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

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Dear Administrator McCarthy and Secretary McHugh,

On behalf of the National Association of Home Builders (NAHB) and its more than 140,000 members, I write to express our deep concerns regarding the U.S. Environmental Protection Agency's and the U.S. Army Corps of Engineers' (collectively, the Agencies) proposed rule, entitled "Definition of 'Waters of the United States' Under the Clean Water Act," that was published in the *Federal Register* on April 21, 2014. Despite the goal of creating certainty and consistency, the proposal does little to stop the moving target that comprises the Agencies' interpretation of "waters of the United States," and instead, exacerbates the challenges builders and developers face when making decisions to purchase land, design subdivisions, control stormwater and mitigate impacts of development. Due to the proposal's many infirmaries and untenable results, NAHB strongly urges the Agencies to withdraw the rule.

NAHB is a Washington, D.C.-based trade association representing builder and associate member firms organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Our members include those who design, construct, and supply single-family homes; build and manage multifamily, light commercial, and industrial structures; develop land; and remodel existing homes.

Creating lots and building homes involves substantial earth-moving activities. Because the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have historically asserted broad jurisdiction over "waters of the U.S.," NAHB members must often obtain Clean Water Act (CWA) permits to complete their development and home building projects. Due to the significant

project delays, permitting costs, mitigation and other requirements associated with obtaining and operating pursuant to CWA permits, most builders and developers regularly avoid wetlands and other jurisdictional features to minimize the associated challenges and uncertainties.

Unfortunately, defining which areas are subject to the CWA has never been easy or predictable. In fact, since the U.S. Supreme Court rulings in *SWANCC* (2001) and *Rapanos* (2006), perhaps the only thing all parties agree on is that the current regulatory definition of "waters of the U.S." is too vague. The result has been regulatory confusion, inconsistent application and questionable jurisdictional interpretation, particularly with respect to isolated wetlands, man-made conveyances, and ephemeral streams. In 2008, the Agencies attempted to address these problems by issuing interim guidance. However, its implementation proved burdensome and unpredictable, particularly when demonstrating a "significant nexus." At the same time, it created uncertainty for home builders and developers in assessing what landscape features may or may not be deemed jurisdictional. In an attempt to rectify these issues, NAHB asked the Agencies to complete a rulemaking that allows for consistent application of the statute, while simultaneously providing landowners the clarity they need for making reasonable purchase and land use decisions.

Unfortunately, the proposed rule misses the mark. For example, although the Agencies claim the rule would provide greater clarity regarding the scope of the CWA, it is littered with ambiguous terms (e.g., "shallow subsurface hydrologic connection," "gully," "rill," "upland," "waste treatment system," etc.), ill-defined limits (e.g., extent of the floodplain and riparian area), and fails to define the point at which any connection between a "water" and a traditional navigable water (TNW) becomes "significant." These undefined terms and vague concepts will only generate more, not fewer questions. As a result, the proposed rule creates clarity and certainty only by illegally asserting jurisdiction over every possible wet feature.

Similarly, the Agencies claim the rule does not expand the scope of federal jurisdiction, yet the overbroad definition of "tributary" includes ditches and man-made conveyances and the expanded concept of "adjacency" extends to all waters found within subjectively identified and potentially expansive "floodplains" and "riparian areas." What's more, even if a feature fails to meet the categorically jurisdictional "tributary" or "adjacent waters" definition, the Agencies could still assert jurisdiction over the most isolated wetland regardless of how remote or tenuously connected it is to a TNW based upon the ill-defined "other waters" provision. In the end, many landscape features that exhibit few attributes of "waters" will be brought into the federal regulatory net.

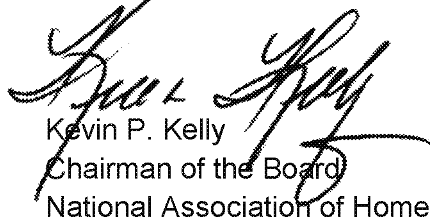
Equally problematic is the Agencies' claim that the rule does not impose significant economic impacts on small businesses. Home builders have long recognized the substantial costs incurred whenever the Agencies assert jurisdiction over their properties. In fact, EPA's own economic analysis finds that over $1.7 billion is spent each year by the private and public sectors to obtain federal wetlands permits. Over 90 percent of NAHB's land developer and builder members meet the federal definition of a "small entity" and many will be swept into the

federal realm a result of this rule. Given these facts and the notable increase in the number of areas and entities subject to the permitting and other requirements of the CWA, it is not clear how the Agencies can justify their claim that the proposal will not have a substantial economic impact. This conclusion is even more troublesome considering the U.S. Small Business Administration Office of Advocacy has called for the rule's withdrawal because of its significant and direct economic impacts on small businesses.

Instead of developing a rule that provides the certainty, predictability, and consistency that was promised and is sorely needed, the Agencies have drafted a proposal that is riddled with considerable constitutional, statutory, judicial, scientific, economic, practical and procedural deficiencies that are further explained in the attached comments. Further the proposed rule is inconsistent with Congressional intent, Supreme Court precedent, and common practice. Given the many deficiencies within the proposed rule, coupled with the fact that identifying the types of landforms that fall under the jurisdiction of the federal CWA imposes immediate, binding, and real legal obligations and liabilities on property owners; Congress not the Agencies is in the best position to address this issue. At a minimum, the Agencies should withdraw the proposed rule, engage in open dialog with the regulated communities, states and other affected entities, develop a revised proposal that corrects the many identified shortcomings, and initiate a replacement rulemaking process.

