April 15, 2019

Via Federal eRulemaking Portal: http:// www.regulations.gov/

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

Re: Comments of the American Petroleum Institute, the Independent Petroleum Association of America, the American Exploration and Production Council, and Association of Oil Pipe Lines in Response to the Environmental Protection Agency's and the Army Corps of Engineers' Proposed Rule to Define "Waters of the United States." EPA-HQ-OW-2018-0149.

Dear Sir/Madam:

This letter provides comments from the American Petroleum Institute ("API"), the Independent Petroleum Association of America ("IPAA"), the American Exploration and Production Council ("AXPC"), and the Association of Oil Pipe Lines ("AOPL") (collectively, "the Associations") in support of the U.S. Environmental Protection Agency's ("EPA's") and the U.S. Army Corps of Engineers' ("Army Corps'") (collectively, "the Agencies") Proposed Rule to Define "Waters of the United States" ("WOTUS") ("Proposed WOTUS Rule").[1] The Associations welcome the Agencies' commitment to transparent rulemaking and effective stakeholder engagement, and appreciate the opportunity to provide these comments and recommendations.

We believe that the Proposed WOTUS Rule reflects careful consideration of the Agencies' prior interpretations, the broad guideposts provided by the United States Supreme Court ("Supreme Court" or the "Court"), and a genuine interest in developing an interpretation of WOTUS that is clear, protective of the environment and human health, administrable, and legally sound. Our comments include a detailed executive summary - with our discussion points and requests outlined in a "table of contents" format. Additionally, we are pleased to share a recent study commissioned from ERM NC, Inc. ("ERM")[2] that demonstrates that the benefits of the Proposed WOTUS Rule will exceed its costs under any reasonably foreseeable scenario.

[1] 84 Fed. Reg. 4,154 (Feb. 14, 2019).
[2] ERM is a leading global provider of environmental, health, safety, and risk consulting services.

API is a national trade association representing over 600 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.

The 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 about 54 percent of American oil, and produce more than 85 percent of American natural gas. 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.

The AXPC is a national trade association representing 33 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry, such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

AOPL is a nonprofit national trade association that represents owners and operators of oil pipelines across North America before state and federal agencies, legislative bodies, and the judiciary, and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members bring crude oil to the nation's refineries and important petroleum products to our communities, including all grades of gasoline, diesel, jet fuel, home heating oil, kerosene, propane, and biofuels, through pipelines that extend approximately 215,000 miles across the United States. These pipelines safely, efficiently, and reliably deliver over 21 billion barrels of crude oil and petroleum products each year. AOPL strives to ensure that the public and all branches of government understand the benefits and advantages of transporting crude oil and petroleum products by pipeline as the safest, most reliable, environmentally-friendly, and cost-effective method of serving energy consumption demand.

The Associations and their members have a substantial interest in the scope of federal jurisdiction under the Clean Water Act ("CWA" or "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 drilling and producing from oil and natural gas wells, refining crude oil, transporting crude oil or refined product, and operating filling stations. Protecting water resources is important, and the Associations and their members remain committed to working with federal and state regulators to ensure that water resource regulations are protective, clear, administrable, and legally sound.

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

I. EXECUTIVE SUMMARY OF COMMENTS

The definition of WOTUS under the CWA matters for several very practical reasons. From an environmental perspective, a clear definition of WOTUS will allow both the federal and state governments to allocate their limited resources more effectively toward those waters appropriately under their jurisdiction and protection. From a permitting perspective, additional clarity allows landowners to make more educated decisions about their property, and will likely reduce the number of jurisdictional determinations submitted to the Army Corps (a major source of delay under the current permitting system). When landowners, regulated entities, and regulators themselves can readily discern the entity with jurisdiction over a waterbody, they can readily take appropriate actions to make sure that the necessary permits are in place. Faced with jurisdictional uncertainty, important projects—including projects that promote and protect water quality—may be substantially delayed or altogether abandoned. Additionally, given the significant civil and criminal penalties that can be imposed under the CWA, it is essential that the Act is administered and jurisdiction is asserted in a clear, predictable, and transparent manner.

With great respect for cooperative federalism, the Associations strongly support the Agencies' framework to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." [3] We further agree with the Agencies that the "the line between Federal and State waters is a legal distinction, not a scientific one, that reflect the overall framework and construct of the CWA."[4] The Agencies also are clear that the proposed definitions are based on the legal limit of federal jurisdiction. The Proposed WOTUS Rule is therefore "informed by, though not dictated by, science."[5]

The Associations' close legal review of the Proposed WOTUS Rule indicates that the Agencies carefully considered the requirements in the CWA and the broad guideposts provided by the Supreme Court. The Proposed WOTUS Rule provides an interpretation of WOTUS that is clear, protective, administrable, and legally sound.

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[3] 84 Fed. Reg. at 4,187.
[4] *Id.*
[5] *Id*.

The Associations applaud the Agencies' efforts and ask for the Agencies to move toward a final rule and implementation without any further delay. Additionally, the Associations provide comments for the Agencies' consideration that we believe are aligned with these overall objectives and that provide further consistency and clarity to the WOTUS definition. The Associations also submit recommended changes to certain proposed definitions and exclusions.

Summary Outline with Associated Page Numbers

reasonably foreseeable scenario, according to a recent study completed by ERM.[6]	
Comments on Proposed Categories of Waters (*Please note: our suggested changes to the proposed agency definitions are provided in underline and agency language proposed to be deleted is in strike-out*).	**Page No.** p. 25
1. **Traditional Navigable Waters (TNWs) and Territorial Seas:** The Associations support combining TNWs and territorial seas as one category. The Associations also recommend that the Agencies amend the definition of TNWs to reflect that: a) historic use alone is insufficient to demonstrate navigability, and b) recreational uses alone do not constitute transport in interstate or foreign commerce. The Associations propose the following changes to the definition of TNWs: Waters that are currently used ~~or were used in the past~~ or may be susceptible to use in their natural condition or by reasonable improvement as a means to transport ~~in~~ interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.	p. 26
2. Interstate Waters: The Associations support Agencies' proposal to remove interstate waters as a separate category of WOTUS.	p. 33
3. **Tributaries:** The Proposed WOTUS Rule reasonably requires tributaries to be connected to waters under federal jurisdiction via perennial or intermittent surface flows. The Associations support the Agencies' definitions of perennial and ephemeral and recommend it remain unchanged. The Associations recommend revising the definition of intermittent for additional certainty as follows: The term *intermittent* means surface water flowing continuously ~~during certain times~~ for at least 90 consecutive days in ~~of~~ a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).	p. 34

[6] ERM is a leading global provider of environmental, health, safety, and risk consulting services.

4. **Impoundments:** The Associations recommend revising the proposed definition of Impoundments as follows: Impoundments of waters identified in paragraphs (1)(i) through (iv) and (v) of this definition, the movements of which have been impeded either in whole or in part by a man-made structure, such as a dam.	p. 39
5. **Ditches:** The Associations support a separate category of ditches and recommend that the Agencies clarify that ditches can be WOTUS or point sources but that they cannot be both WOTUS and point sources. We support the Proposed WOTUS Rule's assertion that the Agencies have the burden of proof as relating to the demonstration of a ditch's jurisdictional status, and we recommend that the Proposed WOTUS Rule establish reasonable limits for jurisdictional determinations. Consistent with the Army Corps' regulatory reform efforts, the Associations recommend that the Proposed WOTUS Rule be amended to require the Agencies to review an applicant's data and render a jurisdictional determination on ditches within 60 days.	p. 40
6. **Lakes and Ponds:** The Associations support the separate category of lakes and ponds. The Associations ask for further clarification on the term "flooding" and propose that the type of flooding necessary to bring a lake or pond within federal jurisdiction should be more defined using the following language: . . . lakes and ponds that are flooded-annually by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year and for a duration that is not less than one week. For purposes of this section, "flooded" shall mean the submergence of the ordinarily dry land between a water identified in paragraphs (1)(i) through (v) of this definition and a lake or pond such that there is no surface separation between waters identified in paragraphs (1)(i) through (v) of this definition and a lake or pond for a least a week. "Flooded" shall not mean short-term overtopping of the surface separation between a water identified in paragraphs (1)(i) through (v) of this definition and a lake or pond; or the mere inflow to a lake or pond from a water identified in paragraphs (1)(i) through (v) that has overflowed its normal confines.	p. 43
7. **Adjacent Wetlands:** The Associations support the clear and legally defensible definition that the Agencies' propose for the adjacent wetlands	p. 46

category. We also support the Proposed WOTUS Rule's retention of the Agencies' longstanding three-part wetlands delineation criteria.	
Exclusions (*Please note: our suggested changes to the proposed agency definitions are provided in underline and agency language proposed to be deleted is in strike-out*).	**Page No.** p. 48
1. The Associations support all of the the proposed exclusions and offer clarifying changes to some of the exclusions.	p. 48
2. **Groundwater:** The Associations support the groundwater exclusion and further support use of the following alternate language recommended by the Agencies: Groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems.	p. 49
3. **Prior Converted Cropland:** The Associations support the prior converted cropland definition and request that the time period for considering a parcel abandoned be extended from the proposed five years to ten years. The Associations recommend revising the definition of prior converted cropland with one word change as follows: . . . Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding ~~five~~ ten years.	p. 51
4. **Artificial Lakes and Ponds:** The Associations support the artificial lakes and ponds exclusion and request clarifying language that this exclusion include industrial features necessary for the operation of a facility, such as water storage ponds, impoundments, conveyances and other structures used for fire water, utility water, cooling water, process water, raw water.	p. 52
5. **Wastewater Recycling Structures:** The Associations support the wastewater recycling structures exclusion and recommend that the Agencies include other examples as provided in the 2015 WOTUS Rule. These include "detention and retention basins built for wastewater recycling; groundwater	p. 52

recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling."	
6. **Waste Treatment Systems:** This is a crucial longstanding exclusion that the Associations recommend be further clarified to unambiguously include all systems for managing waters subject to regulation under the CWA. The Associations propose the following revised language: The term '*system for managing waters subject to regulation under the CWA'* ~~*waste treatment system*~~ includes the entire system and all components, ~~including lagoons and treatment ponds (such as settling or cooling ponds),~~ designed to convey, ~~or~~ retain, detain, store, concentrate, settle, reduce, or remove pollutants, either actively or passively, ~~from wastewater prior to discharge (or eliminating any such discharge).~~ from water, the discharge of which would be subject to regulation under the CWA (including waters that are not discharged directly or indirectly because they are recycled, reused, evaporated, injected in an underground injection control well, or otherwise). 7. The Associations provide an enumerated list of types of systems covered under this exclusion and urge the Agencies to include these illustrative examples to aid agency staff and regulated industry in applying this exclusion consistently.	p. 53

II. BACKGROUND – KEY CWA PROVISIONS AND SUPREME COURT CASES

The CWA establishes multiple programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[7] One element of Congress's comprehensive strategy is the program to regulate the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.[8] The Act in turn defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[9]

[7] 33 U.S.C. § 1251(a); The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the states for water quality standards (33 U.S.C. §§ 1311-14), area-wide waste treatment management (33 U.S.C. § 1288), and nonpoint source management (33 U.S.C. §§ 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (33 U.S.C. § 1281); funding to study impacts on water quality (33 U.S.C. § 1251-74); and programs targeting specific types of pollution (*e.g.*, 33 U.S.C. § 1321).

[8] *Id.* at § 1311(a), § 1362(12).

[9] *Id.* at § 1362(7).

To "discharge" lawfully to navigable waters, a business or person must obtain a permit. EPA and authorized state and tribal governments (if delegated authority) may issue permits for "the discharge of any pollutant."[10] The Army Corps and the two currently authorized states may issue permits for "the discharge of dredged or fill material."[11]

The CWA permitting regimes are not the sole means of protecting waters. Grounded on principles of cooperative federalism, the CWA establishes states as the primary permitting and enforcement authorities. In fact, the primary role of states was among Congress' foremost considerations when designing the Act:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination or pollution.[12]

Thus, in recognition of the states' sovereignty and the fact that states are best situated to regulate their own resources, the CWA requires EPA to coordinate its water resource protection efforts with the states.[13] Waters and wetlands that are outside the definition of WOTUS, and therefore federal jurisdiction, are not unprotected. These waters and wetlands are regulated and protected by states, tribes, and localities. In that respect, every overly broad regulatory extension of federal jurisdiction readjusts the federal-state balance that Congress sought to preserve and impinges on states' authority and responsibility to manage their own land and water resources.

In 1974, the Army Corps defined WOTUS as waters that "are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[14] The Army Corps later revised the definition in 1977 to encompass not only TNWs, but also adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce."[15]

Although the text of the Agencies' definition of WOTUS remained essentially unchanged for the next 33 years, the Agencies' interpretation of their regulatory definition of WOTUS continued to

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[10] *Id.* at § 1342(a).
[11] *Id.* at §§ 1344(a), 1344(g) ("CWA Dredge and Fill Program"). Under these provisions, states and tribes may assume administration of this program. To date, two states have assumed administration with plans being implemented through rule development to encourage more states/tribes to assume the CWA Dredge and Fill Program.
[12] *Id.* at § 1251(b).
[13] *Id.* at §§ 1251(b), 1251(g).
[14] 39 Fed. Reg. at 12,115, 12,119 (Apr. 3, 1974).
[15] 42 Fed. Reg. at 37,122, 37,144 (July 19, 1977).

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

a. *Riverside Bayview*

In *Riverside Bayview*, the Court considered the Army Corps' assertion of jurisdiction over "low-lying, marshy land" immediately abutting a navigable water on the ground that it was an "adjacent wetland" within the meaning of the Army Corps regulations.[16] The Court addressed the question of whether non-navigable wetlands may be regulated as WOTUS 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."[17] Observing that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts* on a navigable waterway" falls within the definition of WOTUS.[18]

b. *SWANCC*

Following *Riverside Bayview*, the Agencies "adopted increasingly broad interpretations" of their regulations, asserting jurisdiction over an ever-growing set of features bearing little or no relation to TNWs.[19] One of those interpretations—the Migratory Bird Rule—was struck down in *SWANCC*.[20]

The Army Corps asserted CWA jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[21] The Supreme Court explained that a ruling for the Army Corps would have required the Court "to hold that the jurisdiction of the Army Corps extends to ponds that are not adjacent to open water," a conclusion that "the text of the statute will not allow."[22] 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.[23] According to the Supreme Court, that approach impermissibly read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA."[24] As discussed in the preamble to the Proposed WOTUS Rule, "the Court held that interpreting the statute to extend to nonnavigable, isolated, intrastate ponds that lack a sufficient nexus to traditionally navigable waters would invoke the outer limits under the Commerce Clause" and "[w]here an administrative interpretation of a statute presses against the outer limits of the Congress' constitutional authority, the Court explained that, it expects a clear

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[16] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985) (*Riverside Bayview*).
[17] *Id*. at 131-135 & n.9.
[18] *Id*. at 135 (emphasis added).
[19] *Rapanos v. United States*, 547 U.S. 715, 725 (2006).
[20] *Solid Waste Agency of Northern Cook County v. Army Corps,* 531 U.S. 159 (2001) (*SWANCC*).
[21] *SWANCC*, 531 U.S. at 162-165 (*citing* 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[22] *Id.* at 171.
[23] *Id*. at 171-172.
[24] *Id*. at 171.

statement from Congress that it intended that result."[25] In this case, the CWA contains no clear statement.[26] The Court therefore invalidated the rule.

c. *Rapanos*

In *Rapanos*, the Supreme Court's most recent consideration of this issue, the Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water."[27] The Army Corps asserted that because these sites were "near ditches or man-made drains that eventually empty into traditional navigable waters" they should be considered "adjacent wetlands" covered by the Act.[28]

Justice Scalia, writing for a four-Justice plurality, rejected the Army Corps' position because WOTUS include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[29] In going beyond this "commonsense understanding" to classify features like "ephemeral streams" and "dry arroyos" as WOTUS, the Agencies stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'"[30] And wetlands fall within the CWA jurisdiction as adjacent wetlands "*only* [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[31] "[A]n intermittent, physically remote hydrologic connection" to TNWs is not enough under either *Riverside Bayview* or *SWANCC*.[32]

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

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[25] 84 Fed. Reg. at 4,159 citing *SWANCC* at 172.
[26] *Id.* at 174. Note: As the Agencies have solicited comments on this issue, the Associations note that we concur with the Agencies' view that the case should be read as restricting federal jurisdiction over all ''nonnavigable, isolated, intrastate waters.'' 84 Fed. Reg. at 4,165.
[27] *Rapanos,* 547 U.S. at 720, 2000.
[28] *Id*. at 729.
[29] *Id.* at 732, 739.
[30] *Id*. at 734.
[31] *Id*. at 742.
[32] *Id*.
[33] *Id.* at 779.
[34] *Id*. at 780.
[35] *Id*. at 781; *Id.* at 778 (The Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters").

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

III. SPECIFIC COMMENTS ON PROPOSED WOTUS RULE

On November 28, 2017, API submitted comments in response to the Agencies' request for recommendations for defining WOTUS.[37] In those comments, API encouraged the Agencies to promulgate a WOTUS rule that is clear, protective, administrable, and legally sound. The Associations are pleased with the Agencies' Proposed WOTUS Rule because it furthers those overall objectives. We encourage the Agencies to proceed with a final rule without any further delay. We also provide specific comments for your consideration that we believe can further ensure that the Proposed WOTUS is clear, administrable, and legally sound.

In this section, the Associations provide comments on the overall structure of EPA's Proposed WOTUS Rule and the extent to which the proposal, as a whole, respects jurisprudential guideposts, promotes clarity, furnishes predictability, and facilitates its application and administration by regulators and regulated parties alike. As noted in more detail in the subsections herein, we believe that EPA has framed the Proposed WOTUS Rule in a manner that satisfies all of these essential features of a sound and enduring definition of WOTUS. In Section IV, the Associations provide comment on each of the Proposed WOTUS Rule's categories of waters and many of its exclusions using the same examination of these elements' contribution to a lawful, clear, predictable, and administrable definition of WOTUS. Where the Associations believed that additional exclusions or explanations could further the clarity, predictability, administrability, or legality of a final WOTUS rule, we identify those areas and offer recommendations.

a. The Proposed WOTUS Rule is Consistent with the CWA and Supreme Court Jurisprudence, and is Therefore a Lawful Exercise of Agency Discretion under the APA

The Proposed WOTUS Rule relies on the text of the CWA. Where the Act is ambiguous, the Agencies' proposal offers interpretations that meaningfully consider the CWA's legislative history, Supreme Court jurisprudence, and other case law to give voice to Congress's intended meaning of WOTUS and the jurisdictional scope that Congress expected this phrase to encompass. In those instances where the statutory text, legislative history, and judicial guideposts could accommodate multiple interpretations, the Agencies opted for those interpretations that most effectively furnished clarity, eased administration, respected cooperative federalism, and avoided testing the outer limits of the Agencies' Constitutional powers and statutory authority. As such, the Proposed WOTUS Rule represents a valid exercise of the Agencies' authority to interpret a statute they are tasked to implement.

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[36] *Id*.at 781.

[37] 82 Fed. Reg. 40,742 (Aug. 28, 2017). Comments submitted by API in response to Request for Written Recommendations for the Step 2 Rulemaking to Define "Waters of the United States." EPA-HQ-OW-2017-0480. Nov. 28, 2017. Available at: https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0480-0536. (Also, attached as Appendix A).

1. The Proposed WOTUS Rule is Consistent with the CWA and Supreme Court Jurisprudence

The Proposed WOTUS Rule is drawn from the text of the CWA and an even-handed consideration and use of the Supreme Court's established reading of the statute and prior agency interpretations of WOTUS. Where specific types of waterbodies, such as navigable waters including the territorial seas,[38] were clearly identified by Congress as WOTUS in the CWA, the Proposed WOTUS Rule properly includes those waters in its proposed definition of WOTUS.

While the Proposed WOTUS Rule's above-referenced interpretations dutifully reflect the *SWANCC* majority's directive[39] to constrain interpretations of the term "navigable," the Agencies were also compelled to heed the Supreme Court's view in *Riverside Bayview*, *SWANCC*, and *Rapanos* that Congress intended to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense.[40] In order to preserve a constrained notion of navigability while effectuating Congress's intent to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense, the Proposed WOTUS Rule appropriately extends federal jurisdiction to non-navigable waters and wetlands with at least perennial or intermittent flow to TNWs.

In order to determine the type or degree of connection required to extend federal jurisdiction to non-navigable waters, the Agencies are guided by both the plurality opinion and Justice Kennedy's concurrence in *Rapanos*. The *Rapanos* plurality described the requisite connections to navigable waters as "relatively permanent, standing or flowing bodies of water," and affirmatively not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[41] While Justice Kennedy disagreed with the plurality on the precise type of connection necessary to extend federal jurisdiction to non-navigable waters, he too categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a significant nexus.[42] As described further in Section IV below, the Agencies analyze the intersection of these positions in detail, and in opting against extending federal jurisdiction to non-navigable waters with only ephemeral flow to TNWs, heed to the fullest extent possible the guideposts provided by the plurality opinion and Justice Kennedy's concurrence in *Rapanos*.

Lastly, the Proposed WOTUS Rule's extension of jurisdiction over wetlands adjacent to TNWs is based on Congress's specific identification of "wetlands adjacent thereto"[43] as navigable waters and is further informed by the unanimous decision in *Riverside Bayview* permitting the Army Corps to interpret WOTUS to include adjacent wetlands. Like the unanimous *Riverside Bayview* decision, the Agencies countenance the inclusion of wetlands adjacent to navigable waters within

[38] 33 U.S.C. § 1362(7). The CWA also specifically defines territorial seas at 33 U.S.C. § 1362(8).
[39] The need to assign some importance and effect to the word "navigable" is also recognized by the *Rapanos* plurality and in Justice Kennedy's concurrence in the same. *Rapanos plurality and concurrence opinions*, 547 U.S. 715.
[40] *See Riverside Bayview*, 474 U.S. at 132; *SWANCC*, 531 U.S. at 167, 171, 188-189, *Rapanos*, 547 U.S. at 731, 767-768.
[41] *See* footnote 29.
[42] *See* footnote 35.
[43] 33 U.S.C § 1344(g)(1).

the Act's jurisdiction due to the difficulty of ascertaining a boundary between waters and land areas where the wetland "actually abuts on a navigable waterway . . . "[44] Guided by the Court's decision in *SWANCC* and plurality opinion in *Rapanos*, however, the Agencies refrain from defining adjacency so broadly that it could encompass wetlands that are either fully isolated or wetlands only tangentially connected to TNWs. Instead, the Agencies adopt the commonly understood definition of adjacent to mean actually abutting and/or touching on at least one side.

While the foregoing examples certainly do not represent all the ways in which the Proposed WOTUS Rule is grounded in a faithful adherence to the text of the CWA and dutiful consideration and use of Supreme Court jurisprudence, the Associations believe they demonstrate the earnestness of the Agencies' consideration of statutory and judicial guideposts, and the validity of the Proposed WOTUS Rule. This same thoughtful approach is reflected throughout the Proposed WOTUS Rule and in each instance where the Agencies interpret the CWA through the Proposed WOTUS Rule. As such, and as further described below, the Proposed WOTUS Rule complies with the APA and the CWA.

2. The Proposed WOTUS Rule is a Valid Exercise of Agency Discretion that Complies with the APA

The APA governs the manner under which federal agency actions are promulgated and reviewed.[45] For those statutes, like the CWA, that do not contain their own standards for reviewing regulations promulgated pursuant to the statute, the APA provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be," . . . "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[46] As discussed below, the Proposed WOTUS Rule is permissible under the APA because it is in accord with the CWA and the jurisdictional limitations Congress imposed therein. Moreover, the validity of the Proposed WOTUS Rule is not undermined simply because it provides a definition of WOTUS that substantially differs than the definition in the 2015 WOTUS Rule. Such a shift would not render the new interpretation arbitrary, capricious, or in conflict with the law—particularly where, as here, key aspects of the Proposed WOTUS Rule aim to correct the jurisdictional overreach reflected in the 2015 WOTUS Rule.

i. Proposed WOTUS Rule Should be Entitled to Chevron Deference

As noted in Riverside Bayview, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."[47] This recital of "Chevron deference" underpinned the Supreme Court's unanimous decision to uphold the Agencies' decision to interpret WOTUS to delineate the often blurry line dividing waters subject to federal jurisdiction and dry land.[48] Conversely, disagreement over the

[44] *Riverside Bayview,* 474 U.S. at 135.
[45] 5 U.S.C. § 551 et seq.
[46] *Id.* at § 706. (In addition to the quoted language, there are four other provisions that the reviewing court shall consider in order to find an agency action unlawful and setting it aside).
[47] *Riverside Bayview*, 474 U.S. at 131.
[48] *Id.* at 121.

outer limits of Chevron deference led to the split decision in *SWANCC* and the *Rapanos* plurality. The Agencies understand that these decisions circumscribe the bounds of their regulatory discretion and appropriately relied on them to craft a Proposed WOTUS Rule that is squarely within their statutory authority. If finalized, the Associations believe that the Proposed WOTUS Rule should be afforded deference because it is in harmony with congressional intent in enacting the CWA and because it draws from the Agencies' previous WOTUS interpretations of those waters and jurisdictional indicators that the Supreme Court has found to be within the bounds of agency discretion to define as WOTUS. Most importantly, however, the Proposed WOTUS Rule should be considered a valid exercise of agency discretion because it omits, to the greatest extent possible, those jurisdictional interpretations that are clearly beyond what is permissible under the text of the Act.

Indeed, the Proposed WOTUS Rule is based on meaningful observance of the interpretive guideposts furnished in *Riverside Bayview, SWANCC* and *Rapanos*, and reflects the regulatory restraint necessary to remain within those guideposts.

