August 13, 2018

Via Regulations.gov Portal

Water Docket
U.S. Environmental Protection Agency
Mail Code: 4203M
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments of the American Petroleum Institute, the Independent Petroleum Association of America, the Ohio Oil and Gas Association, and the New Mexico Oil and Gas Association in Response to the Environmental Protection Agency's and the Army Corps of Engineers' Supplemental Notice of Proposed Rulemaking on the Recodification of the Preexisting "Waters of the United States" Rule; EPA-HQ-OW-2017-0203.

Dear Sir/Madam:

This letter provides comments from the American Petroleum Institute ("API"), the Independent Petroleum Association of America ("IPAA"), the Ohio Oil & Gas Association ("OOGA"), and the New Mexico Oil & Gas Association ("NMOGA") (collectively, "the Associations") comments in support of the U.S. Environmental Protection Agency's ("EPA's") and the Army Corps of Engineers' ("Army Corps'") (collectively, "the Agencies'") Supplemental Notice of Proposed Rulemaking on the Recodification of the Preexisting "Waters of the United States" ("WOTUS") Rule ("Supplemental Notice").[1] API provided comments through the Waters Advocacy Coalition ("WAC"), the Federal Water Quality Coalition ("FWQC"), and the Federal Storm Water Association ("FSWA") in support of the Agencies' 2017 proposed WOTUS recodification[2], and welcomes this additional opportunity to support the repeal of the Agencies' 2015 rule defining WOTUS ("2015 WOTUS Rule")[3] and the restoration of the regulatory framework that existed prior to the 2015 WOTUS Rule. The confusion, uncertainty, and litigation caused by the 2015

[1] 83 Fed. Reg. 32,227 (July 12, 2018).
[2] 82 Fed. Reg. 34,899 (July 27, 2017).
[3] 80 Fed. Reg. 37,054 (June 29, 2015).

WOTUS Rule's jurisdictional overreach demonstrate its inconsistency with the law, cooperative federalism, and the goal of "predictability and consistency," which served as the Agencies' justification for the 2015 WOTUS Rule. The Associations believe that Agencies' present effort to repeal the 2015 WOTUS Rule and reinstate the preexisting regulations is an important step to address the legal, jurisdictional, and practical deficiencies of the 2015 WOTUS Rule. The Associations further believe that this Supplemental Notice and opportunity to comment reflects the Agencies' commitment to transparent rulemaking and effective stakeholder engagement.

I. SUMMARY OF COMMENTS

The Associations strongly support the Agencies' proposed repeal of the 2015 WOTUS Rule because it did not meet any of the Agencies' objectives, disrupted the balance of federal and State regulatory jurisdiction, created substantial confusion, and exceeded the Agencies authority under the Clean Water Act ("CWA") and other statutes. We believe these issues effectively compel the repeal of the 2015 WOTUS Rule, but even if repeal were not mandatory, the Agencies have ample discretion to undertake a repeal of the 2015 WOTUS Rule.

The 2015 WOTUS Rule undermines, rather than furthers, the Agencies' goal to "provide clarity" and improve the "predictability and consistency of WOTUS determinations." The pervasive ambiguity of its language confounds regulated parties and obscures the Agencies' true regulatory intent.

Post-promulgation litigation demonstrates and magnifies the confusion caused by the 2015 WOTUS Rule. The Rule's subsequent widespread litigation itself also adds inconsistency and unpredictability to its impact because it would likely take years for courts to resolve the legality of the 2015 WOTUS Rule.

In addition to the confusion it has caused, the 2015 WOTUS Rule also improperly intrudes on State jurisdiction and regulatory authority. Regulation of land and water within a State's borders is a "quintessential" State and local function. The 2015 WOTUS Rules asserts jurisdiction over features with little semblance to navigable waters, further demonstrating the critical nature of State and local input regarding the definition of WOTUS.

The 2015 WOTUS Rule was also improperly promulgated, inconsistent with the law, and well in excess of the Agencies' statutory authority. The Agencies are therefore compelled to revoke the 2015 WOTUS Rule because it exceeds the Agencies' statutory and constitutional authority, is inconsistent with Supreme Court precedent, and was improperly promulgated.

The 2015 WOTUS Rule reads the words "navigable" out of the CWA and provides an impermissible definition of "tributaries" that would bring within federal jurisdiction isolated,

purely intra-state, and largely dry land features. For many similar reasons, the 2015 WOTUS Rule's given definition of "adjacent" is impermissible.

Much of the 2015 WOTUS Rule's jurisdictional "standards" are impermissibly vague and subjective. This absence of clear standards fails to give the public fair notice of when and where discharges are unlawful, and confers to multitudes of agency staff broad authority to make jurisdictional determinations without supplying them with discernable criteria for those determinations. The inevitable result of this vagueness will be inconsistent jurisdictional determinations that differ by region, agency staff member, and other factors that the regulated public cannot predict.

In promulgating the 2015 WOTUS Rule, the Agencies also shielded scientific literature from public comments, failed to consider important comments raising concern that federal regulatory jurisdiction would expand to infringe on traditionally local land-use regulation, and improperly attempted to sway public opinion during rulemaking proceedings by covertly disseminating propaganda. These procedural deficiencies – alone or in combination with the substantive illegality of the 2015 WOTUS Rule – mandate its repeal.

Even if not compelled, Agencies have authority and discretion to repeal the 2015 WOTUS Rule, as the proposed revocation aims to correct expansive and legally suspect assertions of CWA jurisdiction. This decision is entitled to deference because the Agencies have provided reasoned explanations for the change and because the Agencies are endeavoring to more squarely base their decision on the administrative record – a record that includes hundreds of substantive and credible public comments like these.

Repeal of the 2015 WOTUS Rule reinstates the regulatory regime that existed prior to the 2015 WOTUS Rule—an action that would reduce confusion and inconsistencies. While the regime in place before the 2015 WOTUS Rule still warrants revision, this imperfect regulation's efficiency greatly exceeds that of the 2015 WOTUS Rule. The Associations therefore recommend that the Agencies re-codify the preexisting regulations.

At the same time, the Agencies should continue to prioritize a "Step 2" WOTUS replacement that is administrable, clear, and legally defensible. This added administrability and clarity will improve environmental protection and regulators' ability to ensure programs are effectively implemented.

II. DETAILED COMMENTS

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a. The Associations' Interests

API is a national trade association representing more than 620 member companies involved in all aspects of the oil and natural gas 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.

API's members have a substantial interest in the scope of federal jurisdiction under the Clean Water Act ("CWA" or "the Act"). All segments of the oil and natural gas industry are subject to extensive water permitting and regulatory requirements at both the State and federal levels for activities such as the drilling and producing from oil and natural gas wells, pumping oil from the wells, refining crude oil, transporting crude oil or refined product, and operating filling stations.

IPAA represents the thousands of independent oil and natural gas explorers and producers—as well as the service and supply industries that support their efforts—that will most directly be impacted by the federal regulatory policies. Independent producers develop about 95 percent of American oil and natural gas wells, produce 54 percent of American oil, and produce 85 percent of American natural gas. Historically, independent producers have invested over 150 percent of their cash flow back into American oil and natural gas development to find and produce more American energy. The IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

OOGA is a trade association with more than 2,000 members involved in all aspects of the exploration, production and development of crude oil and natural gas resources within the State of Ohio. OOGA's mission is to protect, promote, foster and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA strives to serve the broad range of entities involved in the Ohio oil and natural gas industry by being an effective voice in government and the media as well as an information resource to the membership.

NMOGA is a coalition of oil and natural gas companies, individuals, and stakeholders dedicated to promoting the safe and environmentally responsible development of oil and natural gas resources in New Mexico. Representing over 900 members, NMOGA works with elected officials, community leaders, industry experts, and the general public, to advocate for responsible oil and natural gas policies and increase public understanding of industry operations and contributions to the state.

New Mexico's oil and natural gas activity is concentrated in two areas: the Permian Basin in the southeast and the San Juan Basin in the northwest. New Mexico is one of the United States' leading producers, ranking 5th in annual oil production and 8th in annual natural gas production. New Mexico is attracting interest and attention from around the globe, as the Permian Basin undergoes a resurgence of production and investment activity.

The Associations support the Agencies' efforts here – not because it would unburden their members of their CWA compliance obligations – but because repealing and replacing the 2015 WOTUS Rule would provide the necessary clarity and certainty that helps the Associations' members comply with their obligations under the CWA and other statutes. 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, clear, administrable, and legally sound.

This commitment is reflected in the Associations' long engagement on this very 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 submitted comments on their own, as well as through multi-industry trade coalitions.

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's 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 provided by the United States Supreme Court ("Supreme Court" or "the Court"), and our members' deep interest in developing an interpretation of WOTUS that is clear, protective, administrable, and legally sound.

b. The Agencies Should Repeal the 2015 WOTUS Rule

The preamble to the 2015 WOTUS Rule states that the "rule reflect[ed] the judgment of the agencies in balancing the science, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health, consistent with the law."[4] Notwithstanding this characterization, the 2015 WOTUS Rule did not meet any of the objectives that the Agencies identified in justifying the rule or the specific approaches and decisions contained therein. The 2015 WOTUS Rule upended the balance of federal and State regulatory jurisdiction, created profound uncertainty over jurisdictional reach and compliance obligations, imposed requirements for costly case-by-case analyses with unpredictable outcomes, and triggered

[4] 81 Fed. Reg. at 37,065

widespread litigation over the 2015 WOTUS Rule's questionable legality and consistency with the Act and Supreme Court jurisprudence.

The Associations readily identified these looming issues in advance of, and immediately following, finalization of the 2015 WOTUS Rule. Now, with the benefit of three years of hindsight since promulgation, problems with the Agencies' 2015 approach are even more pervasive and apparent. Now, more than ever, the Agencies should revoke the 2015 WOTUS Rule and redouble their efforts to promulgate a new definition of WOTUS in a manner consistent with Congressional intent and the broad guideposts of Supreme Court jurisprudence. In doing so, the Agencies can meaningfully advance the CWA's water quality objectives through clear jurisdictional boundaries that promote administrative accountability and which can be administered in a way that preserves resources for actual environmental protection.

1. The 2015 WOTUS Rule Undermines, Rather than Furthers, the Agencies' Goal to "Provide Clarity" and Improve the "Predictability and Consistency of WOTUS Determinations

The Agencies' stated justification for the 2015 WOTUS Rule was to provide clarity and certainty on the scope of the "waters of the United States."[5] However, as the Associations and thousands of other stakeholders noted in comments on the proposed 2015 WOTUS Rule and in legal challenges following its promulgation, the 2015 WOTUS Rule lacked clarity on key terms and definitions, hindered administrability of jurisdictional determinations, created significant confusion, and failed to put parties on notice regarding when their conduct might violate the law. Indeed, the 2015 WOTUS Rule's incomprehensibility was not limited to marginal elements of the WOTUS definition. The 2015 WOTUS Rule's ambiguity was most pervasive in the central elements of the WOTUS definition – key words and phrases through which the Agencies may, or may not, assert federal jurisdiction over expansive areas, remote or isolated waterbodies, and thousands of additional manmade structures and landscape features. A few key examples of the 2015 WOTUS Rule's ambiguous or undefined terms and concepts include:

- Interstate waters: The 2015 WOTUS Rule asserts jurisdiction over "interstate waters" and allows for features to be jurisdictional based on their relationship to "interstate waters," but fails to provide a definition of the term, and sweeps in remote and minor volume waters contrary to the Supreme Court decisions.[6] The Agencies failed to respond to comments seeking clarity on what waters are considered "interstate waters," and whether, for example, waters that cross tribal boundaries are considered "interstate waters."[7]

[5] 80 Fed. Reg. at 37,055.
[6] 80 Fed. Reg. at 37,074,
[7] See WAC Comments on 2015 WOTUS Rule at 31.