Thank you for your consideration of our comments. If you have any questions or would like to discuss any of the issues raised, please do not hesitate to contact Owen McDonough. Program Manager, NAHB at omcdonough@nahb.org or 202 266-8662.

Best regards,



Kevin P. Kelly
Chairman of the Board
National Association of Home Builders

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I. Introduction

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association representing over 140,000 builder and associate member firms organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Our members include those who design, construct, and supply single-family homes; build and manage multi-family, light commercial, and industrial structures; develop land; and remodel existing homes. Collectively, NAHB's members will construct about 80% of the new housing units projected for 2014.

NAHB and its members have been advocates of the Clean Water Act (CWA) since its inception. The CWA has helped the nation make significant strides in improving the quality of our water resources. Because the nature of the home building industry involves substantial earth-moving activities and because the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) have historically asserted such broad jurisdiction over "waters of the United States," NAHB members must often obtain CWA Section 402 permits to be allowed to discharge stormwater into a "water of the United States" and Section 404 permits in instances where activities result in placement of dredged or fill materials into "waters of the United States." Most builders and developers must also comply with a myriad of state and local requirements that are designed to protect natural resources and promote conservation. For example, there are an estimated 4,000 to 6,000 local governments that have adopted wetland protection regulations and ordinances.[1] Beyond these mandates, NAHB members regularly design their projects to avoid sensitive areas, showcase natural resources, and mitigate adverse impacts. As an organization, NAHB has tirelessly advocated for the CWA and an associated permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. NAHB has also strongly supported implementing measures that honor the Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts.

Despite this continuing work, the moving target that comprises the Agencies' interpretation of the meaning of "waters of the United States," its inconsistent application, and the reliance on staff judgment to determine which waters fall under federal authority regularly causes confusion and concern. Unfortunately, today's proposal does little to alleviate these problems and only exacerbates the uncertainty developers and home builders face when making decisions to purchase land, design subdivisions, control stormwater, or reduce impacts.

These challenges are further amplified by the fact that the housing industry is only beginning to recover from the greatest housing downturn in recent memory. The ability to obtain project financing, the availability of lots, and the ability to produce affordable housing – primary components needed for NAHB's members to fulfill their missions – have been severely impacted. Likewise, because residential construction already is one of the most heavily regulated industries in the country, we remain concerned about any government action, like today's proposed rule, that will impose broad obligations and substantially impact regulated

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

entities and the public. As the Agencies' jurisdiction expands, so does the time and costs of compliance. This not only impacts a business's ability to thrive and grow, it can also negatively affect housing affordability and stifle economic development. As our nation slowly recovers following the Great Recession, regulatory burdens placed on home builders should be reduced, not increased.

It should be noted that residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners. The breadth of these regulations is largely invisible to the home buyer, the public, and even the regulators themselves, yet nevertheless has a profound impact on housing affordability and homeownership. While each of these regulations on its own may not be significantly onerous or problematic, builders and developers are often subject to a layering effect, where numerous regulations are stacked on top of one another. When ten or more seemingly insignificant regulations are imposed concurrently, the cost implications, complexities, and delays can be considerable. Likewise, the overabundance of these regulatory policies tends to distort and cause inefficiencies in the market due to decreased competition. When there are fewer builders, land, design, and construction costs increase, housing prices expand, and profit margins are skewed.

The nation's home builders recognize the need for certain rules and regulation, but when the government goes too far, as it is proposing to do here, the implications can be widespread and untenable. For years, landowners and regulators alike have been frustrated with the continued uncertainty regarding the scope of federal jurisdiction over "waters of the United States" under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered. Such proposed changes are not consistent with the original legislative intent of the CWA when developed in 1972. They would also represent a marked departure from Supreme Court decisions and raise significant constitutional questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

For these reasons, and the numerous additional shortcomings highlighted in these comments, it is clear that the scope of the CWA should be determined by Congress. If that cannot be done, the Agencies should withdraw the rule and repropose it only after its many constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified.

II. Background

The CWA gives EPA and the Corps authority over "navigable waters" which Congress defined in 1972 as "waters of the United States, including the territorial seas."[2] For over ten years, however, due to two U.S. Supreme Court decisions, identifying which waters may be protected under the Act has not been easy or predictable. In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*),[3] the Court addressed CWA jurisdiction over isolated non-navigable intrastate ponds and concluded that jurisdiction could not be based solely on the use of such ponds by migratory birds. In 2006, in *Rapanos v. United States* & *Carabell v. United States Army Corps of Engineers* (collectively, *Rapanos*), the Court addressed CWA protections for wetlands adjacent to non-navigable tributaries and issued five opinions with no single opinion commanding a majority.[4] The plurality opinion, authored by Justice Scalia, stated that "waters of the United States" extended beyond traditional navigable waters to include "relatively permanent, standing or flowing bodies of water."[5] The plurality went on to clarify that relatively permanent waters do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought, and seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. The plurality opinion also asserted that only wetlands with a continuous surface connection to other jurisdictional waters are considered "adjacent" and protected by the CWA.[6]

Justice Kennedy's concurring opinion took a different approach from that of the plurality. Justice Kennedy concluded that "waters of the United States" included wetlands that had a significant nexus to traditional navigable waters, "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[7] Finally, the four justices who signed onto Justice Stevens' dissenting opinion would have upheld jurisdiction under the Agencies' existing regulations and stated that they would uphold jurisdiction under either the plurality or Justice Kennedy's opinion.