In *Riverside Bayview*, a unanimous Supreme Court afforded deference to the Army Corps' interpretation of the "point at which water ends and land begins," in a wetland adjacent to a navigable water.[49] This holding was based on the Court's belief that the Army Corps' exercise of jurisdiction over adjacent wetlands was not in conflict with the CWA, and was, in fact, "reasonable, in light of the language, policies, and legislative history of the Act . . ."[50]

At the other end of the interpretive spectrum is the Supreme Court's *SWANCC* decision, in which the majority and minority disagreed whether an interpretation of WOTUS to include isolated wetlands that may be used by migratory birds[51] violated the jurisdictional boundaries Congress expressly placed in the CWA. The majority in *SWANCC* held that the Army 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.[52] As the Court further noted, "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[53]

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*.[54] As Chief Justice Roberts explained in his concurrence, the Agencies' persistent interpretation of WOTUS to include water with "any connection" to navigable water reflected a knowing decision to sacrifice legal and regulatory certainty in favor of spurious jurisdictional objectives:

> Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are

[49] *Riverside Bayview*, 474 U.S. at 132.
[50] *Id.* at 131.
[51] *See SWANCC*, 531 U.S. 159.
[52] *Id.* at 172 (citations omitted).
[53] *Id.* at 173.
[54] *See Rapanos*, 547 U.S. at 715.

> 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.[55]

Chief Justice Robert's concurrence provides clear guidance—the courts will defer to an agency interpretation of WOTUS that reflects a plausible reading of the CWA, earnest consideration of the Supreme Court's jurisprudence on the matter, and reasonably restrained jurisdictional objectives. The Agencies have clearly heeded this admonition as their Proposed WOTUS Rule fits squarely within this capacious "room to operate" and avoids testing the outer bounds of the Agencies' authority.

ii. Proposed WOTUS Rule Represents a Permissible Policy Shift under the APA

The APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[56] There is therefore "no basis in the Administrative Procedure Act . . . for a requirement that all agency change be subjected to more searching review."[57] 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.[58]

It is therefore enough for an agency to give "a reasoned explanation for [its] change."[59] 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 under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . . ."[60] This is not an "especially 'demanding burden of justification.'"[61]

Nevertheless, the APA's arbitrary-and-capricious standard is not completely toothless in the changed-regulation context. For one, an agency must acknowledge it is changing past practice; "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[62] For another, an agency is held to a higher standard when its "new policy

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[55] *Id*. at 758. (citations omitted).
[56] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).
[57] *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." (citations omitted)).
[58] *See Fox Tel. Stations*, 556 U.S. at 515. (citations omitted).
[59] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). (citations omitted).
[60] *Fox Tel. Stations*, 556 U.S. at 515 (emphases in original).
[61] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016). (citations omitted).
[62] *Fox Tel. Stations*, 556 U.S. at 515.

rests upon factual findings that contradict those which underlay its prior policy" or "when its prior policy has engendered serious reliance interests that must be taken into account."[63] But even in these circumstances, the arbitrary-and-capricious standard does not change. Rather, "[i]t would be arbitrary or capricious to ignore such matters"; "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[64]

Here again, the Proposed WOTUS Rule is grounded in a faithful reading of the CWA, legislative records, and relevant case law—all of which are publicly available and already within the Agencies' administrative record for the 2015 WOTUS Rule. In fact, the Proposed WOTUS Rule is predicated on the same the statutes, jurisprudence, and legislative materials that the Agencies cited in the 2015 WOTUS Rule.

Further, the Agencies' decision to base the Proposed WOTUS Rule on the CWA and Supreme Court jurisprudence rather than agency-generated technical or scientific justifications is not a factual finding that contradicts the Connectivity Report[65] on which the Agencies relied to justify the broader jurisdictional assertions in the 2015 WOTUS Rule. The change from the 2015 WOTUS Rule to the Proposed WOTUS Rule is not based on factual findings at all. It reflects a lawful policy decision and an appropriate agency decision to establish the bounds of agency jurisdiction based on the CWA and case law interpreting the Act.

iii. Proposed WOTUS Rule Properly Considers the Connectivity Report in Analyzing the Proposed WOTUS Rule, and Appropriately Recognizes that Science can Inform but Cannot Dictate the Lines between Federal and State Jurisdiction

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."[66] This conclusion is not particularly relevant to interpreting the jurisdictional limits imposed by the CWA. There is no question that waterbodies share connectivity in watersheds, that certain upstream discharges can sometimes have downstream impacts, and 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, no matter how tenuous. Instead, as Justice Roberts discussed, Congress selected the "somewhat ambiguous, but nonetheless clearly limiting"[67] 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."[68] Consequently, regardless of whether the

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[63] *Id*.
[64] *Id*. at 515-516; *See also Encino Motor Cars*, 136 S. Ct. at 2126-27 (vacating an agency's regulation where the agency did not explain why it was breaking from decades of settled practice that the industry had relied upon).
[65] EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report). Washington, DC, EPA/600/R-14/475F, 2015 (Connectivity Report).
[66] 80 Fed. Reg. at 37,066.
[67] *Rapanos*, 547 U.S. at 758.
[68] *Id.* at 778.

Connectivity Report is considered a high-quality scientific study or simply validation for the Agencies' policy decision in 2015, its presence in the administrative record does not constrain the Agencies' discretion to base the Proposed WOTUS Rule's jurisdictional limits on the text of the statute, jurisprudence, and legislative materials.

The Proposed WOTUS Rule represents a policy shift toward a closer reading of the statute and case law, and develops an administrative record on which to justify expansive federal jurisdiction. No record basis exists to contradict or question this approach. A decision to more closely align the Agencies' interpretation within the CWA is precisely the type of policy shift agencies are entitled to make.

Significantly, the Agencies now recognize that the Connectivity Report can only be used to inform – rather than disregard – the CWA's jurisdictional limits. To that end, the Agencies use the Connectivity Report to describe the "connectivity gradient," which recognizes that at sufficiently large spatial and temporal scales, all waters and wetlands are connected, but that mere connections alone do not adversely impact downstream waters.[69] Only connections of a certain degree (*e.g.*, frequency, magnitude, timing, duration) are likely to affect the chemical, physical, and biological integrity of downstream waters."[70] This "connectivity gradient" helped inform the Agencies' proposed distinction between perennial and intermittent flows from ephemeral flows."[71] The traditional notion of "adjacency" in the Agencies' adjacent wetlands category was similarly informed by the Connectivity Report's conclusion that "areas that are closer to rivers and streams have a higher probability of being connected than areas farther away . . . ."[72] Neither of these examples reflect use of the Connectivity Report in disregard of statutory or jurisprudential limits on jurisdiction. Nor do they suggest that scientific analyses can supersede statutory text.

Because these conclusions are in harmony with the jurisdictional limitations of the CWA, and are not utilized by the Agencies in any effort to expand their jurisdictional reach, the Associations support the Agencies' decision "to use the Connectivity Report for certain aspects of this proposed definition of 'waters of the United States,' such as recognizing the 'connectivity gradient' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system."[73] The Associations also understand and agree with the Agencies, "that science cannot be used to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA."[74]

b. The Proposed WOTUS Rule Provides a Definition of WOTUS that is Clear, Predictable, and Administrable

[69] 84 Fed. Reg. at 4,175.
[70] *Id*.
[71] *Id*.
[72] Connectivity Report at ES-4.
[73] 84 Fed. Reg. at 4,176.
[74] *Id.*

The Associations believe that the Proposed WOTUS Rule furnishes categories of water subject to federal jurisdiction that are clear, concise, and well-defined. Further, by replacing case-by-case analyses with clear categories to determine the scope of federal jurisdiction, the Proposed WOTUS Rule eases the burdens of administering the rule and fosters greater transparency, predictability, and clarity as well as reserves role for the states to address non-federally-jurisdictional local waters which they are best positioned to address. Finally, while we recommend in Section IV below certain improvements with the manner of identifying and demonstrating continuous surface flows, the Associations support the Proposed WOTUS Rule's development of a simple framework for rendering jurisdictional determinations that relies on readily ascertainable boundaries through reasonably observable conditions.

1. Well-Defined Categories of Waters Clarify Lines between Federal and State Jurisdictional Waters

The Proposed WOTUS Rule will be broadly protective of water quality because it would clarify the lines between state and federal jurisdiction, thereby facilitating state regulatory decisions with respect to waters readily identifiable as outside federal jurisdiction, and preserving agency resources for actual environmental protection. And, because the Proposed WOTUS Rule's categories of waters are genuinely designed to clarify, rather than constrain or expand, the federal government's jurisdiction under the CWA, the Proposed WOTUS Rule is far more likely to withstand judicial scrutiny and potentially provide lasting predictability.

Unlike the 2015 WOTUS Rule and many preceding interpretations, the Proposed WOTUS Rule much more clearly identifies where federal jurisdiction ends and state jurisdiction begins. States are thereby enabled to quickly and efficiently identify the areas of the landscape under their jurisdiction and apply their state-specific requirements rather than turn to a subjective case-by-case assessment based on biological, chemical, or physical connectivity to distant navigable waters.

Indeed, the Proposed WOTUS Rule rejects the misconception that waters outside of federal jurisdiction are unregulated or unprotected. Congress, in crafting the CWA, understood that the Act's lofty goals could only be accomplished through maximum cooperation with the states, and explicitly established a "cooperative federalism" framework "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."[75]

While the National Pollution Discharge Elimination System ("NPDES") program is a very important part of the CWA, it does not represent the full extent of the tools Congress provided the Agencies to protect water quality. The CWA also provides both technical and financial assistance to states to improve the nation's water quality. These programs are not specifically limited to waters qualifying as WOTUS, and include:

[75] 33 U.S.C. § 1251(b).

- Grants for research to improve pollution control methods and/or prevent discharges from sewers carrying stormwater;[76]
- Grants to improve waste treatment methods and water purification;[77]
- Grants for research to improve treatment and pollution control for both point and nonpoint sources in river basins;[78]
- Grants for research and demonstration projects by industry for water pollution prevention;[79]
- Programs for the development of waste treatment and management methods, including identifying and measuring pollutants' effects;[80]
- Grants for research projects to prevent and reduce pollution from agriculture and rural sewage areas, in consultation with the Secretary of Agriculture;[81] and,
- Programs managing the Great Lakes[82], Chesapeake Bay[83], Long Island Sound[84], and Lake Champlain.[85]

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

- State Planning for Nonpoint Sources: As part of state water quality management plans, the CWA specifically requires states to incorporate nonpoint source elements into each state's planning process for controlling water pollution.[86]
- Impaired Waters and Total Maximum Daily Load Program: States identify waters that are impaired, or in danger of becoming so, then develop and implement plans to bring these waters into compliance with water quality standards. A state develops an EPA-approved TMDL to cap the amount of a specific pollutant that may be discharged to that water.[87]
- Spill Prevention, Control, and Countermeasure Plans: Facilities storing certain amounts of oil develop and implement plans to prevent discharges to navigable waters and to reduce the risk of spills and leaks.[88]

[76] *Id.* at § 1256.
[77] *Id.* at § 1255(a)(2).
[78] *Id.* at § 1255(b).
[79] *Id.* at § 1255(c).
[80] *Id.* at § 1255(d).
[81] *Id.* at § 1255(e).
[82] *Id.* at § 1268.
[83] *Id.* at § 1267.
[84] *Id.* at § 1269.
[85] *Id.* at § 1270.
[86] *Id.* at §§ 1288 and 1313(e).
[87] *Id.* at § 1313(d).
[88] *Id.* at § 1321(j)(1)(C).

- National Nonpoint Source Program: EPA guides and grants funding to states implementing nonpoint source programs, including technical and financial assistance, education, training, watershed project, *etc.*[89]

In addition to the above, other federal statues, including the Safe Drinking Water Act ("SDWA") and the Resource Conservation and Recovery Act ("RCRA") help to protect aquatic resources through state implemented programs.[90] The SDWA establishes state programs to protect Underground Sources of Drinking Water ("USDWs") by regulating public water systems. RCRA defines solid and hazardous waste, authorizes EPA to set standards for waste-generating facilities, and authorizes EPA to set standards for disposal facilities accepting municipal solid waste.

SDWA programs include:

- Underground Injection Control ("UIC") Programs: The UIC Programs are responsible for the regulation of injection wells and for assuring that their operation does not contaminate underground sources of drinking water.[91]
- Sole Source Aquifer Demonstration Program: These are state programs for protecting wellhead areas around public water system wells. If a state's program was established and EPA-approved by 1989, EPA covers between 50 and 90 percent of the implementation costs.[92]
- State Groundwater Protection Grants: Under this program, EPA may contribute 50 percent toward grants for states to develop programs for protecting states' groundwater.[93]
- Source Water Assessment and Protection Programs ("SWAPP"): All states are required to implement SWAPPs for the assessment of the potential contamination of public water system ground water and surface water sources.[94]

RCRA programs include:

- Hazardous Waste: Though EPA has primary responsibility to implement this program, states can implement their own hazardous waste management programs that are authorized by EPA and are at least as stringent as the federal program.[95]
- Solid Waste: State and local governments are the primary planning, regulating, and implementing entities to manage non-hazardous solid waste.[96]

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[89] *Id.* at § 1329
[90] *Id.* at § 1321(j)(1)(C).
[91] 44 U.S.C. §300(h).
[92] *Id.* at §300(h)-6.
[93] *Id.* at §300(h)-8.
[94] *Id.* at §300(h)-13.
[95] 42 U.S.C. § 6926(b).
[96] *See* EPA's "Hazardous Waste: RCRA Subtitle D" at http://www.epa.gov/region02/waste/dsummary.htm.

- Citizen Suits and Imminent Hazard Provisions: States and citizen suits enforce[97] open dumping prohibitions specified under the Sanitary Landfill Regulations.[98]
- Underground Storage Tank ("UST") Compliance Act: EPA and states receiving funding under Subtitle I must conduct compliance inspections of all USTs at least once every three years.
- Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"): Enacted in 1972,[99] the Coastal Zone Management Act introduced incentive-based planning programs for states to manage water and land resources contributing to the impairment of coastal waters. When reauthorized in 1990,[100] the CZARA created the Coastal Nonpoint Pollution Control Program to target polluted runoff to these waters.

The jurisdiction and authority described above is regularly used by states to protect water resources. Recognizing that states are informed and effective stewards of water quality, EPA has delegated to nearly every state broad permitting and enforcement authority over discharges to WOTUS through the NPDES permit system, pretreatment program, and general permitting program.[101] State authority to implement these programs is not delegated freely—it is earned through the development of programs that EPA reviews and determines to be adequately protective. In fact, many state permitting programs are considered more stringent or restrictive than federal permitting programs and criteria.

Nor does EPA delegate this authority permanently. EPA retains broad discretion to withdraw state NPDES permitting authority. Significantly, even though activists have petitioned EPA many times to withdraw the agency's delegation of authority to various states, EPA has never done so. Without question, states are already capable stewards of water quality and proven partners in furtherance of the CWA's objectives.

Duly recognizing the effectiveness of state efforts to protect water quality, the Proposed WOTUS Rule furthers the CWA's water quality (and cooperative federalism) objectives by preserving a clear and meaningful role for the states. Notably, the preservation of this role for states does not require the Agencies to cede the entirety of their jurisdiction or preclude the Agencies from exercising all authority under the CWA. The framework of cooperative federalism that Congress mandated through the CWA also established a major role for the federal government. As such, under the Proposed WOTUS Rule, the federal government would retain jurisdiction over the oceans, TNWs, territorial seas, and wetlands adjacent to such waters, as well as multiple types of waterbodies (and wetlands) with perennial or intermittent surface connections to TNWs. In all other respects, we believe—as Congress did—that federal jurisdiction should only encroach on the "primary" responsibilities of states where the source of that jurisdiction is clear and its exercise appropriate.

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[97] 42 U.S.C. § 6972.
[98] 40 C.F.R. § 257.
[99] 16 U.S.C. § 1452(1).
[100] *Id.* at § 1455b.
[101] *See* EPA's NPDES state program information at https://www.epa.gov/npdes/npdes-state-program-information.

Previous WOTUS interpretations, and the resources devoted to defending those interpretations, have drained substantial agency resources. Moreover, these interpretations required (or would have required) burdensome and unpredictable analyses and case-specific inquiries that could not be implemented without devoting significant federal, state, and private resources. Given the inherent limitations on agency resources and the basic principle of opportunity costs, resources spent on jurisdictional line-drawing are not spent on environmental protection—particularly where, as here, the delineation is between entities that are each committed to protecting water resources.

These attempts to maximize the expanse of federal jurisdiction caused the Agencies to blur jurisdictional lines and to sacrifice clear, consistent, and readily observable jurisdictional criteria for uncertain, subjective, and often case-specific analyses. When jurisdiction over a waterbody is clear, the entities tasked with protecting that waterbody are similarly clear about their mandate. When jurisdiction over a waterbody is unclear, it can fall into a jurisdictional quagmire rife with poor accountability and few opportunities for federal/state cooperation.

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

In these respects, and many others, the CWA's water quality objectives are best accomplished through clear jurisdictional boundaries that promote administrative accountability and which can be administered in a way that preserves resources for actual environmental protection. The Proposed WOTUS Rule would provide this necessary clarity and workability, and it would do so in a manner consistent with Congressional intent and the broad guideposts of Supreme Court jurisprudence.

2. Case-by-Case Analyses are Replaced with Categories of Water that are Clearer, More Objective, and Which Ease Administrative Burdens

The Proposed WOTUS Rule identifies and clearly describes six categories of waters that are unambiguously subject to federal jurisdiction (*e.g.*, TNWs) or are sufficiently and more conspicuously connected to such waters (*e.g.*, tributaries, ditches, lakes, ponds, wetlands) to justify extension of federal jurisdiction. The Proposed WOTUS Rule would assert jurisdiction based on far more objective and observable measures of connectivity grounded in notions of actual adjacency and the frequency of surface flows to TNWs or territorial seas in a typical year.

The 2015 WOTUS Rule relied on case-by-case analyses to reach jurisdictional determinations asserted jurisdiction for all waters located within the 100-year floodplain of any TNW, territorial sea, or interstate water, and all waters located within 4,000 feet of the high tide line or ordinary high water mark ("OHWM") of any of the six categories of waters that the 2015 WOTUS Rule deemed "jurisdictional by rule."[102] The Proposed WOTUS Rule, on the other hand, identifies and

[102] 80 Fed. Reg. at 37,105. The jurisdictional waters by rule include: (1) navigable waters; (2) interstate waters; (3) the territorial seas; (4) impoundments of jurisdictional waters; (5) covered tributaries, and: (6) covered adjacent waters.

clearly describes six categories of waters that are unambiguously subject to federal jurisdiction (*e.g.*, TNWs and territorial seas) or are sufficiently and more conspicuously connected to such waters (*e.g.*, tributaries, ditches, lakes, ponds, wetlands) to justify extension of federal jurisdiction.

Under the 2015 WOTUS Rule, all waters within these areas (*i.e.*, within 100-year floodplain, or within 4,000 feet of high tide line or OHWM) could be brought within federal jurisdiction if it was determined that they shared a "significant nexus" with a jurisdictional water.[103] This significant nexus determination required an analysis of whether a feature "alone, or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a Category (1)-(3) water,[104] and instructed the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur.[105] As the Army Corps noted at the time, 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.[106]

In contrast to the 2015 WOTUS Rule's unwieldy, opaque, and subjective case-by-case significant nexus test, the Proposed WOTUS Rule would provide an approach that is simple, clear, predictable, broadly applicable, and lawful. Under the Proposed WOTUS Rule, states retain jurisdiction over waters with ephemeral surface connections or connectivity that only occurs based on atypical precipitation. The federal government may claim jurisdiction over only those waterbodies with flow to, or that are flooded by, TNWs in a typical year. As such, under the Proposed WOTUS Rule, in most cases, the jurisdictional status of any given waterbody should either be readily observable or reasonably ascertainable to the most regulated entities and landowners.

Notably, the simplicity and clarity provided by the Proposed WOTUS Rule is not so much a function of the Agencies' skillful drafting as it is a function of the Agencies' exercise of jurisdictional restraint. The complexity and opacity of the 2015 WOTUS Rule was necessitated by the Agencies' interest in using the WOTUS definition to assert federal jurisdiction over as many waters as possible.

The Proposed WOTUS Rule is clear and unambiguously drafted within the jurisdictional guideposts established by the Supreme Court with all elements working toward the administration's larger goal of re-balancing the relationship between the federal government, states, and tribal governments by drawing boundaries between those waters subject to federal

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[103] *Id.* at 37,104-05.

[104] 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." *Id.* at 37,104.

[105] 80 Fed. Reg. at 37,106.

[106] Memorandum from Jennifer A. Moyer, Chief, Regulatory Program, Army Corps, to John W. Peabody, Deputy Commanding Gen. for Civil & Emergency Ops., Army 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").

CWA requirements and those waters that states and tribal governments have flexibility to manage under their authorities.

3. Agencies' Consideration of Burden of Proof as Relating to Ditches is a Positive Shift and Should be Extended to Other Categories and Exclusions

As discussed above, the Proposed WOTUS Rule provides a framework for identifying waters subject to federal jurisdiction that is clearer and more objective than the Agencies' prior approaches. But of course, we recognize that no single framework for identifying WOTUS can remove all sources of subjectivity or ambiguity from jurisdictional determinations. Similarly, even though the Proposed WOTUS Rule largely delineates categories of waters and the availability of exclusions based on readily identifiable or observable criteria, determining the jurisdictional status of some waters and features will likely still present significant evidentiary challenges.

In the ditches discussion, the Agencies identify an approach that meaningfully mitigates against jurisdictional uncertainty and onerous evidentiary determinations.[107] We request the Agencies clarify that it would be the Agencies' burden to show that a water is under federal jurisdiction. We also agree that the ditches category presents a strong case for burden-shifting, but we do not believe that there is any justification for limiting this approach to the ditches category.

For clarity and consistency, the Associations recommend that the Agencies clarify in the final rule that the burden of proof is on the Agencies to establish WOTUS jurisdiction for *all* categories of waters. We similarly recommend that, when an applicant asserts that a particular water or feature falls within one of the Proposed WOTUS Rule's exclusions, the Agencies must have the burden of proving that the exemption is inapplicable to the water or feature in question.

Given the significant civil and criminal penalties that the Agencies can impose under the CWA,[108] it is reasonable that the Agencies should shoulder the burden of proving their jurisdictional reach to impose such penalties. It is unreasonable, however, to require landowners and potentially regulated parties to prove that their actions and/or determinations were lawfully conducted on waters or features under state jurisdiction.

IV. COMMENTS ON PROPOSED CATEGORIES OF WATERS

In addition to broad comments provided above, the Associations are providing comments on specific elements of the Proposed WOTUS Rule. Wherever possible, we tried to identify the practical implications and potential impediments to defining, and extending jurisdiction to, certain categories of waters. Where we believed it was necessary or helpful, the Associations also provide additional analysis of the statutory and jurisprudential guideposts within which the proposed

[107] 84 Fed. Reg. at 4,181.

[108] 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. 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. 33 U.S.C. § 1319(c)(1)-(2).

categories of waters must fall. In those instances where the Associations believe that the Agencies' approach could be improved, we recommend changes for the Agencies' consideration.

a. Traditional Navigable Waters and Territorial Seas

The Proposed WOTUS Rule would establish a category of waters that consists of waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide."[109] The Associations agree with the Agencies that combining TNWs and territorial seas under a single category of waters represents a non-substantive change that can help streamline and simplify the Proposed WOTUS Rule. The Associations also recommend that the Agencies amend the definition of TNWs to reflect that: a) historic use alone is insufficient to demonstrate navigability, and b) recreational uses alone do not constitute transport in interstate or foreign commerce. We discuss each of these issues in turn.

1. Support Combining TNWs and Territorial Seas as One Category

Classifying TNWs and territorial seas under a single category is logical as these two types of waters are the only specific water types explicitly referenced within the operative sections of the CWA. The scope of federal jurisdiction under the CWA is described as limited to discharges to "navigable waters," and the only specific waterbodies identified within the CWA's definition of "navigable waters" are "territorial seas."[110] The definition's other, "broad, somewhat ambiguous, but nonetheless limiting" phrase, "waters of the United States,"[111] compels a degree of analysis and interpretation that justifies setting apart these two CWA-referenced water types from waters to be regulated based on interpretation of the phrase "WOTUS."

While it is logical to separate navigable waters and territorial seas from the categories of waters that the Agencies propose to be encompassed as WOTUS, the Associations agree with the Agencies that navigable waters and territorial seas need not be separated from each other within the proposed categories of waters subject to federal jurisdiction. In fact, because these two types of waters share substantially the same basis for inclusion within the Proposed WOTUS Rule (*i.e.*, explicit reference in the CWA), we believe that combining these waters in one category makes the rule clearer and easier to apply.

Under the Proposed WOTUS Rule, each of the waters that the Agencies interpret as encompassed within the phrase "WOTUS" (tributaries; ditches; lakes and ponds; impoundments; and adjacent wetlands) may be subject to federal jurisdiction based on analysis of whether they are sufficiently connected to TNWs and/or territorial seas. As such, by collapsing TNWs and territorial seas into a single category, the Proposed WOTUS Rule provides a single reference point from which to describe the connections necessary to bring tributaries, ditches, lakes and ponds, impoundments, and adjacent wetlands under the proposed definition of WOTUS, and therefore within federal jurisdiction.

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[109] 84 Fed. Reg. at 4,170.
[110] 33 U.S.C. § 1362(7). The CWA also specifically defines "territorial seas" at 33 U.S.C. § 1362(8).
[111] Roberts Concurrence in *Rapanos*, 547 U.S. at 758.

The Proposed WOTUS Rule's approach in this respect is consistent with the plain language of the CWA and the Supreme Court's interpretation of the Act. As such, the Associations believe it is well within the Agencies' discretion to structure the Proposed WOTUS Rule to provide this needed clarity and simplicity.

