible to the proponent.

³⁰⁸ 86 Fed. Reg. at 69,435.

³⁰⁹ 86 Fed. Reg. at 69,435.

³¹⁰ *Rapanos*, 547 U.S. at 781.

³¹¹ *Rapanos*, 547 U.S. at 742.

Requiring an analysis of this scale and complexity for the entire reach of the stream networks for as many as 1,000 different waters is plainly unreasonable, particularly because the reach analysis is not intended to identify those portions of a tributary that share a jurisdictionally sufficient connection to navigable waters. The intent of this proposed “reach” analysis is to evaluate how far the Agencies can extend federal jurisdiction irrespective of whether the furthest reaches share the requisite connection to navigable waters. The Associations therefore urge the Agencies to rescind this proposed “reach” analysis.

3. The Agencies’ request for comment on interpreting “relatively permanent” consistent with the NWPR’s approach

While the Associations have already extensively discussed the “relatively permanent” standard, we herein add one brief additional response to the Agencies’ request for comment whether they should interpret “relatively permanent” to include *all* perennial and intermittent tributaries, and use the NWPR’s approach to the terms “perennial” and “intermittent” or modified definitions of those terms.³¹² We do not agree with this alternative approach.

The Associations supported the NWPR’s overall approach to defining and asserting federal jurisdiction over tributaries with perennial or intermittent surface flows to navigable waters. We did so, however, not because we viewed the approach as the most direct application of the *Rapanos* plurality opinion, but because we believed it reasonably balanced the plurality’s views with important elements of Justice Kennedy’s concurrence.

More specifically, the Associations found that the NWPR approach to tributaries maintained consistency with the plurality position and Justice Kennedy’s concurrence by adopting the commonalities in the Justices’ positions and focusing on substantial flows of waters that create non-speculative connections to waters under federal jurisdiction. From the guideposts furnished by the *Rapanos* plurality, the rule adopted a requirement that tributaries must have relatively permanent surface connections to WOTUS in order for the tributaries themselves to be defined as WOTUS. At the same time, it reflected cognizance of Justice Kennedy’s concern that under the plurality’s view, “[t]he merest trickle, if continuous, would count as a “water” subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.”³¹³

In recognizing the commonalities found in the *Rapanos* plurality and concurrence opinions, the NWPR did not require that tributaries’ connections to WOTUS be constant or continuous. Rather, under the NWPR, federal jurisdiction would extend to a tributary if its surface connection to WOTUS is at least perennial or intermittent.

³¹² 86 Fed. Reg. at 69,436.

³¹³ *Rapanos*, 547 U.S. at 769.

In our view, the NWPR properly excluded ephemeral flows from the definition of tributaries, and by doing so, reflected the *Rapanos* plurality's decision not to define as "tributaries" those "ordinarily dry channels through which water occasionally or intermittently flows."³¹⁴ Because the NWPR attempted to maintain a level of consistency with Justice Kennedy's views, however, it did not go as far as the *Rapanos* plurality in limiting the definition of tributaries to "continuously present, fixed bodies of water."³¹⁵ As such, some of the "typically dry" features discussed by the *Rapanos* plurality may be deemed WOTUS under the NWPR.³¹⁶

The NWPR also departed from Justice Kennedy's concurrence to some degree in that it limits federal jurisdiction to only those tributaries with at least seasonal surface flow to WOTUS. Yet, both the NWPR and Justice Kennedy's concurrence shared the key principle that federal jurisdiction can extend to non-navigable waters only when those waters share substantial and non-speculative connections to WOTUS. Indeed, while they differ in their means, the NWPR and Justice Kennedy's concurrence serve to distinguish those connections that are remote, speculative, or insubstantial³¹⁷ from those connections that create a "significant nexus"³¹⁸ with WOTUS.

Importantly, the Associations still support the NWPR's approach to tributaries, but not in the context suggested by the Agencies in the Proposed Revision. The Agencies suggest the NWPR's approach to tributaries could inform its "relatively permanent" standard, which it proposes to use alongside the "significant nexus" standard under the Agencies' proposed "either/or" approach to asserting jurisdiction.³¹⁹ But, as explained above, the NWPR's approach to tributaries already incorporates key aspects of both the *Rapanos* plurality and Justice Kennedy's concurrence.

Thus, the NWPR addressed tributaries through a singular approach based on both the "relatively permanent" and "significant nexus" standards. It is therefore not an appropriate replacement of just one of the standards in the Proposed Revision's impermissible "either/or" approach.

- f. **The Associations recommend that, in order to categorically assert federal jurisdiction over wetlands adjacent to navigable waters, the Agencies must interpret "adjacent" to mean adjoining or abutting. The Associations recommend discarding the "either/or" approach to asserting jurisdiction over wetlands adjacent to impoundments and tributaries, as the approach is impermissibly expansive and substantively unworkable**

The Proposed Revision would maintain "adjacent wetlands" as a discrete category within the Agencies' proposed definition of WOTUS,³²⁰ but the manner through which the Agencies would

³¹⁴ *Rapanos*, 547 U.S. at 733.

³¹⁵ *Rapanos*, 547 U.S. at 733.

³¹⁶ *Rapanos*, 547 U.S. at 727.

³¹⁷ *Rapanos*, 547 U.S. at 780-81.

³¹⁸ *Rapanos*, 547 U.S. at 759.

³¹⁹ 86 Fed. Reg. at 69,436.