In an attempt to clarify and implement the *Rapanos* decision in the field, the Corps and EPA issued two memoranda in June 2007[8] and a guidance document in 2008[9] (hereinafter, 2008 *Rapanos* Guidance) to address which waters are subject to CWA Section 404 jurisdiction. Specifically, the guidance identified those waters over which the Agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* opinions. In short, the 2008 *Rapanos* Guidance stated that the Agencies will:

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[2] 33 U.S.C § 1362(7).
[3] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).
[4] *Rapanos v. United States*, 547 U.S. 715 (2006).
[5] *Id.* at 715.
[6] *Id.*
[7] *Id.* at 780.
[8] Memorandum for Director of Civil Works and US EPA Regional Administrators, Subject: U.S. EPA and Corps Coordination on Jurisdictional Determinations (JDs) under Clean Water Act Section 404 in Light of *SWANCC* and *Rapanos* Supreme Court Decisions (June 5, 2007); Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (June 5, 2007).
[9] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United State* (Dec. 8, 2008) (hereinafter, 2008 *Rapanos* Guidance).

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- Assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (i.e., typically three months), and wetlands that directly abut such tributaries;

- Decide jurisdiction over non-navigable tributaries that are not relatively permanent, wetlands adjacent to non-navigable tributaries that are not relatively permanent, and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water;

- Generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow), or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water; and

- Apply Justice Kennedy's significant nexus standard as follows: "A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters."[10]

Implementation of the 2008 *Rapanos* Guidance has been a challenge for both property owners and Corps staff, as the documentation is lengthy and cumbersome, there is little consistency across districts, subjective decision-making still occurs, and there is no assurance that by following their guidance, the Agencies are staying within the bounds of the authority conferred by the CWA.

Even Congress has joined in on the debate over the scope of CWA jurisdiction. For over a decade, legislation has been introduced in the House and Senate that would fundamentally alter and greatly expand the scope of the CWA by deleting the term "navigable." The first such version of a bill was introduced in 2002, and various iterations have been reintroduced in the 108th - 113th Congresses. None of these jurisdictional bills have come to a vote due to the fact that changing the CWA's scope has always been highly controversial. Despite Congress's reluctance to do so, the Agencies have sought to expand the scope of their authority to effectively take control over evermore waters regardless of their ecological value or significance of their connection to a navigable water. Although the language of the CWA has remained unchanged for decades, the Agencies continue to broaden their reach.

In an attempt to clarify the definition of "waters of the United States" and, in turn, identify what waters are and are not jurisdictional under the CWA, EPA and the Corps issued a proposed rule

[10] 2008 *Rapanos* Guidance at 1.

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entitled "Definition of 'Waters of the United States' Under the Clean Water Act" on April 21, 2014.[11]

Since its publication, the proposed rule has created a firestorm of opposition and concern from all sides, including states, local governments, farmers, industry, water quality administrators, and home builders, among others:

- Governors and attorneys general representing 14 states have requested that the proposed rule be withdrawn as it "impermissibly seeks to broaden federal authority."[12] Additionally, 12 governors have cited serious concerns with the proposal, including adverse impacts on state economies, lack of clarity, and federal encroachment on state authority over land and water resources.[13]

- The United States Conference of Mayors is concerned that the expanded "waters of the United States" definition will increase the costs local governments must bear to maintain and improve water quality and represents an unfunded mandate on the public and private sectors.[14]

- Western states have voiced concerns that individual states did not have the opportunity to provide substantive feedback until after the Agencies developed the proposed rule and published it for public comment in the Federal Register.[15]

- The National Association of Counties (NACo) fears the proposed rule will place millions of miles of county-owned ditches under federal oversight and require costly CWA Section 404 permits for regular ditch maintenance, including cleaning, mowing, and application of pesticides.[16]

- The American Farm Bureau Federation has strongly voiced farmers' concerns with the proposal, particularly with regard to the treatment of ditches as waters of the United

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[11] 79 Federal Register at 22,187 (April 21, 2014).

[12] Letter from West Virginia Attorney General Patrick Morrisey *et al.* to the Hon. Gina McCarthy and the Hon. John M. McHugh re: Comments Of The Attorneys General Of West Virginia, Nebraska, Oklahoma, Alabama, Alaska, Georgia, Kansas, Louisiana, North Dakota, South Carolina, And South Dakota And The Governors Of Iowa, Kansas, Mississippi, Nebraska, North Carolina, And South Carolina On The Proposed Definition Of "Waters of the United States" (Docket No. EPA-HQ-OW-2011-0880) (Oct. 8, 2014), *available at* http://media.nola.com/environment/other/Caldwell%20State%20Officials%20Comment%20Letter%2010-8-14.pdf

[13] *See* Republican Governors Association press release: Republican Governors Speak Out Against Expanded Federal Regulation of Waters and Wetlands (Oct. 23, 2014), *available at* http://www.rga.org/homepage/republican-governors-speak-out-against-expanded-federal-regulation-of-waters-and-wetlands/

[14] U.S. Conference of Mayors Resolution to Ensure that Municipal Concerns are Addressed in Clean Water Act Regulations, Including the Definition of "Waters of the U.S." (adopted June 2014), *available at* http://www.usmayors.org/resolutions/82nd_Conference/env12.asp

[15] Letter from Western Governors' Association Chairman Gov. John Hickenlooper and Vice Chairman Gov. Brian Sandoval to the Hon. Gina McCarthy and the Hon. Jo-Ellen Darcy (March 25, 2014) *Available online:* http://westgov.org/component/docman/doc_download/1794-clean-water-act-rulemaking?Itemid=53

[16] National Association of Counties Policy Brief. County Action Needed: New "Waters of the United States" Definition Released (Oct. 2014) , *available at* http://www.naco.org/legislation/Documents/Waters-of-the-US-County-Analysis.pdf