2. Historic Use Alone is Insufficient to Demonstrate Navigability

The Associations caution that, as currently proposed, the Proposed WOTUS Rule's reliance on historic use to demonstrate navigability obscures the intended meaning of TNWs. We agree with the Agencies' proposal to group TNWs and territorial seas under a single category of waters, however, we are concerned that the Proposed WOTUS Rule would perpetuate an overly inclusive definition of TNWs that is inconsistent with the CWA and applicable case law. The Associations believe that a more reasonable reading of the CWA and relevant case law affirms that a water's past use to transport goods in interstate or foreign commerce does not alone cause a waterbody to be forever classified as a TNW subject to federal jurisdiction.

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

> . . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto . . .[112]

The Supreme Court justices agreed in *Riverside Bayview*, *SWANCC*, and *Rapanos* that this phrase in 33 U.S.C § 1344(g)(1) of the Act indicated that Congress intended "navigable waters," and therefore the 33 U.S.C § 1362(7) definition of "navigable waters" as WOTUS, to extend federal jurisdiction to some waters that are not navigable in the traditional sense.[113] The majority and minority in *SWANCC* also agreed that the CWA Dredge and Fill Program remains ambiguous "because it does not indicate precisely how far Congress considered federal jurisdiction to extend;"[114] However, the conspicuous omission of "past use" from 33 U.S.C § 1344(g)(1) indicates that Congress did not intend the Act to assert federal jurisdiction over waters based solely on historic use in commerce. While the Associations acknowledge that the phrase "navigable waters" in the Act reflects congressional intent to extend federal jurisdiction over waters that are not navigable in the traditional sense, the Agencies' discretion to interpret WOTUS to include certain non-navigable waters does not extend so far as to allow the Agencies to overlook the jurisdictional limits that Congress actually drafted into the CWA.

[112] 33 U.S.C § 1344(g)(1).
[113] *See* footnote 40.
[114] *SWANCC*, 531 U.S. at 189.

The Agencies similarly lack sufficient discretion to interpret "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce," as including purely historic uses when applied to 33 U.S.C § 1362(7).

The Associations are not suggesting that the Agencies are unconditionally compelled to interpret "navigable waters" in 33 U.S.C § 1362(7) precisely as Congress defined that same term in 33 U.S.C. § 1344(g)(1). We believe the Agencies continue to enjoy a measure of discretion in interpreting these terms; however, this discretion is limited by the "Presumption of Consistent Usage," which states that "[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."[115]

The Agencies' obligation to harmonize their interpretation of the same term in the same statute is particularly apparent here because, not only do 33 U.S.C S§ 1362(7) and 33 U.S.C § 1344(g)(1) use the same term (navigable waters), they use the term for precisely the same purpose—to define the scope of federal jurisdiction. In 33 U.S.C § 1344(g)(1), Congress identified the "navigable waters" that could be administered through *state* "dredge-and-fill" permit programs and those "navigable waters" that must be administered through *federal* programs. Again, while Congress did not clearly delineate the "other" navigable waters that are within the jurisdictional purview of the states, it explicitly circumscribed federal jurisdiction under the CWA to those "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."

It is perhaps possible that Congress intended the term "navigable waters" to have a different meaning in 33 U.S.C § 1362(7), but the Proposed WOTUS Rule provides no evidence of this intent—certainly not evidence sufficient to overcome the Act's definition of the term in 33 U.S.C § 1344(g)(1) or the presumption against assigning different meanings to the same term.

Indeed, when the term "navigable waters" is viewed in light of "what Congress had in mind as its authority for enacting the CWA,"[116] it is all the more evident that the Agencies may lack discretion to alter the definition in 33 U.S.C § 1344(g)(1) to include historic use in interstate or foreign commerce.

As the *SWANCC* majority noted, nothing in the CWA or its legislative history "signifies that Congress intended to exert [nothing] more than its commerce power over navigation."[117] To the extent the phrase "commerce power over navigation" is unclear, it is readily understood by looking to the CWA's predecessor statute, the Rivers and Harbors Act of 1899 ("RHA"), and the case law that established the test for "navigability" as the term was used in the RHA.

Being the product of its era, the RHA was primarily focused on discharges of refuse that could obstruct and impede navigation, but it did for the first time make it unlawful to discharge "into any

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

[116] *SWANCC*, 531 U.S. at 172.

[117] *Id.* at 181. (citations omitted).

navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."[118] All subsequent statutory federal water pollution controls spring from these modest restrictions in the RHA.

Of significance here are the 1972 Amendments to the Federal Water Pollution Control Act ("FWPCA"),[119] which are now referred to as the CWA. While the CWA has been amended multiple times since 1972, the FWPCA represents Congress's initial shift from merely mandating the control of pollutants that can obstruct shipping to prohibiting discharges of pollutants in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[120] The 1972 Amendments are also significant here because there are the amendments through which Congress first applied this new pollution control regime to "navigable waters," which it defined as "waters of the United States and the territorial seas." Viewing the CWA in this context, it is more apparent that while the 1972 Amendments represented a "total restructuring" of Congress's pollution reduction goals and tools, they did not completely sever the jurisdictional reach delineated by the RHA. To this day, the breadth of federal jurisdiction continues to be tethered to Congress's authority to regulate navigable waters under the RHA and other statutes.

As the case law on the RHA and other statues explains, federal jurisdiction over navigable waters comes from Congress' authority under the Commerce Clause to regulate the "channels of interstate commerce" under the Commerce Clause.[121] As noted by the Supreme Court in *SWANCC*, nothing in the CWA's legislative history indicates that "Congress intended to exert anything more than its commerce power over navigation."[122] While the Supreme Court determined that, in enacting the CWA, Congress likely intended to assert jurisdiction over "at least some waters that would not be deemed 'navigable' under the classical understanding of that term,"[123] the Court "also emphasized . . . that the qualifier 'navigable' is not devoid of significance."[124]

The "classical understanding" of the term "navigable" is best articulated by the Supreme Court in *The Daniel Ball v. United States* ("*The Daniel Ball*"):[125]

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

[118] 33 U.S.C. § 407.
[119] Public Law 95-217 (1977).
[120] 33 U.S.C. § 1251(a).
[121] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *See also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (describing the "channels of interstate commerce" as one of three areas of congressional authority under the Commerce Clause).
[122] *SWANCC*, 531 U.S. at 168 n.3.
[123] *Riverside Bayview*, 474 U.S. at 133; *See also SWANCC*, 531 U.S. at 167.
[124] *Rapanos*, 547 U.S. at 731; *See also SWANCC*, 531 U.S. at 172.
[125] 77 U.S. 557 (1870).

> waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[126]

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

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.[127]

In 1921, the Court clarified that a waterway need not be continuously navigable; it is navigable even if it has "occasional natural obstructions or portages" and even if it is not navigable "at all seasons . . . or at all stages of the water."[128] And, in 1926, the Supreme Court helpfully summed up its previous rulings on navigability:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.[129]

Subsequent decisions by the Court further clarified that waters may be deemed navigable even if they are merely susceptible to use in the transport of, as opposed to actually used in commercial transport.[130] Further, the Court deemed "irrelevant" to the question of navigability the fact that a water was used for hauling of animals by ranchers rather than for the transportation of "water-borne freight."[131] The Court said, "[t]he lake was used as a highway and that is the gist of the federal test."[132]

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[126] 77 U.S. (10 Wall.) 557, 563 (1871).
[127] *The Montello*, 87 U.S. 430, 441-42 (1874).
[128] *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 122 (1921).
[129] *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (citations omitted).
[130] *U.S. v. Utah*, 283 U.S. 64, (1931); *See also U.S. v. Appalachian Elec. Power Co*, 311 U.S. 377 (1940).
[131] *Utah v. United States*, 403 U.S. 9, 11 (1971).
[132] *Id*. at 11.

While each of these decisions supply detail and nuance to the classical understanding of the term "navigable," they are all premised on a forward-looking analysis of the present or potential use of waters for the transport of interstate or foreign commerce. None of these decisions, or the Supreme Court's determinations of navigability therein, were predicated on a water's prior use in navigation. In most respects, the Court's unwavering focus on present and future navigability is unsurprising because Congress's power to regulate navigable waters is predicated on Congress's power to regulate the *ongoing channels* of interstate and foreign commerce. This same predicate underlies the federal jurisdiction claimed by the CWA.

Given the Agencies' stated interest in promulgating a clear and legally supportable definition of WOTUS by reconsidering the conclusions they reached in the 2015 WOTUS Rule, the Associations believe the Agencies should also reexamine the conclusions that the 2015 WOTUS Rule attributed to Appendix D. In reexamining Appendix D, the Agencies should remain mindful of the *SWANCC* majority's views of Congress's "commerce power over navigation" and extend federal jurisdiction over only those waters that are actually used today to transport in interstate commerce. The Agencies should therefore also affirmatively decline to extend federal jurisdiction to waters based solely on historic transport of interstate or foreign commerce. Waters that once conveyed, but no longer convey *or are capable of conveying* interstate or foreign commerce are not within Congress's present "commerce power over navigation," and therefore do not forever remain "navigable waters" for purposes of asserting federal jurisdiction under the CWA.[133]

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

Moreover, because the Proposed WOTUS Rule's unsupported assertion of jurisdiction over waters previously used in commercial transport appears based at least in part on Appendix D, the Associations respectfully recommend that the Agencies rescind Appendix D and any erroneous conclusions that the Agencies previously attributed to Appendix D.[134] In lieu of Appendix D and

[133] Waters that once conveyed, but no longer convey or are capable of conveying interstate or foreign commerce, cannot be considered "navigable waters" in our interpretation of WOTUS. Yet, many of these same waters likely remain within federal jurisdiction by virtue of their surface connection to "navigable waters."

[134] Appendix D also cites two appellate court decisions as part of its interpretation of navigability. Both of these cases are consistent with the Supreme Court case law and API's interpretations discussed herein. More importantly, none of these cases stands for the proposition that "navigability" can be determined based solely on past use in commercial transport. The first case involved an interpretation of the Federal Power Act ("FPA"), which defines "navigable waters" as "those parts of streams . . . which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . . ." 16 U.S.C. § 796(8). *See FPL Energy Marine Hydro LLC v. FERC, 287 F.3d 1151* (D.C. Cir. 2002). Given the FPA's definition of navigable waters, the Court's decision was not surprisingly based on a forward-looking analysis of present and potential future navigability. As the Court noted, "The question before this Court is whether the Stream, with the presence of the Union Gas Project and the flow created when there is generation, is *presently* navigable . . . not whether the Stream was navigable prior to the Project's construction." *Id*. at 1156. (citations omitted). "[J]ust because a body

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

3. Recreational Uses Alone do not Constitute Transport in Interstate or Foreign Commerce

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

None of the Supreme Court cases discussed in Subsection IV.a.2 above remotely suggest that a water could be deemed navigable, and therefore within federal jurisdiction, based on potential use for any vaguely commercial activity that could conceivably impact interstate or foreign commerce. In fact, in all of these cases, the Supreme Court explicitly based their determinations of navigability on the waters' present suitability or potential future use to transport goods in interstate or foreign commerce.

Indeed, every Supreme Court case cited in Appendix D demonstrates that the Court's navigability determinations were relegated to "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water;"[135] or "customary modes of trade and travel on water;"[136] waters susceptible "to use as . . . highway[s] of commerce;"[137] or "commercial navigation."[138] While it did not matter whether the "transport" consisted of a rancher bringing cattle to market or a freighter carrying hundreds of containers—every one of the Supreme Court's tests of navigability was predicated on transport in interstate or foreign commerce.[139]

As such, as demonstrated by the same case law cited in Appendix D, there is no legal basis to regard as TNWs those waterways that are merely *used in* commerce rather than used *for the transportation of goods* in interstate commerce. If the Agencies do not meaningfully reassess their assertion of federal jurisdiction based on the potential recreational use of waters, the Proposed WOTUS Rule could conflict with Supreme Court jurisprudence. Unless the Agencies revisit this

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of water has not been used for commercial use does not mean that it is not *susceptible* to commercial use." *Id*. at 1157. (citations omitted).

The second case involved an examination of navigability in order to determine if certain waters passed to Alaska at statehood or were properly conveyed to the regional tribal corporation. *See State of Alaska v. Ahtna, Inc.,* 891 F. 2d 1401 (9th Cir. 1989). While the Court did in fact look at prior uses of the water, it did so in order to determine the water's susceptibility to future commercial uses. *Id.* at. 1404.

[135] *The Daniel Ball*, 77 U.S. at 563.

[136] *The Montello*, 87 U.S. 441-42.

[137] *U.S. v. Utah*, at 81-83.

[138] *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. at 416.

[139] *Utah v. United States*, 403 U.S. at 11.

position, the Proposed WOTUS Rule will likely also be less clear, more unpredictable, and harder to implement. While the actions that constitute commercial transport can be reasonably ascertained and are generally confined to commonly-held and easily understood notions of transportation, the universe of actions that could constitute "recreation" in a jurisdictional determination are far more unpredictable.

This Proposed WOTUS Rule represents an important opportunity to reduce the ambiguity over the federal government's jurisdictional reach, and to eliminate those aspects of the Agencies' prior interpretations (*i.e.*, jurisdictional determinations based on recreational use alone, that could potentially remove all meaningful limits on the extent of federal jurisdiction). The Associations therefore recommend that the Agencies amend the Proposed WOTUS Rule to define TNWs based on their present or future potential use in *transporting goods* in commerce as follows:[140]

> Waters that are currently used ~~or were used in the past~~ or may be susceptible to use in their natural condition or by reasonable improvement as a means to transport ~~in~~ interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide.

We further recommend the Agencies rescind Appendix D based on its implication that recreation alone can cause a water to be considered a TNW.

4. Support Agencies' Proposal to Remove Interstate Waters as a Separate Category of WOTUS

The Associations support the Agencies' proposal to remove interstate waters as a separate category of WOTUS.[141] Interstate waters are not *per se* subject to federal jurisdictional simply because they are present in more than one state. As explained in the forgoing subsections, the Associations agree with the Agencies that federal jurisdiction under the CWA springs from Congress's established authority to regulate the channels of commerce. Isolated waters and wetlands that bridge state borders are not channels of commerce, and automatically including interstate waters in the definition of WOTUS is inconsistent with congressional intent to regulate navigable waters, significant waters that flow into those waters, or adjacent wetlands. Those interstate, but otherwise isolated and unconnected waters and wetlands are properly regulated by states and tribes.

While we do not believe it is relevant to the legality of the Proposed WOTUS Rule's interpretations, the Associations agree with the Agencies that many interstate waters will remain subject to federal jurisdiction based on their inclusion in other categories of waters. Nor are the Associations concerned that most interstate waters will remain within federal jurisdiction under the Proposed WOTUS Rules. As stated throughout these comments and elsewhere, the Associations' interest is in a WOTUS Rule that is lawful, clear, and administrable. This proposed change furthers those goals and we therefore support it.

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[140] Additions to the Proposed WOTUS Rule's existing language are underlined and agency language proposed to be deleted is in strike-out.

[141] 84 Fed. Reg. at 4,171.

b. Tributaries

As noted above, the Associations believe that the Agencies are compelled to follow the *SWANCC* majority's directive[142] to constrain interpretations of the term "navigable" to the usage provided by Congress in 33 U.S.C § 1344(g) and described in the extensive Supreme Court case law on navigability, but we recognize that the Proposed WOTUS Rule also must heed the Supreme Court's views in *Riverside Bayview*, *SWANCC*, and *Rapanos*, that Congress intended to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense.[143] As currently proposed, the definition of tributaries successfully bridges and adheres to these judicial requirements.

The Associations support the proposed definition and recommends only a few minor refinements. By including within the proposed WOTUS definition certain tributaries connected to waters under federal jurisdiction *by surface flows of meaningful frequencies and durations*, the Proposed WOTUS Rule would preserve a constrained notion of navigability while effectuating Congress's intent to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense.

Nonetheless, in contrast to the Proposed WOTUS Rule's interpretations of navigable waters and territorial seas, which were directly derived either from explicit language in the CWA or from binding Supreme Court jurisprudence, the proposed definition of tributaries required more extensive interpretation and a greater exercise of discretion. Given the CWA's parsimonious guidance and the Supreme Court's divergent views in *Rapanos*, however, it is inevitable that, at some point, one of the Agencies' proposed interpretations would seemingly conflict with one or more Justices' stated views. Importantly, it is precisely this situation, where Agencies must pursue one policy to the preclusion of another, which affords Agencies their greatest discretion and extends Agencies their greatest deference. What matters is that the Agencies do not misuse this "room to operate" to altogether abandon their attempt to faithfully give meaning and effect to the statute and the jurisprudence interpreting the statute. The Agencies must base their choice to the greatest extent possible on reasonable interpretations of congressional intent and explain the merits of, and rationale for, the decision they reach.

The Associations believe that the Agencies' proposed definition of WOTUS meets this burden. The Proposed WOTUS Rule's interpretation of tributaries meticulously explains, fully supports, more than reasonable in light of the divergent judicial positions that the Agencies were tasked with accommodating, and squarely within the Agencies' "room to operate." As important, by developing a definition of tributaries drawn from the commonalities between the divergent views expressed in *Rapanos*—rather than tacking around each judicial guidepost that the Agencies viewed as an obstacle to expansive federal jurisdiction—the Agencies lands on a definition of tributaries that is much more clear, predictable, and administrable than the case-by-case significant nexus approach set forth in the 2015 WOTUS Rule.

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[142] *See SWANCC*, 531 U.S. 159.
[143] *See* footnote 40.

1. The Proposed WOTUS Rule Reasonably Requires Tributaries to be Connected to Waters Under Federal Jurisdiction Via Perennial or Intermittent Surface Flows

Based on the relevant judicial guidance, the Proposed WOTUS rule defines the scope of tributaries. A short review of the cases substantiates the Agencies' definition, intended application, and interpretation here.

The *Rapanos* plurality described the requisite connections to navigable waters as "relatively permanent, standing or flowing bodies of water," and affirmatively not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[144] Applying the "plain language of the statute," the plurality concluded that channels that ordinarily are dry and contain flowing water only during precipitation events should not be viewed as "waters,"[145] much less WOTUS. The plurality similarly concluded that wetlands fall within the CWA's jurisdiction "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." "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.

Justice Kennedy concurred with key parts of the plurality's view, and described the connection necessary to extend federal jurisdiction to wetlands that would otherwise be outside of federal jurisdiction as depending "upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[146] 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.'"[147]

Justice Kennedy categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a significant nexus.[148] Accordingly, the extension of federal jurisdiction from navigable waters to non-navigable waters and wetlands rests on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and the "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."[149]

The Proposed WOTUS Rule's interpretation of tributaries is consistent with the plurality position and Justice Kennedy's concurrence by adopting the commonalities in the Justices' positions and focusing on substantial flows of waters that create non-speculative connections to waters under federal jurisdiction. From the guideposts furnished by the *Rapanos* plurality, the Proposed WOTUS Rule adopts a requirement that tributaries must have relatively permanent surface connections to WOTUS in order for the tributaries themselves to be defined as WOTUS. The

[144] *See* footnote 29.
[145] *Id.* at 734.
[146] *Rapanos*, 547 U.S. at 779.
[147] *Id.* at 780.
[148] *See* footnote 35.
[149] *Id.*

Agencies remains cognizant, however, of Justice Kennedy's concern that under the plurality's view, "[t]he merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not."[150] In recognizing the commonalities found in the *Rapanos* plurality and concurrence opinions, the Proposed WOTUS Rule did not require that tributaries' connections to WOTUS be constant or continuous. Rather, under the Proposed WOTUS Rule, federal jurisdiction would extend to a tributary if its surface connection to WOTUS is at least perennial or intermittent.

The Proposed WOTUS Rule properly excludes ephemeral flows to the definition of tributaries, and by doing so, the Proposed WOTUS Rule reflects the *Rapanos* plurality's decision to decline to define as tributaries those "ordinarily dry channels through which water occasionally or intermittently flows."[151] Because the Agencies also attempted to maintain a level of consistency with Justice Kennedy's views, the Proposed WOTUS Rule would not go as far as the *Rapanos* plurality in limiting the definition of tributaries to "continuously present, fixed bodies of water."[152] As such, some of the "typically dry" features discussed by the *Rapanos* plurality may be deemed WOTUS under the Proposed WOTUS Rule.[153]

The Proposed WOTUS Rule also departs from Justice Kennedy's concurrence to some degree in that it limits federal jurisdiction to only those tributaries with at least seasonal surface flow to WOTUS. Yet, as discussed in the preamble, there are "sufficient commonalities" between the plurality and Justice Kennedy opinions that help instruct the Agencies on where to draw the line between Federal and State waters.[154] As such, both the Proposed WOTUS Rule and Justice Kennedy concur on the key principle that federal jurisdiction can extend to non-navigable waters only when those waters share substantial and non-speculative connections to WOTUS.

Indeed, while they differ in their means, both the Proposed WOTUS Rule and Justice Kennedy's concurrence serve to distinguish those connections that are remote, speculative, or insubstantial[155] from those connections that create a "significant nexus"[156] with WOTUS. To that end, in addition to adopting a more expansive approach urged by the *Rapanos* plurality to define the requisite connections to WOTUS, the Proposed WOTUS Rule is also informed by the Connectivity Report, which is the same report that the Agencies determined in the 2015 WOTUS Rule to be relevant to identifying the significant nexus between waters.

The Connectivity Report was developed by EPA's Office of Research and Development and reviewed by EPA's Science Advisory Board ("SAB") as part of the rulemaking process through which the Agencies ultimately promulgated the 2015 WOTUS Rule. The Connectivity Report reviewed more than 1,200 publications and attempted to summarize the scientific understanding

[150] *Id.* at 769.
[151] *Id.* at 733.
[152] *Id.*
[153] *Id.* at 727.
[154] 84 Fed. Reg. at 4,168.
[155] *Rapanos*, 547 U.S. at 780-81.
[156] *Id.* at 759.

of the manner and degree of connectivity that can cause upstream streams and wetlands to affect downstream water quality.

In promulgating the 2015 WOTUS Rule, the Agencies noted that their interpretation of the CWA was "informed by the Science Report and the review and comments of the SAB, but not dictated by them."[157] Likewise, the tributary definition in the Proposed WOTUS Rule is informed by the Connectivity Report (within the limits discussed in the preamble) by providing scientific support for a statutory interpretation that is necessarily based on an analysis of the text of the CWA and the Supreme Court jurisprudence interpreting the Act.

The Agencies decline to follow Justice Kennedy's concurrence further because delineating federal from state jurisdiction based on a "potential to affect the chemical, physical or biological integrity of truly jurisdictional waters" would fully undermine the Proposed WOTUS Rule's ability to bring clarity and administrative ease to jurisdictional determinations. Following Justice Kennedy's suggestion to the word would require abandonment of all common notions of waterbodies, case-by-case analyses based on nexus that are not readily observable, and considerations of significance that are so subjective that they would place no meaningful limit on the Agencies' ability to claim boundless jurisdiction.

Congress empowered the states, and to some extent the Agencies, to address those areas where pollutants are picked up and carried by runoff into waterbodies, but that does not mean Congress intended that vast land areas, depressions and dry channels were themselves to be considered waters subject to federal jurisdiction. Consistent with traditional notions of state primacy over land use, such features should remain under state jurisdiction.

Were the decision solely ours to make, Justice Kennedy, the Rapanos plurality, the dissenting justices in *Rapanos*, and countless others may each choose different means of distinguishing tributaries with insufficient connections to WOTUS from tributaries with sufficient connections to WOTUS, but it is improper to portray the Proposed WOTUS Rule as invalid simply because we would do things differently. All that matters is that the Proposed WOTUS Rule is "reasonable and not in conflict with the expressed intent of Congress."[158]

Bearing this in mind, the Associations believe that the Proposed WOTUS Rule not only respects the jurisdictional limits conceived by Congress, it also aids in the clarity and administrability of the CWA.

By limiting the requisite connections to navigable waters to surface flows, the Proposed WOTUS Rule would not allow jurisdictional determinations to be made on the often-conflicting opinions of experts. The Proposed WOTUS Rule would instead further the clarity, credibility, and administrative ease of these determinations by obviating any need for case-by-case analyses and grounding this most important determination on clear, understandable, and readily observable surface connections.

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[157] 80 Fed. Reg. at 37,060.
[158] *Rapanos*, 547 U.S. at 766.

Of course, the Proposed WOTUS Rule's manner of delineating perennial and intermittent surface flows from ephemeral flows is not entirely devoid of ambiguity and arbitrariness. These are the inevitable hallmarks of any line-drawing exercise. To minimize the ambiguity and arbitrariness, however, the Associations are providing recommendations in Subsection IV.b.2 below.

2. Recommended Changes to the Tributaries Category of the Proposed WOTUS Rule

We appreciate that the Agencies are seeking comments on whether the tributary definition should include specific flow characteristics (*e.g.* timing, duration, frequency, or magnitude). Under the Proposed WOTUS Rule, tributaries subject to federal jurisdiction would *not* include surface features that flow only in direct response to precipitation, such as ephemeral flows, dry washes, arroyos, and similar features, because these lack the required perennial or intermittent flow regimes to satisfy the tributary definition under this proposal and therefore would not be jurisdictional.[159] In order to distinguish and define these types of flows, the Agencies propose the following definitions:

- Ephemeral is defined as "surface water flowing or pooling only in direct response to precipitation (*e.g.*, rain or snow fall)."[160]
- Intermittent is defined as "surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts)."[161]
- Perennial is defined as "surface water flowing continuously year-round during a typical year."[162]

While the Associations agree with this overall approach and supports the proposed definitions of ephemeral and perennial, we believe that, as written, the definition of intermittent could bring into jurisdiction features that flow sporadically and have no substantial effects on the TNWs that they may be hypothesized to have a connection. At a minimum, this definition could result in confusion that we believe can readily be addressed.

The Associations' concern with the definition of intermittent relates to the phrase "during certain times." The definitional requirement that flows occur in "a typical year" is proper because it helps exclude from federal jurisdiction those features that flow only occasionally or sporadically. But, distinguishing between relatively continuous, substantial connections and ephemeral, insubstantial connections requires consideration of both the frequency and duration of flow. The Agencies' proposed definition of intermittent, however, seemingly imparts no requirement that the flow occur for a specified duration.