³²⁰ 40 C.F.R. § 120.2(a)(7)

assert federal jurisdiction over adjacent wetlands is new, legally suspect, and far too nebulous to reasonably ascertain the jurisdictional status of many wetlands.³²¹ In particular, the Proposed Revision would assert jurisdiction over wetlands “adjacent” to: (i) traditional navigable waters, interstate waters, or territorial seas; (ii) relatively permanent, standing, or continuously flowing impoundments or tributaries with a continuous surface connection to such waters; or (iii) impoundments or tributaries if the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of so-called “foundational waters,” *i.e.*, traditional navigable waters, interstate waters (which includes interstate wetlands), or the territorial seas.³²²

Thus, the Agencies propose to extend federal jurisdiction to wetlands based on their adjacency to each of the categories of waterbodies identified in the Proposed Revision except the “other waters” category.³²³ Under the Proposal, wetlands adjacent to “other waters” would need to be assessed under the “other waters” category to determine if they meet the Agencies’ proposed versions of the “relatively permanent” or “significant nexus” standards, instead of as adjacent wetlands under proposed 40 C.F.R. § 120.2(a)(7).

1. Wetlands adjacent to traditional navigable waters, interstate waters, or territorial seas

The Agencies propose to assert jurisdiction over wetlands adjacent to traditional navigable waters, interstate waters, and territorial seas without need for further assessment.³²⁴ The Associations agree that wetlands directly abutting traditional navigable waters and the territorial seas are plainly within federal jurisdiction. Congress specifically identified “wetlands adjacent thereto” as navigable waters within federal jurisdiction under section 404(g)(1) of the Act, and in *Riverside Bayview*, a unanimous Supreme Court agreed that the Agencies were entitled to interpret WOTUS to include adjacent wetlands. Because the CWA’s definition of “navigable waters” includes territorial seas,³²⁵ wetlands abutting territorial seas are within federal jurisdiction as well.³²⁶

While Supreme Court case law permits the Agencies to assert jurisdiction over wetlands “adjacent” to navigable waters, that jurisdictional reach is based on the ordinary meaning of “adjacent” that

³²¹ 86 Fed. Reg. at 69,422.

³²² 86 Fed. Reg. at 69,450.

³²³ 40 C.F.R. § 120.2(a)(3)

³²⁴ 86 Fed. Reg. at 69,422.

³²⁵ 33 U.S.C. § 1362(7).

³²⁶ The Associations do not agree, however, that wetlands adjacent to interstate waters automatically fall under federal jurisdiction. As explained in Section V.b. above, interstate waters (or interstate wetlands) are not per se subject to federal jurisdiction simply because they are present in more than one state. Federal jurisdiction under the CWA springs from Congress’ authority to regulate the channels of interstate and foreign commerce, and isolated waters and wetlands that bridge state borders are not channels of commerce. As such, federal jurisdiction over interstate waters, wetlands adjacent to interstate waters, and interstate wetlands can only be established by assessing the sufficiency of their navigability or connection to navigable waters.

the Court used in *Riverside Bayview*, *SWANCC*, and *Rapanos*. The Court in *Riverside Bayview*, for example, described “wetlands adjacent to [jurisdictional] bodies of water” as wetlands “adjoining” and “actually abut[ting] on” a traditional “navigable waterway.”³²⁷ Jurisdictional adjacent wetlands thus are those “inseparably bound up with the ‘waters’ of the United States” and not meaningfully distinguishable from them.³²⁸

For the same reason, the Court in *SWANCC* rejected the Agencies’ assertion of jurisdiction over isolated non-navigable waters “that [we]re not adjacent to open water” and thus not “inseparably bound up” with “navigable waters.”³²⁹ *Rapanos* continued this plain-language approach to adjacency. As the Sixth Circuit explained, *Rapanos* stands for the proposition that, regardless whether the word adjacent may be “ambiguous . . . in the abstract,” it clearly includes “‘physically abutting’” and not “‘merely ‘near-by.’”³³⁰

Notwithstanding the Supreme Court’s consistent view that adjacent wetlands are categorically within federal jurisdiction when they actually abut a navigable water, the Agencies propose to delete the NWPR’s requirement that “adjacent wetlands” actually abut navigable waters.³³¹ In place of this the NWPR’s commonly understood definition of adjacency, the Agencies propose to reinstate the 1986 regulations’ definition of “adjacent,” which reads:

The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.³³²

As applied to navigable waters, this definition of “adjacent” represents a significant departure from the Supreme Court’s view that wetlands are “inseparably bound up” with “navigable waters,”³³³ and therefore categorically within federal jurisdiction, only when the wetlands actually adjoin the navigable waters. Wetlands that are merely neighboring, or proximate to, navigable waters do not implicate the same problematic question of where open water ends and dry land begins that the Court contended with in *Riverside Bayview*.³³⁴ These line-drawing concerns are also not implicated when wetlands are physically separated from navigable waters.

Thus, in order to categorically assert federal jurisdiction over wetlands adjacent to navigable waters, the Agencies must interpret “adjacent,” to mean adjoining or abutting. If the Agencies persist in interpreting “adjacent wetland” to include neighboring or physically separated wetlands,

³²⁷ *Riverside Bayview*, 474 U.S. at 135 & n.9.

³²⁸ *Riverside Bayview*, 474 U.S. at 134-35 & n.9.

³²⁹ *SWANCC*, 531 U.S. at 167-68, 171.

³³⁰ *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (quoting *Rapanos*, 547 U.S. at 748 (plurality)).

³³¹ 86 Fed. Reg. at 69,423.

³³² 86 Fed. Reg. at 69,450.

³³³ *SWANCC*, 531 U.S. at 167-68, 171.