- Impoundments: The 2015 WOTUS Rule asserts jurisdiction over "impoundments" and allows for features to be jurisdictional based on their relationship to "impoundments" without defining the term.[8] The Agencies likewise failed to respond to comments seeking to understand the meaning of "impoundment" and, for example, which features on a landscape holding water (*e.g.*, farm ponds? stock ponds? industrial ponds?) can be considered impoundments.[9]

- Ordinary high water mark ("OHWM"): OHWM is the lynchpin concept of the 2015 WOTUS Rule's "tributary" definition, but the 2015 WOTUS Rule failed to change or clarify the OHWM definition, which experts at the Army Corps have said is one of the most inconsistent and ambiguous terms in the CWA regulatory program.[10] The Agencies failed to respond to commenters' concerns that use of the imprecise regulatory definition of OHWM is problematic because many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration.[11]

- Floodplain: The 2015 WOTUS Rule provided for jurisdiction over waters within the floodplain of and within 1,500 feet of a jurisdictional water, as well as waters within the 100-year floodplain of a water identified in categories (1) through (3) of the Rule[12] ("(1)-(3) water(s)") that has a significant nexus, but the 2015 WOTUS Rule failed to provide adequate clarity for the term "floodplain."[13] The preamble to the 2015 WOTUS Rule suggested that the Agencies would use the 100-year floodplain where a Federal Emergency Management Agency ("FEMA") Flood Zone Map is available, but acknowledges "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground."[14] Thus, the obligation to assess the applicable floodplain and therefore the authority to assert federal jurisdiction over "much of the United States," in many instances, was left to the widely varying discretion of the agency field staff. Again, the Agencies

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[8] 80 Fed. Reg. at 37,104-05.

[9] *See* WAC Comments on 2015 WOTUS Rule at 32-33.

[10] Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014), http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014_0760.pdf (subscription required) (noting that inconsistent interpretations of the OHWM concept have led to inconsistent field indicators and delineation practices).

[11] *See* WAC Comments on 2015 WOTUS Rule at 37-38.

[12] The first three categories of jurisdictional waters under the 2015 WOTUS Rule are: "(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; (3) The territorial seas." 81 Fed. Reg. at 37,104.

[13] 80 Fed. Reg. at 37,104-05.

[14] 80 Fed. Reg. at 37,081.

failed to respond to commenters' questions, such as whether areas behind levees are still within the "floodplain" for purposes of adjacency determinations.[15]

- Significant nexus: The 2015 WOTUS Rule categorically determined that all features meeting the definition of "tributary" and "adjacent waters" have a "significant nexus" to navigable waters, and were therefore within the Agencies' jurisdiction.[16] It also allowed for jurisdiction over other features (*e.g.*, prairie potholes, Western vernal pools, waters within 4,000 feet of a jurisdictional water) if the Agencies found a "significant nexus."[17] The 2015 WOTUS Rule allowed for a significant nexus determination where a feature "alone, or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a (1)-(3) water, and instructed the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur.[18] As the Army Corps noted, the 2015 WOTUS Rule "does not provide clarity for how 'similarly situated' is defined" and fails to explain how the definition's "more than speculative or insubstantial" standard would be quantified.[19] Moreover, the public was not given the opportunity to comment on the evaluation of the nine specific ecological functions because this aspect of the rule was not in the Agencies' proposal. As noted by Dr. Michael Josselyn, EPA Science Advisory Board ("SAB") Panel Member and Certified Professional Wetland Scientist, however, "these functions are extremely broad, sometimes contradictory, and provide little room for any true evaluation of the particular nature of the wetland being evaluated nor the significance of that wetland on downstream [traditional navigable waters]."[20] Dr. Josselyn also noted that the 2015 WOTUS Rule provided "no guidance as to the specificity of the information required, how to quantify any of these variables, and what measures would be used to assess how they influenced downstream [waters]."[21]

- Dry land: Many of the 2015 WOTUS Rule's exclusions applied only to features that were "created in dry land."[22] These features include artificial lakes and ponds, reflecting and

[15] *See* WAC Comments on 2015 WOTUS Rule at 52.
[16] 80 Fed. Reg. at 37,068-70.
[17] 80 Fed. Reg. at 37,104-05.
[18] 80 Fed. Reg. at 37,106.
[19] Memorandum from Jennifer A. Moyer, Chief, Regulatory Program, Dep't of the Army, Corps, to John W. Peabody, Deputy Commanding Gen. for Civil & Emergency Ops., Corps, Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States," at 6 (May 15, 2015) ("Moyer Memorandum").
[20] *A Review of the Technical, Scientific, and Legal Basis of the WOTUS Rule Before the S. Comm. on Env't & Pub. Works*, 115th Cong. (Apr. 26, 2017) (written testimony of Dr. Michael Josselyn, Certified Professional Wetland Scientist, Principal, WRA, Inc., at 6) ("Josselyn Testimony").
[21] Josselyn Testimony at 6-7.
[22] 80 Fed. Reg. at 37,105.

> swimming pools, water-filled depressions, stormwater control features, and wastewater recycling structures that were created in dry land.[23] However, the Agencies declined to define the term "dry land" in the regulatory text despite commenters' requests for a regulatory definition. Instead, in the preamble to the 2015 WOTUS Rule, the Agencies lamented that they could not define "dry land" because "there was no agreed upon definition."[24]

Given the 2015 WOTUS Rule's ambiguity and lack of regulatory certainty in the above-referenced provisions (and several others), landowners, other regulated parties, and States have little basis to reliably surmise which parties and/or areas the Agencies intend to regulate through the 2015 WOTUS Rule. For the regulated public, the potential consequences of this opaque and ambiguous regulatory jurisdiction are severe.[25]

This manifest regulatory confusion was immediately obvious upon promulgation of the 2015 WOTUS Rule. While the immediate adverse impact of the 2015 WOTUS Rule's ambiguity has been stayed through legal and regulatory action, the profound confusion surrounding the rule has not subsided. In fact, as described below, in the three years since the publication of the 2015 WOTUS Rule, confusion over the Rule's jurisdiction and applicability has only increased, thereby making plain that the 2015 WOTUS Rule did not fulfill the Agencies' primary objective of providing clarity and certainty on the scope of federal jurisdiction under the definition of WOTUS.

2. Post-Promulgation Litigation Demonstrates and Magnifies the Confusion Caused by the 2015 WOTUS Rule

The ambiguity of the 2015 WOTUS Rule is reflected in the widespread litigation that followed its promulgation. Following publication of the 2015 WOTUS Rule, 31 States and 53 non-State interests petitioned for review in multiple district and appellate courts. These non-State interests included farmers, ranchers, local governments, private land owners, environmental groups, companies and trade associations representing manufacturing, construction, public works, forestry, mining, and oil and natural gas industries. While the precise bases for these challenges differed to some degree, all petitioners agreed that the 2015 WOTUS Rule lacked sufficient clarity. If the purpose of this 2015 WOTUS Rule was to abate confusion and aid predictability, then the subsequent litigation over the Rule's ambiguous terminology validates the need for its repeal and recodification.

Moreover, this litigation is so widespread that it too now impedes the clarity, consistency, and predictability of the 2015 WOTUS Rule. While there had been some consolidation of actions,

[23] 80 Fed. Reg. at 37,105.
[24] 80 Fed. Reg. at 37,099.
[25] *See Sackett v. EPA*, 132 S.Ct. 1367, 1375, (2012) (Alito, J., concurring). The CWA imposes civil penalties of up to $51,570 per day for unauthorized discharges to waters of the U.S. 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017).

challenges to the merits of the 2015 WOTUS Rule remain pending in multiple federal courts. After the Supreme Court's January 22, 2018 ruling that the 2015 WOTUS Rule was indeed subject to review in district courts, litigation regarding the Rule has resumed and is now pending in four district courts. Each of these actions is proceeding on a different schedule and the courts are very likely to reach decisions at different times. Regardless of outcome, decisions for each of these actions are very likely to be appealed to appellate court and beyond. Consequently, if these actions are allowed to proceed, judicial resolution of these actions may be years away.

The unlikelihood of a near-term judicial resolution of the fate of the 2015 WOTUS Rule thereby compounds the regulatory uncertainty by adding to the substantive ambiguity of the 2015 WOTUS Rule's significant confusion over the status and applicability of the Rule. Two district courts have enjoined the 2015 WOTUS Rule. There are 13 States subject to a preliminary injunction issued by the District of North Dakota and 11 States subject by the U.S. District Court for the Southern District of Georgia. The U.S. District Courts for the Southern District of Texas and the Southern District of Ohio are also considering preliminary injunction motions for multiple States.

Faced with a potentially unworkable patchwork of applicability, the Agencies promulgated a rule to uniformly delay the applicability of the 2015 WOTUS Rule by 18 months ("Applicability Rule").[26] That Applicability Rule has also been challenged in four different district courts, with each action proceeding on a different schedule and with the potential for different outcomes.[27]

In sum, a uniform judicial resolution of the challenges to the 2015 WOTUS Rule is, at best, years away. In the meantime, the applicability of the 2015 WOTUS Rule is in flux, and will remain in flux, if one or more challenges to the Applicability Rule are even initially successful. The potentially long-standing uncertainty resulting from the unresolved status of the 2015 WOTUS Rule compounds stakeholders' uncertainty over the ambiguity of the Rule. Given the unlikelihood of timely judicial resolution, administratively rescinding the 2015 WOTUS Rule is likely the only means of timely resolving the widespread uncertainty over these important jurisdictional determinations.

3. The 2015 WOTUS Rule Improperly Intrudes on State Jurisdiction and Regulatory Authority

The 2015 WOTUS Rule should be revoked because it upended the balance between the CWA's overall objectives to "restore and maintain" the integrity of the nation's waters and to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

[26] 83 Fed. Reg. at 5,200 (Feb 6. 2018)

[27] *See New York v. Pruitt*, Case No. 18-cv-1030 (S.D.N.Y.); *Natural Resources Def. Council v. EPA*, Case No. 18-cv-1048 (S.D.N.Y.); *S.C. Coastal Conservation v. Pruitt*, Case No. 2:18-cv-330 (D.S.C.); *Puget Soundkeeper Alliance v. Pruitt*, Case No. 15-cv-01342-JCC (W.D. Wash.); *Waterkeeper Alliance v. Pruitt*, Case No. 3:18-cv-3521-JSC (N.D. Cal.).

eliminate pollution."[28] The regulation of land and water use within a State's borders is a "quintessential" State and local function.[29] The Supreme Court has explained that when an agency takes action that infringes on traditional State powers, agencies must be able to point to a clear grant of such authority from Congress in the relevant statute.[30] The CWA contains no such clear statement that Congress intended to alter that scheme. In fact, as described in Section c below, the text and legislative history of the Act, and the Supreme Court jurisprudence interpreting the same, all demonstrate that Congress intended to preserve and protect cooperative federalism. Nonetheless, the 2015 WOTUS Rule infringed on traditional State powers without pointing to any clear grant of authority from Congress.

The 2015 WOTUS Rule's sweeping jurisdictional assertions over features with little or no relationship to navigable waters (*e.g.*, channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters) raise serious federalism concerns. As was the case with the jurisdictional theories at issue in *SWANCC* and *Rapanos*, the 2015 WOTUS Rule would allow the federal government to control land use and planning activities traditionally controlled by States by extending jurisdiction to essentially all wet and potentially wet areas. Indeed, under the 2015 WOTUS Rule, many types of waters and landscape features that were never previously regulated as "waters of the State" or that States purposely chose not to regulate (*e.g.*, roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) were drawn into the broad jurisdictional scope asserted by the 2015 WOTUS Rule.[31]

Notwithstanding the 2015 WOTUS Rule's claims of jurisdiction over land and water traditionally regulated by States, the Agencies did not conduct any meaningful federalism consultation with State and local entities. Failure to seek input from State and local entities contributed to the Rule's legal flaws and lack of clarity, resulting in a 2015 WOTUS Rule that does not adequately preserve the States' authority to regulate non-navigable water resources. Many State and local agencies raised this concern in comments on the 2014 Proposed Rule[32] as well as in response to the Agencies' May 2017 request[33] for comments from State and local officials and organizations on federalism issues. For example, the Florida Department of Agriculture and Consumer Services ("FDACS") noted in its comments on the 2014 proposal that the Rule's "changes in definition,

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[28] 33 U.S.C. 1251(a)

[29] *Rapanos*, 547 U.S. at 738 (plurality).

[30] *See SWANCC*, 531 U.S. at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

[31] Importantly, the fact that the Agencies may disagree with a State's decision whether to regulate "non-CWA" waters bears no relationship to the question of federal jurisdiction and cannot be used to boot-strap an imagined federal authority where the Constitution has provided none.

[32] 79 Fed. Reg. 22,188 (Apr. 21, 2014).