As written, the proposed definition's use of the phrase "during certain times" suggests that, as long as it reliably occurs in a typical year, the most modest and momentary trickle would cause a feature

[159] 84 Fed. Reg. at 4,203-4.
[160] *Id.*
[161] *Id.*
[162] *Id.*

to become a tributary subject to federal jurisdiction. The prospect of this rather perverse interpretation is mitigated to some degree by the Agencies' use of the term "continuously." However, absent a specified duration for this term, the Agencies' proposed definition remains too ambiguous to assuredly preclude inconsistent application in jurisdictional determinations.

Justice Kennedy's concurrence certainly does not compel, and the *Rapanos* plurality would definitely preclude a definition that extends jurisdiction to features with annual but fleeting flows to WOTUS. The Associations therefore recommend that the Agencies amend the proposed definition of intermittent to prevent any potential future misinterpretations that would conflict with the Supreme Court's guideposts.

To effectuate that change, the Associations recommend that the Agencies replace the phrase "during certain times of" with the phrase "for at least 90 consecutive days in" so that the amended definition of intermittent would read:[163]

> The term *intermittent* means surface water flowing continuously ~~during certain times~~ for at least 90 consecutive days in ~~of~~ a typical year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts).

We believe this definition reflects the Agencies' intention to preserve common notions of waterbodies, while eliminating those insubstantial, intermittent, or episodic flows that render jurisdictional determinations less predictable, harder to demonstrate or disprove, and more inclined to be misused to fulfill unlimited jurisdictional aspirations.

c. Impoundments

The Associations support the Proposed WOTUS Rule's inclusion of impoundments as a stand-alone category of WOTUS, but we recommend that the Agencies clarify the scope of this category with a definition of impoundments. The Associations believe these recommendations are necessary because, absent a sufficiently clear definition, many different types of structures and features are susceptible to being improperly construed as jurisdictional impoundments.

As such, the Associations recommend that the Agencies further define impoundment with the following underlined language:[164]

> Impoundments of waters identified in paragraphs (1)(i) through (iv) and (v) of this definition, the movements of which have been impeded either in whole or in part by a man-made structure, such as a dam.

The Associations further recommend that impoundments of WOTUS existing before the effective date of the Proposed WOTUS Rule, and created for the purpose of compliance with a federal or

[163] Additions to the Proposed WOTUS Rule's existing language are underlined and agency language proposed to be deleted is in strike-out.
[164] Additions to the Proposed WOTUS Rule's existing language are underlined.

state statutes or regulations (including, but not limited to the CWA), should be excluded from the definition of impoundments subject to federal jurisdiction under the Proposed WOTUS Rule.

Per the Agencies' long-standing interpretation, which is supported by the applicable case law,[165] impounding a WOTUS generally does not change the impounded waters' status as WOTUS. As such, the Associations agree that, irrespective of whether an impoundment impedes some or all flow in a waterbody, that waterbody will remain a WOTUS subject to federal jurisdiction both upstream and downstream of the impoundment, unless specifically excluded from jurisdiction by the Proposed WOTUS Rule. For example, a waste treatment system that is explicitly excluded would remain excluded even it is otherwise a jurisdictional impoundment.

Similarly, if a new impoundment of a waterbody severs one of the definitional elements that caused the water to be subject to federal jurisdiction before the impoundment (*e.g.,* intermittent or perennial flow), the waterbodies impacted by the impoundment would remain subject to federal jurisdiction. While this interpretation will arguably cause more waters to remain under federal jurisdiction, it provides important clarification that waters under federal jurisdiction cannot be transferred to state jurisdiction through impoundment.

Separate and aside from an impoundment's impact on the jurisdiction of another water, the Agencies also need to precisely define when the impoundments themselves are subject to federal jurisdiction. The Associations recommend that the definition not include water that is diverted from a WOTUS to an upland location that is itself not subject to federal jurisdiction.

While the various Supreme Court justices have rarely articulated the same threshold for determining when to extend federal jurisdiction to non-navigable water, every justice who has rendered an opinion in one of the WOTUS cases has understood that the extension of federal jurisdiction from navigable waters to non-navigable waters is based on the potential for movement of water (and pollution) from the non-navigable water to the navigable water. No justice has suggested that non-navigable waters can be brought under federal jurisdiction because non-navigable waters may be polluted by WOTUS. Nor have the Agencies in this Proposed WOTUS Rule, or even in the 2015 WOTUS Rule, suggested that the CWA's focus on navigable waters reflects Congress's intent to protect non-navigable upstream waters from downstream pollution.

As such, federal jurisdiction should not extend to an impoundment simply because the impoundment diverts water from a WOTUS. In other words, an impoundment that is not a WOTUS but is simply diverting water from a downstream WOTUS (*e.g.* cooling water that is impounded), should not then itself become a WOTUS. Water use and withdrawals are squarely within the purview of the states and tribes. What matters for purposes of asserting federal jurisdiction over a waterbody is whether the waterbody has a continuous surface flow *to* WOTUS. Absent such a flow, there is no impact on the "chemical, physical, and biological integrity of the Nation's waters."[166]

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[165] *See*, *e.g., S. D. Warren Co.* v. *Maine Board of Environmental Protection,* 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.") (citations omitted).
[166] *See* footnote 7.

Agencies should be clear that any impoundments that contain waters, the discharge of which would be regulated under the CWA (*e.g.*, NPDES permit, effluent guidelines, or pretreatment limits), should be explicitly excluded as non-jurisdictional and WOTUS.[167] Lastly, there is some potential for overlap between the lakes and ponds and impoundments categories, and as such, the Agencies should clarify that any impoundment that is determined to be an impoundment should remain an impoundment and not subject to the requirements of other categories such as lakes and ponds."

d. Ditches

The Associations support the Agencies' proposed creation of a ditches category in the Proposed WOTUS Rule. Although we request certain additional clarifications with respect to demonstrating the jurisdictional status of ditches, the Associations agree that the Proposed WOTUS Rule's addition of a separate WOTUS category for ditches will "provide regulatory clarity and predictability regarding the regulation of ditches and similar artificial features."[168]

Further, because ditches can also be discernable, confined and discrete conveyances,[169] properly defining ditches should help distinguish those ditches that are point sources from those ditches that are considered WOTUS. Congress equipped EPA with the NPDES permitting program, but expressly limited its scope through the Act's definition of "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source"[170] Point sources are clearly defined to include "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[171] As such, a ditch cannot be both a point source that discharges pollutants into a WOTUS as well as a WOTUS that accepts discharges of pollutants from a point source. As Justice Scalia noted in *Rapanos*, "[t]he definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories" and that "[t]he definition of "discharge" would make little sense if the two categories were significantly overlapping."[172]

Separately, in another rulemaking,[173] EPA is also attempting to clarify Congress' definition of "point source" as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged."[174] As the Associations noted in their comments on that rulemaking, the Supreme Court has already held term that the "conveyance" in the CWA's definition of "point source" "makes plain" that a point source must "convey the pollutant to 'navigable waters.'"[175] As the Associations noted in their comments on that rulemaking, the Supreme Court has already held

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[167] *See* discussion below in Exclusions, Section V.
[168] 84 Fed. Reg. at 4,179.
[169] 33 U.S.C. § 1362(14).
[170] *Id.* at § 1362(12)(A).
[171] *Id.* at § 1362(14).
[172] *Rapanos*, 547 U.S. at 731, 735.
[173] Comments submitted by API, on behalf of the Associations (and Domestic Energy Producers Alliance and Marcellus Shale Coalition), in response to Request for Comments on "CWA Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water;" EPA-HQ-OW-2018-0063. May 21, 2018. Available at: https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0287
[174] 33 U.S.C. § 1362(14).
[175] *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

"conveyance" in the CWA's definition of "point source" "makes plain" that a point source must "convey the pollutant to navigable waters."[176] We appreciate that EPA is considering the Associations' comments on that issue, and raise them here only to note the important relationship between these proposals.

Indeed, this Proposed WOTUS Rule, and EPA's rulemaking on "CWA Coverage of 'Discharges of Pollutants' via a Direct Hydrologic Connection to Surface Water" are both necessary to meaningfully implement the cooperative federalism framework that Congress required the Agencies to observe. Determining when a ditch is subject to federal jurisdiction requires the Agencies to establish a rational basis for determining when the ditch is a WOTUS and when the ditch is a point source that discharges to a WOTUS. The Proposed WOTUS Rule's definition of a ditch helps make that determination, and therefore clarifies the jurisdictional and regulatory status of ditches.

Under the Proposed WOTUS Rule, ditches are WOTUS if they: (1) are TNWs; (2) are constructed in, relocate, or alter a tributary and meet the tributary definition; or (3) are constructed in adjacent wetlands and meet the tributary definition.[177] All other ditches would be expressly excluded from the Proposed WOTUS Rule.[178] The Agencies also propose to define the term ditch as "an artificial channel used to convey water."[179]

The Associations believe these definitions and exclusions are necessary to distinguish ditches from tributaries and other waterbodies for which the Agencies are proposing alternate tests to establish federal jurisdiction. Because the jurisdictional status of a particular ditch is governed by whether it is an "artificial channel" and whether it was "constructed in," "relocates," or "alters" a tributary, the status of a particular ditch may be difficult to establish without undertaking an analysis of historical conditions. In other cases, where the physical alterations that created the ditch occurred long ago or are undocumented, it may be impossible to demonstrate that a particular waterbody is a ditch or whether it is an alternation of, or construction in, a natural tributary. Many ditches, such as most railroad ditches, were constructed well before the CWA and before tools were readily available that would help demonstrate the historic conditions.

Given this difficulty, the Associations concur with the Proposed WOTUS Rule that the Agencies have the burden of demonstrating the historic status of the ditch's construction, and "if field and remote-based resources do not provide sufficient evidence to show the ditch was constructed in a tributary or an adjacent wetland then a determination would be made that the ditch is not jurisdictional under this proposed rule."[180] We believe, however, that the Proposed WOTUS Rule should also provide some reasonable limits to the field and remote-based resources which must be reviewed before determining that insufficient data exists to show the ditch was constructed in a tributary or an adjacent wetland.

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[176] *Id.*
[177] 84 Fed. Reg. at 4,179, 4,180.
[178] *Id.* at 4,204.
[179] *Id.*
[180] *Id.* at 4,181.

The Proposed WOTUS Rule provides a reasonably comprehensive list of historic tools and resources that can be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction.[181] And, given the variabilities in these historic tools and the inconsistent availability of records, the Associations do not believe that the Agencies should necessarily limit the universe of remote-based sources that should or could be requested from applicants for consideration by the Agencies. Instead, the Associations believe that the Proposed WOTUS Rule should provide reasonable temporal limits to the historic data the Agencies could request from applicants. Applicants could, of course, choose to undertake a more extensive effort to collect data from further back in history, but would not be required to do so by the Agencies in order to show that the record review was sufficient.

Similarly, consistent with the Army Corps' efforts for regulatory streamlining, the Associations believe that the Proposed WOTUS Rule should be amended so that the Agencies' review of data submitted by applicants should also be limited to a reasonable time frame.[182] The Agencies should not be able to sidestep the evidentiary burden this Proposed WOTUS Rule would place on them by unreasonably withholding jurisdictional determinations that require analysis of the presence of a tributary or adjacent wetland at the time of ditch construction.

Individual permitting, when triggered, is a long and burdensome process. Although 33 CFR § 325.2(d)(3) states that permits should be issued within 60 days of a complete application, the exceptions to that deadline, including those related to the National Environmental Policy Act, the Endangered Species Act, and other cross-cutting statutes, have effectively undermined this time limit requirement. For example, the Army Corps needs to perform any required real estate review concurrently with the permitting review. When obtaining an RHA or a CWA Dredge and Fill Program permit from the Army Corps to cross a bay or other jurisdictional body where the Army Corps also has a real estate interest in the underlying land, some of the Associations' members find that the Army Corps may sometimes defer the real estate review (and issuance of a license/easement) until after the permit review. This deferral can almost double the time it takes to get through the Army Corps processes.

The Associations therefore recommend that the Proposed WOTUS Rule be amended so that it requires the Agencies to review an applicant's data and render a jurisdictional determination within 60 days and provide similar reasonable timelines for other permitting requirements related to WOTUS determinations.

e. Lakes and Ponds

The Associations support the Agencies' proposal to create a new category of WOTUS for lakes and ponds. We believe that treating lakes and ponds as a separate and distinct category of WOTUS helps to simplify and clarify the application of the Proposed WOTUS Rule because the means by which the Proposed WOTUS Rule would assert federal jurisdiction over lands and ponds is

[181] *Id.*

[182] *See* Comments submitted by API and AOPL in Response to Army Corps Subgroup to the U.S. Department of Defense Regulatory Reform Task Force, Review of Existing Rule, Docket No. COE-2017-004, Oct. 18, 2017. Available at: https://www.regulations.gov/document?D=COE-2017-0004-0119.

different than other categories of waters. Under the Proposed WOTUS Rule, lakes and ponds are considered WOTUS if they: (1) are TNWs; (2) contribute perennial or intermittent flow to WOTUS; or (3) are flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year.[183] If the Proposed WOTUS Rule included lakes and ponds in a category with other waterbodies, that category would encompass waterbodies subject to different tests for determining federal jurisdiction. While the Agencies certainly have the discretion to create an aggregated category, the Associations believe that the Proposed WOTUS Rule is clearer and less susceptible to misinterpretation if the categories do not combine waterbodies with dissimilar jurisdictional tests.

The Associations also support the Proposed WOTUS Rule's three mechanisms for extending federal jurisdiction to lakes and ponds.[184] Although, as explained below, the Associations recommend that the Agencies clarify aspects of these mechanisms, such as the term "flooding," we believe that these mechanisms are consistent with the CWA, the Court's holding in *SWANCC* regarding isolated waterbodies, the *Rapanos* plurality's guidance on the need to assert jurisdiction via fairly continuous surface connections, and the framework the Agencies employ throughout the Proposed WOTUS Rule.

Additionally, the Associations believe it is equally important to reflect on the jurisdictional framework that this category would replace. The 2015 WOTUS Rule did not specifically categorize lakes and ponds. Instead, the jurisdictional status of most of these features was required to be considered under the case-by-case analysis because most lakes or ponds would likely be located within the 100-year floodplain of any TNW, territorial sea, or interstate water; and/or located within 4,000 feet of the high tide line or OHWM of any of the six categories of waters that the 2015 WOTUS Rule deemed "jurisdictional by rule."[185] The determination of whether any of these lakes or ponds actually fell under federal jurisdiction was then based on analysis of whether they shared a "significant nexus" with a jurisdictional water.[186] This significant nexus determination required an analysis of whether a feature "alone, or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a Category 1-3 water, and instructed the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur.[187]

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.[188] Accordingly, while we request some modest additional clarifications, the Associations appreciate the subjective framework this category of waters would replace.

1. Recommended Clarifications

[183] 84 Fed. Reg. at 4,182.
[184] *Id.* at 4,182.
[185] *See* footnote 102.
[186] *Id.* at 37,104-05.
[187] *See* footnotes 104-105.
[188] *See* footnote 106.

The Associations agree with the Proposed WOTUS Rule's statement that it is difficult to assign a precise definition to lakes and ponds (*i.e.*, the characteristic conceptual distinction between rivers and lakes or ponds being retention time, river reaches having relatively short retention times and lakes or ponds have longer ones), and we support the Agencies' efforts to identify appropriate definitions. Even without an improved definition, however, we believe that the vast majority of lakes and ponds are readily discernable based on common notions of these waterbodies. To the extent the classification of other waterbodies remains uncertain, their status can likely be established through the existing regulatory definitions and classification systems cited in the preamble to the Proposed WOTUS Rule. Although there may be instances where it may be uncertain whether a waterbody should be considered a lake/pond, the potential impact of that residual uncertainty is not particularly meaningful given the three relatively discrete mechanisms by which lakes and ponds can become subject to federal jurisdiction. Stated differently, while there may be instances around the margins where it could be difficult to define lakes and ponds from other features, the Associations believe that federal jurisdiction is far more likely to be established based on whether they: (1) are TNWs; (2) contribute perennial or intermittent flow to WOTUS; or (3) are flooded by a jurisdictional TNW, tributary, ditch, lake/pond, or impoundment in a typical year.[189] So long as the Agencies do not hereafter adopt definitions of lake or ponds that are wholly inconsistent with the conventionally identifiable notions of these geographic features or which do not require the ordinary presence of water,[190] the Associations believe that the definitions of lakes and ponds will remain sufficiently clear and administrable.

While we are less concerned about the potential for confusion from the definitions of lakes and ponds, the Associations believe that the Proposed WOTUS Rule is not clear about what it means for a lake or pond to be flooded by a jurisdictional TNW, tributary, ditch, lake or pond, or impoundment in a typical year.[191] As written, the Proposed WOTUS Rule could potentially extend federal jurisdiction to lakes and ponds based on discrete but periodic overtopping events that allow water to flow from a WOTUS to a lake or pond, but do not allow water from the lake or pond to flow back to the WOTUS. As stated in Subsection IV(c) above, with respect to impoundments, the jurisdictional status of a waterbody is not determined based on the potential for the waterbody to *receive pollution from a WOTUS*—jurisdictional status is established based on the prospect of relatively continuous surface flows from the waterbody *to WOTUS*. Accordingly, the Associations believe that the Agencies should refine their definition of floods so that it is limited to those events where the surface separation between a WOTUS and a lake or pond becomes submerged in such a way, and for such a duration, that there is likely to be significant surface communication between the WOTUS and the lake or pond.

Absent the physical surface separation between the WOTUS and the lake or pond, the lake or pond would be "inseparably bound up with,"[192] and largely indistinguishable from the WOTUS. In

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[189] 84 Fed. Reg. 4,182.

[190] *See Rapanos*, 547 U.S. at 733-34.

[191] As discussed in Subsection 4(b) above, the Associations believe that the Proposed WOTUS Rule should be amended to better distinguish perennial and intermittent flows from ephemeral flows. As the jurisdictional status of lakes and ponds can similarly be established through considerations of flows, our prior recommendations apply equally here.

[192] *See SWANCC*, 151 U.S. at 167 (*quoting Riverside Bayview*, 474 U.S. at 134).

order to constitute a "continuous surface connection," the removal of the surface connection between the lake or pond and the WOTUS, however, must be for a duration that is more than fleeting. Consistent with our recommendations with respect to flows from tributaries, the Associations believe that the jurisdictional status of lakes and ponds should be based both on the frequency *and duration* of flood events.

A continuous surface connection cannot credibly be established from the most transitory submergence of the surface barrier between a WOTUS and a lake or pond. Temporary or short-lived inundations are akin to the ephemeral flows and transitory precipitation impacts that the Proposed WOTUS Rule deems insufficient to extend federal jurisdiction under the *Rapanos* plurality.

In order to clarify and appropriately limit the instances in which a *flood from a WOTUS* can cause a lake or pond to fall within federal jurisdiction, the Associations recommend that the Proposed WOTUS Rule clarify the flooding requirement as follows:[193]

> . . . lakes and ponds that are flooded annually by a water identified in paragraphs (1)(i) through (v) of this definition in a typical year and for a duration that is not less than one week. For purposes of this section, "flooded" shall mean the submergence of the ordinarily dry land between a water identified in paragraphs (1)(i) through (v) of this definition and a lake or pond such that there is no surface separation between waters identified in paragraphs (1)(i) through (v) of this definition and a lake or pond for a least a week. "Flooded" shall not mean short-term overtopping of the surface separation between a water identified in paragraphs (1)(i) through (v) of this definition and a lake or pond; or the mere inflow to a lake or pond from a water identified in paragraphs (1)(i) through (v) that has overflowed its normal confines.

f. Wetlands

The Associations support the Agencies' inclusion of adjacent wetlands as a category of waters subject to federal jurisdiction under the Proposed WOTUS Rule,[194] and further support the Proposed WOTUS Rule's retention of the Agencies' longstanding definition of wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[195] We further agree with the Agencies that, to qualify as a wetland, the area must meet all three of the Army Corps' wetland delineation criteria: soils, vegetation, and hydrology.

We believe that reasonable adherence to these criteria restrains this category to those swamps, marshes, bogs, and similar areas that are well within the common notion of a wetland. Although

[193] Additions to the Proposed WOTUS Rule's existing language are underlined.
[194] 84 Fed. Reg. at 4,204.
[195] *Id.* at 4,205. Consistent with our other recommendations, the Associations urge the Agencies to avoid unreasonable interpretations of the frequency and duration of inundations and saturations such that ephemeral or short-lived events would quality otherwise dry areas as wetlands.

the *Rapanos* plurality may have allowed for a more restrictive interpretation of WOTUS, the Associations believe that the Agencies correctly declined to limit the Proposed WOTUS Rule to those bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.'"[196]

Congress specifically identified "wetlands adjacent thereto" as navigable waters within federal jurisdiction of the Act, and in *Riverside Bayview*, a unanimous Supreme Court agreed that the Agencies were entitled to interpret WOTUS to include adjacent wetlands.[197] As such, we do not believe that there is sufficient basis to exclude from the Proposed WOTUS Rule those wetlands with at least perennial or intermittent flow to WOTUS. The surface flows from these wetlands can provide substantial, non-speculative connections to navigable water, and would therefore qualify the wetlands as "waters that are not navigable in the traditional sense."[198]

The Proposed WOTUS Rule would also extend federal jurisdiction to wetlands adjacent to WOTUS. Here again, in all material respects, the Agencies' interpretation finds ample support in the language of the CWA and in the holdings of the Supreme Court. Defining WOTUS to include adjacent wetlands that abut to a WOTUS is proper because Congress specified that "wetlands adjacent" to waters that are either navigable or "not navigable in the traditional sense" are subject to federal jurisdiction.[199] The Agencies' interpretation similarly tracks the unanimous *Riverside Bayview* decision, which countenanced the inclusion of wetlands adjacent to navigable waters within the Act's jurisdiction due to the difficulty of ascertaining a boundary between waters and land areas where the wetland "actually abuts on a navigable waterway . . . ."[200]

In *SWANCC*, the Court noted that *Riverside Bayview's* acceptance of the Act's jurisdiction over wetlands "that actually abutted on a navigable waterway" stemmed from Congress' acquiescence to the Army Corps' regulations covering such wetlands, and explained that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[201] The extent of federal jurisdiction over adjacent wetlands remained in dispute in *Rapanos*, and consequently, interpretations of the Court's own holdings in *Riverside Bayview* and *SWANCC* were disputed as well.

As we have previously explained, Justice Kennedy would extend federal jurisdiction over wetlands adjacent to WOTUS based on a consideration of the wetland's "potential to affect the chemical, physical and biological integrity of truly jurisdictional waters"—an outcome Justice Kennedy argued was prescribed in *SWANCC*'s discussion of the "significant nexus" between wetlands and navigable waters. The plurality countered this analysis by explaining that the *SWANCC* Court viewed the "*significant nexus*" between waters and adjacent wetlands as merely the ecological rationale for coverage of those wetlands—not as "an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.'"[202] The

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[196] *Rapanos,* 547 U.S. at 739.
[197] 33 U.S.C § 1344(g)(1); *Riverside Bayview*, 474 U.S. at 135.
[198] *See* footnote 40.
[199] 33 U.S.C § 1344(g).
[200] *Riverside Bayview*, 474 U.S. at 135.
[201] *SWANCC*, 151 U.S. at 167. (emphasis added).
[202] *Rapanos*, 547 U.S. at 741. (emphasis in original).

plurality further averred that the *SWANCC* Court "found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction."[203]

Like the plurality's position, the Proposed WOTUS Rule and Court's holdings in *Riverside Bayview* and *SWANCC* follow commonsense notions of adjacency and base jurisdiction solely on the ecological connections that Congress and the *Riverside Bayview* Court understood adjoining waters would share. Wetlands are adjacent under the Proposed WOTUS Rule where they "abut or have a direct hydrologic surface connection to other WOTUS in a typical year."[204]

Wetlands that extend to the edge of a navigable river (or any other WOTUS) are adjacent because the wetland directly abuts the navigable river. Wetlands that are directly next to a navigable river but are separated from the river by natural river berms or a sand bar, however, are not WOTUS because they do not share a sufficiently continuous surface connection. Similarly, more geographically distant wetlands would remain within state jurisdiction. Consequently, if a group of wetlands is located near a WOTUS, only those wetlands that are themselves adjacent to, or sharing a continuous surface connection to, the WOTUS would be subject to federal jurisdiction.

This restrained approach to defining both wetlands and adjacency is essential to the Agencies' effort to promulgate a lawful and enduring WOTUS definition. Per *Riverside Bayview*, this approach permits the Agencies to ascertain the boundaries between waters subject to federal jurisdiction and the land areas that must remain under state jurisdiction. It furthers the clarity, predictability, credibility, and administrability of the CWA permitting structure by using objective and commonly understood definitions of adjacent and wetlands. The clear lines provided by these definitions eliminate case-specific and often subjective analyses in favor of readily observable and relatively indisputable criteria. When the line between waters subject to federal jurisdiction and land areas under state jurisdiction can be ascertained easily, responsibilities for environmental protection are clear and resources can be better utilized for the protection of such waters, rather than for resolving disputes over jurisdiction.

V. EXCLUSIONS

The Proposed WOTUS Rule specifically identifies certain waters and features that are expressly excluded from the definition of WOTUS, and therefore relegated appropriately to the jurisdiction of states and tribes. The Associations generally support these exclusions as they are necessary to more fully conform the Proposed WOTUS Rule to the jurisdictional limitations imposed by the CWA and clarified by the Supreme Court. We also believe that the Agencies' use of exclusions as a corollary to the six categories of waters encompassed within the proposed WOTUS definition decreases the likelihood of misinterpretation, improves clarity and certainty, and facilitates a more administrable rule.