³³⁴ *Riverside Bayview*, 474 U.S. at 134-35 & n.9.

then federal jurisdiction will not extend to those wetlands unless the Agencies assess and establish a sufficient connection between those wetlands and navigable waters.³³⁵

2. Wetlands adjacent to impoundments and tributaries

While the Proposed Revision’s definition of “adjacent” for purposes of establishing jurisdiction over wetlands to navigable waters is problematic, the means by which the Agencies propose to assert jurisdiction over wetlands adjacent to impoundments and tributaries is plainly impermissible and substantively unworkable. Unlike the definition of “adjacent” that the Agencies proposed to use to establish jurisdiction over wetlands adjacent to navigable waters, the Agencies propose to determine whether wetlands are adjacent to impoundments and tributaries by assessing the wetlands’ connections to those waterbodies using either the “relatively permanent” standard and the “significant nexus” standard.³³⁶

Using the “relatively permanent” approach, the Agencies propose to establish that wetlands are “adjacent” if one of three criteria is satisfied: (i) there is an unbroken surface or shallow subsurface connection to jurisdictional waters and at least an intermittent hydrologic connection; (ii) wetlands are physically separated only by man-made dikes or barriers or natural breaks; or (iii) proximity to a WOTUS is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.³³⁷

To establish whether a wetland is “adjacent” to an impoundment or tributary under the significant nexus approach, the Agencies will consider the flow and functions of the impoundment or tributary³³⁸ “together with the functions performed by *all the wetlands* adjacent”³³⁹ to any part of the full reach of the stream network in evaluating whether a significant nexus is present.

In the subsections below, the Associations explain our specific concerns with the Agencies’ proposed “relatively permanent” and “significant nexus” approaches to determining whether

³³⁵ The Agencies’ overbroad conception of “adjacent” is particularly problematic as applied to wetlands adjacent to “other waters.” The Proposed Revision suggests that wetlands adjacent to “other waters” should be considered under the proposed “other waters” category. 86 Fed. Reg. at 69,423. Such an application greatly compounds the Agencies’ already specious proposed basis for asserting federal jurisdiction. The Agencies already propose to assert jurisdiction over an indeterminate number of “other waters” without adequate consideration of the substantiality of their connection to TNWs. Applying the Agencies’ overbroad definition of “adjacent,” to wetlands adjacent to “other waters,” the Agencies could then assert federal jurisdiction over wetlands that may only be roughly proximate to these otherwise isolated and insufficiently connected “other waters.” Thus, in addition to changing their interpretation of “adjacent,” to mean adjoining or abutting, the Agencies should also reconsider whether wetlands adjacent to “other waters” should be assessed under the proposed “other waters” category.

³³⁶ 86 Fed. Reg. at 69,423.

³³⁷ 86 Fed. Reg. at 69,435.

³³⁸ At least for tributaries, the Agencies must first establish the relevant reach of the tributary. 86 Fed. Reg. at 69,437. See discussion of tributaries in Section V.e.

³³⁹ 86 Fed. Reg. at 69,423 (emphasis added).

wetlands are “adjacent” to impoundments and tributaries. Importantly, these concerns are in addition to our previously stated concerns with related aspects of the Proposed Revision.

For one, the “either/or” application of the “relatively permanent” and “significant nexus” standards is an improper application of the *Rapanos* decision. For another, neither the *Rapanos* plurality nor Justice Kennedy would apply their asserted standards to establish whether a wetland is jurisdictional based on its adjacency to a tributary or impoundment alone. As such, both of the approaches below impermissibly depart from the ordinary notion of “adjacency” that the Supreme Court requires. Moreover, even if a wetland could become jurisdictional by establishing its connections to jurisdictional waters under the approaches below, the profound flaws in the Proposed Revision’s manner of establishing jurisdiction over tributaries and impoundments calls into question whether these waterbodies are, in fact, jurisdictional.

Finally, while the metrics and factors that the Agencies propose to apply when assessing their jurisdictional reach are profoundly unclear and wholly insufficient, the Associations are concerned that none of these key factors are defined or explained in the proposed regulatory text itself. As such, even if these factors were sufficiently described and explained, they are of limited utility unless they are codified within the regulatory text. Preamble language can be helpful to understand the meaning of an uncertain regulatory term or provision, but it is not a substitute for regulatory text, and should not be relied upon in lieu of codification. The clarity and consistency, and therefore the legality and durability of jurisdictional determinations requires the Agencies to clearly spell out in regulatory text all the elements needed to assess federal jurisdiction under the CWA.

i. Determining adjacency under the “relatively permanent” standard

As previously explained, the “relatively permanent” standard described by the Agencies profoundly misreads the plurality opinion in *Rapanos* and is thus misapplied wherever it appears in the Proposed Revision. Its misapplication to determining the jurisdictional status of adjacent wetlands is no different.

Because the Agencies have essentially ignored the “continuous surface connection” requirement for adjacent wetlands, the Proposed Revision asserts CWA jurisdiction over far more lands and waters than the plurality opinion would have countenanced. For the plurality, a “continuous surface connection” is one where it is “difficult to determine where the ‘waters’ ends and the ‘wetland’ begins.”³⁴⁰ The plurality contrasted this description of a jurisdictional wetland with those having “only an intermittent, physically remote hydrologic connection to ‘waters of the United States,’” and “lack the necessary connection to covered waters that we described as a ‘significant nexus’ in *SWANCC*.”³⁴¹

³⁴⁰ *Rapanos*, 547 U.S. at 742 (plurality opinion).

³⁴¹ *Rapanos*, 547 U.S. at 742 (plurality opinion).

Yet, in direct contradiction to the plurality’s language, the Agencies now propose to assert jurisdiction over wetlands with only *intermittent* shallow subsurface connections to waterbodies other than TNWs.³⁴² The Agencies also would assert jurisdiction over wetlands that, because of their “reasonably close” proximity to a jurisdictional water, “support[] the science-based inference that such wetlands have an ecological connection with jurisdictional waters.”³⁴³ That the word “continuous” is conspicuously absent from this discussion demonstrates that these criteria and new tests for “adjacency” are not rooted in *Rapanos*.