[33] *See, e.g.*, Letter from the Hon. Scott Pruitt, Adm'r, EPA, & Douglas W. Lamont, P.E., Sr. Official Performing Duties of the Assistant Sec'y of the Army (Civil Works), to the Hon. Dennis Daugaard, Governor, State of South Dakota (May 8, 2017).

combined with Florida's flat topography and broad expanse of floodplains, wetlands and sloughs, could subject virtually all of Florida's water bodies to federal jurisdiction under the CWA, even concrete lined flood control conveyances and other man made systems intended to capture and treat stormwater flows."[34] In its June 2017 federalism consultation comments, FDACS further noted that the 2015 WOTUS Rule's expansive definition would "greatly complicat[e] Florida's efforts to protect water quality and quantity, imposing costs and uncertainty on private and public entities in the state."[35]

Similarly, Kansas explained that the 2015 WOTUS Rule would burden "the state's ability to manage and regulate the water resources under Kansas jurisdiction" and "threatened to disrupt and undermine Kansas water quality management."[36] Joint comments submitted on behalf of the nation's mayors, cities, counties, and regional governments and agencies explained that the 2015 WOTUS Rule's "lack of clarity and uncertainty" regarding key terms such as "tributary," "floodplain," and "significant nexus" "opens the door unfairly to litigation and citizen suits against local governments," and would "lead to unnecessary project delays, added costs to local governments and inconsistency across the country."[37]

The Pennsylvania Department of Environmental Protection's ("PDEP's") comments on the 2015 WOTUS Rule explained, "[o]ne of DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs . . . ."[38] PDEP noted that an Environmental Law Institute ("ELI") report cited by EPA in the proposed rule characterized Pennsylvania's State program as one in which protection of water resources is lacking, and stated that "[t]his characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with the states."[39]

These comments reflect only some of the practical implications of the 2015 WOTUS Rule's jurisdictional overreach. These comments also demonstrate that State and local input is critical for any rulemaking to define WOTUS. The significant practical concerns with the 2015 WOTUS Rule's jurisdictional assertions alone justify revocation. These practical concerns, however, do

[34] *See* FDACS, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 1 (Oct. 31, 2014), Doc. No. EPA-HQ-OW-2011-0880-10260.
[35] *See* FDACS, Comments on 2015 Clean Water Rule, at 1 (June 16, 2017).
[36] *See* Letter from the Hon. Sam Brownback, Governor, State of Kansas, to the Hon. Scott Pruitt, Adm'r, EPA, & Douglas W. Lamont, P.E., Sr. Official Performing the Duties of the Assistant Sec'y of the Army (Civil Works), at 1, 4 (June 19, 2017).
[37] *See* National League of Cities, National Association of Counties, and U.S. Conference of Mayors, Comments on Waters of the U.S. Rulemaking, at 4 (June 19, 2017).
[38] PDEP, Comments on Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act, at 2 (Oct. 8, 2014), Doc. No. EPA-HQ-OW-2011-0880-7985 ("PDEP Comments").
[39] PDEP Comments at 2.

not even reflect the questionable legality of the jurisdictional reach asserted by the 2015 WOTUS Rule. Those issues are discussed below.

4. The 2015 WOTUS Rule was Improperly Promulgated, Inconsistent with the Law, and in Excess of the Agencies' Statutory Authority

In Section 5 below, we provide a detailed discussion describing how the 2015 WOTUS Rule exceeded the Agencies' authority and how the Agencies' promulgation of the 2015 WOTUS Rule violated the Administrative Procedure Act ("APA"). As the Associations note, the Agencies are effectively compelled to finalize this proposed repeal as the Agencies lack the discretion to maintain an impermissible regulatory program that is demonstrably inconsistent with the CWA. In this subsection, we offer the related but more pragmatic recommendation that the Agencies repeal the 2015 WOTUS Rule because, as indicated below, movement from the judiciary indicates the 2015 WOTUS Rule would eventually be vacated.

Challenges to the 2015 WOTUS Rule are currently pending in seven federal courts. While none of those courts have rendered a decision on the merits, court orders on motions to enjoin the 2015 WOTUS Rule provide some indication of its potential fate because injunction orders require the court to find that the challenges to the rule are likely to succeed on the merits. Three of the seven courts have already made such a finding.

The U.S. District Court for the District of North Dakota ("District of North Dakota") preliminarily enjoined the 2015 WOTUS Rule in the 13 States that filed challenges in that court after finding that the challenges were "likely to succeed" on the merits because, among other reasons, "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule."[40] In particular, the court expressed concern that the 2015 WOTUS Rule's definition of tributary "includes vast numbers of waters that are unlikely to have a nexus to navigable waters."[41] The court further found that "it appears likely that the EPA failed to comply with [APA] requirements when promulgating the Rule."[42] This finding suggests that certain distance-based measures are not a logical outgrowth of the originally-proposed 2015 WOTUS Rule.

The U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") granted a nationwide stay of the 2015 WOTUS Rule after finding, *inter alia*, that the petitioners' challenge to the 2015 WOTUS Rule showed a "substantial possibility of success on the merits."[43] The court made this finding, in particular, on consideration of petitioners' argument that the 2015 WOTUS Rule was inconsistent

[40] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051, 1056, 1058 (D.N.D. 2015).
[41] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051, 1056, 1058 (D.N.D. 2015).
[42] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051, 1056, 1058 (D.N.D. 2015).
[43] *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804 (6th Cir. 2015) ("In re EPA").

with Supreme Court precedent and that the Rule's distance limitations were not substantiated by specific scientific support.[44]

The U.S. District Court for the Southern District of Georgia also preliminarily enjoined the 2015 WOTUS Rule, holding that the State plaintiffs had demonstrated "a likelihood of success on their claims that the [2015] WOTUS Rule was promulgated in violation of the CWA and the APA."[45] The court found that the 2015 WOTUS Rule likely failed the jurisdictional standards set forth in Supreme Court precedent, and that the Rule's entire jurisdictional approach was flawed because it "allows the Agencies to regulate waters that do not bear any effect on the chemical, physical, and biological integrity of any navigable-in-fact water."[46] The court also held that the plaintiffs "have demonstrated a likelihood of success on both of their claims under the APA," that the 2015 WOTUS Rule "is arbitrary and capricious," and "that the final rule is not a logical outgrowth of the proposed rule."[47]

These three decisions on the likelihood of successfully challenging the 2015 WOTUS Rule represent the only judicial evaluations of the likelihood of success, and each of these courts identified multiple infirmities susceptible to successful challenge. As such, all initial indicators suggest that the 2015 WOTUS Rule will not survive the legal challenges that are currently pending. As the Associations have cautioned from the earliest rulemaking stages, the 2015 WOTUS Rule exceeds the Agencies' authority, misreads Supreme Court precedent, and violates the APA.

No valid interests would be served by waiting for the inevitable vacatur of the 2015 WOTUS Rule by some or all of the courts with pending challenges. To the contrary, those incremental decisions will only cause more confusion, waste agency and judicial resources, and unnecessarily postpone an important opportunity to craft a clear and legally sound WOTUS definition.

5. Repeal of the 2015 WOTUS Rule Reinstates the Regulatory Regime that Existed Prior to the 2015 WOTUS Rule

The 2015 WOTUS Rule amended longstanding regulations by revising, removing, and re-designating certain paragraphs and definitions in those regulations. As such, repeal of the 2015 WOTUS Rule would necessarily restore that prior regulatory structure and approach to defining WOTUS.[48] This was precisely the approach the Agencies adopted during court-ordered stays to the implementation of the 2015 WOTUS Rule. As the Sixth Circuit noted when issuing a

[44] *In re EPA,* 803 F.3d 804 (6th Cir. 2015).
[45] *Georgia v. Pruitt*, No. 15-cv-79, 2018 U.S. Dist. LEXIS 97223, at *14 (S.D. Ga. June 8, 2018) (granting preliminary injunction).
[46] *Id*. at *17-18.
[47] I*d.* at *18.
[48] *See, e.g., API* v. *EPA,* 883 F.3d 918, 923 (DC Cir. 2018) (regulatory criterion in effect immediately before enactment of criterion that was vacated by the court "replaces the now-vacated" criterion).

nationwide stay of the 2015 WOTUS Rule, maintaining the longstanding approach to defining WOTUS "temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule."[49]

As the Sixth Circuit further explained, a return to the regulatory approach used prior to the 2015 WOTUS Rule necessarily reduces confusion and potential inconsistency because it is "familiar, if imperfect,"[50] The Agencies, States, and regulated public have significant experience operating under the longstanding regulations and, regardless of whether the States and regulated public agreed with the jurisdictional determinations that resulted from that preexisting approach, these stakeholders at least had some basis for predicting and anticipating the result of those analyses. While the Associations continue to believe that the Agencies' pre-2015 approach to defining WOTUS is itself flawed and in need of revision, its "familiar, if imperfect" approach remains far superior to the widespread confusion and questionable legality of the 2015 WOTUS Rule. As such, the Associations support re-codifying the Agencies' pre-existing regulatory approach upon repeal of the 2015 WOTUS Rule and further support using this re-codified approach until the Agencies are able to promulgate a new WOTUS definition in "Step 2" of this effort.

Re-codification of the pre-existing regulation also ensures that repeal of the 2015 WOTUS Rule does not result in "[s]udden and unexplained change, . . . or change that does not take account of legitimate reliance on prior [agency] interpretation . . ,"[51] because, with limited exceptions, the Agencies continued to rely on the pre-existing regulations even after promulgation of the 2015 WOTUS Rule. The 2015 WOTUS Rule took effect in 37 States for roughly six weeks between August 28, 2015 (the 2015 WOTUS Rule's effective date) and October 9, 2015 (the date of the Sixth Circuit's nationally applicable stay order). During that 43-day period, there were no enforcement actions and only 540 approved jurisdictional determinations ("AJD") based on the 2015 WOTUS Rule.[52] By way of comparison, since the original effective date of the 2015 WOTUS Rule, over 35,000 AJD continued to be based on the Agencies' pre-existing regulations.[53] This disparity in reliance interests is entirely consistent with the Sixth Circuit's finding that, while there is no indication "that the integrity of the nation's waters will suffer imminent injury if the [2015 WOTUS Rule] is not immediately implemented and enforced[,]" "the sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."[54]

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[49] *In re EPA*, 803 F.3d at 806, 808 (6th Cir. 2015).
[50] *In re EPA*, 803 F.3d at 808,
[51] *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal quotation marks and citations omitted).
[52] *See* https://watersgeo.epa.gov/cwa/CWA-JDs/ (Visited 7/19/18).
[53] *See* https://watersgeo.epa.gov/cwa/CWA-JDs/ (Visited 7/19/18).
[54] *In re EPA*, 803 F.3d at 808.

Accordingly, re-codification of the pre-existing regulations effectively amounts to the continuation of a regulatory regime that, with the exception of a brief period, has been utilized continually many years before the 2015 WOTUS Rule was even proposed. This "familiar, if imperfect," approach is clearer than the 2015 WOTUS Rule and has been used much more extensively. The Associations therefore recommend that the Agencies re-codify the preexisting regulations to ensure their continued use until a new, clearer, and more legally sound definition of WOTUS can be promulgated.

6. The Agencies Should Continue to Prioritize "Step 2" WOTUS Replacement

Although rescinding the 2015 WOTUS Rule (and the corresponding recodification of the pre-existing regulations) is necessary in the near-term for clarity and regulatory certainty, there are many issues with the current regulations and guidance documents that should be addressed through a new "Step 2" rulemaking. The Associations therefore encourage the Agencies to craft a new WOTUS rule that is clear and administrable. Jurisdictional uncertainty and complexity impede the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In contrast, jurisdictional clarity will 1) allow federal and State regulators to readily identify the waters they are tasked with protecting and 2) provide the predictability State and federal regulators need to ensure that robust programs are in place to specifically protect the various categories of waters.

Ease of administration will positively impact environmental protection. Federal and State regulators constantly balance resource constraints with their obligation to fulfill their environmental protection mandates. The time and budgets currently devoted to complex and protracted jurisdictional analyses can be better spent toward actually protecting water resources once a clear division of jurisdiction has been established.

In response to EPA's request for recommendations for the Step 2 rulemaking to define WOTUS, API offered a proposed definition that would accomplish these goals.[55] The categories of water included in this proposed interpretation are limited to those over which the Agencies have jurisdiction that is either established or reasonably supportable. This interpretation was designed to settle decades of WOTUS uncertainty and to endure through legal challenges because it was drawn from the statutory text and an objective application of the Supreme Court's statutory constructions.

API's interpretation is also readily administrable and clear. It set forth clear jurisdictional delineations that can be accomplished through readily observable conditions, and without the need

[55] *See* API comment at EPA-HQ-OW-2017-0480-0536.

for costly and subjective studies. This recommended interpretation would also eliminate the need for case-by-case analyses that undermine regulatory certainty and administrative accountability.