In an overarching comment, the Associations support the definition of upland generally, and as it specifically relates to the four exclusions. This definition, as well as certain supporting language in the preamble to the Proposed WOTUS Rule, provides much needed clarity. It is especially

[203] *Id.* at 741-42.
[204] 84 Fed. Reg. at 4,205.

helpful to the regulated community and its operations for the Agencies to note that "a proposed excluded feature that develops wetland characteristics within the confines of the water/feature would remain excluded from the definition of 'waters of the United States.'"[205] This provides assurance to those planning or developing long-term energy infrastructure projects that the jurisdictional status of areas selected for these projects will not change. The Associations appreciate this clarification and recommend that this language be clearly stated to apply to all other jurisdictional determinations. That is, once a water or feature is determined to be outside of federal jurisdiction, such as an excluded ditch, lake or pond, an impoundment, or an excluded CWA system and that water/feature then develops wetland characteristics, it should remain outside of federal jurisdiction regardless of whether it develops wetland characteristics.

In the sections that follow, the Associations provide comments on certain exclusions. We also identify exclusions that we believe should be added, clarified, or expanded.

- **Groundwater** – The Associations support the Proposed WOTUS Rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems."[206] This exclusion is consistent with the 2015 WOTUS Rule and necessary to fully and unambiguously affirm that groundwater can neither be considered a WOTUS nor a point source discharge subject to NPDES permitting. As the Agencies explained, the 2015 WOTUS Rule excluded groundwater because "the agencies have never interpreted [it] to be a 'water of the United States under the CWA.'"[207] Nor could they, because including groundwater in the definition of WOTUS would require the Agencies to entirely disregard all notions of navigability, which is plainly at odds with *SWANCC* and the plurality in *Rapanos*.

  Moreover, Congress understood the important role of groundwater in the hydrologic cycle, but as Senator Edwin Muskie (the Senate's sponsor of the 1972 CWA amendments) explained: "There is no effective way, as yet other than land use control, by which you can intercept that [nonpoint source] runoff and control it in the way that you do a point source."[208] In other words, because land-use controls were understood to be the only effective means of mitigating groundwater pollution, groundwater could not be WOTUS because they are controls which principally lie within the regulatory domain of states.

  The Senate Committee on Public Works' report on the 1972 CWA amendments similarly recognized that groundwater pollution adversely impacted water quality.[209] That report also "evidences a clear intent to leave the establishment of standards and controls for

[205] *Id.* at 4,192
[206] 84 Fed. Reg. at 4,190.
[207] 80 Fed. Reg. at 37,073.
[208] A Legis. History of Waters Pollution Control Act Amendments of 1972 together with a Section by Section Index ("CWA Legis. History") Prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Comm. Print 1973), Vol. 2 at 1,315 (93rd Cong. 1st Session).
[209] *Exxon Corp. v. Train*, 554 F.2d 1310, 1325 (5th Cir. 1977) *citing* S. Rep. No. 92-414, 92nd Cong., 1st Session (1971) *reprinted* in U.S. Code & Ad. News at 3,739 ("The importance of groundwater in the hydrological cycle cannot be underestimated . . . . Groundwater pollution is not as serious a national problem as is surface water pollution, but groundwater availability and quality is deteriorating.").

groundwater pollution to the states."[210] In particular, the report explained that, "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt th[e] recommendation" to establish specific groundwater pollution standards.[211]

Further support is provided by the House of Representatives' rejection of a similar amendment.[212] Representative Clausen (House sponsor of the 1972 CWA amendments)[213] successfully argued against an amendment that would have prohibited "any addition of any pollutant to ground waters from any point source"[214] by explaining that "there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters."[215] Representative Clausen further explained that the 1972 CWA amendments already addressed groundwater pollution by denying the transfer of UIC permitting authority if a state could not demonstrate that it had regulatory authority to control disposal of pollutants into wells.[216]

Again, the legislative history demonstrates that Congress recognized that groundwater pollution was a problem, but it also demonstrates that Congress knowingly and purposely excluded groundwater from the definition of WOTUS. Indeed, even those courts that have decided in favor of direct federal regulation of groundwater-derived pollution have recognized that groundwater itself is not WOTUS.[217]

The Associations agree with the Agencies that there is no basis to include groundwater in the definition of WOTUS, but we also agree that stating this exemption explicitly remains important to make plain the distinction between groundwater and WOTUS. This distinction is fundamental to the CWA's mandated approach to cooperative federalism.

We also support the additional clarity furnished by the Agencies' alternate definition, and recommend that this exclusion should be revised to read with additional language in underline:[218]

> Groundwater, including <u>diffuse or shallow subsurface flow and</u> groundwater drained through subsurface drainage systems.

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[210] *Id*.
[211] *Id.*
[212] CWA Legis. History, Vol 1. at 597.
[213] *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1319 (D. Or. 1997).
[214] CWA Legis. History, Vol. 1 at 589.
[215] *Id.* at 591.
[216] *Id.*
[217] *See*, *e.g.,* 273 F. Supp. 3d 775 (M.D. Tenn. 2017), at 826 ("The Court agrees with those courts that 'view[] the issue not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater.'") (quoting *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas*, 141 F. Supp. 3d at 445 (2015)); *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d at 996 (upholding liability on a "conduit theory," but still recognizing that an "unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act").
[218] *See* 84 Fed. Reg. at 4,195. Additions to the Proposed WOTUS Rule's existing language are underlined.

- **Ephemeral Features and Diffuse Stormwater Runoff** – The Associations support the proposed language to retain this exclusion. Consistent with the established case law and the CWA, the Proposed WOTUS Rule clearly and appropriately distinguishes between those perennial or intermittent flows that can subject a waterbody to federal jurisdiction and those ephemeral flows which only occur in direct response to precipitation, and therefore remain under state jurisdiction. As this distinction is central to the Proposed WOTUS Rule's framework and essential to heeding the guideposts provided by the *Rapanos* plurality, the Associations support the Agencies' proposal to restate this distinction in an exclusion.[219]

- **Ditches** – As discussed in Section IV(d) above, the Associations support the Proposed WOTUS Rule's creation of a WOTUS category for certain ditches.[220] As there may be some confusion regarding the specific ditches to be included in this new category of WOTUS, we agree with the Agencies' proposal to clarify that all ditches are excluded unless they convey perennial or intermittent flow to downstream TNWs and were constructed in a tributary, relocate or alter a tributary, or were constructed in an adjacent wetland.

- **Prior Converted Cropland** – The Associations support the Proposed WOTUS Rule's continued exclusion of prior converted cropland from the definition of WOTUS and therefore federal jurisdiction.[221] We also support the Agencies' clarification of the framework by which the Agencies can render a determination that an agricultural use has been abandoned, thereby allowing the Agencies to assert federal jurisdiction over any wetlands that had thereafter developed. However, we disagree that five years is a sufficient duration for determining that a prior converted cropland has been abandoned or is otherwise no longer used for agricultural purposes.[222] The Associations believe that a more appropriate duration for determining abandonment is 10 years. A parcel of land can lie unused for a significant period of time without ever being abandoned from an operational perspective. Land use decisions are made on time horizons that far exceed five years and frequently fluctuate based on markets, investment strategies, resource availability, and capital requirements. We believe ten years is a sufficient timeframe to account for these variables so that land is not inaccurately classified as abandoned. Allowing land to remain unused for significant durations is also an environmentally responsible and sustainable method of allowing land to recover from previous uses and generate the nutrients needed for future uses. Conversely, the shorter five-year timeframe incentivizes farmers and others to continually maintain drainage and periodically maintain croplands that otherwise would not be disturbed but for the five-year lookback. Responsible management practices

[219] *Id.*
[220] *Id.* at 4,190 - 91.
[221] *Id.*
[222] *Id.*

should not be discouraged by imposing an unnecessarily short duration for classifying land as abandoned. The Associations propose the following language change: [223]

> . . . Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding ~~five~~ ten years.

We also note that, while this exemption seemingly applies only to agricultural land, many industrial and commercial facilities have within their boundaries former wetlands that were lawfully filled and converted to upland. There is no ecological or hydrological rationale for treating wetlands converted to cropland different than wetlands converted to serve industrial purposes. As such, the Associations believe that the Agencies should at least explain their basis for limiting the availability of this exclusion to croplands.

- **Artificial Lakes and Ponds Constructed in Upland** – The Associations support the exclusion of these features, and the language in the preamble to the Proposed WOTUS Rule noting that these features remain excluded regardless of their precise use or use for more than one purpose.[224] To avoid confusion and any unjustifiably restrictive interpretation of this exclusion, we recommend including in the rule, by way of example, a non-exhaustive list of features that fall within the exemption. The Associations believe these features should encompass, but not be limited to, industrial features necessary for the operation of a facility, such as water storage ponds, impoundments, conveyances and other structures used for fire water, utility water, cooling water, process water, raw water. Based on the preamble to the Proposed WOTUS Rule,[225] it is clear that the Agencies intends to exclude features such as cooling ponds. Nonetheless, the Associations believe that listing these features within the rule (as opposed to the preamble) will help avoid future misinterpretations.

- **Wastewater recycling structures constructed in Upland** – The Associations support this exclusion, and support the Agencies' intent to apply this exclusion broadly to all "[s]tormwater control features excavated or constructed in upland to convey, treat, infiltrate, or store stormwater run-off."[226] While we agree with the broad applicability of this exclusion and the need to ensure that the text of the exclusion does not preclude it from encompassing lesser known or future stormwater control features, the Associations believe it is helpful to the regulated community if the exclusion contains a non-exclusive list of features subject to the exclusion. As such, the Associations recommend that the Agencies bring back the text used in the 2015 WOTUS Rule language that defined "wastewater recycling structures" as "detention and retention basins built for wastewater recycling;

[223] Additions to the Proposed WOTUS Rule's existing language are underlined and agency language proposed to be deleted is in strike-out.
[224] 84 Fed. Reg. at 4,191.
[225] *Id.* at 4,194.
[226] *Id.* at 4,204.

groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling."[227]

- **Waste Treatment Systems** – The Associations support the continued exclusion of these features consistent with the Agencies long-standing practice. We believe this exclusion is supported by the text of the CWA and the applicable case law. We also recommend that the Agencies clarify the waste treatment systems exclusion in the Proposed WOTUS Rule[228] so that it encompasses more clearly all components of those systems that are used to treat, store, retain, detain, convey, or otherwise manage waters, the discharge of which is subject to regulation under the CWA.[229] To that end, the Associations also recommend that the Agencies remove references to wastewater so that this exclusion would more clearly apply to stormwater and any other water, the discharge of which would be subject to regulation under CWA (including waters that are not discharged directly or indirectly because they are recycled, reused, evaporated, injected in a UIC well, or otherwise). As the regulated industry continues to innovate recycling of wastewater and other water use (generated, or otherwise present on-site), it is imperative that such efforts are not discouraged due to uncertainty over the definition of WOTUS. This recommendation is therefore necessary to ensure that the Proposed WOTUS Rule clearly excludes waters and features already regulated under the CWA.

  The Associations do not believe there is any rational basis to limit this exclusion to wastewaters (however defined). While there is another exclusion for stormwater control features, that exclusion appears limited to those features located in the upland. We believe that this exclusion should apply to any feature designed to treat, store, retain, detain, convey, or otherwise manage any waters either presently subject to regulation under the CWA, or which would be subject to regulation under the CWA, if the water discharged to a water under federal jurisdiction (*i.e.*, including regulated stormwater regardless of whether it is in the upland).

  Doing so can help minimize the inconsistency and complexity of applicability determinations inherent in varying the applicability of the exclusion depending on the precise type of water that may be captured, treated, stored, retained, detained, conveyed, or otherwise managed by features broadly used by facilities to comply with the CWA requirements.

  The Associations also believe it is important that this definition prohibit future interpretations that inappropriately narrow this exclusion based on the Agencies presumptions about the function of particular features. For instance, the Associations' members have experience with agency staff inconsistently applying this exclusion based on differing views of whether storage constitutes active or passive treatment. In one case,

[227] 80 Fed. Reg. at 37,105.
[228] 84 Fed. Reg. at 4,193.
[229] While the Associations would interpret "store" and "retain" in the same manner, we are aware of instances where the Agencies have suggested that storage and retention have distinct meanings for purposes of excluding features from WOTUS. As such, we are recommending that both of these terms be specified in the exclusion.

agency staff did not recognize the critical components of settlement, flow regulation, and off-specification impoundment for additional treatment as necessary active treatment. Therefore, it is important that the exclusion is drafted to clearly use key terms such as "store," so that this exemption covers all components of systems for managing waters, the discharge of which is subject under the CWA. It would also avoid inconsistent application over systems in which stormwater is comingled with wastewater as well as situations where operators use a feature for wastewater storage/treatment etc. during normal operating conditions, but also rely on that feature's capacity during heavy precipitation events.

At base, all that matters from a legal and policy perspective is that the waters within the feature would be subject to regulation if they were discharged directly to WOTUS or indirectly through a publicly owned treatment system. As such, the Associations recommend that the Agencies revise the waste treatment system exclusion with the following exclusion for "systems for managing waters subject to regulation under the CWA" as follows:[230]

> The term '*system for managing waters subject to regulation under the CWA'* ~~*waste treatment system*~~ includes the entire system and all components, ~~including lagoons and treatment ponds (such as settling or cooling ponds),~~ designed to convey, ~~or~~ retain, detain, store, concentrate, settle, reduce, or remove pollutants, either actively or passively, ~~from wastewater prior to discharge (or eliminating any such discharge).~~ from water, the discharge of which would be subject to regulation under the CWA (including waters that are not discharged directly or indirectly because they are recycled, reused, evaporated, injected in an underground injection control well, or otherwise).

The Associations also urge the Agencies to include illustrative examples to aid agency staff and the regulated community in applying this exclusion consistently. Examples to include are as follows:

> Structures and features encompassed by this exclusion include but are not limited to: (1) temporary and/or permanent/secondary basins/ponds and conveyance systems for regulated discharges associated with stormwater; (2) biological treatment lagoons with source water from lagoon; (3) cooling water ponds; (4) fly ash ponds; (5) treatment systems including but not limited to treatment ponds, equalization ponds, storage ponds or lagoons as related to regulated waters; (6) secondary containment systems; and (7) CWA-regulated MS4 and component conveyances within such systems. This exclusion also includes all impoundments and features designed and/or intended to function as part of a system including all related conveyances

[230] Additions to the Proposed WOTUS Rule's existing language are underlined and agency language proposed to be deleted is in strike-out.

that may be used to manage water, the discharge of which is subject to regulation under the CWA, but may not perform those functions at all times.

VI. THE ECONOMIC ANALYSIS FOR PROPOSED WOTUS RULE IS ROBUST AND DEMONSTRATES THAT THE PROPOSED WOTUS RULE'S BENEFITS WILL EXCEED ITS COSTS UNDER ANY REASONABLY FORESEEABLE SCENARIO, AS VALIDATED BY ERM'S INDEPENDENT EVALUATION

In support of their rulemaking effort, the Agencies prepared an "*Economic Analysis for the Proposed Revised Definition of 'Waters of the United States'*" ("Economic Analysis").[231] As the Agencies recognizes, assessing the economic impact of the Proposed WOTUS Rule is particularly challenging.

Unlike most other environmental rules, the Proposed WOTUS Rule would not promulgate any specific effluent limit, emissions limit, recordkeeping requirement, work practice standard, control technology, or any other regulatory mandate. Understanding the economic impact of these types of rules, while still difficult and uncertain, is generally based on a more straight-forward assessment of the presumed costs and benefits of the specific regulatory mandate as compared to a pre-mandate status quo.

The Proposed WOTUS Rule, on the other hand, interprets a phrase in the CWA that delineates the waters subject to federal jurisdiction from the waters left to state and tribal jurisdiction. As such, estimating the costs and benefits of the Proposed WOTUS Rule requires assumptions and estimates of changes in the universe of waters subject to federal jurisdiction as compared to the 2015 WOTUS Rule and changes in the universe of waters subject to the framework that existed prior to the 2015 WOTUS Rule.[232]

Further, because the Proposed WOTUS Rule would not itself set any regulatory limit or standard on any waterbodies, assessing the economic impact of the Proposed WOTUS Rule requires an additional analysis of the costs and benefits of the regulations that states/tribes impose or may decide to impose on waters newly relegated to their jurisdiction by the Proposed WOTUS Rule. This requires assessment of multiple state/tribal regulations, presumptions about potential changes to state regulations in response to the Proposed WOTUS Rule, potential future changes to federal regulations, and, again, comparison against two separate regulatory baselines.

a. The Agencies' Analytical Approach is Reasonable, Transparent, and Appropriate

[231] The Agencies also developed a *Resource and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States"* that describes how the Proposed WOTUS Rule compares to the baseline of the 2015 WOTUS Rule as well as the framework that existed prior to the 2015 WOTUS Rule. The Associations found this assessment to be thorough, comprehensive, and appropriately transparent about the various uncertainties inherent in the analysis. We therefore support the analysis and the important role it plays in demonstrating that the Proposed WOTUS Rule was developed through a transparent and rigorous analytical process.

[232] As discussed in the preamble, litigation over the 2015 WOTUS Rule has resulted in implementation of the pre-2015 framework in 28 states and implementation of the 2015 WOTUS Rule in 22 states. 84 Fed. Reg. at 4,162.

Faced with these challenges and additional data limitations, the Agencies' Economic Analysis utilizes a two-stage analytical process. Stage 1 assesses the potential impact of the change from the 2015 WOTUS Rule to the pre-2015 framework (*i.e.,* repealing the 2015 WOTUS Rule and recodifying the prior regulations). For the Stage 1 analysis, the Agencies uses the economic analysis for the 2015 WOTUS Rule as a starting point and: (1) includes updates to state laws/regulations since 2015; (2) incorporates improved data on potential benefits, and; (3) utilizes several scenarios using different assumptions about potential state regulation of waters to provide a range of costs and benefits.[233]

Under Stage 2 of the Economic Analysis, the Agencies provides a series of qualitative analyses and three detailed case studies of the cost and benefits of changing from the pre-2015 jurisdictional approach to the approach described in the Proposed WOTUS Rule. As the Agencies notes, "[t]he qualitative analysis is intended to provide information on the likely direction of the potential effects on the CWA regulatory programs."[234] The Agencies also includes case studies in three major watersheds (Ohio River basin, Lower Missouri River basin, and Rio Grande River basin) to provide information for a quantitative assessment of the potential effects of the Proposed WOTUS Rule on programs implemented under three sections of the CWA.[235]

Because of data limitations, the Economic Assessment provides Stage 2 national-level estimates of the potential avoided permit and mitigation costs and forgone benefits only for the CWA Dredge and Fill Program.

> Using the same methodologies employed in the case studies and using a meta function benefits transfer to value forgone wetland benefits, the national annual avoided costs of the CWA 404 program are estimated to range from $28 million to $266 million and national annual forgone benefits from the CWA 404 program are estimated to range from $7 million to $47 million. When considering the full range of scenarios regarding potential State regulation of waters no longer considered jurisdictional under the proposal, the estimated national annual avoided costs of the CWA 404 program range from $28 million to $497 million and national annual forgone benefits range from $7 million to $136 million.[236]

Overall, the Associations believe that the Agencies' two-part approach to assessing the costs and benefits of the Proposed WOTUS Rule are reasonable and appropriate in light of multiple assumptions, variables, and data limitations inherent in an assessment of this type. In economic

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[233] Under the scenario that assumes the fewest number of states regulating newly non-jurisdictional waters, the Agencies estimate the Proposed WOTUS Rule would produce annual avoided costs ranging between $98 and $164 million and annual forgone benefits ranging between $33 and $38 million. When assuming the greatest number of states are already regulating newly non-jurisdictional waters, the Agencies estimate there would be avoided annual costs ranging from $9 to $15 million and annual forgone benefits are estimated to be approximately $3 million. Under the scenario that assumes no states will regulate newly non-jurisdictional waters, the Agencies estimate the Proposed WOTUS Rule would produce annual avoided costs ranging from $165 and $343 million and annual forgone benefits ranging from $93 to $104 million. 84 Fed. Reg. at 4,200-4,201.

[234] 84 Fed. Reg. at 4,201.

[235] *Id.* 33 U.S.C §§ 1321, 1342, 1344.

[236] *Id.*

assessments of regulations like the Proposed WOTUS Rule, for which outcomes are highly uncertain, the Agencies must exercise utmost diligence in assuring that their analyses and each assumption, data gap, and source of uncertainty in that analysis is transparently portrayed and fully disclosed. As the Office of Management and Budget ("OMB") instructed all agencies in Circular A-4:

> The treatment of uncertainty must be guided by the same principles of full disclosure and transparency that apply to other elements of your regulatory analysis. Your analysis should be credible, objective, realistic, and scientifically balanced. Any data and models that you use to analyze uncertainty should be fully identified. You should also discuss the quality of the available data used. Inferences and assumptions used in your analysis should be identified, and your analytical choices should be explicitly evaluated and adequately justified. In your presentation, you should delineate the strengths of your analysis along with any uncertainties about its conclusions. Your presentation should also explain how your analytical choices have affected your results . . .[237]

The Associations believe that the Agencies' Economic Analysis meaningfully follows this directive through its transparent identification and treatment of the multiple sources of uncertainty. We were able to identify the assumptions the Agencies employ and we understand the Agencies' basis for those assumptions. We also believe that the Agencies appropriately manages the uncertain outcome of the Proposed WOTUS Rule by analyzing costs and benefits across multiple scenarios and by presenting costs and benefits in ranges.

b. The Associations' Independent Evaluation by ERM of the Agencies' Economic Analysis of the CWA Dredge and Fill Program Validates the Agencies' Conclusion that the Proposed WOTUS Rule's Benefits Substantially Exceed its Costs

Separate and aside from our support for the broad approach that the Agencies employed in assessing impacts, the Associations contracted with ERM to evaluate the Economic Analysis's assessment of the benefits and costs for the CWA Dredge and Fill Program.[238] ERM's evaluation supports the Agencies' conclusions that the benefits (*i.e.*, avoided costs) of the Proposed WOTUS Rule exceed the costs (*i.e.*, foregone benefits). ERM conducted an independent analysis of this finding using the Monte Carlo model and determined that the Agencies' economic assessment of the CWA Dredge and Fill Program is robust.

While the magnitude by which the benefits exceed the costs is uncertain, ERM agrees that it is highly unlikely that the benefits of the Proposed WOTUS Rule are less than the costs. ERM also identifies multiple issues suggesting that the benefits of the Proposed WOTUS Rule exceed costs by a wider margin than calculated by the Agencies. These issues include:

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[237] OMB, Circular A-4, at 40.

[238] *See* ERM, Comments on the Economic Analysis for the Proposed Definition of WOTUS, attached as Appendix B (Apr. 2019) ("ERM Report").

- The unit cost for permitting and wetland mitigation used by the Economic Analysis likely underestimate the actual cost of compliance and therefore underestimate the benefits (*i.e.*, avoided costs) of the Proposed WOTUS Rule.

- The number of acres that will no longer be jurisdictional under the Proposed WOTUS Rule is likely underestimated in Stage 1.

- The unit "Willingness to Pay" values used by the Economic Analysis overestimate the value of the wetlands that will no longer be jurisdictional and therefore overestimate the costs (*i.e.*, foregone benefits) of the Proposed WOTUS Rule.

To evaluate these issues, ERM utilizes a Monte Carlo model that shows the overall impact of all the major sources of uncertainty. Monte Carlo analysis is a well-accepted technique, and often used by Agencies to quantify the impact of uncertainty that is inherent in the analysis of environmental regulations. The value of a Monte Carlo analysis is that it eliminates the need to assert which numbers or values are correct. The range of plausible of values for each model input can be used, which provides a more complete assessment of the inputs that affect the results. Monte Carlo also provides an integrated assessment of the results, instead of creating multiple scenarios and tables and results based on alternative assumptions for upper and lower bounds.

Tables 1 and 2 summarize the results of ERM's application of the Monte Carlo model.[239] Table 1 shows that both Stages 1 and 2 of the Proposed WOTUS Rule yield positive annual net benefits and a benefit cost ratio well above 1. Table 2 shows the results when the likelihood that states will reduce their regulation of wetlands in response to implementation of the Proposed WOTUS Rule are considered. The key finding under this scenario is that annual net benefits are positive and the benefit cost ratio is well above one. As such, under any reasonably anticipated scenario, the benefits of the Proposed WOTUS Rule on the CWA Dredge and Fill Program (a key cost/benefit component of the Agencies' Economic Analysis) far exceed costs – often by margins greater than those projected by the Agencies.

Table 1: Benefit and Cost Estimates (mean values, $millions) – All States

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio
Stage 1	$541	$39	$502	13.9
Stage 2	$233	$177	$116	6.0

Table 2: Benefit and Cost Estimates ($millions) – Weighted Scenarios

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio

[239] Reproduced from the ERM Report, *See* Appendix B.

Stage 1	$126	$14	$114	10.5
Stage 2	$71	$40	35	5.9

V. CONCLUSION

The Associations appreciate the Agencies for proposing a clear, protective, administrable, and legally sound rule that can bring clarity and alleviate unnecessary regulatory burdens in ways that affect not only the oil and gas industry, but also land owners, developers, and others in the regulated community. We appreciate that the Agencies have grounded that clarity in their past interpretations of WOTUS, as well as the broad guideposts provided by the Supreme Court. In furtherance of the cooperative federalism that Congress mandated in the CWA, the Proposed WOTUS Rule would provide clear boundaries for identifying waters under federal jurisdiction while balancing the rights and responsibilities of states and tribes to manage their land and water resources. Finally, from a cost-benefit perspective, the ERM Report demonstrates that the benefits of the Proposed WOTUS Rule will exceed its costs under any reasonably foreseeable scenario.

In short, the Associations support the Proposed WOTUS Rule and we appreciate the opportunity to submit these comments for your consideration. We hope the Agencies will not hesitate to contact us with any questions regarding our comments, and we look forward to working with further you on this important issue.

Sincerely,

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Attachments: Appendix A – API Comments in Response to the Request for Written Recommendations for the Step 2 Rulemaking to Define WOTUS, 2017.