The Proposed Revision also suffers from vagueness issues that may create significant implementation challenges. How will the Agencies implement these criteria in practice, especially when they do not define key phrases and concepts, like “unbroken . . . shallow subsurface connection”? The Agencies also do not provide criteria or guidelines for distinguishing such connections from groundwater³⁴⁴. Given the ubiquitous presence and complex nature of subsurface hydrological connections, and their importance in the Proposed Revision’s regulatory framework, the Agencies should define, or at least provide a detailed clarification of, what it means by “subsurface hydrological connections” and “ecological interconnection.” The terms in these criteria lack clarity and thus it is likely individual regulators will identify adjacent wetlands inconsistently.

As it is presently constructed, however, the Proposed Revision’s assertion of jurisdiction over adjacent wetlands with only “maybe intermittent” hydrological connections comes perilously close to the “any hydrological test” that the plurality and Justice Kennedy rejected in *Rapanos*. The Associations therefore urge the Agencies to reconsider the use of these vague and undefined terms and propose new guidance that is true to the plurality’s “relatively permanent” standard.

ii. *Determining adjacency under the “significant nexus” standard*

The Associations have already explained in great detail that the Proposed Revision’s construal of the “significant nexus” standard profoundly misapplies the test Justice Kennedy described. The variant of the “significant test” that the Agencies espouse in the Proposed Revision is indefensibly atextual, wholly unmoored from the context in which it was first used, implausibly overreaching, and unconstitutionally vague.

Moreover, as particularly relevant here, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any traditional navigable water or interstate feature, the Proposed Revision directly contravenes Justice Kennedy’s *Rapanos* concurrence. Justice Kennedy rejected the idea that a wetland’s mere adjacency to a tributary could be “the determinative measure” of whether it was “likely to play an important role in the integrity of an

³⁴² See 86 Fed. Reg. at 69,435.

³⁴³ See 86 Fed. Reg. at 69,435.

³⁴⁴ Nor have the Agencies expressly excluded groundwater from federal jurisdiction, even though groundwater regulation is plainly within the sole purview of states and tribes.

aquatic system comprising navigable waters as traditionally understood.”³⁴⁵ “[W]etlands adjacent to [such] tributaries,” Justice Kennedy explained, “might appear little more related to navigable-in-fact waters than were the isolated ponds [*in SWANCC*].”³⁴⁶ On that understanding, Justice Kennedy voted to vacate the Agencies’ assertion of jurisdiction over wetlands supposedly “adjacent” to a ditch that indirectly fed into a navigable lake.³⁴⁷

In Justice Kennedy’s view, “mere adjacency to a tributary of this sort is insufficient.”³⁴⁸ Similarly, Justice Kennedy disagreed with the assertion of jurisdiction over wetlands based on a mere surface water connection to a non-navigable tributary; some greater “measure of the significance of the connection for downstream water quality” was required.³⁴⁹

Yet the Agencies propose to adopt precisely this disfavored approach. Indeed, they propose to take it further. Rather than establishing jurisdiction based on the significance of the connection between the jurisdictional water and the wetland under review, the Agencies propose to establish jurisdiction over individual wetlands using the aggregate significance of all wetlands and other waterbodies within some broad but indeterminate area.³⁵⁰

As previously noted, the Agencies have not bounded or limited this proposed aggregation. There is no outer limit of distance, number of waters, or scattered distribution of waters beyond which a water could reasonably be excluded from this aggregated analysis. Such vaguely described standards and malleable standards are the hallmark of arbitrary and capricious rulemaking. Setting aside the obvious unworkability of this opaque and unbounded approach, however, it also bears noting that the Agencies’ proposed “significant nexus” test is not even remotely similar to Justice Kennedy’s “significant nexus” test.

Justice Kennedy’s concurrence neither aggregated the wetlands at issue, nor did he instruct lower courts to determine jurisdiction over the wetlands at issue through analysis of the cumulative significance of all wetlands at issue. Rather, Justice Kennedy counseled for consideration of the distance, quantity, and regularity of flow for *each wetland*.³⁵¹ Indeed, the individualized approach to assessing the significance of each wetland’s nexus to navigable water pervades the entirety of Justice Kennedy’s concurrence.³⁵²

³⁴⁵ *Rapanos*, 547 U.S. at 781.

³⁴⁶ *Rapanos*, 547 U.S. at 781-82.

³⁴⁷ *Rapanos*, 547 U.S. at 764; *accord Rapanos*, 547 U.S. at 730 (plurality).

³⁴⁸ *Rapanos*, 547 U.S. at 786.

³⁴⁹ *Rapanos*, 547 U.S. at 784-85.

³⁵⁰ *See* 86 Fed. Reg. at 69,437 (“functions performed by all the wetlands adjacent to the tributary;”); *See also* 86 Fed. Reg. at 69,439-69,440 (omnibus consideration of all similarly situated wetlands across entire watersheds, ecoregions, hydrological landscape regions, or physiographic regions).

³⁵¹ *Rapanos*, 547 U.S. at 784-87.

³⁵² “[T]he Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus *between the wetlands in question and navigable waters in the traditional sense*.” *Rapanos*, 126 S. Ct. at 2248 (emphasis added); *See also id.* at 2249 (“the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands”).

The “significant nexus” standard that the Agencies propose be used to assert jurisdiction over wetlands “adjacent” to impoundments and tributaries bears little resemblance to the assessment Justice Kennedy described or the context in which he urged its use. Indeed, if utilized by the Agencies in the manner described in the Proposed Revision, the resulting jurisdictional determinations would be precisely the type that Justice Kennedy rejected in his concurrence, and four other justices rejected for entirely different reasons.