While we refer the Agencies to API's response to EPA's request for recommendations for an extensive discussion of our recommended WOTUS definition, the Associations herein encourage the Agencies to assert federal jurisdiction over the following categories of waters:

(1) the territorial seas;

(2) waters subject to the ebb and flow of the tide;

(3) waters presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce;

(4) waters with at least seasonal surface flow to waters identified in Categories 1 through 3 and wetlands with at least seasonal surface flow to waters identified in Categories 1 through 3;

(5) wetlands adjacent to waters identified in Categories 1 through 4; and

(6) impoundments of waters identified in Categories 1 through 4 and impoundments of wetlands identified in Category 5.

c. **The Agencies are Compelled to Revoke the 2015 WOTUS Rule because it Exceeds the Agencies' Statutory and Constitutional Authority, is Inconsistent with Supreme Court Precedent, and was Improperly Promulgated**

As noted, the 2015 WOTUS Rule exceeds the Agencies' authority and is the product of an impermissible regulatory process. The Agencies seemingly recognize this and are therefore obligated to repeal a regulatory approach they view as illegal.

1. Legal Background

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[56] 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"

[56] 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 (*id*. at 1288), and nonpoint source management (*id.* at 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (*id.* at 1281); funding to study impacts on water quality (*id*. at 1251-74); and programs targeting specific types of pollution (e.g., *id.* at 257, 1321).

other provisions of the Act.[57] The Act in turn defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[58]

To "discharge" lawfully to navigable waters, a business or person must obtain a permit. Under Section 402 of the Act, EPA and authorized State agencies may issue permits for "the discharge of any pollutant."[59] Under Section 404, the Army Corps may issue permits for "the discharge of dredged or fill material."[60]

For illegal discharges, Congress created a strict liability system, enforceable by agencies and private citizens with civil actions for penalties of up to $51,570 per violation per day.[61] The Act also provides for criminal penalties: negligent violations bring penalties of up to $25,000 per day and one year of imprisonment; "[k]nowing" violations trigger penalties up to $50,000 per day and three years' imprisonment—or twice that in the case of a second violation.[62]

The CWA permitting regimes are not the sole means of protecting waters. Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources."[63] Waters and wetlands that are not "navigable waters" are protected by States and localities. In that respect, every regulatory extension of federal jurisdiction readjusts the federal-State balance that Congress sought to preserve.

In 1974, the Corps defined "the waters of the United States" 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."[64] The Corps later revised the definition in 1977 to encompass not only traditional navigable waters, but also "adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce."[65]

Although the text of the Agencies' definition of "waters of the United States" remained essentially unchanged for the next 33 years, the Agencies' interpretation of their own regulations continued

[57] 33 U.S.C. 1311(a), 1362(12)(A).
[58] 33 U.S.C. 1362(7).
[59] 33 U.S.C. 1342(a).
[60] 33 U.S.C. 1344(a).
[61] 33 U.S.C. 1319(b), (d), 1365; 81 Fed. Reg. 43,091, 43,095 (July 1, 2016).
[62] 33 U.S.C. 1319(c)(1)-(2).
[63] 33 U.S.C. 1251(b).
[64] 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).
[65] 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

to expand. The Supreme Court confronted those increasingly aggressive interpretations in a series of decisions beginning in 1985.

i. Riverside Bayview

In *Riverside Bayview Homes*,[66] the Court considered the 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 Corps' regulations. The Court addressed the question whether non-navigable wetlands may be regulated as "waters of the United States" on the basis that they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem."[67] 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 'waters of the United States.'"[68]

ii. 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 traditional navigable waters.[69] One of those interpretations—the Migratory Bird Rule—was struck down in *SWANCC*.[70]

The Corps had asserted CWA jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[71] The Supreme Court explained that a ruling for the Corps would have required the Court "to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," a conclusion that "the text of the statute will not allow."[72] 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.[73] According to the Supreme Court, that approach impermissibly read the term "navigable"

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[66] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
[67] *Id*. at 131-135 & n.9.
[68] *Id*. at 133, 135 (emphasis added).
[69] *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality).
[70] 531 U.S. 159 (2001) (*SWANCC*).
[71] *SWANCC*, 531 U.S. at 162-165 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[72] *SWANCC*, 531 U.S. at 168.
[73] *Id*. at 171-172.

out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA."[74] The Court therefore invalidated the rule.

iii. Rapanos

In the Supreme Court's most recent consideration of this issue (*Rapanos*), the Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water."[75] The 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.[76]

Justice Scalia, writing for a four-Justice plurality, rejected the Corps' position because "waters of the United States" 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."[77] In going beyond this "commonsense understanding" to classify features like "ephemeral streams" and "dry arroyos" as "waters of the United States," the Agencies had stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'"[78] And wetlands fall within 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."[79] "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.[80]

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."[81] 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.'"[82] While Justice Kennedy suggested that this test "*may*" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a traditionally navigable water, 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

[74] *Id*. at 167.
[75] 547 U.S. at 720-721.
[76] *Id*. at 729.
[77] *Rapanos*, 547 U.S. at 732, 739.
[78] *Id*. at 734.
[79] *Id*. at 742.
[80] *Id*.
[81] *Rapanos*, 547 U.S. at 779.
[82] *Id*. at 780.

conception of a significant nexus.[83] Accordingly, he suggested that any agency regulation identifying covered tributaries would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."[84]

2. The 2015 WOTUS Rule Violates the CWA and Conflicts with Supreme Court Precedent on the Scope of Federal Jurisdiction under the CWA

The 2015 WOTUS Rule asserts jurisdiction over vast tracts of the United States, including innumerous miles of man-made ditches and municipal stormwater systems, dry desert washes and arroyos in the arid West, "tributaries" that are invisible from the ground and from which water has long since disappeared, ponds on 100-year floodplains that have never been mapped or delineated, and virtually all land in the water-rich Southeast. Many of these land and water features bear little or no relation to the traditional definition of navigable waters that Congress had in mind when it enacted the CWA. Whatever leeway the Act may give the Agencies to regulate "navigable waters",[85] the statutory text is not limitless and "does not authorize this 'Land is Waters' approach to federal jurisdiction."[86] The Agencies' approach to the 2015 WOTUS Rule—like their approach to the Migratory Bird Rule rejected in *SWANCC* and the "any connection" theory rejected in *Rapanos*—is inconsistent with both the law and the scientific evidence.

The consequences of this inconsistency are not academic. Land use and development would be disrupted all across the country—at enormous expense and without any legal grounding—if the 2015 WOTUS Rule is allowed to come into effect. The Agencies are therefore compelled to address this recognized illegality as well as the widespread adverse impacts caused by the overreach, through repeal of the 2015 WOTUS Rule.

i. The 2015 WOTUS Rule Reads the Word "Navigable" Out of the CWA

Assuming for the sake of argument that it were appropriate for the Agencies to base jurisdiction over tributaries, adjacent waters, and other isolated waters solely on Justice Kennedy's significant-nexus test,[87] the 2015 WOTUS Rule stretches and distorts that test beyond recognition. It reaches

[83] *Id*. at 781; see *Id*. at 778 (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").
[84] *Id*. at 781.
[85] 33 U.S.C. § 1362(7).
[86] *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (plurality).
[87] *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment).

innumerable features that lack the "volume of flow" and "proximity" necessary to ensure that effects on navigable waters are more than "insubstantial" or "speculative."[88]

"Statutory interpretation, as [the Supreme Court] always say[s], begins with the text,"[89] and the text "must, if possible, be construed in such fashion that every word has some operative effect."[90] Here, the CWA grants the Agencies jurisdiction over "navigable waters",[91] which in turn are defined as "the waters of the United States."[92] "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."[93] Although "the word 'navigable' in the statute" may have "limited effect," it does not have "no effect whatever."[94] 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."[95]

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."[96] 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."[97]

The 2015 WOTUS Rule ignores this admonition. As public commenters explained, the 2015 WOTUS Rule would allow the Agencies to assert federal regulatory jurisdiction over desiccated ditches (as "tributaries") and any isolated water features that happen to be nearby (waters with a "significant nexus"). For example:

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[88] *Id.* at 778-81.
[89] *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016).
[90] *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).
[91] 33 U.S.C. § 1311(a).
[92] *Id.* § 1362(7).
[93] *SWANCC*, 531 U.S. at 172 (2001).
[94] *Id.* at 172-73 (*quoting Riverside Bayview*, 474 U.S. at 133 (1985)).
[95] *Id.* 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).
[96] *Rapanos*, 547 U.S. at 778-79 (emphasis added).
[97] *Id*. at 778.

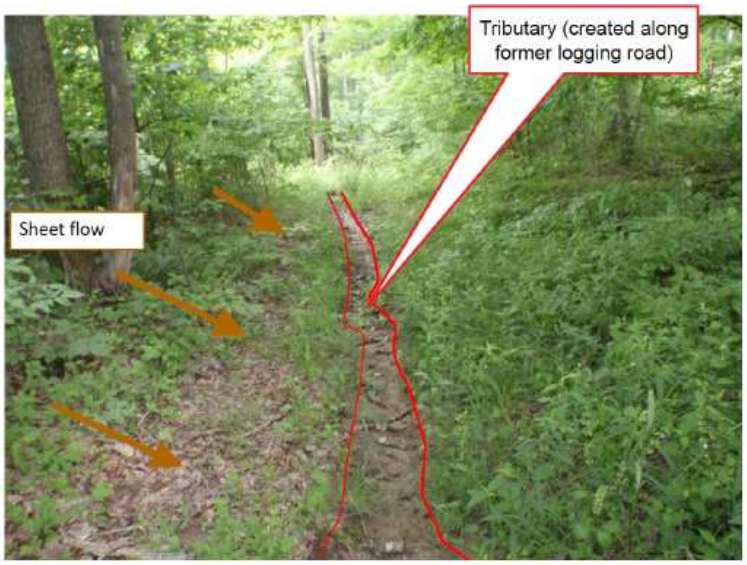
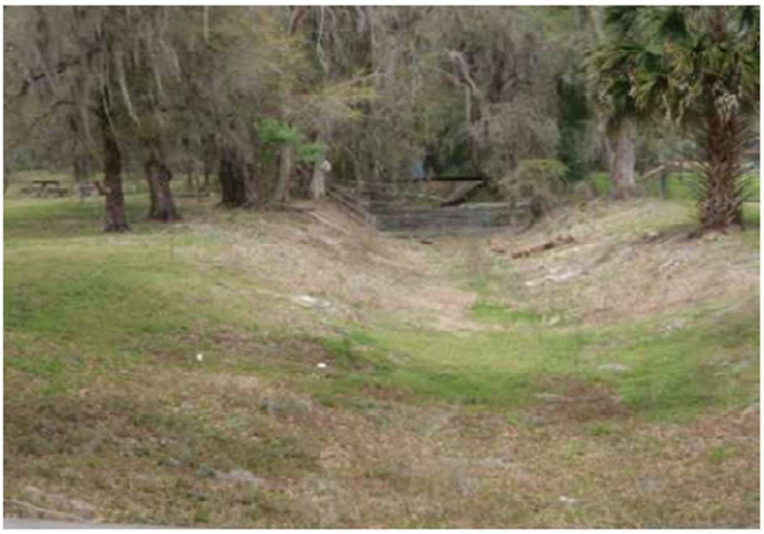


Figure 1: Because the red lines likely constitute an "ordinary high water mark" with a bed and banks between them, the feature depicted above is likely to be a "navigable water" under the Rule's definition of a tributary.[98]



[98] Am. Petroleum Inst. Comments, ID-15115.

Figure 2: Dade City Canal in Florida is a man-made, mostly dry conveyance for flood control. Dade City Canal is not currently a water of the United States but would likely be deemed a "tributary" under the Rule.[99]

Figure 3: This feature was deemed to be a "water of the United States" in 2014 after the Corps concluded that it exhibits an ordinary high water mark.[100]

[99] Stormwater Ass'n Comments 10, ID-7965.

[100] AFBF comments, App. A at 31. See also Laura Campbell, The WOTUS Rule is Final, but the Fight Continues, Mich. Farm Bureau (last visited Sept. 7, 2016), perma.cc/US3K-GKP3

Figure 4: Typical ephemeral arid washes, likely to be deemed waters of the United States under the Rule.[101]

As a matter of plain meaning, treating features like these as "tributaries" to "navigable waters"—and treating barely damp, isolated "wetlands" nearly a mile away as likewise "waters of the United States" because they are located within 4,000 feet of such "tributaries"—is impermissible.