Appendix B – ERM, Comments on the Economic Analysis for the Proposed Definition of WOTUS, 2019.

APPENDIX A: 2017 STEP 2 COMMENTS

November 28, 2017

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 in Response to the Environmental Protection Agency's Request for Written Recommendations for the Step 2 Rulemaking to Define "Waters of the United States." EPA-HQ-OW-2017-0480.

Dear Sir/Madam:

This letter provides the American Petroleum Institute's ("API's") Response to the Environmental Protection Agency's ("EPA's") and the Department of the Army's (collectively, "the Agencies'") Request for Written Recommendations for the Step 2 Rulemaking to Define "Waters of the United States" ("WOTUS").[1] API welcomes the Agencies' commitment to transparent rulemaking and effective stakeholder engagement, and appreciates the opportunity to provide these recommendations. We believe that a clear and administrable rule that distinguishes federal jurisdiction from state waters based on objectively identifiable characteristics will help protect the environment and benefit the economy by removing elements of uncertainty that deter private sector investment.

API is a national trade association representing over 640 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, refining crude oil, transporting crude oil or refined product, and operating filling stations. Protecting water

[1] 82 Fed. Reg. 40,472 (Aug. 28, 2017); EPA-HQ-OW-2017-0480.

resources is important, and API and its 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 API's long engagement on this very issue. In this and each prior effort to interpret WOTUS, API and its 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, API submitted comments on its own, as well as through multi-industry trade coalitions including the Waters Advocacy Coalition ("WAC"), the Federal Water Quality Coalition ("FWQC"), and the Federal Stormwater Association ("FSA")

To that end, API's recommendations reflect API's 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 recommendations also reflect API's 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.

1. SUMMARY OF COMMENTS

API encourages the Agencies to craft a 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."[2] 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.

API's proposed definition of WOTUS accomplishes these goals. The categories of water included in this proposed interpretation are those over which the Agencies have jurisdiction that is either established or reasonably supportable. This interpretation is designed to settle decades of WOTUS uncertainty and to endure through legal challenges because it is drawn from the statutory text and an objective application of the Supreme Court's statutory constructions.

This interpretation is also readily administrable and clear. It sets forth clear jurisdictional delineations that can be accomplished through readily observable conditions, and without the need for costly and subjective studies. This recommended interpretation also eliminates the need

[2] 33 U.S.C. § 1251(a).

for case-by-case analyses that undermine regulatory certainty and administrative accountability. Increasing jurisdictional certainty in this manner therefore will streamline costs for both regulators and regulated entities.

With these factors in mind, API encourages 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.

We also urge the Agencies to adopt certain clarifying exceptions to these 6 categories. In the sections that follow, we explain these elements in detail and our rationale for recommending them.

2. 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."[3] One element of Congress's comprehensive strategy is the program to regulate the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.[4] The Act in turn defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[5]

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."[6] Under Section 404, the Army Corps of Engineers ("Corps") may issue permits for "the discharge of dredged or fill material."[7]

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[3] 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).
[4] 33 U.S.C. 1311(a), 1362(12)(A).
[5] 33 U.S.C. 1362(7).
[6] 33 U.S.C. 1342(a).
[7] 33 U.S.C. 1344(a).

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.[8] 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.[9] The government brought over 100 criminal prosecutions for negligent violations of the CWA between 1990 and 2000.[10]

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."[11] 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."[12] 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."[13]

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

2.1 *Riverside Bayview*

In *Riverside Bayview Homes*,[14] 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."[15] Observing that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to

[8] 33 U.S.C. 1319(b), (d), 1365; 81 Fed. Reg. 43,091, 43,095 (July 1, 2016).
[9] 33 U.S.C. 1319(c)(1)-(2).
[10] See perma.cc/UM94-MQDA.
[11] 33 U.S.C. 1251(b).
[12] 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).
[13] 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).
[14] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
[15] *Id*. at 131-135 & n.9.

conclude that "a wetland that *actually abuts* on a navigable waterway" falls within the "definition of 'waters of the United States.'"[16]

2.2 *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.[17] One of those interpretations—the Migratory Bird Rule—was struck down in *SWANCC*.[18]

The Corps asserted CWA jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[19] 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."[20] The Court stressed that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule asserted jurisdiction over isolated ponds bearing no connection to navigable waters.[21] According to the Supreme Court, that approach impermissibly read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA."[22] The Court therefore invalidated the rule.

2.3 *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."[23] 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.[24]

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."[25] 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.'"[26] And wetlands fall within CWA jurisdiction as "adjacent" wetlands "*only* [if they

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[16] *Id*. at 133, 135 (emphasis added).
[17] *Rapanos v. United States*, 547 U.S. 715, 725 (2006) (plurality).
[18] 531 U.S. 159 (2001) (*SWANCC*).
[19] *SWANCC*, 531 U.S. at 162-165 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[20] *SWANCC*, 531 U.S. at 168.
[21] *Id*. at 171-172.
[22] *Id*. at 167.
[23] 547 U.S. at 720-721.
[24] *Id*. at 729.
[25] *Rapanos*, 547 U.S. at 732, 739.
[26] *Id*. at 734.

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."[27] "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.[28]

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."[29] 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.'"[30] 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 conception of a significant nexus.[31] 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."[32]

3. RECOMMENDED APPROACH TO INTERPRETING WOTUS

Notwithstanding three Supreme Court decisions discussing the five-word phrase "waters of the United States," a clear and understandable definition of WOTUS has continued to elude the Agencies, states, and stakeholders in greatest need of the regulatory certainty that a valid WOTUS definition would provide. API encourages the agencies to promulgate a WOTUS rule that is clear, protective, administrable, and legally sound. Accordingly, as described in the summary above, API's recommended interpretation of WOTUS would assert federal jurisdiction over the following areas:

(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.

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[27] *Id*. at 742.
[28] *Id*.
[29] *Rapanos*, 547 U.S. at 779.
[30] *Id*. at 780.
[31] *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").
[32] *Id*. at 781.

This proposed interpretation is broadly protective of water quality because it provides clear jurisdictional lines that incentivize state action and preserve agency resources for actual environmental protection, and because it does not inappropriately constrain (or expand) the federal government's rule under the CWA. Unlike the 2015 WOTUS Rule and many preceding interpretations, API's proposed interpretation very clearly identifies where federal jurisdiction ends and state jurisdiction begins. States are thereby enabled to quickly and efficiently identify the areas of the landscape under their jurisdiction rather than judge and weigh invisible indicia of biological, chemical, or physical connectivity to distant navigable waters.

Indeed, our recommended interpretation rejects the misconception that waters outside of federal jurisdiction are unregulated. Congress, in crafting the CWA, understood that the Act's lofty goals could only be accomplished through maximum cooperation with the states, and explicitly established a "cooperative federalism" framework "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…."[33]

States are effective stewards of water quality. Recognizing the ability of states to regulate their own waters, EPA has delegated to nearly every state broad permitting and enforcement authority over discharges to WOTUS through the National Pollutant Discharge Elimination System ("NPDES") permit system, pretreatment program, and general permitting program.[34] State authority to implement these programs is not delegated freely – it is earned through the development of programs that EPA reviews and determines to be adequately protective. In fact, many state permitting programs are considered more stringent or restrictive than federal permitting programs and criteria.

Nor does EPA delegate this authority forever – EPA retains broad discretion to withdraw state NPDES permitting authority. Significantly, even though activists have petitioned EPA many times to withdraw the Agency's delegation of authority to various states, EPA has never done so. Without question, states are already capable stewards of water quality and proven partners in furtherance of the CWA's objectives.

Given the recognized effectiveness of state efforts to protect water quality, our recommended interpretation furthers the CWA's water quality (and federalism) objectives by preserving a clear and meaningful role for the states. Further, our interpretation does not preserve this role for states to the preclusion of the Agencies. The framework of cooperative federalism that Congress mandated through the CWA also established a major role for the federal government. The obvious limitation to state authority to regulate out-of-state contributors to in-state water pollution necessitates some exercise of federal jurisdiction over our shared water resources. As such, under our recommended interpretations, the federal government would retain jurisdiction over the oceans, navigable waters, perennial streams, seasonal streams (regardless of size), wetlands adjacent to those waters, and manmade impoundments. In all other respects, we believe – as Congress did - that federal jurisdiction should only encroach on the "primary" responsibilities of states where the source of that jurisdiction is clear and its exercise appropriate.

[33] 33 U.S.C. 1251(b) (emphasis added).
[34] See https://www.epa.gov/npdes/npdes-state-program-information. (last visited 11/13/17).

Prior WOTUS interpretations, and the resources devoted to defending those interpretations, have drained substantial agency resources. Moreover, they required (or would have required) burdensome and unpredictable analyses and case-specific inquiries that could not be implemented without devoting significant federal and state resources as well as private party resources. Given the inherent limitations on agency resources and basic principle of opportunity costs, resources spent on jurisdictional line drawing are not spent on environmental protection – particularly where, as here, the delineation is between entities that are each committed to protecting water resources.

Moreover, prior attempts to probe the uncertain depths of federal jurisdiction caused the Agencies to blur jurisdictional lines and to sacrifice clear, consistent, and readily observable jurisdictional criteria for uncertain, subjective, and often case-specific analyses. When jurisdiction over a waterbody is clear, the entities tasked with protecting that waterbody are similarly clear about their mandate. When jurisdiction over a waterbody is unclear, it can fall into a jurisdictional no-mans-land.

When the regulated community such as landowners, and industry can readily discern the entity with jurisdiction over a waterbody, they can readily take appropriate actions to obtain the necessary permits. Faced with jurisdictional uncertainty, important projects – including projects that promote and protect water quality – may be substantially delayed or altogether abandoned.

In these respects, and many others, the CWA's water quality objectives are best accomplished through clear jurisdictional boundaries that promote administrative accountability and which can be administered in a way that preserves resources for actual environmental protection. Our recommended interpretation provides this necessary clarity and workability, and it does so in a manner consistent with Congressional intent and the broad guideposts of Supreme Court jurisprudence.

3.1 If Promulgated, the Recommended Interpretation Would Comply with the Administrative Procedure Act and be Entitled to Deference

The Administrative Procedure Act ("APA") governs the manner under which federal agency actions are promulgated and reviewed.[35] 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."[36] As discussed below, API's recommended interpretation of WOTUS is permissible under the APA because it is in accord with the CWA and the jurisdictional limitations Congress imposed therein. Moreover, should the Agencies ultimately replace the 2015 WOTUS Rule with our recommended interpretation or something similar, such a shift would not render the new interpretation arbitrary, capricious, or in conflict with the law – particularly where, as here, many of the policy shifts aim to correct jurisdictional overreach.

3.1.1 Recommended Interpretation Entitled to *Chevron* Deference

[35] 5 U.S.C. § 551 et seq.
[36] 5 U.S.C. § 706.

"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."[37] 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.[38] 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, and they guided API in developing our recommended interpretation of WOTUS. If the agencies were to adopt our recommended approach, they would be entitled to deference because it is in harmony with the congressional intent of the CWA and because it draws from the Agencies' previous WOTUS interpretations those waters and jurisdictional indicators that the Supreme Court has found to be within the bounds of agency discretion to define as WOTUS. More importantly, however, our recommended interpretation of WOTUS is entitled to deference because it omits, to the greatest extent possible, those jurisdictional interpretations that are clearly beyond the limits of agency deference.

The primary guideposts for our recommended definition 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.[39] 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.[40] 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."[41]

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*.[42] As Chief Justice Roberts explained in his concurrence, the Agencies' persistent interpretation of WOTUS to include water with "any connection" to navigable water reflected a knowing decision to sacrifice legal and regulatory certainty in favor of spurious jurisdictional objectives:

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

[37] *Riverside Bayview*, 474 U.S. 121, 131.
[38] *See Riverside Bayview*, 474 U.S. 121.
[39] *See SWANCC*, 531 U.S. 159.
[40] *SWANCC*, 531 U.S. at 172 (citations omitted).
[41] *SWANCC*, 531 U.S. at 173.
[42] *See Rapanos*, 547 U.S. 715.

> 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.[43]

Chief Justice Robert's concurrence provides clear guidance – the courts will defer to an agency interpretation of WOTUS that reflects a reasonable interpretation of the CWA. API's recommended interpretation fits squarely within this capacious "room to operate" and avoids testing the outer bounds of the Agency's authority. It is therefore entitled to deference.

3.1.2 Recommended Interpretation and Policy Shift are Permissible under APA

The APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."[44] There is therefore "no basis in the Administrative Procedure Act . . . for a requirement that all agency change be subjected to more searching review."[45] 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.[46]

It is therefore enough for an agency to give "a reasoned explanation for [its] change."[47] 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 under the statute, that there are good reasons for it, and that the agency believes it to be better."[48] This is not an "especially 'demanding burden of justification.' "[49]

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."[50] 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."[51] That evaluation may include the current agency head's

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[43] *Rapanos*, 547 U.S. at 758.
[44] *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009).
[45] *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.").
[46] *See Fox Tel. Stations*, 556 U.S. at 515.
[47] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[48] *Fox Tel. Stations*, 556 U.S. at 515 (emphases in original).
[49] *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (citation omitted).
[50] *National Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).
[51] *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.").

determination that a new statutory interpretation is superior to the interpretation reached by a previous administration.[52]

API's recommended interpretation of WOTUS is grounded in a faithful reading of the CWA and relevant case law – all of which are publicly available and already within the Agencies' administrative record for the 2015 WOTUS Rule. Our recommended interpretation does not in any way disregard these records. In fact, our recommended interpretation was guided by the same statutes, jurisprudence, and legislative materials that the Agencies cited in the 2015 WOTUS Rule.

3.2 Recommended Interpretation Comports with the Language of CWA as Interpreted by the Supreme Court

API's proposed jurisdictional approach is consistent with the plain language of the CWA and the Supreme Court's interpretation of the Act. Where specific types of waterbodies were clearly identified by Congress as WOTUS in the CWA, no interpretation of the Act is necessary or appropriate. Accordingly, we included "territorial seas" in our interpretation ("Category 1") because the CWA's definition of "navigable waters" states that WOTUS include territorial seas.[53]

Similarly, Section 404(g)(1) of the Act, which authorizes the states to administer their own "dredge-and-fill" permit programs, references "navigable waters:"

> . . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto . . .

The Supreme Court justices agreed in *Riverside Bayview*, *SWANCC*, and *Rapanos* that this phrase in Section 404(g)(1) of the Act indicated that Congress intended "navigable waters," and therefore the Section 502(7) definition of "navigable waters" as WOTUS, to extend federal jurisdiction to some waters that are not navigable in the traditional sense.[54] The majority and minority in *SWANCC* also agreed that Section 404(g)(1) of the Act remains ambiguous "because it does not indicate precisely how far Congress considered federal jurisdiction to extend."[55] Where Section 404(g)(1) of the Act is unambiguous, however, is with its specific identification of "waters which are subject to the ebb and flow of the tide" as navigable waters, and therefore WOTUS. Consequently, our recommended interpretation of WOTUS includes "waters which are subject to the ebb and flow of the tide" ("Category 2").

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[52] *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).
[53] 33 U.S.C. § 1362(7). The CWA also specifically defines "territorial seas" at 33 U.S.C. § 1362(8).
[54] *See Riverside*, 474 U.S. at 132; *SWANCC*, 531 U.S. at 167, 171, 188-189, *Rapanos*, 547 U.S. at 731, 767-768.
[55] *SWANCC*, 531 U.S. at 189.

3.2.1 Waters Presently Used or Susceptible to Use in Their Natural Condition or by Reasonable Improvement as a Means to Transport Interstate or Foreign Commerce

Like the first two categories of waters in our interpretation of WOTUS, our third category – "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce" ("Category 3") – adopts the precise language Congress used in the CWA. This phrase is taken from the same Section 404(g)(1) parenthetical that preserved federal jurisdiction over "waters which are subject to the ebb and flow of the tide," and it reveals Congress's intent to define "navigable waters," and therefore WOTUS, to include "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."

In Section 404(g)(1) of the Act, Congress identified the "navigable waters" that could be administered through *state* dredge-and-fill" permit programs and those "navigable waters" that must be administered through *federal* programs. Again, while Congress did not clearly delineate the "other" navigable waters that are within the jurisdictional purview of the states, it explicitly extended federal jurisdiction under the CWA to include "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." Because the majority in *SWANCC* held that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,"[56] our interpretation also constrains its assertion of federal jurisdiction to only those "navigable waters" explicitly identified by Congress as within federal jurisdiction.

As the *SWANCC* majority further noted, nothing in the CWA or its legislative history "signifies that Congress intended to exert anything more than its commerce power over navigation."[57] As such, our interpretation also circumscribes the notion of navigability to the *SWANCC* majority's views of Congress's "commerce power over navigation" by extending federal jurisdiction over waters that are actually used today to transport interstate commerce. It is Congress's power to regulate the ongoing *channels* of interstate and foreign commerce that underlies federal CWA jurisdiction.

In our recommended definition, therefore, we decline to extend federal jurisdiction to waters based solely on historic transport of interstate or foreign commerce. Waters that once conveyed, but no longer convey *or are capable of conveying* interstate or foreign commerce are not within Congress's present "commerce power over navigation," and therefore do not forever remain "navigable waters" for purposes of asserting federal jurisdiction under the CWA.[58] Similarly, recreational use alone is not sufficient to establish federal jurisdiction under this interpretation because such activity is not the transportation of interstate or foreign commerce.

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[56] *SWANCC*, 531 U.S. at 172.

[57] *SWANCC*, 531 U.S. at 168.

[58] While waters that that once conveyed, but no longer convey or are capable of conveying interstate or foreign commerce cannot be considered "navigable waters" in our interpretation of WOTUS, many of these same waters likely remain within federal jurisdiction by virtue of their surface connection to "navigable waters."

This construction of navigability is not only consistent with the statute and the views of the *SWANCC* majority, it makes our interpretation of WOTUS clear and administrable. Jurisdictional determinations under our interpretation can be made based on widely available, easily understood, and relatively incontrovertible information - not time-consuming reviews of historic uses that are often incomplete or inconclusive, and based on not subjective (and potentially boundless) interpretations of all the commercial uses a waterbody may have historically accommodated. Our recommended interpretation draws a clear line between federal and state jurisdiction so that regulators in the respective jurisdictions can devote more of their resources to environmental protection and fewer resources figuring out which waters they are tasked to protect.

3.2.2 Relatively Permanent Flowing Waters and Wetlands

While the interpretation above necessarily reflects the *SWANCC* majority's directive[59] to constrain interpretations of the term "navigable" to the usage provided by Congress in Section 404(g)(1) of the Act, it also must heed the Supreme Court's view in *Riverside Bayview*, *SWANCC*, and *Rapanos* that Congress intended to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense.[60] Preserving the appropriate scope of "navigable" waters while effectuating Congress's intent to extend federal CWA jurisdiction to some waters that are not navigable in the traditional sense guides our interpretation that federal jurisdiction should extend to non-navigable waters and wetlands with at least seasonal surface flow to waters identified in Categories 1 through 3 ("Category 4").

Each of API's preceding categories of jurisdictional waters included in our recommended interpretation have been directly derived either from explicit language in the CWA or from Supreme Court jurisprudence. Given the CWA's parsimonious guidance and the Supreme Court's divergent views in *Rapanos*, however, it is inevitable that our recommended interpretation will, at some point, conflict with one or more Justices' stated views. Importantly, it is precisely this situation, where Agencies must pursue one policy to the preclusion of another, which allows agencies their greatest discretion and extends agencies their greatest deference. What matters is that the Agencies do not misuse this "room to operate" to altogether abandon their attempt to faithfully give meaning and effect to the statute and the jurisprudence interpreting the statute. The Agencies must base their choice to the greatest extent possible on reasonable interpretations of congressional intent and, explain the merits of, and rationale for, the decision they reach. Category 4 of our recommended interpretation does just that.

As discussed above, interpreting WOTUS to extend federal jurisdiction to waters and wetlands with at least seasonal surface flow to waters identified in Categories 1 through 3 effectuates Congress's intent to extend federal CWA jurisdiction to some non-navigable waters. The Supreme Court justices all broadly agree that the CWA extends federal jurisdiction to *some* waters based on their connection to traditionally navigable waters, but they did not agree on the type or degree of connection required to extend federal jurisdiction to non-navigable waters.

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[59] The need to assign some importance and effect to the word "navigable" is also recognized by the *Rapanos* plurality and in Justice Kennedy's concurrence in the same. *Rapanos*, 547 U.S. at 767.

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

The *Rapanos* plurality described the requisite connections to navigable waters as "relatively permanent, standing or flowing bodies of water," and affirmatively not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[61] Applying the "plain language of the statute," the plurality concluded that channels that ordinarily are dry and contain flowing water only during precipitation events should not be viewed as "waters."[62] The plurality similarly concluded that wetlands fall within CWA jurisdiction "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." "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.

Justice Kennedy concurred with certain aspects of the plurality's view, and described the connection necessary to extend federal jurisdiction to wetlands that would otherwise be outside of federal jurisdiction as depending "upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[63] 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.'"[64]

Justice Kennedy categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his conception of a significant nexus.[65] Accordingly, the extension of federal jurisdiction from navigable waters to non-navigable waters and wetlands rests 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."[66]

Our interpretation finds purchase in both the plurality position and Justice Kennedy's concurrence by adopting the commonalities in the Justices' positions and focusing on substantial flows of waters that create non-speculative connections to navigable waters. Congress specifically identified "wetlands adjacent thereto" as within federal jurisdiction under Section 404(g)(1) of the Act, and in *Riverside Bayview*, a unanimous Supreme Court agreed that the agencies were entitled to interpret WOTUS to include adjacent wetlands. Our recommended interpretation also departs from Justice Kennedy's concurrence to some degree in that it requires at least seasonal surface flow to establish substantial and non-speculative connections to waters identified in Categories 1 through 3. While Justice Kennedy may also extend deference to an interpretation that includes high-volume intermittent surface flows, subsurface connections, and other impact-based connections to waters identified in Categories 1 through 3, his more broad view does not necessarily diminish the likelihood that Justice Kennedy would also extend deference to our narrower interpretation of the substantial and non-speculative connections he described in *Rapanos*. Nor does his concurrence necessarily foreclose the possibility that Justice

[61] *Rapanos*, 547 U.S. at 732, 739.
[62] *Rapanos,* 547 U.S. at 734.
[63] *Rapanos*, 547 U.S. at 779.
[64] *Id*. at 780.
[65] *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").
[66] *Id*. at 781.

Kennedy would view our interpretation as a reasonable attempt to clearly and easily identify a "significant nexus" between waters.

Our interpretation declines to follow Justice Kennedy's concurrence further because delineating federal from state jurisdiction based on a "potential to affect the chemical, physical and biological integrity of truly jurisdictional waters" would not result in clear and administrative jurisdictional lines.

API's recommended interpretation not only respects the jurisdictional limits conceived by Congress, it also aids in the clarity and administrability of the CWA. In our interpretation, the connection to navigable waters that is sufficient to extend federal jurisdiction must be a "surface connection." While we recognize that waterbodies can share subsurface connections, those connections widely vary in their extent and importance. Subsurface connections also cannot be readily observed, and often can only be demonstrated through complex and subjective hydrological analyses. The CWA cannot reasonably be interpreted to suggest that Congress intended that the fundamental dividing lines between federal and state jurisdiction would be drawn according to tenuous subsurface connections that may be identified (and disputed) by experts in hydrology, but invisible to the vast majority of people who must administer or subject themselves to these determinations.

By limiting the requisite connections to navigable waters to surface flows, our recommended interpretation does not allow jurisdictional determinations to be made on the often conflicting opinions of experts. We have instead furthered the clarity, credibility, and administrative ease of these determinations by obviating any need for case-by-case analyses and grounding this most important determination on clear, understandable, and readily observable surface connections.

API recommends defining "seasonal surface flow" to mean a continuous flow of water for least 90 consecutive days per year during years of typical precipitation. We believe this definition reflects our intention to preserve common notions of waterbodies, while eliminating those insubstantial, intermittent, or episodic flows that render jurisdictional determinations less predictable, harder to demonstrate or disprove, and more inclined to be misused to fulfill unlimited jurisdictional aspirations.

The "significant nexus test" cannot aid in jurisdictional line drawing because *everything and every place* has the "potential to affect the chemical, physical and biological integrity of truly jurisdictional waters." From the flattest land to the steepest peaks, pollutants inevitably will find their way to jurisdictional waters through precipitation runoff and may have the "potential to affect" navigable waters. Congress primarily empowered the states to address those areas where pollutants are picked up and carried by runoff into water bodies, but that does not mean Congress intended that vast land areas, depressions and dry channels were themselves to be considered "waters" subject to federal jurisdiction. Consistent with traditional notions of state primacy over land use, such features should remain under state jurisdiction. Furthermore, jurisdictional boundaries should not be based on the language used by a single Supreme Court justice not concurred with by any other justice on that court, which is what became the basis for the most far reaching part of the 2015 WOTUS definition.

3.2.3 Adjacent Wetlands

API's recommended interpretation would also extend federal jurisdiction to include wetlands adjacent to waters identified in Categories 1 through 4 (Category 5). Here again, in all material respects, our interpretation finds ample support in the language of the CWA and in the holdings of the Supreme Court. We include wetlands adjacent to waters identified in Categories 1 through 4 in our WOTUS interpretation because Congress specified in Section 404(g)(1) of the Act that "wetlands adjacent" to waters that are either navigable or "not navigable in the traditional sense" are subject to federal jurisdiction. Our recommended interpretation similarly tracks the unanimous *Riverside Bayview* decision, which countenanced the inclusion of wetlands adjacent to navigable waters within the Act's jurisdiction due to the difficulty of ascertaining a boundary between waters and land areas where the wetland "actually abuts on a navigable waterway...."[67]

In *SWANCC*, the Court noted that *Riverside Bayview's* acceptance of the Act's jurisdiction over wetlands "that actually abutted on a navigable waterway" stemmed from Congress' acquiescence to the Corps' regulations covering such wetlands, and explained that "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[68]

As we have previously explained, Justice Kennedy would extend federal jurisdiction over wetlands adjacent to WOTUS based on a consideration of the wetland's "potential to affect the chemical, physical and biological integrity of truly jurisdictional waters" – an outcome Justice Kennedy argued was prescribed in *SWANCC*'s discussion of the "significant nexus" between wetlands and navigable waters. The plurality countered this analysis by explaining that the *SWANCC* Court viewed the "significant nexus" between waters and adjacent wetlands as merely the ecological rationale for coverage of those wetlands - not as "an independent basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States'."[69] The plurality further averred that the *SWANCC* Court "found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction."[70]

Like the plurality's position, our interpretation of the CWA and Court's holdings in *Riverside Bayview* and *SWANCC* follows commonsense notions of adjacency and base jurisdiction solely on the ecological connections that Congress and the *Riverside Bayview* Court understood adjoining waters would share.