The Agencies’ proposed application of the “significant nexus” standard in this context and all others asserted in the Proposed Revision is plainly impermissible. Reliance on this standard will not make the Agencies’ definition of WOTUS more durable. Instead, it will call into question the legality of the Proposed Revision, and it may ultimately lead to its invalidation.

VI. EXCLUSIONS

The Associations appreciate the Agencies’ request for comment on their approach to codifying and implementing exclusions. We also welcome the Agencies’ position that they “**would expect to implement the Proposed Revision consistent with longstanding practice, pursuant to which they have generally not asserted jurisdiction over certain other features.**”³⁵³ We believe that the Agencies’ inclusion of exclusions as a corollary to the categories of jurisdictional waters, will continue to ensure CWA protections to downstream waters as well as improve clarity and certainty, decrease the likelihood of misinterpretation, and overall, facilitate a more administrable and legally defensible rule that is less likely to be subject to litigation.

To that end, we strongly encourage the Agencies to retain the two proposed exclusions as well as to consider codifying certain other exclusions that as a matter of longstanding practice and by their own admission, the Agencies have not asserted jurisdiction over and nor would they do so under the Proposed Revision.

The Associations provide for your consideration the following carefully curated list of exclusions which are also consistent with CWA and informed by relevant Supreme Court decisions. The recommended exclusions are also familiar and relied upon by the regulated community and Agencies to provide regulatory certainty to key CWA programs that are central to protecting the foundational downstream waters.

³⁵³ 86 Fed. Reg. at 69,424 (emphasis added).

Our specific comments are as follows:

- a. **The Associations appreciate the continued inclusion of the longstanding waste treatment systems and prior converted cropland exclusions and we request these two exclusions to be retained for the important clarity and regulatory certainty they provide.**

The waste treatment systems exclusion as reflected in the 1986 preamble and the prior converted cropland exclusion as added in 1993 are proposed to be retained.³⁵⁴ We agree with the Agencies that “these longstanding exclusions from the definition provide important clarity.”³⁵⁵

1. The Associations agree that the waste treatment system exclusion should be retained as a codified rule consistent with the 1986 regulations with some clarifications.

- i. *The Associations support the “ministerial change” to delete the outdated cross-reference to a definition of ‘cooling ponds’ that no longer exists.*³⁵⁶

This ministerial change was also proposed in the 2015 WOTUS Rule and the NWPR and we support this change. We agree with the Agencies’ longstanding approach to excluding waste treatment systems as including those that are not manmade bodies of water. Indeed, there are many waste treatment systems that are not of manmade origin, and yet are designed to meet the requirements of the CWA. We appreciate that the Agencies conclude that these should be excluded. We agree that that it is a reasonable and lawful exercise of the Agencies’ authorities on determining the scope of jurisdiction.³⁵⁷

- ii. *The Associations agree with the Agencies’ proposal to delete a sentence in EPA’s NPDES regulations that was suspended by the EPA regarding limitations of the exclusion to certain manmade bodies of waters.*

As the Agencies state, “both Agencies have not limited application of the waste treatment system exclusion to manmade bodies of water” and that this Proposed Revision maintains the deletion from the NWPR as well as is “consistent with other versions of the exclusion” and “EPA’s decades-long practice implementing the exclusion under the 1986 regulations.”³⁵⁸

³⁵⁴ 51 Fed. Reg. 41,216–17 (Nov. 13, 1986), 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993).

³⁵⁵ 86 Fed. Reg. at 69,424.

³⁵⁶ 86 Fed. Reg. at 69,426.

³⁵⁷ 86 Fed. Reg. at 69,427.

³⁵⁸ 86 Fed. Reg. at 69,427.

- iii. *The Associations request that the additional proposed comma after “or lagoons” be removed to avoid any unintended consequences of what is represented as a non-substantive change.*

The Agencies propose to add a comma that per the preamble clarifies the Agencies’ longstanding implementation of the exclusion as applying only to systems that are designed to meet the requirements of the Act.³⁵⁹ The 2015 WOTUS Rule, in response to comments, removed the comma as proposed initially. It noted that:

Many commenters expressed concern about whether the agencies’ insertion of a comma following this ministerial change unintentionally narrowed the exclusion such that all excluded waste treatment systems must be designed to meet the requirements of the Clean Water Act. The commenters indicated concerns that waste treatment systems built before the Clean Water Act or primarily for purposes of other environmental laws could not be exempt. **The agencies do not intend to change how the waste treatment exclusion is implemented and have deleted this proposed comma.**³⁶⁰

We share similar concerns about systems constructed prior to 1972 no longer qualifying for this exclusion and that this introduction of the comma may be construed as reducing the scope of the exclusion per the longstanding policy.

As in 2015, the Agencies also have explained here that they do not intend to change how this exclusion is implemented per longstanding policy, and thus adding the comma is unnecessary and provides no additional clarifying benefits.

- iv. *The Associations appreciate footnote 49 in the preamble referencing the definition of a waste treatment system which is helpful in providing clarification on the applicability and limits of the exclusion.*³⁶¹

Without any objections, the Agencies note the definition from the NWPR as a reference point for the scope of a waste treatment system. We appreciate the clarification that is provided by the inclusion of the definition in the preamble’s footnote 49.

- v. *The Associations would ask that the Agencies refrain from adding any additional limiting language to the regulatory text based on unsupported comments.*

The Agencies include a comment that they “are aware of concerns raised by some stakeholders that features subject to the waste treatment system exclusion could be used by any party to dispose waste or discharge pollutants with abandon.”³⁶² This exclusion is a longstanding practice that the Agencies have been implementing successfully in compliance with the CWA, and aside from

³⁵⁹ 86 Fed. Reg. at 69,426.