States in a campaigned entitled "Ditch the Rule."[17]

- The Waters Advocacy Coalition (WAC), representing a large cross-section of the Nation's construction, real estate, mining, agriculture, energy, and public health and safety sectors, has raised industry concerns about the proposals' numerous infirmities and the detrimental impacts the expanded regulation will have on the U.S. economy.[18]

- The Association of Clean Water Administrators (ACWA), which has representatives from all fifty states, raised concerns that the Agencies did not adequately consult with the states early on in the rulemaking process.[19]

- Kevin Kelly and Tom Woods, on behalf of the National Association of Home Builders, testified before Congress regarding the detrimental impacts the proposed rule will have on the home building industry and housing affordability.[20]

Congress has also voiced its displeasure with the Agencies' work. On September 9, 2014, the U.S. House of Representatives' passed the *Waters of the United States Regulatory Overreach Protection Act* (H.R. 5078). In an effort to curb the Agencies' attempt to take control over nearly every wet spot across the nation, H.R. 5078 prohibits the Corps and EPA from "developing, finalizing, adopting, implementing, applying, administering, or enforcing the proposed rule entitled, 'Definition of 'Waters of the United States' Under the Clean Water Act,' issued on April 21, 2014."[21] The bill also calls on the Agencies to consult with the states and other stakeholders to develop recommendations for a regulatory proposal that would identify the scope of waters covered under the CWA and the scope of waters not covered, and to share those recommendations in a report to Congress. While this bill is not expected to be addressed by the Senate, it sends a strong message that the Agencies are overstepping their bounds and need to go back to the drawing board to craft a balanced rule that respects both congressional intent and Supreme Court precedent. What's more, a group of 24 U.S. Senators have urged the Agencies to withdraw the proposal, suggesting the Agencies, in unlawful attempts to gain support for the

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[17] *See* http://ditchtherule.fb.org/

[18] Letter from Diedre Duncan *et al.* (Waters Advocacy Coalition counsel) to EPA Docket ID EPA-HQ-OW-2011-0880, Comments of the Waters Advocacy Coalition on the Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act (Nov. 13, 2014).

[19] Letter from Michael Fulton (ACWA President) to Mr. Ken Kopocis and Ms. Jo Ellen Darcy, Re: *Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880* (Nov. 12, 2014).

[20] Testimony of Kevin Kelly, Chairman of the Board, National Association of Home Builders, Before the U.S. House of Representatives Subcommittee on Water Resources and Environment Hearing on "Potential Impacts of the Proposed Changes to the Clean Water Act Jurisdiction Rule (June 11, 2014), *available at* http://transportation.house.gov/uploadedfiles/2014-06-11-kelly.pdf; Testimony of Tom Woods, First Vice Chairman of the Board, National Association of Home Builders, Before the United States House of Representatives Small Business Committee Hearing on "Will EPA's 'Waters of the United States' Rule Drown Small Businesses?" (May 29, 2014) , *available at* http://smallbusiness.house.gov/uploadedfiles/5-29-2014_tom_woods_written_testimony.pdf

[21] H.R. 5078, 113th Congress. (2014).

measure, have "manipulated this rulemaking in ways that appear to be designed to prejudge the outcome."[22]

III. Importance of the Scope of Jurisdiction under the Clean Water Act

The definition of what constitutes "waters of the United States" is not mere words on a page. Once an area has been deemed as such, there are regulatory responsibilities, land use implications, and legal liabilities and consequences that apply. As such, developing a new definition that fits within the legal and statutory parameters set by the CWA cannot be done without significant consultation, analysis, and consideration. Indeed, the very fact that the definition of "waters of the United States" has stood the test of time for 42 years since the CWA's passage should, in and of itself, underscore the magnitude and import of today's undertaking. Clearly, any change to this definition must not be taken lightly as even minor changes will have significant ramifications not only within the Act itself, but under other environmental laws as well.

According to the Agencies, the proposed rule revises the existing administrative definition of "waters of the United States" consistent with legal rulings and science concerning the interconnectedness of tributaries, wetlands, and other waters to downstream waters and effects of these connections on the chemical, physical, and biological integrity of downstream waters. But unlike other efforts to define the breadth of federal authority, which were limited to those waters regulated under Section 404 of the Act, today's proposal applies to all CWA programs and to waters not even considered by the Supreme Court in *SWANCC* and *Rapanos*, including all "tributaries" and all "adjacent" waters (not limited to wetlands).

Because the term "navigable waters," defined as "waters of the United States, including the territorial seas,"[23] applies to all sections of the CWA, any change to the definition of "waters of the United States" will result in significant trickle down effects on a number of substantial CWA programs, including:

- **Section 303(a)** – requires states to establish Water Quality Standards (WQS; fishable, swimmable) for all waters of the United States

- **Section 303(d)** – requires states to establish total maximum daily loads (TMDLs) for all waters of the United States that are impaired (i.e., failing to achieve established WQSs)

- **Section 311** – prohibits the discharge of oil or hazardous substances into all waters of the United States and requires facilities that handle oil or hazardous substances to develop spill prevention and response programs

[22] Letter from U.S. Senator John Barrasso et al. to the Hon. Gina McCarthy and the Hon. John McHugh, Re: Proposed Rule to Define "Waters of the United States" (Oct. 23, 2014) at 1, *available at* http://www.barrasso.senate.gov/public/_files/WOTUS_Letter10_23_14.pdf
[23] 33 U.S.C § 1362(7).