API's recommended interpretation of "adjacent wetlands" would include those wetlands that are **"bordering, contiguous, or directly abutting"** a water in Category 1 through Category 4. Wetlands that extend to the edge of a navigable river (or any other water under Categories 1 through 3) are "adjacent" because the wetland directly abuts the navigable river. Wetlands that are directly next to a navigable river but are separated from the river by natural river berms or sand bars are also "adjacent" because they are bordering or contiguous to the river. More geographically distant wetlands, however, fall within state jurisdiction. Similarly, if a group of

[67] 474 U.S. at 135.
[68] *SWANCC*, 151 U.S. at 167 (emphasis added).
[69] *Rapanos*, 547 U.S. at 741. (emphasis in original).
[70] *Rapanos*, 547 U.S. at 741-42.

wetlands are located near a Category 1 through Category 4 water, only those wetlands that are themselves adjacent to the Category 1 through 4 water would be subject to federal jurisdiction.

Our recommended interpretation defines "wetland" consistent with its previous regulatory definition: "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." To qualify as a wetland, the area must meet all three of the Army Corps' wetland delineation criteria: soils, vegetation, and hydrology. We believe that reasonable adherence to these criteria restrains Category 5 wetland to those swamps, marshes, bogs, and similar areas that are well within the common notion of a wetland.

This restrained definition of adjacent wetlands is essential to our recommended interpretation. Per *Riverside Bayview*, it permits the Agencies to ascertain the boundaries between waters subject to federal jurisdiction and the land areas under state jurisdiction. It furthers the clarity, predictability, credibility, and administrability of the CWA permitting structure by using the most objective and commonly understood definitions of "adjacent" and "wetlands." The clear lines provided by these definitions eliminate case-specific and often subjective analyses in favor of readily observable and relatively indisputable criteria. When the line between waters subject to federal jurisdiction and land areas under state jurisdiction can be ascertained easily, responsibilities for environmental protection are clear and resources can be better utilized for the protection of such waters rather than for resolving disputes over jurisdiction.

3.2.4 Impoundments

In API's final category, our recommended interpretation of WOTUS includes impoundments of waters that are jurisdictional under Categories 1 through 5. Our interpretation defines "impoundments" as jurisdictional waters whose movement has been impeded either in whole or in part by a man-made structure, such as a dam. Importantly, this definition does not include water that is diverted from a WOTUS to another location that is itself not subject to federal jurisdiction.

Under our interpretation, new impoundments would remain within federal jurisdiction even if the impoundment severed one of the definitional elements in API's proposed definition that caused the water to be subject to federal jurisdiction before the impoundment. While this interpretation will arguably cause more waters to remain under federal jurisdiction, it provides important clarification that waters under federal jurisdiction cannot be transferred to state jurisdiction through impoundment.

Impoundments of WOTUS existing before the effective date of this rule, and created for the purpose of compliance with a federal or state statute or regulations, including but not limited to the Clean Water Act, shall be exempt from this provision and shall not be considered Waters of the U. S.

3.2.5 Specific Exclusions to WOTUS

Our proposed WOTUS interpretation contains a number of specific exclusions. For instance, our proposed interpretation excludes from federal jurisdiction those waters that cross state lines but otherwise satisfy no other jurisdictional element. Interstate waters are not *per se* subject to federal jurisdictional simply because they cross a state line. As explained in Section 3.2.1 above, federal jurisdiction under the CWA springs from Congress's established authority to regulate the channels of commerce. Isolated waters and wetlands that bridge state borders are not channels of commerce, and they do not satisfy congressional intent to regulate navigable waters, significant waters that flow into those waters, and adjacent wetlands.

The following exclusions also apply to our recommended interpretation:

- Waters designed and/or operated to meet any provision of the Act or any other federal, state, or local environmental statute regulation, permit, or requirement. Exclusions include but are not limited to: 1) temporary and/or permanent/secondary basins/ponds and conveyance systems for regulated discharges associated with storm water; 2) biological treatment lagoons with source water from lagoon; 3) cooling water ponds; 4) fly ash ponds; 5) waste treatment systems including but not limited to treatment ponds, storage or lagoons; 6) secondary containment systems; and 7) CWA regulated MS4 and component conveyances within such systems.

- Industrial features necessary for the operation of a facility, such as: 1) water storage ponds, impoundments, and conveyances including those for fire, utility, and cooling water; and 2) process water holding ponds.

- Existing longstanding agricultural exclusions, including those for prior converted cropland;

- Erosional features and ephemeral or intermittent water bodies with flow duration that is less than seasonal, including, but not limited to gullies, rills, swales, channels, playa lakes, prairie potholes and other waters or features or the exemption for green infrastructure;

- Ditches;

- Groundwater;

- Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distribution structures built for wastewater recycling;

- Green infrastructure that uses natural or engineered systems designed to mimic natural processes and directs storm water to where it can be infiltrated, evapotranspired, or re-used;

- Ornamental waters created in dry land; and,

- Water-filled excavations created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water.

Recognizing that the scope of any new WOTUS rule may be the subject of dialogue between the field personnel from the Agencies' as well as the permit applicant, we urge the Agencies to take a "belt-and-suspenders" approach to listing exclusions for the sake of consistency.

4. CONCLUSION

In conclusion, we believe that the environmental protection goals of the Agencies can best be served by continuing the model of cooperative federalism that is already well-articulated in the CWA. API encourages the Agencies to respect the role of the states and to craft a WOTUS rule that is clear and administrable so that both state and federal agencies can focus their limited staff and budgets on protecting the waters within their jurisdiction.

To this end, API encourages 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.

Similarly, API also encourages the Agencies' to adopt the clarifying exclusions listed on page 18.

Finally, we note the obligation of the Agencies to bring closure to the WOTUS issue that has gone unresolved for well over a decade. EPA should not attempt an overly ambitious definition that will test the boundaries of Constitutional authority or technological assessment – particularly if a narrow rule would better serve the interests of clarity and efficient administration. Continued uncertainty does not serve the interest of regulators, property owners, developers, or the environment itself. We urge EPA to choose a clear, administrable, and defensible definition of WOTUS that will effectively resolve this issue.

We look forward to continuing to work with the Agencies' on this important regulation.

Sincerely,

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APPENDIX B: 2019 ECONOMIC ANALYSIS

Comments on the Economic Analysis for the Proposed Definition of WOTUS

10 April 2019

Project No.: 0490529

The business of sustainability

ERM

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SUMMARY

The US EPA is proposing a new rule for defining the waters of the US ("Proposed Rule") and has issued an Economic Analysis ("EA") in support of the Proposed Rule. The Proposed Rule will define six categories of waters considered "Waters of the United States" (WOTUS) for jurisdiction under federal law, and potentially excludes seven other categories from federal jurisdiction. The Proposed Rule will have benefits and costs that affect numerous Clean Water Act Programs. This document deals with the EA assessment of the benefits and costs for the Section 404 Permit Program, which regulates the discharge of dredged or fill material into WOTUS.

The primary finding of the EA Section 404 analysis is that the benefits (i.e. avoided costs) of the Proposed Rule exceed the costs (i.e. foregone benefits). The estimated benefits and costs are uncertain because of incomplete data and questionable assumptions in the EA. Moreover, the assumptions understate the benefits of the Proposed Rule and overestimate the costs. Nevertheless, based on the independent analysis conducted using the Monte Carlo model discussed below, the primary finding of the EA on Section 404 is robust. While the magnitude by which the benefits exceed the costs is uncertain, – it is highly unlikely that benefits of the Proposed Rule are less than the costs. Issues with the EA benefit and cost estimates include:

1. The unit cost for permitting and wetland mitigation used by the EA likely underestimate the actual cost of compliance and therefore underestimate the benefits (i.e. avoided costs) of the Proposed Rule.
2. More acres will be non-jurisdictional than Stage 1 estimates. As a result, net benefits will be higher.
3. Stage 1 and Stage 2 often make different assumptions about key inputs affecting the benefits and costs.
4. The unit WTP values used by the EA overestimate the value of the wetlands that will no longer be jurisdictional and therefore overestimate the costs (i.e. foregone benefits) of the Proposed Rule.
5. The states that will change their wetland regulations because of the Proposed Rule is uncertain, and should include additional factors.

To evaluate these issues, this report uses a Monte Carlo model that shows the overall impact of all the major sources of uncertainty. Monte Carlo analysis is a well-accepted technique, and often used by the EPA, to quantify the impact of uncertainty that is inherent in the analysis of environmental regulations (EPA 2016). The value of a Monte Carlo analysis is that it eliminates the need to assert which numbers or values are correct. The range of plausible values for each model input can be used, which provides a more complete assessment of the inputs that affect the results. Monte Carlo also provides an integrated assessment of the results, instead of creating multiple scenarios, tables and results based on alternative assumptions for upper and lower bounds.

The Monte Carlo model, to the extent possible, makes adjustments to overcome the shortcomings described above. First, the model uses the same set of assumptions for benefits (avoided costs) for Stages 1 and Stage 2 and incorporates a wider range of permitting cost estimates. In addition, the WTP values are adjusted to reflect uncertainty about the reliability of the WTP studies and the population they are applied to. Finally, the Monte Carlo model assigns probabilities to the likelihood that states will maintain the current level of permitting requirements.

Table 1 & 2 summarize the results of the Monte Carlo model. Table 1 shows that both Stage 1 and Stage 2 of the Proposed Rule yield positive annual net benefits and a benefit cost ratio well above 1. Table 2 shows the results when the likelihood that states will reduce their regulation of the wetlands in response

to implementation of the Proposed Rule are considered. The key finding is that annual net benefits are positive and the benefit cost ratio is well above one.

Table 1: Benefit and Cost Estimates (mean values, $millions) – All States

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio
Stage 1	$541	$39	$502	13.9
Stage 2	$233	$177	$116	6.0

Table 2: Benefit and Cost Estimates ($millions) – Weighted Scenarios

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio
Stage 1	$126	$14	$114	10.5
Stage 2	$71	$40	$35	5.9

BACKGROUND

The Proposed Rule defines six categories for "waters of the United States" (WOTUS). Those categories are traditional navigable waters (TNWs), tributaries, certain ditches (if they are either TNWs or tributaries), certain lakes and ponds (if they are TNWs, contribute flow to TNWs, or are flooded by WOTUS), impoundments of WOTUS, and adjacent wetlands (if they physically touch WOTUS, or have a surface water connection through flooding or flow). The Proposed Rule excludes the following from WOTUS jurisdiction:

- Waters not included in the six categories defined above;
- Ephemeral features;
- Groundwater;
- Ditches, except as defined above;
- Prior converted cropland;
- Stormwater control features;
- Wastewater recycling structures; and,
- Waste treatment systems.

The Proposed Rule affects the Section 404 Permit Program because as the status of certain waters changes, so will the requirements to obtain permits for certain activities affecting those waters. Mitigation requirements for waters no longer considered WOTUS will also decrease, as will stages to avoid impacts to aquatic resources no longer considered jurisdictional WOTUS. All of these changes assume that there are no requirements at the local, state, or tribal level that are similar to those that previously existed at the federal level.

The economic analysis divides the impacts of Section 404 into two stages in the EA because of the data available to support the analysis. Stage 1 estimates the benefits and costs of eliminating the 2015 Rule. Stage 2 estimates the benefits and costs of implementing the new definition of WOTUS under the Proposed Rule, compared to the pre-2015 rule baseline.

In the EA for the 2015 Rule, the costs of implementing the rule were the additional permitting costs and the additional wetland mitigation costs for wetlands that would become jurisdictional. The benefits were the natural capital and ecosystem service values that the 2015 Rule protected. The EA for the Proposed Rule reverses the roles. Moving from the current baseline back to the 2015 baseline, the additional costs become avoided costs and are considered benefits of the Proposed Rule. The 2015 benefits now become foregone benefits and are considered to be the costs of the Proposed Rule. The Proposed Rule EA uses the same permitting and mitigation cost assumptions as the 2015 Rule EA and the same number of 404 affected acres. Therefore, the limitations of those assumptions still apply. The Proposed Rule EA uses a modified approach to estimate the foregone benefits per acre. The EA for the Proposed Rule also considers different definitions of states that might be affected by the rule, which was not done in the 2015 EA.

Table 3 shows the results of the Stage 1 analysis for the Proposed Rule for Section 404 impacts. The results are separated into 4 scenarios as follows:

- Scenario 0: No states regulate the now non-jurisdictional waters that were previously considered WOTUS, and impacts to all states except Hawaii are included.
- Scenario 1: Includes only impacts for states that EPA considers as likely to reduce, may reduce, or may continue their regulatory practices in response to the changes in the definition of WOTUS.

Includes Alaska, Alabama, Arkansas, Arizona, Colorado, Delaware, Georgia, Iowa, Idaho, Kansas, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Mexico, Nevada, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, West Virginia, and Wyoming.

- Scenario 2: Includes only impacts for states that EPA considers as likely to or may reduce their regulatory practices. Includes Alaska, Alabama, Arkansas, Arizona, Colorado, Delaware, Georgia, Idaho, Kentucky, Missouri, Mississippi, Montana, North Dakota, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming.
- Scenario 3: Includes only states that EPA considers likely to reduce their regulatory practices. Includes Arizona, Idaho, Kentucky, Mississippi, and South Dakota.

Table 3: Stage 1 404 Wetland Summary Results

Scenario	Annual Benefits (Avoided Costs) M$2017	Annual Costs (Foregone Benefits) M$2017	Net Benefits – (Benefits – Costs) M$2017	Benefit Cost Ratio
Scenario 0	$160	$59	$101	2.7
Scenario 1	$75	$16	$59	4.5
Scenario 2	$52	$14	$38	3.7
Scenario 3	$5	$1	$4	4.4

The acres affected in Stage 2 come from the agencies' review of the Army Corps of Engineers' ORM2 database, which has information about the affected waters for each permit. The waters considered affected by the rule are ephemeral streams and wetlands adjacent to but not directly abutting permanent waters. The Proposed Rule uses the Stage 1 foregone benefits approach to estimate the benefits for these acres. Table 4 shows the results of the Stage 2 analysis for each of the scenarios described for Table 1 above.

Table 4: Stage 2 404 Summary Results

Scenario	Annual Benefits (Avoided Costs) M$2017	Annual Costs (Foregone Benefits) M$2017	Net Benefits – (Benefits – Costs) M$2017	Benefit Cost Ratio
Scenario 0	$367	$136	$231	2.7
Scenario 1	$200	$47	$153	4.3
Scenario 2	$164	$42	$122	3.9
Scenario 3	$45	$7	$38	6.4

The key issues in the EA for the Proposed Rule are:

1. Per unit WTP values for costs (Foregone Benefits)
2. Per unit costs for permitting and wetland mitigation costs
3. Number of acres affected by the Proposed Rule
4. The number of states with wetlands affected by the Proposed Rule

We deal with each of these issues in the following four sections.

Also, the EA discusses each of these issues separately and does not provide an overall summary of the potential impact of uncertainty on their conclusions. Therefore, in Section 6, we use a Monte Carlo model to integrate and assess the impact of the various sources of uncertainty.

1. PER UNIT WTP VALUES FOR COSTS OF THE PROPOSED RULE (FOREGONE BENEFITS)

The Proposed Rule estimates the cost of the rule (i.e., foregone benefits) using a benefits transfer model. The model is a nonlinear regression of ten willingness to pay (WTP) studies about public's hypothetical valuation of wetland programs throughout the U.S. The approach in the Proposed Rule is an improvement over the approach used in the 2015 Rule. The transfer function approach is more theoretically advanced and the WTP studies have been more carefully vetted; however, the results are still flawed and unreliable. In addition, the EA does not provide sufficient information to fully evaluate and replicate the analysis.

The EA clearly acknowledges two key assumptions of their WTP analysis, which is the source of the weakness of the analysis. The EA states: "Following standard benefit transfer approaches, this analysis proceeds under the assumption that the source study provides a valid, unbiased estimate of the welfare measure under consideration. " (Page 202). However, as discussed below, there are numerous reasons to believe the WTP values do not meet this criteria. As the EA further points out, "If the underlying studies do not provide a good match to the resource in question or do not rely on well-accepted practices for questionnaire development and/or econometric techniques, those studies should be excluded from meta-analysis. (pg. 68)". This is commonly referred to as "similarity and soundness". Unfortunately, as discussed in the first part of this section, if the EPA had applied this rule, they may not have had any WTP studies to include.

As a result of these shortcomings, the appropriate WTP for the types of wetlands that would become non-jurisdictional is not known. However, as described below, it is likely that the true WTP is less than estimates used in the EA. Therefore, we consider the EA WTP estimates as an upper bound and derive lower bound estimates. This provides a method to include WTP estimates in the Monte Carlo and assess whether the EA conclusions are robust

1.1 Evaluation of WTP Studies

The EA analysis assumes that the WTP studies provide accurate values of the value of wetlands to the public. If the underlying studies are unreliable, then no amount of statistical sophistication can make the values credible or reliable. The WTP studies used in the EA are listed in Table III-5 of the EA, reproduced in Figure 1 for clarity.

Figure 1: Studies used in the freshwater only meta-regression model

Table III-5: Studies used in the freshwater only meta-regression model in Moeltner et al. (2018)

Author	Year	Target Population	Wetland Type	Acres	WTP (2017$)
Awondo et al.	2011	Maumee Bay SP, OH, visitors	freshwater, unspec.	2,499	$193
Beran, L.J.	1995	all SC HHs	freshwater, forested	2,500	$36
Beran, L.J.	1995	all SC HHs	freshwater, forested	2,500	$27
Beran, L.J.	1995	all SC HHs	freshwater, forested	2,500	$33
Blomquist & Whitehead	1998	all KY HHs	freshwater	500	$3
Blomquist & Whitehead	1998	all KY HHs	freshwater, forested	500	$8
Blomquist & Whitehead	1998	all KY HHs	freshwater, forested	500	$6
Blomquist & Whitehead	1998	all KY HHs	freshwater, forested	500	$19
deZoysa	1995	selected MSAs, OH	freshwater, unspec.	3,000	$109
Loomis et al.	1991	all CA HHs	freshwater, unspec.	58,000	$258
Loomis et al.	1991	all CA HHs	freshwater, unspec.	40,000	$426
MacDonald et al.	1998	Atlanta region, GA	freshwater, unspec.	330	$108
Mullarkey & Bishop	1999	all WI HHs	freshwater, forested	110	$64
Newell & Swallow	2013	Two townships, RI	freshwater, forested	29	$9
Newell & Swallow	2013	Two townships, RI	freshwater, forested	45	$12
Newell & Swallow	2013	Two townships, RI	freshwater, forested	60	$16
Poor[1]	1999	all NE HHs	freshwater, unspec.	16,000	$47
Poor	1999	all NE HHs	freshwater, unspec.	41,000	$42
Poor	1999	all NE HHs	freshwater, unspec.	66,000	$47
Whitehead et al.	2009	selected counties, MI	freshwater, unspec.	1,125	$73
Whitehead & Blomquist	1991	all KY HHs	freshwater, forested	5,000	$19

HHs = Households

[1] This study is included in meta-analysis discussed in Section III.C.2.2 because the dependent variable in the meta-regression model is the total WTP per household and not per acre values

All of the studies in the benefits transfer use stated preference (SP) techniques to elicit WTP, and all but one (Newell and Swallow 2013) use the contingent valuation (CV) approach. A recent book, edited by Nobel Prize winner Daniel McFadden and Kenneth Train, highlights the major reliability problems with CV and stated preference studies (McFadden and Train 2017). These problems include:

- Inadequate response to cost
- Inadequate response to the number of payments
- Inadequate response to scope
- Difficulty in answering CV questions
- Fruitless search for "corrections" to hypothetical bias

The 'inadequate response to cost' problem is that WTP responses are heavily influenced by the cost prompts offered in the survey, and a study by Parsons and Myers showed that "(essentially) any estimated WTP can be obtained through specification of the highest cost prompt" (McFadden and Train 2017). In other words, rather than obtaining true WTP, CV surveys are creating a WTP value that is driven by the range of cost prompts that the study offers respondents.

The second problem, 'inadequate response to the number of payments', is that CV responses are not consistent when gathered for a one-time payment versus a series of periodic payments. Myers, Parsons, and Train found that estimated WTP was 32 times larger when respondents were asked for periodic payments than when they were asked for a single, one-time payment (McFadden and Train 2017). The 'inadequate response to scope' problem occurs because CV responses are not consistent when estimated for different quantities of the environmental good, and not only do most studies not have adequate scope tests, a study by Burrows, Newman, Genser, and Plewes finds that "more often than not,

CV studies don't find *any* response to scope, much less an adequate response." (McFadden and Train 2017).

Respondents have difficulty with CV questions about environmental goods because they possess the characteristics that make CV least reliable: they are often unfamiliar; people are not accustomed to making choices about them, they are not commonly valued; and they are not part of a typical individual's budget. Thus, people struggle to answer the questions in a meaningful way (McFadden and Train 2017). The temptation is to adjust the CV results to make them reliable, but a study by Myers, MacNair, Tomasi, and Schneider that adjusts for various issues finds that out of 1,224 responses, only two were answering the question "appropriately", and those two both voted against the specified program described in the stated preference question (McFadden and Train 2017). There is a similar temptation to try to adjust for hypothetical bias, which is the tendency for respondents to provide inaccurate answers because they are not expected to commit any real money. However, a study by Foster and Burrows that looks at 432 comparisons from hypothetical and real settings found that the ratios varied widely and there was no "typical" ratio that could be used as a correction factor (McFadden and Train 2017).

There is no indication that the EPA assessed whether any of these problems affected the results in the studies they used for their benefits transfer[1]. Our review shows that in addition to using a technique which has been shown to be unreliable for environmental goods, these studies each value a very specific good, describing a scenario for respondents that includes details about the benefits, costs, and tradeoffs. The highly detailed nature of the valuation questions make the results inappropriate for transfer to another context, and several of the authors state that in their studies.

The following bullets provide a brief overview of the study-specific issues associated with each of these studies for the application to estimating the foregone benefits associated with reduced wetland protection from the proposed rule. These issues are in addition to those identified above for the CV technique.

- Awondo et al. (2011) values the potential benefits for beach recreation at a popular swimming beach at Maumee Bay State Park in Ohio from restoring wetlands in order to improve the water quality and reduce the number of days with beach use restrictions. The study does not actually value the wetlands themselves, but rather the water quality benefits they can provide for recreational swimming by reducing advisories.[2] It seems unlikely that the typical wetland covered by the proposed rule would provide beach recreation benefits.
- Blomquist and Whitehead (1998) uses CV to test how providing survey respondents with different information about wetland quality influences their WTP estimates. They have four different descriptions for areas of the same wetland that differ in quality and type. The descriptions included information about the wetland acreage, percent of the year that flooding occurs, flora and fauna species found in the wetland, flood control ability, and water quality improvement ability. The study elicits four values and two are significantly different from each other, indicating that the wetland characteristics influence valuation responses. Details matter, and applying the values from the wetlands studied here to other types of wetlands is contra-indicated by the study results.
- De Zoysa (1995) evaluates the value of wetland protection in the Maumee River Basin, Ohio. The wetlands are described as providing important habitat for the Mississippi Flyway population of black ducks, as well as 16 pairs of nesting bald eagles and more than 45 other endangered species or species of special concern. The WTP value includes not only 3,000 acres of wetlands protection, but also restoring and maintaining improved wetlands and providing 20 percent more habitat for

[1] It is worthwhile to note that the economic analysis contains insufficient documentation to fully verify the values used in the meta-analysis.

[2] Neither the survey nor the study reports the quantity of wetlands to be restored; the source for the 2,499 acres cited in Table III-5 is unknown.

migrating birds. The WTP value for the wetlands cannot be separated from the specific services the wetlands provide, in this case habitat for specific wildlife species. It is not clear that the wetlands impacted by the proposed rule would provide the specific services described in this study.