³⁶⁰ 80 Fed. Reg. at 37,097 (emphasis added).

³⁶¹ 86 Fed. Reg. at 69,428.

³⁶² 86 Fed. Reg. at 69,428.

stating that the Agencies are aware of concerns, no actual evidence is provided to counter these unfounded claims. If any clarification is required, we request codifying the clear definition of waste treatment system as provided in footnote 49. This definition at a minimum provides the necessary regulatory certainty to the regulated industry as well as provides clarification of coverage to the Agencies for compliance purposes.

- vi. *The Agencies' assertion in the preamble "that the waste treatment system exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed" introduces ambiguity, and will invite inconsistent and unduly narrow application of this exclusion amongst Agencies' staff unless corrected and clarified with contextual examples.*³⁶³

Language such as this inappropriately narrows the exclusion based on the Agencies' presumptions about the complex multi-layered functions of particular features. For instance, our members have experience with agency staff inconsistently applying this exclusion based on differing views of whether storage constitutes active or passive treatment. In fact, this distinction between active and passive treatment is irrelevant to the question of whether the waste treatment system was designed to meet the requirements of the CWA. In one case, agency staff did not recognize the critical components of settlement, flow regulation, and off-specification impoundment for additional treatment as necessary active treatment. Providing illustrative examples as guidance would avoid inconsistent application over systems in which stormwater is comingled with wastewater, as well as situations where operators use a feature, *e.g.*, for wastewater storage/treatment during normal operating conditions, but also rely on that feature's capacity during heavy precipitation events.

- vii. *The Associations ask that the final rule preamble provide an illustrative list of types of systems that would be covered under this exclusion.*

We understand that certain exclusions can be site-specific or activity-based and thus would not warrant inclusion in nationally-applicable definitions, however, any illustrative examples for discussion purposes would be valuable for the regulated community in providing additional clarity.

This request is not unlike the Agencies' inclusions of illustrative examples in the Proposed Revision's preamble as related to waters that would likely not be jurisdictional under the "significant nexus" standard.³⁶⁴

Our illustrative list of covered features that we provide for your consideration include:

Structures and features encompassed by this exclusion include but are not limited to: (1) temporary and/or permanent/secondary basins/ponds and conveyance systems for discharges associated with stormwater; (2) biological treatment lagoons with source water from lagoon; (3) cooling water ponds; (4) treatment systems including but not limited to treatment ponds, equalization ponds, storage ponds or

³⁶³ 86 Fed. Reg. at 69,428. (emphasis added).

³⁶⁴ See 86 Fed. Reg. at 69,432.

lagoons as related to CWA-regulated waters; (5) secondary containment systems; and (6) CWA-regulated MS4 and component conveyances within such systems.

2. The Associations support the Proposed Revision's continued exclusion of prior converted croplands from jurisdictional waters, and we ask that its longstanding implementation consistent with its interpretation in the 1993 preamble based on the abandonment principle be retained.

i. *Any change in interpretation as suggested by the Proposed Revision is outside the overall scope of this Proposed Revision and should not be considered.*

This is in keeping with the Agencies' stated position to propose a rule in line with the pre-2015 framework and longstanding policies.

ii. *If any changes were to be made, we would ask for the Agencies to retain the NWPR definition of prior converted cropland.*

In addition, further clarification on the definition of abandonment as occurring when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years, would be helpful.

iii. *We also note that, while this exclusion seemingly applies only to agricultural land, many industrial and commercial facilities have^[SRP1] within their boundaries former wetlands that were lawfully filled and converted to upland.*

There is no ecological or hydrological rationale for treating wetlands converted to cropland different than wetlands converted to serve industrial purposes. As such, as the Agencies progress to the second phase of the rulemaking, the Agencies should at least consider and explain their basis for limiting the availability of this exclusion to croplands.

b. **The Associations support the specific 1986 preamble exclusions that the Proposed Revision discusses, and we request that per the "return to the familiar and longstanding regulations," these listed exclusions in the preamble be explicitly codified in the final rule.**

1. Codifying the exclusions as listed in the 1986 preamble is important to provide regulatory certainty.

These exclusions are also codified in the prior two rulemakings, reflect long-standing agency practices, are beneficial to the regulated industry, and are easy to understand and implementable.

i. *We support the Agencies' overall intentions regarding the 1986 exclusions.*

Specifically, in the Proposed Revision, the Agencies note their plan to continue the practice of “generally not assert[ing] jurisdiction over certain other features under the pre-2015 regulatory regime and the Agencies intend to continue the practice for these features.”³⁶⁵ These other features include certain ditches as well as:

Artificially irrigated areas which would revert to upland if the irrigation ceased; artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; and waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of “waters of the United States.”³⁶⁶

- ii. *The Agencies’ use of language “generally not assert[ing] jurisdiction” appears to suggest possible consideration to ad hoc exceptions to these longstanding set of exclusions.*

To avoid this confusion and to clarify that the Agencies do not intend to limit the scope of this exclusion, we ask that in keeping “with the goal of this Proposed Revision to return to the familiar and longstanding framework,” the Agencies codify the exclusions as explicitly noted in the 1986 regulations and as implemented by the Agencies since that time in the 2015 WOTUS Rule and the NWPR.

2. Specifically, in reference to the artificial lakes and ponds constructed in the uplands exclusion, the Associations ask that this exclusion be codified, and for the Agencies to include an illustrative list of covered features as guidance.

For decades, the exclusion has included examples such as settling basins and rice growing ponds which has helped provide certainty and clarity.

- i. *The Associations request that the illustrative list of covered features as found in the 1986 language also include “cooling ponds” in keeping with longstanding practice.*

³⁶⁵ 86 Fed. Reg. at 69,434.