- **Section 401** – requires states to establish a water quality certification process

- **Section 402** – establishes the National Pollutant Discharge Elimination System (NPDES), which regulates the point source discharge of pollutants into all waters of the United States

- **Section 404** – establishes the "dredged or fill" permit program, which regulates the discharge of dredged or fill material into all waters of the United States.

For each of these programs, EPA has developed subsequent regulations that direct one or more entities to take one or more actions purportedly aimed at restoring or maintaining the chemical, physical, and biological integrity of the Nation's waters. For example, under Section 303 and its subsequent regulations found at 40 CFR 130.4 and 40 CFR 130.7, the CWA directs the states to monitor the quality of all of the "waters of the United States" within their borders and establish total maximum daily loads (TMDLs) for any waters that are not meeting their water quality standards. For home builders, receiving a jurisdictional determination that one's property contains "waters of the United States" has an immediate binding and constraining effect on their land-use activities, could adversely impact land values, and may require obtaining and operating pursuant to a Section 404 wetlands permit. In both of these cases, in addition to new administrative requirements, as more areas are deemed jurisdictional, responsible parties are also immediately subject to the liabilities, red tape, costs, and penalties associated with the Act.

IV. Today's Proposal

On April 21, 2014, a proposed rule to amend the 1986 regulations by redefining the "waters of the United States" was published in the *Federal Register* for public comment.[24] The Agencies claim that the proposal will enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The proposal maintains, for the most part, the current terms to define "waters of the United States," but includes new definitions that expand the scope of the existing regulations and a significant nexus analysis that can be used to deem virtually any wet spot jurisdictional.

Pursuant to the proposed rule to define "waters of the United States" under the CWA, the Agencies will assert jurisdiction over:[25]

(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;

[24] 79 Fed. Reg. at 22,187.
[25] *Id.* at 22,262 – 22,263.

(3) The territorial seas;

(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;

(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and

(7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section.

The Agencies will not assert jurisdiction over the following waters notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) above:[26]

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

(5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

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[26] *Id.* at 22,263.

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

The Agencies propose a modified regulatory definition for the term "adjacent." The existing 1986 regulatory definition only applies to wetlands, whereas the proposed rule's definition applies to all waters, including wetlands:

Existing 1986 regulatory definition:

> The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."[27]

Proposed regulatory definition:

> The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters." [28]

The Agencies also propose new regulatory definitions for the following terms:[29]

> *Neighboring.* The term *neighboring*, for purposes of the term "adjacent" in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.
>
> *Riparian area.* The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

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[27] 33 C.F.R. § 328.3(c).
[28] 79 Fed. Reg. at 22,263 (original emphasis).
[29] *Id.*

Floodplain. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

Tributary. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.

Significant nexus. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a "water of the United States" so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section.

The Agencies claim that the extent of waters over which they assert jurisdiction under the CWA will not increase under this proposed rule when compared to the extent of waters over which jurisdiction has been asserted under existing guidance. Yet, by categorically asserting jurisdiction over all broadly defined "tributaries," all broadly defined "adjacent waters," and on a case-by-case basis, "other waters" – alone or in combination – the Agencies have proposed to expand their reach well beyond what was intended by Congress, what can be supported by science, and critical case law holdings.

Because there is only one definition of "waters of the United States" within the CWA, the proposed rule will apply to all decisions concerning whether a water is subject to any of the CWA programs. Although *SWANCC* and *Rapanos* specifically involved only Section 404 and the discharge of dredged or fill material, the term "waters of the United States" must be interpreted consistently for all CWA provisions that use the term. Indeed, the term "navigable waters" is used throughout the CWA and its regulations 135 times. The term "waters of the

United States" is used 98 times. Changing the definition of "waters of the United States" will have broad and dramatic implications for the Agencies, states, and the regulated community, including the home building industry.

EPA and the Corps are now seeking public comment on the proposed rule defining "waters of the United States" and identifying those waters protected by the CWA. The Agencies intend for the final rule to supersede the "Joint Memorandum" providing clarifying guidance on *SWANCC*, dated January 15, 2003, and "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell* v. *United States*," dated December 2, 2008.[30] Until a final rule is issued, both the 2003 and 2008 CWA jurisdiction guidance remain in effect.

V. Overview of Comments and Recommendations

As detailed in today's comments, NAHB highlights the proposed rule's numerous constitutional, statutory, judicial, scientific, economic, practical, and procedural shortcomings. In light of these many flaws, the Agencies must withdraw the rule and repropose it only after addressing its deficiencies.

In particular, NAHB provides the following specific comments:

- **The Proposed Rule Ignores the Intent of Congress.** The Clean Water Act was enacted as a means for Congress to exercise its traditional commerce power over navigation. The proposal's attempt to expand the CWA's reach to isolated, non-navigable waters, among others, is a far cry from the navigable waters that Congress intended the statute to cover.

- **The Proposed Rule Fails to Adhere to Supreme Court Holdings.** In both *SWANCC* and *Rapanos* the Supreme Court made it clear that there are limits to federal authority under the CWA. By proposing to expand coverage to include areas that are rarely wet or exhibit characteristics of regular flooding or flow, the Agencies are plainly ignoring these limits and Supreme Court precedent.

- **The Proposed Rule Impermissibly and Unnecessarily Expands Federal Jurisdiction.** Despite the Agencies' claims that this rule is narrower in scope than existing regulations, the proposed rule contains changes that will expand federal jurisdiction, triggering substantial and additional expensive and time-consuming permitting and regulatory requirements while delivering minimal environmental benefit.