The 2015 WOTUS Rule's coverage of all "interstate waters"[102] likewise ignores the word "navigable," replacing it with the word "interstate," and ignores Congress's choice to remove the term "interstate waters" from the Act.[103] The Agencies purported to assert jurisdiction over all interstate water features, even when those features "are not [traditional] navigable [waters]" and "do not connect to such waters."[104] Under the view embodied in the 2015 WOTUS Rule, an interstate water need not be navigable—an intermittent trickle or isolated pond is enough, so long as it crosses a State line. The 2015 WOTUS Rule jurisdiction over features that are not navigable, cannot be made navigable, have no nexus ("significant" or otherwise) to a navigable water or commerce, are not adjacent to, and do not contribute flow to, a navigable water, simply because the feature "flow[s] across, or form[s] a part of, state boundaries."[105] And this overreaching view

[101] Freeport-McMoRan Comment 3, at 5.
[102] 33 C.F.R. § 328.3(a)(2).
[103] Compare Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), with Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), with 33 U.S.C. § 1362(7) ("navigable").
[104] 80 Fed. Reg. at 37,074.
[105] 80 Fed. Reg. at 37,074.

is compounded by the 2015 WOTUS Rule's treatment of all "interstate waters" as if they were traditional navigable waters. As a result, any trickle that crosses a state line can be the starting point for the assertion of jurisdiction over its "tributaries" or "adjacent" wetlands.

"The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law," but "'the power to adopt regulations to carry into effect the will of Congress.'"[106] As such, the Agencies must therefore repeal the 2015 WOTUS Rule and the unlawful exercise of statutory authority contained therein.

ii. The 2015 WOTUS Rule's Definition of "Tributaries" is Impermissible

Several other aspects of the 2015 WOTUS Rule are irreconcilable with Supreme Court precedent, the scientific evidence, and (quite often) simple logic. The 2015 WOTUS Rule defines "tributary" to include any feature contributing any flow to a traditional navigable water or interstate feature, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark."[107] Because flow may be "intermittent[] or ephemeral",[108] jurisdiction may extend to minor creek beds, municipal stormwater systems, ephemeral drainages, and dry desert washes that are dry for months, years, or even decades at a time, as long as they exhibit a bed, banks, and OHWM. A feature may qualify despite passing "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris piles, or underground features) of any length, so long as a bed, banks, and OHWM can be identified upstream of the break.[109] And the Agencies need not use current facts in assessing jurisdiction based on these features—they may use historical information alone.[110]

The 2015 WOTUS Rule defines OHWM to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."[111] That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States.[112] Because an OHWM is an uncertain indicator of "volume and regularity of flow," it brings within the Agencies' jurisdiction "remote" features with only

[106] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976).
[107] 33 C.F.R. § 328.3(c)(3).
[108] 80 Fed. Reg. at 37,076.
[109] *Id*; 33 C.F.R. § 328.3(c)(3).
[110] *See, e.g.,* 80 Fed. Reg. at 37,081, 37,098.
[111] 80 Fed. Reg. at 37,106.
[112] 547 U.S. at 781.

"minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[113]

The definition's reach is thus vast, covering countless miles of previously unregulated features. The definition is also categorical, sweeping in many isolated, often dry land features, regardless of whether their "effects on water quality are speculative or insubstantial."[114] To be sure, Justice Kennedy contemplated that the Corps might, by rule, "identify categories of tributaries" (and adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations, "are significant enough" to support federal jurisdiction.[115] But the 2015 WOTUS Rule eschews consideration of frequency and volume of flow or proximity to navigable waters, proclaiming that the presence of "physical indicators" of bed and banks and OHWM guarantee there will be a significant nexus to navigable waters.[116] That is simply wrong. For example, although many ephemeral washes in Maricopa County, Arizona experience flow infrequently (*e.g.*, less than once per year, with each flow event lasting less than 5 hours) and the Corps has previously found that many such washes do not have a significant nexus, these washes often exhibit physical indicators of an OHWM and therefore would be treated under the 2015 WOTUS Rule as jurisdictional tributaries.[117]

Even if some features meeting the 2015 WOTUS Rule's definition of tributary have a "significant nexus" with traditional navigable waters, "[i]n other instances" it is clear that they do not.[118] By treating all tributaries as categorically jurisdictional—even ones "carrying only minor water volumes toward" a "remote" navigable water—the 2015 WOTUS Rule is inconsistent with Justice Kennedy's "significant nexus" approach, to say nothing of the plurality opinion.

For similar reasons, the 2015 WOTUS Rule's definition of "tributary" is inconsistent with the scientific evidence. The crux of that definition is the presence of a bed, banks, and OHWM. The underlying premise is that an "OHWM forms due to some regularity of flow and does not occur due to extraordinary events."[119] When an OHWM is present, the reasoning goes, a water feature with relatively constant and significant water flow must also be present. But that key predicate of the 2015 WOTUS Rule is demonstrably false.

In attempting to show that all "tributaries" nationwide have significant physical, biological, or chemical connections to navigable waters, the Agencies focused on non-representative, water-rich

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[113] *Id.* at 781-82.
[114] *Rapano*s, 547 U.S. at 780 (Kennedy, J.).
[115] *Id.* at 780-81.
[116] *See* 80 Fed. Reg. at 37,076.
[117] *See* City of Scottsdale Comments 2-3, ID-18024.
[118] *Rapanos*, 547 U.S. at 767 (Kennedy, J.).
[119] Technical Support Document 239, ID-20869.

systems.[120] Yet the Agencies, at the same time, conceded that the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—had long been "called into question"[121] and that the evidence of connectivity for such features is "less abundant."[122]

Nowhere is that more apparent than in the arid West, where erosional features with beds, banks, and OHWMs often reflect one-time extreme water events, and are not reliable indicators of regular flow.[123] In the desert, rainfall occurs infrequently, and sandy, lightly-vegetated soils are highly erodible. Thus washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow.[124] Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state, as they do in wet, humid climates.[125]

The Corps' experience bears this out as their studies have found "no direct correlation" between the location of OHWM indicators and future water flow in arid regions.[126] In fact, "OHWM indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics."[127] Needless to say, "randomly" distributed indicators cannot provide a rational basis for a blanket "significant nexus" finding.

Thus, in the arid West, dry channels deemed "tributaries" under the 2015 WOTUS Rule are unlikely to have any impact (much less a significant one) on downstream jurisdictional waters. The Agencies' categorical approach to jurisdictional tributaries is wholly unsupported by scientific evidence.

All of this is well reflected in the record. While it may make sense to assume that a defined "tributary" affects downstream "aquatic life" in water-rich environments, that assumption is out of place for intermittent and ephemeral channels that lack flow for months or years at a time.[128] Similarly, chemical connectivity is "not relevant" in arid systems where "water moves quickly across the landscape" and "dissipates," because chemical processes require "a long residence time

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[120] *See, e.g.,* 80 Fed. Reg. at 37,068-75.
[121] 79 Fed. Reg. at 22,231.
[122] 80 Fed. Reg. at 37,079.
[123] *See* Ariz. Mining Ass'n Comments 7-11.
[124] *See* Barrick Gold Comments 15-16, ID-16914.
[125] Freeport-McMoRan Technical Comments 7.
[126] U.S. Army Corps of Eng'rs, Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability 14 (2006)).
[127] U.S. Army Corps of Eng'rs, Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes 17 (2013)).
[128] *See* GEI Memo 3, ID-15059 ("[B]ecause the OHWM is a more demonstrated humid system criteria, its scientific reliability varies between regions depending on climatic and geomorphic conditions.").

in channels."[129] Evidence of actual transport distances in ephemeral "tributaries" likewise dooms any blanket finding of connectivity.[130]

The 2015 WOTUS Rule also implausibly asserts that there is a significant hydrological nexus between every tributary and the nearest traditional navigable water or interstate feature, despite intervening man-made or natural breaks of literally "any length."[131] As one authoritative report cited in API's comments explained, "the science does not support the Agencies' assertion that a significant nexus between a tributary and a traditional navigable water is not broken where the tributary flows through a culvert or other structure."[132]

Indeed, EPA's own SAB noted that the Connectivity Report lacked sufficient information on the influence of human alterations on connectivity and "generally exclude[d] the many studies that have been conducted in human-modified stream ecosystems."[133] It is often the entire point of such breaks to sever connectivity,[134] as is sometimes the case with dams, for example.[135] It was arbitrary and capricious for the Agencies to reach, on unexplained grounds, a result inconsistent with the SAB's conclusion. And it is the Agencies' obligation here to correct this impermissible assertion of authority through repeal of the 2015 WOTUS Rule.

iii. The 2015 WOTUS Rule's Definition of "Adjacent" is Impermissible

The 2015 WOTUS Rule's categorical approach to "adjacent" waters[136] is impermissible for many of the same reasons the Rule's definition of "tributaries" is impermissible. The 2015 WOTUS Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the OHWM of a navigable water or tributary and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its OHWM.[137] This definition cannot be supported for four reasons.

First, the 2015 WOTUS Rule conflicts with *Riverside Bayview*, *SWANCC*, and *Rapanos*, which have consistently given the word "adjacent" its ordinary meaning. 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."[138]

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[129] *Freeport-McMoRan Comments 4-5.*
[130] *See Ariz. Mining Ass'n Comments 12; Barrick Gold Comments 15-16.*
[131] 33 C.F.R. § 328.3(c)(3).
[132] WAC Comments 36, ID-17921 (quoting Exhibit 6, GEI Report 6).
[133] SAB Report 31, ID-7531.
[134] GEI Report 5-6.
[135] 79 Fed. Reg. at 22,235 (acknowledging that dams cut off flow and store water for flood control, irrigation water supply, and energy generation).
[136] 33 C.F.R. § 328.3(a)(6).
[137] *Id.* § 328.3(c)(2).
[138] 474 U.S. at 135 & n.9.

Jurisdictional adjacent wetlands thus are those "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them.[139] 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."[140]

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.'"[141] To conclude, as the 2015 WOTUS Rule does, that the word "adjacent" covers merely "nearby" waters based on notions of "functional relatedness," rather than "physical and geographical" proximity[142] would "extend[]" the meaning of the word "beyond reason."[143]

Second, by asserting jurisdiction based on adjacency not only to traditional navigable waters, but to any traditional navigable water or interstate feature, the 2015 WOTUS Rule violates 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 aquatic system comprising navigable waters as traditionally understood."[144] "[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*]."[145] 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.[146]

In Justice Kennedy's view, "mere adjacency to a tributary of this sort is insufficient."[147] Similarly, Justice Kennedy disagreed with asserted 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.[148]

Yet the 2015 WOTUS Rule adopted precisely this disfavored approach. It categorically asserts jurisdiction over "waters" (many of which are dry more often than wet) based on their "adjacency"

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[139] *Id.* at 134-35 & n.9.
[140] 531 U.S. at 167-68, 171.
[141] *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (*quoting Rapanos*, 547 U.S. at 748 (plurality)).
[142] *Id.* at 735.
[143] *Id.* at 743.
[144] 547 U.S. at 781.
[145] *Id.* at 781-82.
[146] *Id.* at 764; *accord id. at* 730 (plurality).
[147] *Id.* at 786.
[148] *Id.* at 784-85.

to "tributaries" "however remote and insubstantial,"[149] including ephemeral features, drains, ditches, and streams remote from navigable waters. A blanket inclusion of adjacent "waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like"[150] improperly asserts jurisdiction over a feature the precise aim of which is to interrupt any hydrologic connection to a jurisdictional water.

Third, the 2015 WOTUS Rule improperly relies on adjacency to assert jurisdiction not only over "wetlands," but all other "waters." The Supreme Court has never approved such a sweeping approach.[151] According to the *Rapanos* plurality, non-wetland "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that justified deference to the agency's approach to adjacency in *Riverside Bayview*.[152]

For this reason, courts have rejected past attempts to assert "adjacency" jurisdiction over non-wetlands. In one such case, for instance, the Ninth Circuit rejected jurisdiction over an isolated pond located a mere 125 feet from a navigable tributary of San Francisco Bay, despite evidence that the tributary occasionally flowed into that pond (but not vice-versa) by overtopping a levee.[153] That situation, in the court's view, "falls far short of the nexus that Justice Kennedy required in *Rapanos*."[154] Yet under the 2015 WOTUS Rule, the Agencies would assert jurisdiction over that feature and countless others like it. Again, the case law simply does not support such an approach.