³⁶⁶ 86 Fed. Reg. at 69,434 (citing 1986 regulations).

The term “cooling ponds” was explicitly added in the 2015 WOTUS Rule as part of the artificial lakes and ponds exclusion. Cooling ponds have also long been referenced as part of features not included as jurisdictional waters.³⁶⁷

- ii. *To avoid confusion and any unjustifiably restrictive interpretation of this exclusion, the Associations also recommend including in the rule, by way of example, a non-exhaustive list of features that fall within the exemption.*

We believe that listing these additional features within the rule will help avoid future misinterpretations, especially as relating to longstanding covered industrial features.

These features should encompass, but not be limited to, industrial features necessary for the safe and efficient operation of a facility, such as water storage ponds, impoundments, conveyances and other structures used for fire water, utility water, cooling water, process water, and raw water.

3. At a minimum, certain ditches found to be not jurisdictional in the 1986 preamble and noted as such in the Proposed Revision, should be codified as an exclusion.

The preamble to the Proposed Revision explicitly states:

Under the agencies’ longstanding approach to determining which waters are ‘waters of the United States,’ certain ditches are generally not considered “waters of the United States.” The preamble to the 1986 regulations explains that “[n]on-tidal drainage and irrigation ditches excavated on dry land” are generally not considered “waters of the United States.” 51 FR 41217. The agencies shifted this approach slightly in the *Rapanos* Guidance and explained that “**ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States.**” *Rapanos* Guidance at 11–12. The agencies explained that these features are generally not considered “waters of the United States” “because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.” *Id.* The agencies intend to continue implementing the approach to ditches described in the *Rapanos* Guidance.³⁶⁸

- i. *Notwithstanding our legal positions regarding ditches as discussed above, a baseline exclusion should be included that codifies the Agencies’ longstanding approach consistent with the CWA and as informed by the Supreme Court cases.*

³⁶⁷ Note the definition of “lake” in 1986 regulations also excluded “artificial lakes and ponds created by excavating . . . for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.” 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986).

³⁶⁸ 86 Fed. Reg. at 69,433 (emphasis added).

We recommend and support codified rule language that excludes ditches excavated wholly in and draining only uplands and that do not carry relatively permanent flow of water per *Rapanos*' plurality opinion and the quoted language above. For these ditches that are clearly excluded as jurisdictional waters, requiring individual jurisdictional determinations based on the relatively permanent standard or significant nexus standard would be an overreach and an unnecessary burden on agency resources.

- ii. *Beyond the above language, the Associations disagree with any additional limiting interpretations that are not informed by relevant Supreme Court cases.*

The Agencies state that they intend to continue implementing the approach to ditches describing the *Rapanos Guidance* but the Agencies then provide additional confusing language that “ditches constructed wholly in uplands and draining only uplands with ephemeral flow would generally not be considered ‘waters of the United States.’”³⁶⁹ This interpretation could be read to apply the ditches exclusion *only* to those upland ditches with ephemeral flow, which would significantly narrow the exclusion. That would over-extend the *Rapanos* plurality opinion and is contrary to the Agencies’ longstanding position to exclude upland ditches that do not carry a relatively permanent flow of water.

- iii. *The Associations also support the Agencies’ position that “consistent with previous practice, wetlands that develop entirely within the confines of a ditch that was excavated in and wholly draining only uplands that does not carry a relatively permanent flow would be considered part of that ditch and generally would not be considered ‘waters of the United States.’”³⁷⁰*

This is an important distinction and should also be codified as a rule exclusion to provide regulatory certainty.

- c. **Where referenced in the preamble or rule language, the Associations also recommend replacing the term “dry land” with the consistent term “upland” followed by a clear definition of “upland” as codified in the rule.**

- 1. **The term “dry land” is used in the 1986 preamble and is important for determining applicability for exclusions as well as for determining the boundaries of where federal waters begin and end.**

Yet, the term “dry land” is not defined and is inconsistently implemented by Agencies’ staff. It is also used interchangeably with the term “upland.” The Agencies, for example, rely on the concept

³⁶⁹ 86 Fed. Reg. at 69,433.

³⁷⁰ 86 Fed. Reg. at 69,433.

of upland in areas outside of exclusions, including its illustrative list of waters that would not be considered jurisdictional in the context of not meeting the significant nexus standard.³⁷¹

2. As a simple fix, we recommend a definition of “upland” where the concept of dry land or upland is required.

And instead of reinventing the wheel, we ask the Agencies to add the following clear definition of “upland” from 2020 NWPR with updated reference to the proposed unrevised wetland definition:

The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) identified in [paragraph (b) of this section], and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water

- d. The Associations recommend codifying the exclusions for groundwater and swales/erosional features as discussed in the preamble to the Proposed Revision as examples of non-jurisdictional waters.

With these two exclusions, the agencies note areas where they have not exercised federal jurisdiction and where they would not expand with the Proposed Revision. As such, for regulatory certainty, we request that these two exclusions be codified as rule. Clearly, if such straightforward clarity can be provided in the preamble to the Proposed Revision, the same should be codified in a rule.

1. The Agencies’ footnote 47 clearly states that Agencies “have never interpreted groundwater to be a ‘water of the United States’” and that “the proposed rule makes no change to that longstanding interpretation.”³⁷²

Such an important exclusion cannot be demoted to a footnote.

- ii. *The Associations request that the previously codified language in two prior rules be added back in to transparently and unambiguously affirm the Agencies’ established policy.*

The language as codified in the 2015 WOTUS Rule and NWPR that we propose to be codified here is as follows:

Groundwater, including groundwater drained through subsurface drainage systems.