- **The Proposed Rule Lacks Sufficient Detail or Definition to Allow for Consistent or Repeatable Results.** Despite a heavy reliance on the purported "significant nexus" between traditional navigable waters and most other wet areas (e.g., all "tributaries," all "adjacent waters," and many "other waters"), the proposal fails to distinguish between significant and insignificant connections. Likewise, the rule includes references to vaguely defined "floodplains" and "riparian areas," giving the Agencies full and

[30] 68 Fed. Reg. at 1,991, 1,995 (Jan. 15, 2003); 2008 *Rapanos* Guidance.

unfettered discretion to impose unnecessary federal oversight over many lands and projects.

- **The Proposed Rule Limits the Applicability of Proposed Exemptions.** Although certain ditches are deemed non-jurisdictional under the proposed rule, the expansive definition of "tributary" will ensure that more ditches will be subject to regulation than will be exempt. Likewise, the exclusion for waste treatment systems and non-wetland swales is not clear in that it fails to encompass the full array of green infrastructure devices (e.g., rain gardens), stormwater treatment systems (e.g., MS4s) and other features installed on private property that gain little benefit from federal oversight.

- **The Proposed Rule Continues to Blur the Line Between State- and Federally-Controlled Waters.** It is clear that Congress intended to create a partnership between the federal agencies and state governments to jointly protect the nation's water resources. Under this notion, there must be a point where federal authority ends and state authority begins. The Agencies, however, have fashioned a rule so expansive that it all but abandons this precept in favor of a federal government over all approach.

- **The Proposed Rule Fails to Recognize the True Economic Impacts.** Among numerous other procedural flaws, the proposal fails to sufficiently recognize and quantify the costs associated with the expanded definition of "waters of the United States." Indeed, many of these costs, including those associated with increased permitting, mitigation, and regulatory uncertainty, will be borne by home builders and other small businesses. Using inadequate data and improper baselines to assess the costs of the rule, however, the Agencies have wrongfully certified the rule will not impose a significant economic burden on small businesses.

- **The Proposed Rule Asserts Jurisdiction Based on Inadequate Science.** The Agencies purport that the rule is supported by a scientific literature review discussing the connectivity and effects of streams and wetlands on downstream waters. However, this so-called Connectivity Report falls short of providing the kind of scientific analysis necessary to establish a solid foundation for a proposed rule on CWA jurisdiction. Indeed, the Report merely documents the *presence* of connections between waterbodies, yet fails to provide the basis needed to determine when such connections may or may not significantly affect downstream waters.

- **The Proposed Rule Creates and Exacerbates Regulatory Confusion.** The proposal's ambiguous terms, ill-defined limits, and assertion of federal jurisdiction over waters that exhibit little or no connection to traditional navigable waters will only create more, not fewer questions. The Agencies' claim that the proposed rule creates clarity and certainty is a fallacy because it only does so by illegally asserting jurisdiction over every possible wet feature.

Many of these concerns are not new. NAHB has previously submitted comments on the Agencies' 2011 Draft Guidance on Identifying Waters Protected by the Clean Water Act, 2008 Guidance Regarding Clean Water Act Jurisdiction After *Rapanos*, and the 2003 Advanced

Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," raising many of these same issues.[31] We look forward to the Agencies' careful consideration of our comments below.

VI. Specific Comments

In this section, we highlight NAHB's specific concerns with the proposed rule. We begin by describing the constitutional, statutory, and judicial shortcomings of the proposed rule. Next, we voice concerns regarding the manner in which the Agencies have unlawfully changed the process by which Clean Water Act jurisdiction is determined and highlight the various ways in which the proposed rule wrongly interprets and applies Justice Kennedy's "significant nexus" standard. This section then focuses on the specific concerns we have with the assertion of categorical jurisdiction over (a)(1) through (6) waters and, on a case-by-case basis, "other waters." Finally, we describe our concerns with the limited exclusions outlined in the proposed rule.

a. The Proposed Rule Fails to Adhere to Constitutional, Statutory, and Judicial Limits.

The proposed rule suffers from numerous legal shortcomings that must be addressed by the Agencies. The following section outlines NAHB's primary legal concerns and addresses the proposed rule's failure to comply with applicable constitutional, statutory, and judicial constraints.

i. The Proposed Rule Allows for Jurisdiction That Exceeds Congress's Authority under the Commerce Clause.

The Supreme Court has divided Congress's commerce power into three broad categories: the power to regulate the "channels of interstate commerce," to regulate the "instrumentalities of commerce," and to regulate those activities that "substantially affect interstate commerce."[32] The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce.[33] In *SWANCC*, the Supreme Court recognized this by explaining that Congress enacted the CWA pursuant to its traditional "commerce power over navigation."[34] Thus, the *SWANCC* decision squarely forecloses the argument that the CWA authorizes regulation of certain marginal waters or wetlands based on the "substantial effects" that activities in those areas may have on interstate commerce.[35] Rather, the *SWANCC* Court held that

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[31] *See* National Association of Home Builders, "Comments and Recommendations on the Draft Guidance on Identifying Waters Protected by the Clean Water Act," EPA-HQ-OW-2011-0409 (Aug. 1, 2011); *see also* National Association of Home Builders, "Comments on the U.S. EPA and U.S. Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*," EPA-HQ-OW-2007-0282 (Jan. 18, 2008); *see also* National Association of Home Builders, "Comments on Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States'," EPA-HQ-OW-2002-0050 (April 15, 2003).
[32] *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).
[33] *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2001) (including "navigable rivers, lakes, and canals" among the channels of commerce).
[34] *SWANCC*, 531 U.S. at 168 n.3.
[35] *Id.* at 173.

employing a substantial effects test to reach waters lying beyond navigable waters is entirely inconsistent with Congress's intent to exercise its traditional commerce power over navigation.