Fourth, the 2015 WOTUS Rule improperly defines "adjacency" based on "the 100-year floodplain,"[155] which is defined as a region where the risk of flooding in any given year is one percent or greater. Such infrequent contact with jurisdictional waters disregards the "continuous surface connection" required by the *Rapanos* plurality.[156] And under Justice Kennedy's test, a water that is "connected to [a] navigable water by flooding, on average, once every 100 years",[157] cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered water[]."[158] At most, such a water would have an "insubstantial" "effect[] on water

[149] *Rapanos*, 547 U.S. at 779-80.
[150] 33 C.F.R. § 328.3(c)(1).
[151] *See Riverside Bayview*, 474 U.S. at 139; *Rapanos*, 547 U.S. at 742 (plurality).
[152] 547 U.S. at 742.
[153] *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007).
[154] *Id.*
[155] 33 C.F.R. § 328.3(c)(2)(ii).
[156] *Id.* at 742.
[157] *Rapanos*, 547 U.S. at 728 (plurality).
[158] *Id.* at 780 (Kennedy, J., concurring).

quality" that "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'"[159]

iv. The 2015 WOTUS Rule Misapplies Justice Kennedy's "Significant Nexus" Test

As noted above, while the Associations do not believe it was appropriate for the Agencies to attempt to rely exclusively on Justice Kennedy's "significant nexus" test in defining WOTUS, the 2015 WOTUS Rule fundamentally misapplies that test in several ways, some of which we discussed above. An additional misapplication that is subtle but significant relates to Justice Kennedy's requirement that a significant nexus be demonstrated through "chemical, physical, *and* biological" effects on navigable waters. The Agencies changed this requirement in the 2015 WOTUS Rule to "chemical, physical, *or* biological effects."[160]

Prior to that change, the significant nexus test has been met when the subject water "significantly affects the chemical, physical, ***and*** biological integrity of other covered waters more readily understood as navigable."[161] Under the 2015 WOTUS Rule, a water only needs to "significantly affect[] the chemical, physical ***or*** biological integrity" of a jurisdictional water, in order to now fall within federal jurisdiction.

While this change is subtle, it is quite meaningful. The 2015 WOTUS Rule removed the requirement that jurisdictional assertions be based on finding three different impacts on jurisdictional water (chemical, physical, and biological), and replaced it with a much lower bar that only required a demonstration of one of these types of impacts. Although it is difficult to precisely assess the jurisdictional impact of this change, it very clearly increases the universe of waters potentially subject to federal jurisdiction.

Most important, however, the expansion caused by the 2015 WOTUS Rule's change to the significant nexus test is unlawful because it misapplies Justice Kennedy's concurrence and the case law interpreting that concurrence. The Agencies characterized their use of the significant nexus test as adopting a jurisprudential directive and memorializing an existing interpretation, but it served neither goal. The subtle change in the 2015 WOTUS rule misapplied the case law and changed the Agencies' existing approach.

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[159] *Id.*

[160] 80 Fed. Reg. at 37,206.

[161] 2008 Guidance at 1 (significant nexus standard based upon whether water in question will "significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters" (emphasis added)), 2-3 (same, quoting Justice Kennedy's opinion), 8 (same), 10 (same). This is consistent with the Clean Water Act itself. See 33 U.S.C. § 1251(a).

v. The 2015 WOTUS Rule is Unconstitutionally Vague

The 2015 WOTUS Rule fails to give the public fair notice of when and where discharges are unlawful, by giving government agencies and individual government employees malleable discretion to determine which land features are jurisdictional "waters" and which are not. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application[] violates the first essential of due process of law."[162] "This requirement of clarity in regulation is [therefore] essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague."[163]

"[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns."[164] The first concern is "to ensure fair notice to the citizenry"[165], so regulated individuals and entities "know what is required of them [and] may act accordingly"[166] The second concern is "to provide standards for enforcement"[167], "so that those enforcing the law do not act in an arbitrary or discriminatory way."[168]

The second concern is the "more important aspect of [the] vagueness doctrine."[169] According to courts examining the vagueness doctrine, a regulation is constitutionally invalid if it fails to establish objective guidelines for enforcement.[170] In the absence of such objective guidelines, the law "may permit 'a standardless sweep [that] allows [government agents] to pursue their personal predilections.'"[171] Invalidation is therefore necessary when a regulation "is so imprecise that [arbitrary or] discriminatory enforcement is a real possibility."[172] That is the case here.

OHWM - Take first the concept of an "OHWM"—the crux of the 2015 WOTUS Rule's definition of "tributary" and the starting point for marking off the applicable distances for "adjacent" and "neighboring" waters and waters with a "significant nexus." To begin with, use of vague characteristics such as "changes in the character of soil" and "presence of litter and debris" as indicators of an OHWM impermissibly allow for arbitrary enforcement. What is more concerning, however, is that the 2015 WOTUS Rule also allows the Agencies' staff to rely on whatever "other

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[162] *Fox Television*, 567 U.S. 239 at 253 (*quoting Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).
[163] *Id*. (*citing United States v. Williams*, 553 U.S. 285, 304 (2008)).
[164] *Fox Television*, 567 U.S. at 253.
[165] *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007)
[166] *Fox Television*, 567 U.S. at 253.
[167] *Fire Fighters*, 502 F.3d at 551
[168] *Fox Television*, 567 U.S. at 253.
[169] *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (*citing Smith v. Goguen*, 415 U.S. 566, 574 (1974)).
[170] *Id*.
[171] *Id.* at 358.
[172] *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1051 (1991).

. . . means" they deem "appropriate" in deciding when an OHWM is present and where it lies.[173] In fact, "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination."[174] Regulators can reach any outcome they please, and regulated entities cannot know the outcome until they are already exposed to criminal liability, including the imposition of crushing fines.

As scientific commentators observed during the rulemaking, "[t]here is ambiguity and uncertainty associated with all the primary indicators of OHWM. It is particularly difficult to differentiate between [non-jurisdictional] gullies and [jurisdictional] ephemeral channels with these types of ambiguous indicators. Delineating down to this scale significantly magnifies the degree of subjectivity that must be applied and the intensity of disputes that could arise."[175]

The prospect of arbitrary enforcement made worse by the methods prescribed for identifying an OHWM—these are no standards that can be understood or replicated by the regulated public. Agency staff making an OHWM determination do not even need to visit the site. "Other evidence, besides direct field observation," can "establish" an OHWM.[176] Even more concerning, the preamble suggests that regulators may use desktop computer models "independently to infer" jurisdiction where "physical characteristics" of bed and banks and OHWM "are absent in the field."[177] As such, without even visiting a site, regulators can declare that OHWM exist simply by saying so, even if it not visible to the naked eye. Landowners will have to divine the "prior existence" of an OHWM and "historical presence of tributaries"—with no limit to how far back they must go—based on unclear criteria such as "lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence."[178]

Among the "remote sensing or mapping information" the Agencies may rely on to detect an invisible OHWM from afar are "local stream maps," "aerial photographs," "light detection and ranging" (also known as LiDAR, which means topographic maps drawn by lasers mounted on drones), and other unidentified "desktop tools that provide for the hydrologic estimation of a discharge."[179] The Agencies will use these sources "independently to infer" and "to reasonably conclude the presence" of an OHWM.[180]

From a practical standpoint, the approach dictated by the 2015 WOTUS Rule suggests that the term OHWM will simply come to mean whatever the Agencies say it means, and that the precise

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[173] 33 C.F.R. § 328.3(c)(6).
[174] U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-05, at 3 (Dec. 7, 2005).
[175] GEI Memo 7.
[176] 80 Fed. Reg. at 37,076.
[177] *Id.* at 37,077 (emphasis added).
[178] *Id.* at 37,077-78.
[179] 80 Fed. Reg. at 37,076-77.
[180] *Id.* at 37,077.

meaning of the term will inevitably vary from field office to field office and case to case.[181] That is flatly inconsistent with the Fifth Amendment.

Significant Nexus Text - The 2015 WOTUS Rule's conferral of standardless jurisdictional discretion is equally apparent with respect to the "case-by-case" significant nexus test.[182] At every stage, the test turns on subjective observations and opaque analyses.

Consider a landowner with a small, isolated pond on her property. To determine whether she needs a federal permit to discharge into the pond (for example, by building a swimming pier) the landowner must first identify all traditional navigable waters, interstate waters, and tributaries anywhere within 4,000 feet—nearly a mile—of the pond. Setting aside the vagueness of what counts as a "tributary" in the first place, imagine the landowner finds a tributary within the 4,000-foot limit. She must then sort out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest traditional navigable water or interstate feature.[183]

- Waters are "similarly situated" when "they function alike and are sufficiently close to function together in affecting downstream waters."[184] But when does a pond function "alike" with other ponds, and when does it function distinctly and alone? And what does "sufficiently close" mean? Is a mile too far? 10 miles? 100 miles?

- These "similarly situated" waters must "significantly affect[]" the "biological integrity" of the nearest traditional navigable water or interstate feature, including its capacity for "[s]ediment trapping," "[n]utrient recycling," and "[p]rovision of life cycle dependent aquatic habitat," among other functions.[185] But when is an effect on water integrity significant? The Agencies' explanation—that an effect is significant when it is "more than speculative or insubstantial"—is no clearer than the nebulous word it purports to define.

- "[I]n the region" means in the "the watershed that drains to the nearest" traditional navigable water or interstate feature,[186] unless of course the watershed is too big, in

[181] *See Rapanos*, 547 U.S. at 781-82. (Kennedy J., concurring). See also U.S. Gov't Accountability Office, GAO-04-297, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction 21-22 (2004) ("the difficulty and ambiguity associated with identifying the" OHWM means that "if [you] asked three different district staff to make a jurisdictional determination, [you] would probably get three different assessments"), perma.cc/8NZM-3W52.
[182] 80 Fed. Reg. at 37,058.
[183] 33 C.F.R. § 328.3(c)(5).
[184] 33 C.F.R. § 328.3(c)(5).
[185] 33 C.F.R. § 328.3(c)(5).
[186] 33 C.F.R. § 328.3(c)(5).

> which case it "may be reasonable" to use instead a "typical 10-digit hydrologic unit"[187], which ranges between 40,000 and 250,000 acres in size. But how are regulated entities to know the boundaries of watersheds millions or hundreds of thousands of acres in size, and how are they to know when regulators will deem it "reasonable" to use hydrological sub-units instead? More fundamentally, how are landowners expected to identify all "similarly situated" waters within hundreds of thousands of acres (requiring them to trespass on others' land), and then determine if they, together with the waters on their own land, "substantially effect" a tributary's "water integrity"?

These so-called standards fail to put the regulated community on notice of when the CWA actually applies to their lands. On the face of it, the significant-nexus test in the 2015 WOTUS Rule permits arbitrary enforcement based on vague notions like "sufficiently close," "more than speculative or insubstantial," and "in the region." Who is to say what those words mean, until a government agent wielding significant enforcement and authority says what they mean?

Categorical Exemptions - Many of the 2015 WOTUS Rule's categorical exemptions from jurisdiction are equally vague. For example, in apparent response to comments by agricultural groups, the Agencies inserted an exemption for "puddles."[188] But what is a puddle? The Agencies use the significant nexus test to assert jurisdiction over "depressional wetlands"[189], without regard for size or permanence. But when does a recurring puddle become a small depressional wetland?

Similar ambiguity arises with respect to the 2015 WOTUS Rule's categorical exemption for "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary."[190] As we explained above, there is no way for the regulated public to know when the "volume, frequency, and duration of flow" of such erosional features is "sufficient to create a bed and banks and an ordinary high water mark" to qualify as a "tributary."[191] The Agencies' discretion in interpreting those provisions makes their applicability impossible to predict.

"Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land."[192] "Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."[193] The 2015

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[187] 80 Fed. Reg. at 37,092.
[188] 33 C.F.R. § 328.3(b)(4)(vii).
[189] 80 Fed. Reg. at 37,093.
[190] 33 C.F.R. § 328.3(b)(4)(vi).
[191] *Id.* § 328.3(c)(3).
[192] *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).
[193] *Id.*

WOTUS Rule, including its approach to OHWM, significant nexus, and exemptions, "does not even begin to meet this constitutional requirement."[194]

Jurisdictional determinations - The Corps' jurisdictional determination ("JD") process does not cure the problem.[195] The Associations are unaware of any other circumstance in which a citizen must obtain a case-specific government report, at great personal expense, to be informed of the limits of the law.[196] A JD also does nothing to address the 2015 WOTUS Rule's encouragement of arbitrary and discriminatory enforcement—it is merely another instance in which that arbitrariness can manifest itself.

Members of the Supreme Court have observed that "the reach and systemic consequences of the CWA remain a cause for concern" because "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing."[197] JDs cannot solve that constitutional problem when they are guided by a vague rule; are available only in the Section 404 context, and not to determine the need for a Section 402 permit;[198] and are not binding on environmental litigants, who are free to bring civil enforcement actions under the 2015 WOTUS Rule's nebulous standards. These are flaws which go to the illegality and Constitutionality of the 2015 WOTUS Rule. As such, the Associations believe that the Agencies are compelled to repeal the 2015 WOTUS Rule.