Further, notwithstanding our overall position regarding the flawed “significant nexus standard,” we request the Agencies to remove “shallow subsurface flow” as an example of “Hydrologic Factors” under the definition of “significantly affect.” In the alternative, we ask the Agencies to

³⁷¹ 86 Fed. Reg. at 69,432-69,433.

³⁷² 86 Fed. Reg. at 69,424.

clarify that the determination of significant nexus does not render the shallow subsurface flow itself a jurisdictional water, but rather only constitutes a conduit for the purpose of establishing jurisdiction of the connected waters in limited circumstances. Adjacency cannot simply be based on a subsurface hydrologic connection to jurisdictional waters but also must be tied to legal thresholds of “adjacency” per Supreme Court rulings.

2. The Agencies note in the preamble to the Proposed Revision that “[s]wales and gullies are generally not jurisdictional”³⁷³ and the Associations ask that this longstanding regulatory framework should be clarified and codified into the rule.

i. *Based on the Rapanos Guidance, which has been implemented since 2008 (and codified with varying language in the 2015 and 2020 rules), the Agencies did not generally assert jurisdiction over non-wetland swales or erosional features including gullies and small washes as characterized by low flow, infrequent, or short duration flow.³⁷⁴*

Given that it is the Agencies’ position to resurrect the pre-2015 framework, asserting jurisdiction over these swales and erosional features by subjecting them to a significant nexus assessment would be a major change in the agencies’ longstanding implementation approach. These features should be categorically excluded and not be subject to a case-by-case significant nexus analysis.

ii. *The Agencies should provide an illustrative list of swales and erosional features which are clearly not jurisdictional and would not require any additional jurisdictional analysis.*

The few examples of waters that are provided in the Proposed Revision as not having a significant nexus to downstream waters and not found to be jurisdictional under the pre-2015 regime are not sufficient in providing clarity and only creates further confusion.³⁷⁵

We recommend clarifications that no additional ordinary high water mark (OHWM) analysis is required for these excluded features because as the Agencies state, these types of features are different from ephemeral streams and lack indicators of an OHWM.³⁷⁶ As the Proposed Revision also notes, “the *Rapanos Guidance* states certain ephemeral waters in the arid West are distinguishable from the geographic features like non-jurisdictional swales and erosional features³⁷⁷ At the very least, given the Agencies’ self-declared experience implementing the pre-2015 regulatory regime, these distinguishable features should be easy to identify (even taking into account colloquial terminology which we agree with the Agencies that it can differ), and excluded as non-jurisdictional in a codified rule.

³⁷³ 86 Fed. Reg. at 69,434.

³⁷⁴ *Rapanos Guidance*. See 86 Fed. Reg. at 69,380.

³⁷⁵ 86 Fed. Reg. at 69,432.

³⁷⁶ 86 Fed. Reg. at 69,434.

³⁷⁷ 86 Fed. Reg. at 69,437.

We further request the Agencies conduct an assessment of ephemeral features beyond those mentioned above, to determine if there are additional categories which warrant explicit exclusion from jurisdiction. Doing so will reduce the case-by-case jurisdictional determination burden, and will result in a more durable rule less likely to be subjected to legal challenges.

e. **The Associations recommend codifying the longstanding exclusions related to storm water control features and wastewater recycling features.**

1. These two categories of features related to storm water control and wastewater recycling features are included for Agencies' consideration because they follow the same rationale and provide the same CWA and legal protections as other exclusions discussed above.

In sum, these two exclusions are consistent with the Agencies' stated parameters for what should, and should not, constitute a water of the United States.

- i. *Both of these exclusions were included in two previous sets of rules, based on similar concepts, and follow the same key principles of excluding upland, non-jurisdictional water features related to storm water control and wastewater recycling.*

Language is as follows (Italicized language includes NWPR revisions):

Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off.

Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed, or excavated in upland or in non-jurisdictional waters.

- ii. *Overall, incorporating such language would add regulatory certainty, reflect longstanding practice, and would be supportive of EPA's goals to develop advanced water reuse and wastewater recycling facilities.*

The prior rulemaking notes that these two features were not explicitly discussed in the 1986 and 1988 preamble language; however, these exclusions clarify the Agencies' longstanding practice is to view stormwater control features that are not constructed within WOTUS as non-jurisdictional; and water reuse and recycling features as not jurisdictional when constructed in uplands or within non-jurisdictional waters.³⁷⁸

³⁷⁸ 85 Fed. Reg. at 22,323-22,324.

VII. CONCLUSION

The Associations appreciate the opportunity to provide these comments in response to the Agencies' Proposed Revision. While we recognize the Agencies' interest in promulgating a lawful and durable definition of WOTUS, the Associations' careful review of the Proposed Revision reflects that the Agencies have proposed an approach that is neither durable nor legally defensible. The Proposed Revision is inconsistent with the CWA's recognition of states' primacy over their land and waters, and fails to accord with an objective application of the Supreme Court's guidelines for interpreting the scope of federal jurisdiction under the Act. As a practical matter, we also find that the Proposed Revision is far too vague and confusing to allow federal jurisdiction to be asserted in a clear, consistent manner using readily observable factors and commonly understood term. We also believe that the basic constitutional right to due process protections requires a definition of WOTUS that reasonably provides fair and predictable notice to the regulated community on waters that may be subject to federal jurisdiction and regulation.

As such, the Associations urge the Agencies to withdraw the Proposed Revision and, at a minimum, refrain from finalizing a WOTUS definition until the Supreme Court provides further guidance in *Sackett II*. Should the Agencies persist in pursuing this rulemaking however, we urge the Agencies to substantially alter their approach consistent with the analysis and recommendations the Associations provided herein.

Thank you again for considering these comments. If you have any questions, please feel free to contact the undersigned representatives of the Associations.



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