- Loomis et al. (1991) estimates how much Californians would pay to protect and/or increase wetland acreage and the associated bird populations for critical migratory bird habitat in the Pacific Flyway. The wetland acreages are explicitly tied to percentage changes in the bird population; a decrease in wetlands from 85,000 acres down to 27,000 acres is associated with a 70 percent loss in bird populations, and maintenance of the 85,000 acres plus acquisition of an additional 40,000 acres is associated with a 40 percent increase in bird populations. There is no reason to believe that the acres affected by the rule are critical migratory bird habitat of the size described in this survey. The authors specifically note that the WTP is not linear; there are diminishing incremental benefits with increased wetland acquisition or protection. Thus, the agencies' decision to assume a linear relationship between WTP and acres by calculating a $/acre estimate from this study is contra-indicated by the study results.[3]
- MacDonald et al. (1998) uses CV to estimate the incremental benefit of using constructed wetlands to control agricultural non-point source pollution and improve downstream water quality in the nearby Lake Sinclair, GA. The estimates are explicitly connected to protecting the use of Lake Sinclair for fishing and swimming. Further, the constructed wetlands are explicitly described as a potential management practice for agricultural pollution control; they are not natural wetlands nor existing wetlands. Consequently, the authors note that the estimates are site-specific. There is no evidence that the wetlands affected by the rule are similar to the wetlands covered by this study.
- Mullarkey and Bishop (1999) use CV to evaluate WTP two types of wetlands valued together, isolated basins and tributary wetlands, with each was described in terms of six characteristics: floodflow alteration, water purification, fish and other aquatic animals, wildlife breeding habitat, bird migration habitat, and bird wintering habitat. The authors note the time they spent describing the wetlands accurately and that the two types of wetlands affected by the project varied enough in terms of services and quality, "reflecting the diversity amongst even wetlands in the same geographic area", that they felt it necessary to describe them separately. Applying estimates for such specific services to an entire state or region is contra-indicated by the study results.
- Poor (1999) attempts to value wetland protection in the Nebraska Rainwater Basin, a significant wetland complex in the Central Flyway that the authors describe to the survey respondents as being "recognized internationally as an important waterfowl habitat for migrating birds". The authors note that it fails the scope test because there is no significant difference in the WTP for 16,000 acres, 41,000 acres, and 66,000 acres. The scope test failure is important, because the agencies calculate a $/acre estimate, which is nonsensical when the same total value applies to vastly different acreages.
- Newell and Swallow (2013) value wetland parcels for protection that varied in terms of location (two townships in Rhode Island), level of wildlife diversity, level of public access, sustainability of habitat quality, role as conservation area, character of surrounding land, size of parcel, and cost of protecting the parcel. The authors found that public access, surrounding land, parcel size, respondent education, and respondent age all significantly affected the WTP values. The latter two components are particularly interesting, because they indicate that not only the characteristics of the wetland, but also the characteristics of the population influence the WTP values. None of these components are included in the agencies' meta-analysis. Transferring these values to other wetlands and populations

[3] One of the WTP amounts for this study is incorrectly stated in the table; rather than $426 for 40,000 acres, the correct amount is $426 for 98,000 acres. It is not clear whether this affects the results of the EPA calculations.

assumes that either the wetlands and populations are the same as those included in the study, or that the characteristics of the wetland and the survey population don't matter. Neither of these conditions is likely to be true.

- Whitehead et al. (2006) estimates the value of purchasing and protecting Saginaw Bay coastal marshes. The respondents are first told that 9,000 of the 18,000 acres of marshes in the Saginaw Bay area are currently protected, then asked their willingness to pay to protect 1,125, 2,500, or 4,500 acres of additional coastal marsh. The respondents fail the scope test, because there is no significant difference in the WTP estimates for the three different levels of protection. The authors argue that the WTP estimate is still valid for 1,125 acres with the interpretation that additional wetland protection has no value. This study begs the question of what might have happened if the wetland protection acreages were 10 or 20 acres, which are in line with the purported affected acres per state in the EA? Scope test failure also underscores that calculating a $/acre value and applying it to wetlands of different sizes is inappropriate, since wetland protection greater than 1,125 acres supposedly has no value. Further, the wetlands described were specific to the coastal marshes of Saginaw Bay, and are not appropriate for other wetlands in other areas, even other coastal wetlands. As the authors write in their introduction, "Economists have grappled with various ways of measuring the dollar value of coastal wetlands in various locations around the world, and, not surprisingly, depending on the location and the economic tools applied, the results differ widely."
- Whitehead and Blomquist (1991) explore the impact of different information on WTP estimates. The study provides respondents with different information about related, nearby wetlands when valuing wetland preservation from mining pressures. This study demonstrates the important point that the information provided in the survey about the specific context has a significant impact on WTP (or more accurately, hypothetical estimates of WTP). The authors write "The economic value of a particular wetland area depends on other areas which individuals think are related. The total value of wetlands depends on the configuration of existing quantities and types of wetlands." They also point out that "Statements of willingness to pay across households will not be accurate statements of value if they are based on differing perceptions of the wetland resource and related environmental goods and not on preferences for the wetland resource with good knowledge about related environmental goods.

The use of these study results for benefits transfer is contra-indicated by the study authors. In other words, these wetlands do not exist in a vacuum, and the WTP responses are not provided in a vacuum. The WTP estimates are specific to the survey in which they were generated, and influenced by the design and implementation of the specific survey instruments used.

1.2 Evaluation of the Meta-Analysis Benefits Transfer

It is impossible to fully evaluate and validate the proposed benefits transfer model because the EA does not supply all of the pertinent information to replicate their results. Even if the results could be replicated, there are still underlying problems with the meta-analysis model. Despite these problems, the Monte Carlo model can incorporate adjustments in the WTP range to assess the sensitivity of the net benefits of the Proposed Rule.

The EA description of the WTP model is incomplete. Although Table III-6 of the EA states that several study specific parameters were included in the model (e.g., elicitation method, whether the study was peer reviewed, whether the WTP estimate was a median or mean value), the parameters for these values are not included in the meta-regression results in Table III-7. The model includes numerous other study specific parameters, such as whether the study estimated annual WTP or a one-time payment. The EPA has to determine the setting of these variables when applying them to the states. However, the EA does not report what settings were chosen or why.

Similarly, the EPA had to decide the categories of ecosystem services that the wetlands in the WTP study were providing and they had to decide which services the wetlands in the states provide. These decisions are judgement calls that could have a significant impact on the results; however, the EA does not contain any information about these decisions. For example, in Stage 2, 33% of the states will have fewer than 10 acres affected, but there is no discussion about the legitimacy of assuming the entire population of those states would place a value on such a de minimis number of acres

The EA meta-regression admits to having challenges with predicting out of sample, or applying the analysis to areas that are much smaller than those that the underlying study analyzed. On page 76, the EA reports that the mean value for baseline acres is 10,000 for the studies in the model. Therefore, the analysis by state uses this baseline and adds the statewide acreage to this value to measure the WTP to try to avoid predicting out of sample. This raises several important issues. The EPA is predicting out of sample, and you cannot solve the problem by assuming that you are in sample. The assumption that is made to get back in the sample matters. The WTP to increase from 10,000 acres to 10,500 acres can vary by 10 percent of the WTP to increase from 5,000 acres to 5,500 acres, depending on the state characteristics. The average change in acres for the Proposed Rule analysis is 12 acres per state for Phase 2, compared to 10,000 acres in the meta-analysis transfer value study. These differences make the transfer problematic from a statistical standpoint, but also from a similarity standpoint. The change in acres for each state is minute compared the changes in the studies, which should profoundly affect the valuations. The surveys valued a much different good. It is similar to transferring values from a national park and applying them on a per acre basis to a local park.

The assertion that the meta-regression allows for the transfer of values from studies that are different from the subject site is misleading. The meta-regression transfer model can include a wide variety of studies and determine from a statistical standpoint whether they can be included and used as group. However, the study would need to have tested whether valuation of small half-acre intermittent potholes gives the same results as protecting 10,000 acres to protect bird populations. In other words, the meta-regression could determine that trout fishing and salmon fishing have the same mean and distribution and can be used together. However, that does not mean that fishing values can be used to value walking the dog.

The EA uses the meta-analysis approach as an attempt to resolve some of the underlying problems with the WTP studies. The benefits transfer function itself has some of the desired characteristics that are not inherent in the underlying studies. For example, by construction the meta-analysis meets the adding up principle[4] and shows sensitivity to scope, even if the WTP estimates from the study do not meet this criterion. The problem is that a statistical construct cannot change the quality of the underlying studies, which do not meet these criteria.

The WTP range in the EA is based solely on the statistical properties of meta-regression. The Monte Carlo model adds two sources of uncertainty. First, it considers the impact of hypothetical and other sources of bias by following the NOAA Panel recommendation to reduce WTP values by 50 percent when the study does not explicitly test or adjust for these factors. Second, it adds uncertainty to the range of state population that may actually be willing to pay. The potential number of statewide households is reduced by a range of 80 to 0 percent.

[4] The adding up test evaluates whether summing the WTP for each part of a multi-part program will equal the estimated WTP for the entire program (McFadden and Train 2017).

2. UNIT COSTS FOR BENEFITS OF THE PROPOSED RULE (AVOIDED COSTS)

For Stages 1 and 2, the EA states there are two ways that the Proposed Rule could reduce costs for landowners:

1. Reduced permit costs, including application costs, permitting time costs, and impact avoidance and minimization costs, for projects no longer affecting waters regulated under the CWA, and
2. Reduced compensatory mitigation costs when impacts occur on waters no longer regulated under the CWA.

However, for no apparent reason, the EA uses different unit values for Stage 1 and Stage 2.

2.2 Permitting

The Proposed Rule uses per unit permitting costs from the 2015 Rule EA for Stage 1 benefits (avoided costs). The 2015 EA uses cost estimates from two studies of permitting costs developed for the Nationwide Permit 26 analysis in 1999. For the lower bound estimates the EA uses a study by the Corps (1999), which is a fixed cost per permit, and a study by Sunding and Zilberman, which includes a fixed cost and per acre cost, is used as the upper bound[5]. Even without the per acre component, the Sunding and Zilberman fixed costs are roughly twice the Corps. The Sunding and Zilberman costs are higher because they include indirect costs, such as the opportunity cost of waiting for the approval and redesign costs. For this reason, the Sunding and Zilberman costs are more realistic and probably reflect the midpoint of the range of costs, not the upper bound. But for Stage 2, the EA uses permitting costs from a 2015 Corps publication ($14,700 for individual, $4,400 for general) which are lower than the Corps (1999) costs ($36,000 individual and $16,000 general), adjusted for inflation.

In the Monte Carlo analysis, this report uses the 2015 Rule estimated cost range. It applies that range to both Stage 1 and Stage 2.

2.3 Affected Acres

The EA uses two different methods to calculate the number of acres affected by the Proposed Rule for Stages 1 and 2. In Stage 1, the agencies use estimates of the number of additional permits and the average impact per permit to produce an estimate of additional acres of permitted impacts and associated costs. The agencies estimated that 34.5 percent of ORM2 "other waters" (i.e. non-navigable intrastate waters that lack a direct surface connection to other waterways) [6]will be jurisdictional under the proposed 2015 Rule. In estimating that number, they assumed that 100 percent of the wetlands currently considered adjacent would be jurisdictional and 17.1 percent of waters that were determined not to be jurisdictional would be under the 2015 Proposed Rule.

In Stage 2, the agencies use wetlands adjacent to but not directly abutting permanent waters in the ORM2 database to identify the jurisdictional change in wetlands. The total permanent impacts are used, rather than total acres of mitigation, to estimate reductions in mitigation requirements from the proposed CWA jurisdiction definitional changes. This change from Stage 1 creates a more accurate accounting of the affected acreage because the agencies could identify jurisdictional change based on permitting types in the database and not estimates of what might occur. Table 5 shows the total acres used in the different categories of the analysis.

[5] The unit costs from the 2015 Rule were updated to 2017 using the CPI.

[6] ORM2 is the Army Corp of Engineers database containing CWA 404 applications and permit information.

Table 5: Acres Affected

Category	Acres
Stage 1 (scenario 0)	
Benefits (Avoided Cost)	3,781
Costs (Foregone Benefits)	1,154
Stage 2 (scenario 0)	
Benefits (Avoided Cost)	974
Costs (Foregone Benefits)	1,486

2.3.1 Stage 1

Stage 1 of the analysis uses the same number of acres to calculate foregone benefits and avoided costs that the 2015 analysis uses. "The foregone benefits are calculated from estimates of acreage from all individual permits and half of general permits" (EPA, 2015). The agencies calculate the Stage 1 foregone benefits using 1,154 acres spread across the different states.

To calculate the mitigation requirements, the agencies assumed that all of the additional acres under individual permits would require mitigation at a 2:1 ratio, two acres of mitigation for every acre of impact. The agencies also assumed that half of the general permits issued would require mitigation at the 2:1 ratio. This leads to a total of 3,781 acres of mitigation for the Stage 1 analysis.

The 2015 Rule EA estimates the number of acres that would become jurisdictional by reviewing data on permits that were submitted and determined not to be jurisdictional. The EA estimates the portion of these permits that would become jurisdictional. The EA assumes the total number of permit applications would not change. However, land owners who believed their projects were not subject to WOTUS jurisdiction would not have filed a permitting request. Changing the WOTUS definition will in turn increase the number of projects that have to apply for permits, increasing the number of positive jurisdictional determinations and acreage. (Sunding 2014)

2.3.2 Stage 2

The 404 program has a policy of "no net loss" in wetlands and other aquatic resources. The agencies assumed that the mitigation was equivalent to the impact that it is meant to compensate for. They used the total permanent impact to estimate the number of acres reduced from mitigation requirements to calculate foregone benefits. Army Corp of Engineer guidance on the compensatory mitigation for category III wetlands was used to determine the ratio for mitigation. Category III wetlands are defined as not rare or unique and usually plentiful in the watershed. Due to the type of wetlands, the analysis used a 1:1 ratio for compensatory mitigation for wetlands. To validate this assumption the agencies conducted a statistical analysis of the relationship between impacted acres and mitigation requirements. The estimate is likely underestimated if the projects affect Category II or I wetlands[7] that have higher mitigation ratio requirements.

[7] Category II wetlands are defined as somewhat rare and unique, and Category I wetlands are defined as rare and unique wetlands that are not plentiful in the watershed.

The agencies used 1,486 acres to calculate the national foregone benefits in Stage 2. This value was derived from the number of 404 permits issued in 2011-2015. The agencies assumed that the number of permits issues in those years was representative of projects that may be permitted over the next 20 years.

At the state level, mitigation ratios often exceed 1:1. This is for a wide variety of reasons: the length of time a restoration project will take to reach maturity; the potential for the project to fail; the fact that a project may involve preservation of existing wetlands rather than the creation of restored wetlands. Therefore, it is likely that the 1:1 ratio is too low.

The EA sensitivity analysis for the case studies uses a ratio of 1.5:1, which is a more realistic value. The case study sensitivity also shows that including a looser interpretation of the acres affected by the Proposed Rule, could increase the acres by 50 percent. The Monte Carlo model uses these two scalers in creating a range for the acres affected by Stage 2.

3. SCENARIOS

The EA assumes that states will have different responses to a change in CWA jurisdiction. For example, if a state does not change its determinations concerning wetlands then the Proposed Rule will not have an impact in that state. Of course, the reaction of the states to the change is uncertain. The agencies created four categories of responses and put each state into one of the four categories. Those categories are:

1. Likely to reduce regulatory practices (5 states)
2. State programs are likely to provide some regulatory coverage of waters that would no longer be "waters of the United States" and may reduce aquatic resource permitting practices (15 states)
3. State programs are likely to provide some regulatory coverage of waters that would no longer be "waters of the United States" and may continue baseline permitting practices (8 states)
4. Likely to continue baseline dredge/fill permitting practices (21 states)

The criteria for placing a state in each category are based on state-level dredge and fill programs, regulating waters more broadly then the CWA, and legal restrictions that are identified in a literature review commissioned by EPA (Fredricksson 2018)[8]. The report commissioned by the EPA reviews literature on environmental federalism and political economy, focusing on the most relevant indicators for change in regulatory control. Theoretical indicators from the literature review include efficiency of decentralization, race to the bottom, and political economy. The agencies conclude that the biggest indicator of what a state will do if the Proposed Rule is implemented is how the state has used authority in the past.

The EA should consider other sources of information outside the referenced study in making their categorizations, such as lawsuits involving WOTUS. For example, Ohio, Tennessee, Florida, Indiana and Montana participated in lawsuits against the 2015 Rule. While the suits only involved Stage 1, it seems less than certain that they would continue to follow the WOTUS definitions in place in 2015, as implied by their category being a four.

While the categorization is necessarily subjective, the primary issue is whether the categorization affects the conclusion that the benefits of the Proposed Rule exceed the costs. As shown in Table 1 in the introduction, under all the Scenarios for Stage 1 and Stage 2, the benefits of the Rule exceed the costs and the BCR exceeds one.

To account for the uncertainty of whether the states reaction the Proposed Rule, the Monte Carlo model assigns a probability or likelihood that a state will continue its current regulatory framework and not be affected by the Proposed Rule. Therefore, a state rated in the EA as a 4 is assigned an 80 percent probability of maintaining the current rules. A rating of a 3 is assigned 60 percent probability and so forth.

[8] This paper was not available for review online.

4. MONTE CARLO

As described in this document and in the many comments on prior version of the WOTUS rule, there is substantial uncertainty about the benefits and costs of WOTUS regulations. The uncertainty affects every aspect of the major determinants of the benefits and costs for both Stage 1 and Stage 2: acres affected; mitigation costs; permitting costs; WTP; and the regulatory reaction of the states to the changes. It is challenging to evaluate the overall impact of the Proposed Rule when each uncertain facet of the calculations are evaluated one at time and when the Stages use different assumptions. To overcome this challenge we generated a Monte Carlo analysis that integrates all of the quantifiable sources of uncertainty into a single model. Table 6 shows the assumptions used to generate the ranges for each source of uncertainty.

The basic goal of a Monte Carlo analysis is to characterize, quantitatively, the uncertainty and variability in estimates of interest. A secondary goal is to identify key sources of variability and uncertainty and to quantify the relative contribution of these sources to the overall variance and range of model results. It is widely used by the EPA in Risk Assessments and in other forms of uncertainty analysis. (U.S. EPA. 1997).

This analysis uses a Monte Carlo model to test the overall robustness of the EA results and show whether positive net benefits from the Proposed Rule are likely. In a Monte Carlo model, a value is drawn from the possible range of values for each uncertain input and the net benefits, or benefit cost ratio (BCR), is calculated. This process is repeated 1,000 times, which yields 1,000 estimates of net benefits and BCR. These estimates are averaged to provide a most likely value and sorted from high to low, to show the distribution of net benefits.

Table 6: Sources of Uncertainty

Source of Uncertainty	Range in the EA	Range in the Monte Carlo Model (Same range for Stage 1 and Stage 2)
WTP per acre	Based solely on the benefits transfer model	EA range adjusted to incorporate NOAA panel recommended adjustment for study quality impacts and the proportion of the state population to include in the WTP calculations.
Permitting cost per acre	Stage 1- Range based on Corps 1999 and Sunding Study(2000) Stage 2 – Fixed cost based on Corps (2015)	Range based on fixed cost Corps (2015) and Sunding study. Individual: $34,100 to ($62,000 + $16,800/acre) General: $14,200 to ($23,900 + $13,200/acre)
Mitigation costs per acre	Stage 1- range based on EA 2015 Rule Stage 2 – range based on the EA Proposed Rule	Stage 2 range applied to Stage 1. ($89,950 – $177,120)
Acres – Stage 1	No range used	Lower bound is from EA. Upper bound is 2X lower bound. Mitigation ratio changed from 2:1 to 1.5, per Stage 2 analysis. (1,154 – 2,308)
Acres – Stage 2	No range used	Lower bound is from EA. Upper bound includes EA sensitivity analysis assumption of 1.5 mitigation ratio and that affected acres are 50% higher (974 – 2,191)

The results of the Monte Carlo analysis, with respect to the mean values are presented below.

Table 7: Benefit and Cost Estimates (mean values, $millions) – All States

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio
Stage 1	$541	$39	$502	13.9
Stage 2	$233	$177	$116	6.0

Table 8: Benefit and Cost Estimates (mean values, $millions) – Weighted Scenarios

	Annual Benefits (avoided costs)	Annual Costs – (foregone benefits)	Annual Net Benefits	Benefit Cost Ratio
Stage 1	$126	$14	$114	10.5
Stage 2	$71	$40	$35	5.9

In addition to mean values, the Monte Carlo model shows the distribution of key metrics. Figures 2 and 3 show the distribution of the Benefit Cost Ratio for all of the states and the weighted scenario analysis. The dark line shows the 50 percent probability line. The point where the 50 percent line and the BCR intersect is the point where there is a 50 percent chance that the BCR will be above or below the intersection point. The graph also shows the five percent value, which means there is only a 5 percent chance that the BCR will be 3.086 or less for Stage 2 and 7.558 or less for Stage 1. More importantly, there is a less than one percent chance that the BCR will be below 1.0. A BCR below 1.0 means that the benefits are less than the costs. Therefore, the results show that despite the uncertainty regarding the benefit and cost inputs, there is a low probability that the Proposed Rule results in benefits that are less than the costs.

Figure 2: Benefit Cost Ratio, All States

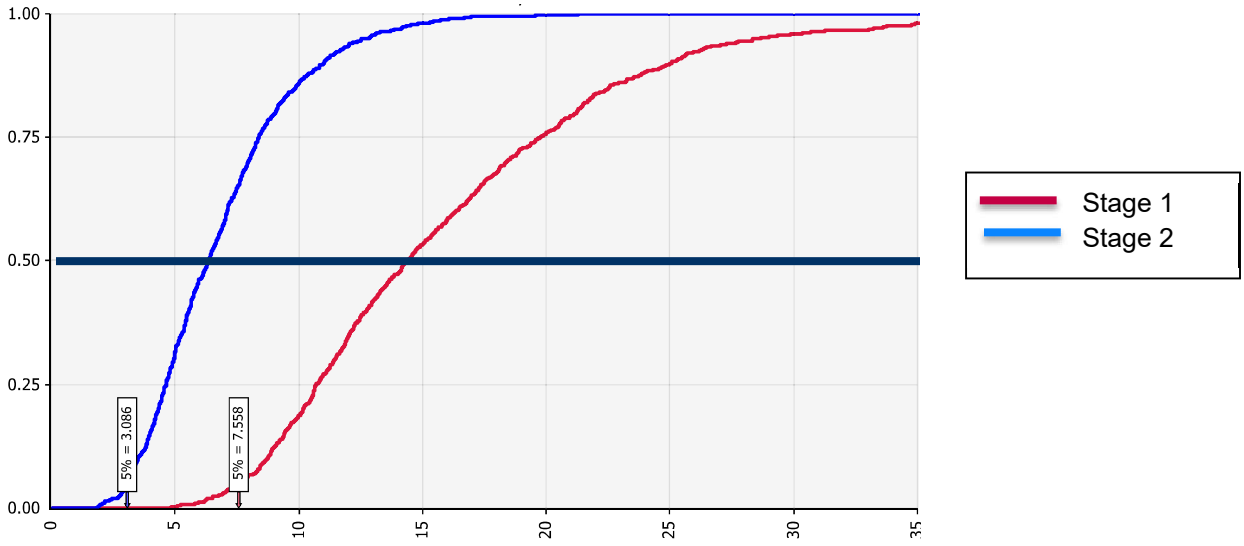
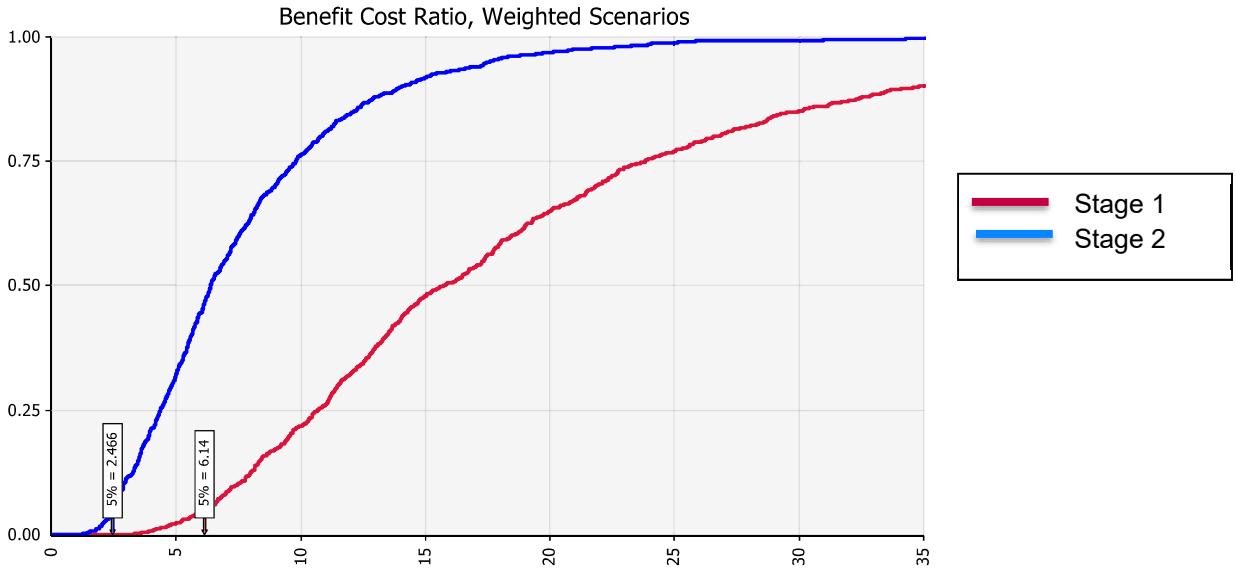


Figure 3 shows the same BCR information, after adjusting for the probability that states may change their regulation of wetlands in response the implementing the Proposed Rule. The Figure also shows that the probability of a low BCR is low, indicating the finding that the benefits of the Proposed Rule exceed the costs is robust.

Figure 3: Benefit Cost Ratio, Weight Scenarios



5. DOCUMENTS THE EPA SHOULD MAKE PUBLIC

The following documents are important components of the EPA analysis that are not included in the docket, but should be in order to validate their results.

Beran, Lawrence. 1995. Measuring the Economic Benefits of the Provision of Nonmarket Goods: Freshwater Wetlands in South Carolina. Dissertation, Clemson University

6. REFERENCES

Arcadis (2014) "An Assessment of EPA/USACE's Economic Analysis of the Proposed Definition of "Waters of the United States," and Cost Implications for the Oil and Gas Industry". Prepared for American Petroleum Institute

Sunding, D. (2014) "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States". Prepared For: The Waters Advocacy Coalition. The Brattle Group

U.S. EPA. 1997. Guiding Principles for Monte Carlo Analysis. Risk Assessment Forum, EPA/630/R-97/001. March. Available at: https://www.epa.gov/sites/production/files/2014-11/documents/montecar.pdf

McFadden, D., & Train, K. (Eds.). (2017). Contingent Valuation of Environmental Goods: A Comprehensive Critique. Edward Elgar Publishing.

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