3. The Agencies' Promulgation of the 2015 WOTUS Rule Violated the Administrative Procedure Act

The heart of the APA rulemaking process is the notice-and-comment procedure. The process begins when an agency publishes a "notice of proposed rulemaking."[199] That notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[200] After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."[201]

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[194] *Id.*
[195] *See U.S. Army Corps of Eng'rs v. Hawkes Co*., 136 S. Ct. 1807, 1811-16 (2016).
[196] *See Hawkes Co. v. U.S. Army Corps of Eng'rs,* 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.").
[197] *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (*quoting Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring)).
[198] *See* 33 C.F.R. § 331.2.
[199] 5 U.S.C. § 553(b).
[200] 5 U.S.C. § (b)(3).
[201] 5 U.S.C. § 553(c).

Notice-and-comment serves three purposes. "First, notice improves the quality of agency rulemaking by ensuring that agency regulations will be 'tested by exposure to diverse public comment.'"[202] "Second, notice and the opportunity to be heard are an essential component of 'fairness to affected parties.'"[203] "Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review."[204]

Notwithstanding the importance of the APA to transparent decision-making and improved regulatory outcomes, the Agencies' promulgation of the 2015 WOTUS Rule disserved each of these goals. To begin with, the Agencies made substantial changes (including by introducing arbitrary distance criteria) after the close of the comment period and refused to reopen the comment period to solicit input from knowledgeable stakeholders. The Agencies similarly withheld the final version of the Connectivity Report until after the comment period closed, thereby denying the public any opportunity to comment on it or its relevance to the proposed WOTUS Rule. Many of the comments that the Agencies received that were critical of the proposed approach to defining WOTUS were simply ignored.

i. The 2015 WOTUS Rule was Not a Logical Outgrowth of the Agencies' Proposal

For a regulation to comply with the notice and comment requirements of Section 553, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed."[205] The logical-outgrowth test asks whether "[a] party, *ex ante*, should have anticipated that" the requirements contained in the final rule "might be imposed."[206] If not, "a second round of notice and comment is required," so interested parties have an opportunity to comment on the elements of the 2015 WOTUS Rule that could not be anticipated.[207]

The "object" of the logical-outgrowth requirement is "fair notice."[208] "While a final rule need not be an exact replica of the rule proposed in the Notice,"[209] "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[210] The 2015 WOTUS Rule fails this logical outgrowth test.

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[202] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).
[203] *Id*.; *accord Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 678 (6th Cir. 2005).
[204] *Small Refiner*, 705 F.2d at 547.
[205] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).
[206] *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991) (brackets omitted).
[207] *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994).
[208] *Coke*, 551 U.S. at 174; see Leyse v. Clear Channel Broad., Inc., 545 F. App'x 444, 454 (6th Cir. 2013).
[209] *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).
[210] *Small Refiner*, 705 F.2d at 547.

There was no way to anticipate from the Agencies' proposal that the final 2015 WOTUS Rule would define key jurisdictional concepts using the arbitrary distances and reference points the Agencies ultimately chose. In their proposal, the Agencies defined "adjacent" waters as those "bordering, contiguous [with] or neighboring" a (1)-(5) feature.[211] "Neighboring" features were defined as those "located in the riparian area or floodplain" or having a "hydrologic connection."[212] In the final 2015 WOTUS Rule, "neighboring" features were defined in very different terms, to include "waters located within 100 feet of the ordinary high water mark" of a (1)-(5) feature, "waters located within the 100-year floodplain" of a (1)-(5) feature but "not more than 1,500 feet from the ordinary high water mark of such water," and "waters located within 1,500 feet of the high tide line" of a (1)-(3) water.[213]

The 2015 WOTUS Rule's case-by-case applicability of the "significant nexus" test for non-categorically jurisdictional features was similarly unanticipated. In the Agencies' proposal, any water, wherever located, could be deemed jurisdictional based on a significant nexus to a (1)-(3) water. The final 2015 WOTUS Rule, by contrast, applied a case-by-case "significant nexus" analysis to features "located within the 100-year floodplain" of a (1)-(3) feature or "within 4,000 feet of the high tide line or ordinary high water mark" of a (1)-(5) feature.[214]

These distances and reference points are central to the 2015 WOTUS Rule's operation, but there was no way for commenters like the Associations to anticipate their inclusion in the final 2015 WOTUS Rule. The 2015 WOTUS Rule is therefore not a logical outgrowth of the Agencies' proposed approach. As the District of North Dakota has already noted, "when the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule."[215] "Nothing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance."[216] This is a violation of the APA that the Agencies are obligated to redress through repeal of the 2015 WOTUS Rule.

ii. The Agencies Shielded the Connectivity Report from Public Comment

The Agencies must repeal the 2015 WOTUS Rule because, when they originally promulgated the Rule, the Agencies did not allow interested parties any opportunity to comment on the final

[211] 79 Fed. Reg. at 22,269.
[212] 79 Fed. Reg. at 22,269.
[213] 80 Fed. Reg. at 37,105.
[214] 80 Fed. Reg. at 37,105.
[215] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015).
[216] North Dakota v. EPA, 127 F. Supp. 3d 1047, 1058 (D.N.D. 2015).

Connectivity Report, which compiled the scientific literature and analysis on which the Agencies relied to determine the hydrological "connectivity" of various features.

The Agencies' proposal was accompanied only by a draft of the Connectivity Report, which was at the time undergoing review by the SAB. The SAB subsequently recommended numerous substantive changes to the Connectivity Report, and the Agencies made several notable changes in response.[217] For example, the final Connectivity Report introduced a new, continuum-based approach that analyzed the connectivity of particular waters to downstream waters along various "[d]imensions."[218] It also added important new material to a case study on "Southwestern Intermittent and Ephemeral Streams."[219] Both changes were responses to SAB criticisms of the Agencies' proposed approach to defining WOTUS, both go to the heart of the legal and scientific flaws of the 2015 WOTUS Rule, and both would have garnered comments from the Associations and others had they been publicly disclosed during the comment period.

The final Connectivity Report, however, was not published until two months after the comment period closed.[220] As the Associations and other commenters explained, the delayed release of the final Report—combined with the Agencies' decision to not extend the comment period to accommodate the delay—made it impossible for interested parties to review and comment on the final Report's conclusions and methodology.[221]

This is no trivial oversight. The Agencies "interpret[ed] the scope of waters of the United States' ... based on the information and conclusions in the Science Report, other relevant scientific literature, [and] the Technical Support Document that provides additional legal and scientific discussion for issues raised in this rule."[222] "In light of this information," the Agencies "made scientifically and technically informed judgments about the nexus between the relevant waters and the significance of that nexus."[223] Because the significant nexus approach underpins the entire 2015 WOTUS Rule and the Agencies' legal justification at the time, it is no overstatement to suggest that the Connectivity Report was the evidentiary linchpin for the 2015 WOTUS Rule.[224]

The decision not to make the final Report available until after the comment period had closed is difficult to rationalize. It is, after all, "fairly obvious" that "studies upon which an agency relies

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[217] SAB Review, ID-8046.
[218] Final Connectivity Report 1-4, ID-20858.
[219] *Id.* at 5-7.
[220] 80 Fed. Reg. 2,100 (Jan. 15, 2015).
[221] *See* WAC Comments 73.
[222] 80 Fed. Reg. at 37,065. The "Science Report" is the Connectivity Report. The Technical Support Document aggregated and summarized the agencies' scientific analysis, including the Connectivity Report and the SAB review.
[223] 80 Fed. Reg. at 37,065.
[224] *See* 80 Fed. Reg. at 37,057 (explaining that the Connectivity Report "provides much of the technical basis for [the] [R]ule").

in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."[225] "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[226] That is precisely what happened when the Agencies promulgated the 2015 WOTUS Rule. While the Agencies now seemingly agree that no *technical* report could have supplied the Agencies sufficient justification to overcome clear *statutory* limitations on the jurisdictional reach of the CWA, the Connectivity Report was fundamental to the Agencies' analysis in 2015. The Agencies' decision to shield this document from comment, therefore, caused a violation of the APA that the Agencies must now address through repeal.

iii. The Agencies Failed to Consider Important Comments

The Agencies additionally failed to comply with their APA obligation to "consider and respond to significant comments received during the period for public comment."[227] Though an agency need not "respond to every comment"[228], it must adequately respond to significant comments that "cast doubt on the reasonableness of a position taken by the agency."[229]

In the rulemaking proceedings for the 2015 WOTUS Rule, numerous parties, including the Associations, submitted significant comments that the Agencies failed to address or consider. In particular, many commenters expressed concern that the Agencies' proposed approach would unduly expand the area subject to federal regulatory jurisdiction, trenching in equal parts on common sense and traditionally local land-use regulation.[230] These concerns were disregarded without any meaningful response or consideration.

For example, several members of the public with land holdings in the arid West commented that the proposal's expansive definition of covered "tributaries" was vastly over-inclusive. They explained that many lands in the West contain features that the Agencies claimed to be excluded from jurisdiction (*e.g.*, desert washes, arroyos, gullies, rills, and channels), but which would in fact often be covered by the 2015 WOTUS Rule any time those features arguably exhibit a bed and banks and an ordinary high water mark.[231] Yet due to the highly erodible nature of the soil in the West, these features are often formed by a single rain event and rarely carry water. Thus, the

[225] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).
[226] *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 199 (D.C. Cir. 2007).
[227] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).
[228] *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984).
[229] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977).
[230] *See, e.g.,* WAC Comments 39
[231] *See, e.g.,* Freeport-McMoRan Comments 5, ID-14135; Ariz. Mining Ass'n Comments 7-8, ID-13951; N.M. Cattle Growers Ass'n Comments 12, ID-19595.

commenters explained, it made no sense to rely on physical characteristics that might indicate a tributary in a wet, humid climate for purposes of identifying tributaries in the arid West.[232]

Despite the serious nature of these comments, they were never addressed in the final 2015 WOTUS Rule or its preamble. The 2015 WOTUS Rule noted generically that commenters "suggested that the agencies should exclude ephemeral streams from the definition of tributary," and responded that ephemeral streams will lack sufficient flow to form "the physical indicators required" by the definition of "tributary."[233] But that discussion was not sufficiently responsive to concerns about channels and gullies in the arid West, which do sometimes have the physical indicators required by the 2015 WOTUS Rule.

Members of the farming community similarly commented that the Agencies' proposal would eviscerate several statutory permit exemptions applicable to agricultural activities.[234] They explained, for example, that although farming activities such as plowing, seeding, harvesting and farm pond construction are exempt from Section 404 permitting requirements[235], the CWA's "recapture" provision[236] would frequently be triggered when common features on the farm, such as erosional features, ephemeral drains and farm ditches, become "tributaries" under the 2015 WOTUS Rule. The Agencies' proposed approach would further override the Section 402 permit exemption for agricultural stormwater runoff and irrigation[237] by regulating as "tributaries" the ditches and drainages that carry stormwater and irrigation water.[238] These concerns were again largely ignored in the 2015 WOTUS Rule, which provided only a terse, unsubstantiated assertion that the 2015 WOTUS Rule "does not affect any of the [statutory] exemptions" and "does not add any additional permitting requirements on agriculture."[239]

"[A] dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[240] The APA required the Agencies to listen to and answer comments and concerns on the proposed 2015 WOTUS Rule; "these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule."[241] The Agencies did not sufficiently comply with these requirements when it promulgated the 2015 WOTUS Rule. This Supplemental Notice and comment opportunity, which follows a lengthy initial opportunity to comment on the proposed repeal, suggests the Agencies'

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[232] *E.g.,* Ariz. Mining Ass'n Comments.
[233] 80 Fed. Reg. at 37,079.
[234] AFBF Comments 13-17, ID-18005.
[235] *See* 33 U.S.C. 1344(f)(1)
[236] 33 U.S.C. 1344(f)(2).
[237] 33 U.S.C. 1342(l)(1).
[238] AFBF Comments 16-17.
[239] 80 Fed. Reg. at 37,055.
[240] *Home Box Office*, 567 F.2d at 35-36.
[241] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

renewed commitment to the APA's procedural requirements. The Associations applaud the Agencies' commitment in this rulemaking effort, and believe that the deficient rulemaking procedures employed in promulgating the 2015 WOTUS Rule warrant the Rule's repeal.