The word "navigable," the *SWANCC* Court found "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."[36] The *SWANCC* Court held that the Corps's application of its regulations raised "significant constitutional questions" and that extending CWA jurisdiction to isolated, non-navigable waters like those at issue in *SWANCC* "is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[37] Similarly, the Supreme Court in *Rapanos* found that the Agencies' assertion of jurisdiction over wetlands that were *not* adjacent to traditional navigable waters under the "any connection" theory "stretch[ed] the outer limits of Congress's commerce power.[38] Even EPA and the Corps acknowledge in the preamble to the proposed rule that "constitutional concerns . . . led the Supreme Court to decline to defer to agency regulations in *SWANCC* and *Rapanos*."[39]

Thus, under *SWANCC* and *Rapanos*, the Agencies' jurisdictional reach is bounded by Congress's "channels" authority. This does not mean that the federal government can only regulate waterbodies that are actually navigable. However, to regulate a waterbody that is not navigable (and therefore not a channel of commerce) the waterbody must impact a navigable water (one which is a channel of commerce). Furthermore, as the Fourth Circuit Court of Appeals explained in *Wilson*, it is not enough that a waterbody "could" affect a navigable water – the effect must be an *actual* effect.[40]

The proposed rule, however, extends jurisdiction so far that it clearly exceeds Congress's power to regulate "channels of interstate commerce." With the proposed rule, the Agencies are attempting to assert authority even broader than the authority they claimed under the sweeping jurisdictional theories that were struck down in *SWANCC* and *Rapanos*. The proposed rule provides for jurisdiction over non-navigable features that lack any meaningful connection to navigable waters, such as isolated wetlands, ephemeral drainages, and isolated ponds. Like the features at issue in *SWANCC* and *Rapanos*, these features are a far cry from the "navigable waters" over which Congress sought to exercise its commerce power. Although federal CWA jurisdiction cannot be justified by simply showing that an activity "affects interstate commerce," the proposed rule does not even stay within the constitutional bounds of the substantial effects test, the most far-reaching basis of congressional authority under the Commerce Clause.[41] Instead, the proposed rule allows for jurisdiction based on connections that are far too weak to constitute links that "substantially affect interstate commerce" under *Lopez*. The proposed rule wholly ignores the limits recognized by the Supreme Court and, once again, the Agencies' expansive jurisdictional interpretations run afoul of the limits of Congress's commerce power over navigation.

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[36] *Id.* at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)).
[37] *Id.* at 174.
[38] *Rapanos*, 547 U.S. at 738.
[39] 79 Fed. Reg. at 22,259.
[40] *United States v. Wilson*, 133 F.2d 251, 256-57 (4th Cir. 1997).
[41] *See Lopez*, 514 U.S. at 558-59.

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What's more, a critical component of the proposed regulation is its reliance on a literature review of wetland and stream science and a Scientific Advisory Board (SAB) panel convened by the EPA. EPA's Office of Research and Development prepared a draft synthesis of more than 1,000 published peer-reviewed studies discussing the nature of connectivity and effects of streams and wetlands on downstream waters, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereinafter, draft Connectivity Report).[42] In the preamble, the Agencies assert the proposed rule is supported by the draft Connectivity Report, and Appendix A of the preamble "summarizes currently available scientific literature and the [Draft Connectivity] Report that are part of the administrative record for this proposal and explains how this scientific information supports the proposed rule."[43] The U.S. Constitution, however, only grants Congress the power to regulate waters on the basis of interstate commerce under the Commerce Clause of Article I, Section 8. Even if the Agencies piled 10,000 more scientific studies onto the existing Connectivity Report, science simply cannot be used to determine federal jurisdiction over "waters of the United States." Indeed, in *Rapanos*, the plurality stated, "The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'"[44] Similarly, Justice Breyer specifically warned against using science to interpret the scope of the CWA: "In the absence of updated regulations, courts will have to make ad hoc determination that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended."[45] Regardless of what the science says, the Agencies must tie their authority under the CWA to the Commerce Clause. They have not done so here.

ii. The Proposed Rule will Result in Significant Impingement of the States' Traditional and Primary Power over Land and Water Use.

In addition to exceeding the limits of Congress's authority under the Commerce Clause, the proposed rule runs afoul of the U.S. Constitution by encroaching on the traditional power of the states to regulate land and water. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the *SWANCC* Court reminded, "we expect a *clear* indication that Congress intended that result."[46] This is especially true "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[47]

Under the CWA, EPA and the Corps, along with the states, serve as co-regulators of the nation's waters. The regulation of land and water use within a state's borders is a "quintessential" state and local function.[48] The CWA contains no such clear statement that Congress intended to alter that scheme. To the contrary, Congress chose to expressly "recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land

[42] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Sept. 2013) (hereinafter, Draft Connectivity Report).
[43] 79 Fed. Reg. at 22,190.
[44] *Rapanos*, 547 U.S. at 749.
[45] *Id.* at 812.
[46] *SWANCC*, 531 U.S. at 172 (emphasis added).
[47] *Id.* at 173.
[48] *Rapanos*, 547 U.S. at 738.