Stated more plainly, the regulatory proceedings underlying the 2015 WOTUS Rule violated the APA and therefore invalidate the final rule. This illegality is not speculative. In response to motions to enjoin the 2015 WOTUS Rule, two District Courts found that the APA claims described above were likely to succeed. The Southern District of Georgia preliminarily enjoined the 2015 WOTUS Rule, holding that State plaintiffs had demonstrated, *inter alia*, "a likelihood of success on both of their claims under the APA" that the 2015 WOTUS Rule "is arbitrary and capricious" and "that the final rule is not a logical outgrowth of the proposed rule."[242]

The District of North Dakota preliminarily enjoined the 2015 WOTUS Rule after similarly observing that plaintiff-States' procedural claims that the Agencies failed to comply with APA requirements in promulgating the rule had a reasonable chance of succeeding on the merits.[243] These demonstrated and judicially recognized violations of the APA effectively compel the Agencies to take action to repeal the 2015 WOTUS Rule that was the product of the impermissible rulemaking process.

d. EPA Improperly Attempted to Sway Public Opinion During Rulemaking Proceedings

The APA violations described above are significant procedural flaws, and yet not the most egregious of the Agencies' procedural transgressions: EPA also engaged in an illegal propaganda campaign against those critical of the Agencies' proposed approach to defining WOTUS.[244] The General Accounting Office ("GAO") has repeatedly held that "materials. . . prepared by an agency . . . and circulated as the ostensible position of parties outside the agency amount to [prohibited] covert propaganda."[245] Yet EPA used Thunderclap (a "crowdspeaking" platform) to recruit supporters of the proposed Rule.[246] Once the campaign reached a minimum threshold of supporters, Thunderclap disseminated a message through each supporter's social media accounts.[247] The message, to an audience of 1.8 million, read: "Clean water is important to me. I

[242] *Georgia v. Pruitt*, No. 15-cv-79, 2018 U.S. Dist. LEXIS 97223, at *18 (S.D. Ga. June 8, 2018) (granting preliminary injunction).
[243] *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056-57 (D.N.D. 2015).
[244] The Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, which authorized funding for EPA during the relevant time, prohibits use of appropriations "for publicity or propaganda purposes." Id., tit. 7, § 718; accord Consolidated and Furthering Continuing Appropriations Act, Pub. L. No. 113-235, tit. 7, § 718, 128 Stat. 2130, 2383 (2014).
[245] B-305368, 2005 WL 2416671, at *5 (Comp. Gen. Sept. 30, 2005).
[246] B-326944, 2015 WL 8618591, at *2; see perma.cc/9CHN-87T8 (archived Thunderclap page).
[247] B-326944, 2015 WL 8618591, at *2.

support EPA's efforts to protect it for my health, my family, and my community."[248] The statement concluded with a hyperlink to EPA's webpage promoting the proposed 2015 WOTUS Rule.[249] Nothing identified EPA as the author; to anyone reading the message, "it appeared that their friend independently shared a message of his or her support for EPA and clean water."[250]

According to the GAO, this is the very definition of covert propaganda. EPA "used supporters as conduits of an EPA message . . . intend[ing] to reach a much broader audience," without disclosing "that the message was prepared and disseminated by EPA."[251] This sort of surreptitious messaging is "beyond the range of acceptable agency public information activities," "reasonably constitute[s] 'propaganda,'" and was accordingly unlawful.[252]

Because it was designed to influence rulemaking proceedings, this effort alone is a basis for repealing the 2015 WOTUS Rule that was the product of those rulemaking proceedings. "Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect . . . regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation."[253] EPA's propaganda campaign, particularly when taken together with its other social media efforts, demonstrates that the rulemaking process underling the 2015 WOTUS Rule did not genuinely seek out and consider public input. Instead, these proceedings provided a veneer of open-minded consideration under which EPA solicited validation for the Agencies' existing conclusions while ignoring criticism and concern.

e. Even if Not Compelled, Agencies Have Authority and Discretion to Repeal the 2015 WOTUS Rule

The APA governs the manner under which federal agency actions are promulgated and reviewed. 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, *inter alia*, "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." As discussed throughout these comments, the Agencies' proposed revocation of the 2015 WOTUS Rule is permissible under the APA because it is in accord with the CWA and the jurisdictional limitations Congress imposed therein. The Agencies' discretion to take this action is not diminished simply because the Agencies analyzed their jurisdiction differently and/or sought different policy outcomes in promulgating the 2015 WOTUS Rule. The 2015 WOTUS Rule cannot be credibly construed as a regulatory outcome

[248] *Id.* at *3.
[249] *Id.*
[250] *Id.* at *8.
[251] B-326944, 2015 WL 8618591, at *8.
[252] B-223098, 1986 WL 64325, at *1 (Comp. Gen. Oct. 10, 1986).
[253] *Iowa League of Cities v. EPA*, 711 F.3d 844, 871 (8th Cir. 2013).

necessitated or even meaningfully informed by scientific or technical data. The 2015 WOTUS Rule reflected nothing more than the prior administration's policy decision. The decision to revoke the 2015 WOTUS Rule, therefore, need not be based on a reanalysis or reinterpretation of scientific data. The decision to revoke the 2015 WOTUS Rule is a policy decision that is squarely within the Agencies' discretion to make – particularly where, as here, the proposed revocation aims to correct (among other issues) expansive and legally suspect assertions of jurisdiction under the CWA.

1. A Decision to Revoke 2015 WOTUS Rule is Entitled to Deference

"An 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."[254] This recital of "Chevron deference" underpinned the Supreme Court's unanimous decision to uphold the Agencies' discretion to interpret WOTUS to delineate the often blurry line dividing waters subject to federal jurisdiction and dry land.[255] 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 directly relevant guidance on the bounds of the Agencies' regulatory discretion.

The primary guideposts come from *Riverside Bayview, SWANCC* and *Rapanos*. In *SWANCC*, the majority and minority disagreed whether it violated Congress's express intent to interpret WOTUS to include isolated wetlands that may be used by migratory birds.[256] The majority in *SWANCC* held that Corps was entitled to no deference 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.[257] 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."[258]

After the Agencies adopted a WOTUS interpretation based on an improbably narrow construction of *SWANCC* and impossibly broad jurisdictional aspirations, it was again the Justice's profound disagreement over the extent of agency authority that led to the decision in *Rapanos*.[259] 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:

[254] *Riverside Bayview*, 474 U.S. 121, 131.
[255] *See Riverside Bayview*, 474 U.S. 121.
[256] *See SWANCC*, 531 U.S. 159.
[257] *SWANCC*, 531 U.S. at 172 (citations omitted).
[258] *SWANCC*, 531 U.S. at 173.
[259] *See Rapanos*, 547 U.S. 715.

> 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 boundless view of the scope of its power. The upshot today is another defeat for the agency.[260]

Chief Justice Robert's concurrence provides clear guidance – the courts will defer to decisions that refine the Agencies' prior jurisdictional assertions in light of Supreme Court precedent and avoid testing the outer bounds of the Agencies' authority. A decision to revoke the 2015 WOTUS Rule fits squarely within this capacious "room to operate," is therefore entitled to deference precisely because it removes this "essentially boundless view of the scope of its power" and rescinds the Agency's prior practice of continuously testing the furthest reaches of federal jurisdiction under the CWA.

2. Changing the Agencies' Prior Approach to Defining WOTUS Does Not Diminish Agency Deference

Agencies are entitled to change their minds, and are arguably compelled to do so in situations such as this. Indeed, the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[261] There is therefore "no basis in the Administrative Procedure Act . . . for a requirement that all agency change be subjected to more searching review."[262] Rather, the same arbitrary-and-capricious standard applies to both an agency's initial decision to issue a regulation and its later decision to rescind or modify the regulation.[263]

It is therefore enough for an agency to give "a reasoned explanation for [its] change."[264] Under this standard, an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible

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[260] *Rapanos*, 547 U.S. at 758.
[261] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).
[262] *Id.*; *see also Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016) ("[N]o specially demanding burden of justification ordinarily applies to a mere policy change.").
[263] *See Fox Tel. Stations*, 556 U.S. at 515.
[264] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

under the statute, that there are good reasons for it, and that the agency believes it to be better."[265] This is not an "especially 'demanding burden of justification.'"[266]

Critically, an agency's reasoned explanation for its shift can be that, with a change of administrations, the agency's view as to the public interest has changed. The D.C. Circuit has held that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."[267] So long as "the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."[268] That evaluation may include the current agency head's determination that a new statutory interpretation is superior to the interpretation reached by a previous administration.[269]

If finalized, the Agencies' revocation of the 2015 WOTUS Rule would assuredly meet the requisite "burden of justification." In the preamble accompanying this Supplemental Notice and in multiple other contexts, the Agencies provided a detailed recital of the multiple justifications for revoking the 2015 WOTUS Rule. The Agencies also provided compelling evidence that the 2015 WOTUS Rule failed to achieve its stated objectives of regulatory certainty. Instead, the 2015 WOTUS Rule generated significant confusion and litigation, exceeded the Agencies' authority, and improperly intruded on State jurisdiction.[270] This evidence is extensively supported by comments and other data submitted by States and other stakeholders in the administrative record for the 2015 WOTUS Rule, and in the docket for this proposal. The Agencies' proposed revocation is also supported by briefing in litigation over the 2015 WOTUS Rule and initial court orders assessing the likelihood of successfully overturning the 2015 WOTUS Rule.[271]

The Agencies' proposed repeal finds additional support by the Agencies' retrospective review of their administrative record for, and analysis of, the 2015 WOTUS Rule. This more searching review revealed the questionable analytical underpinnings of 2015 WOTUS Rule. These questionable underpinnings include incongruous assertions that the 2015 WOTUS Rule would not significantly expand federal jurisdiction under the CWA, would result in implausibly low cost

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[265] *Fox Tel. Stations*, 556 U.S. at 515 (emphases in original).
[266] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (citation omitted).
[267] *National Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).
[268] *Id.*; *see also Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.").
[269] *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (upholding an agency's conclusion that its new statutory interpretation was "more consistent with [the] statutory language" than its previous one).
[270] See 83 Fed. Reg. at 32,237 – 32,249.
[271] 83 Fed. Reg. at 29,230

impacts, and, a deeply flawed assertion, that a scientific study could provide the justification for disregarding the CWA's jurisdictional limitations.[272]

This study, the Connectivity Report, "concluded that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed."[273] This conclusion is not new, not reasonably in question, and not remotely relevant to defining WOTUS. There is no question that waterbodies share connectivity in watersheds, no question that upstream impacts can, but not always have downstream impacts, and no question that it is important to examine water quality at a watershed level. Congress understood this when it promulgated the CWA, but declined to extend federal jurisdiction to the outermost tendrils of hydrological connectivity and to every potential contributor to downstream impairment, no matter how tenuous. Instead, Congress selected the "somewhat ambiguous, but nonetheless clearly limiting"[274] term "navigable waters."

As the plurality and Justice Kennedy both observed in *Rapanos*, "environmental concerns provide no reason to disregard limits in the statutory text"[275] Consequently, regardless of whether the Connectivity Report is considered a high-quality scientific study or simply validation for a policy decision, its presence in the administrative record does not constrain the Agencies' discretion to revoke the 2015 WOTUS Rule. It need not be regarded or disregarded in the present decision to revoke the 2015 WOTUS Rule because interpreting the proper scope of the Agencies' jurisdiction under the CWA requires consideration of the text of the statute, jurisprudence, and legislative materials—not the prospects of upstream connectivity and downstream impairment.

III. CONCLUSION

The Associations support the Agencies' present effort to repeal the 2015 WOTUS Rule and reinstate the prior regulations in order to address the Rule's legal, jurisdictional, and practical deficiencies. The 2015 WOTUS Rule did not meet any of the objectives put forth by the Agencies' in its promulgation, and exceeded the Agencies' Authority under the CWA. A repeal of the 2015 WOTUS Rule is necessary to uphold the balance between Federal and State regulatory jurisdiction and to provide transparency to this important rulemaking effect.

Thank you for the opportunity to provide these supplemental comments. The Associations look forward to working with the Agencies in their effort to promulgate a clear and legally defensible WOTUS definition. If you have any questions, please feel free to reach out to Amy Emmert (API) at 202.682.8372/emmerta@api.org, Lee Fuller (IPAA) at 202.857.4722/lfuller@ipaa.org,

[272] 83 Fed. Reg. at 32,240-32,347
[273] 80 Fed. Reg. at 37,066.
[274] *Rapanos*, 547 U.S. at 758.
[275] *Rapanos*, 547 U.S. at 777.

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