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and water resources."[49] There was "nothing approaching a clear statement from Congress" that it intended CWA jurisdiction to extend to features like the abandoned sand and gravel pit at issue in *SWANCC*.[50] Accordingly, the *SWANCC* Court found that allowing the Agencies to assert jurisdiction over isolated ponds and mudflats based on their migratory bird theory "would result in a significant impingement of the States' traditional and primary power over land and water use."[51] The *Rapanos* plurality similarly found that the Agencies' "any connection" theory of jurisdiction would bring "virtually all planning and development and use of land and water resources by the States under federal control," and, therefore could not be a lawful interpretation of "waters of the United States."[52]

Like the "waters" at issue in *SWANCC* and *Rapanos*, the proposed rule's sweeping assertion of jurisdiction over features with little or no relationship to navigable waters (e.g., ephemeral streams that only exhibit flow when it rains, non-navigable ditches, and isolated waters) raises serious federalism concerns (*see* Section X. d.). As was the case with *SWANCC* and *Rapanos*, the proposed rule would authorize the federal government to take control of land use and planning by extending jurisdiction to essentially any wet area. Many types of waters and features that were not previously regulated as "waters of the state" or that states purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral flow, arroyos, and industrial ponds) would now be subject to federal regulation as "waters of the United States" under the proposed rule.

One reason the Agencies claim they need to broaden the definition of "waters of the United States" is that the states cannot be relied upon to fill the gap in CWA coverage that would result from faithful interpretation of *SWANCC* and *Rapanos*.[53] In an attempt to support this assertion, they cite a study published by the Environmental Law Institute (ELI) in May 2013, which concludes that "[s]tate laws imposing limitations on the authority of state agencies to protect aquatic resources are commonplace . . . [and] the prevalence of these state constraints across the country, together with the reality that only half of all states already protect waters more broadly than is required by federal law, suggest that states are not currently 'filling the gap' left by US Supreme Court rulings . . ., and face significant obstacles in doing so."[54]

Based on the ELI Study, EPA expresses concern that "36 states have legal limitations on their ability to fully protect waters that are not covered by the Clean Water Act."[55] Unfortunately, there are several problems with ELI's study and EPA's conclusion. First, the results of the study do not support ELI's conclusions. To the contrary, they indicate that whether "constraint" exists

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[49] 33 U.S.C. § 1251(b).
[50] *SWANCC*, 531 U.S. at 174.
[51] *Id.*
[52] *Rapanos*, 547 U.S. at 737.
[53] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (last visited: Oct. 9, 2014).
[54] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, at 2 (May 2013), *available at* http://www.eli.org/research-report/state-constraints-state-imposed-limitations-authority-agencies-regulate-waters (hereinafter, ELI Study).
[55] EPA, Waters of the United States Proposed Rule Website, http://www2.epa.gov/uswaters (last visited: Oct. 9, 2014).

under state law has little bearing on whether the state regulates waters that are not regulated by the CWA.[56] Indeed, roughly half of the states in each category (constraint or no constraint) regulate non-CWA waters.

Second, most of the laws characterized as "constraints" in the ELI Study do not prohibit or limit regulation. The "qualified" stringency provisions claimed to limit water quality laws in 23 states – which ELI admits "stop[] short of creating a bar to state agency action,"[57] are nothing more than procedural requirements common to administrative practice, such as notice-and-comment rulemaking requirements.[58] And many of the other cited provisions are very narrow, focusing on state-specific concerns. They are not across-the-board prohibitions against regulating more broadly than the CWA. For example, Oregon focuses on effluent limitations for nonpoint source pollutants from forest operations, Virginia addresses treatment levels for sewage treatment works, Colorado addresses agricultural irrigation flows, and Minnesota has provisions that would come into effect should Minnesota assume Section 404 permitting authority.[59]

Third, some of the restrictions cited by ELI do not actually restrict state regulation under state law, but merely limit what the state can do when it is exercising delegated federal authority under the CWA.[60] It is hardly surprising that when a state elects to take over the NPDES program, it would also decide that its delegated program should not outrun the CWA unless certain conditions are met.

Fourth, ELI's "property-based" limitations[61] do nothing to limit the ability of state agencies to act[62] – they simply "create additional processes for an agency to follow when a proposed

[56] ELI's data indicate a near-even split among states that regulate non-CWA waters and those that do not, regardless of whether a "constraint" exists under state law. Of the 36 jurisdictions ELI characterizes as having constraints, 17 (47%) regulate non-CWA waters and 19 (53%) do not. And of the 15 states without constraints, 8 (53%) regulate non-CWA waters and 7 (47%) do not. *See* ELI Study at 2, 34-35.

[57] ELI Study at 1.

[58] These provisions include such things as notice-and-comment rulemaking, written justifications of the need for regulation, findings regarding the need to address particular issues, and reports to state legislature. *See* ELI Study at 13-14. Also, in many instances, these so called "constraints" are irrelevant because expansion of the State program is not necessary to reach non-CWA waters. *See,* e.g., Craig P. Wilson, Tad J. Macfarlan, Response to ELI Report on State Constraints: The Scope of Regulated Waters in Pennsylvania, at 4 (June 4, 2014).

[59] ELI Study at 12, n. 27.

[60] *See,* e.g., ELI Study at 169 (The North Dakota Department of Health "is prohibited from adopting a rule *for purposes of administering a program under the federal Clean Water Act* that is 'more stringent than corresponding federal regulations which address the same circumstances,' or for which there is no corresponding federal regulation—unless the [state] satisfies additional requirements.") (describing N.D. Cent. Code § 23-01-04.1) (emphasis added), 213 (Utah has a similar law).

[61] These limitations "are an outgrowth of 'takings' law," which is "based on the Takings Clause of the Fifth Amendment of the U.S. Constitution." *See* ELI Study at 20.

[62] As noted by Charles M. Carvell, "During my 26 years as an Assistant Attorney General for the State of North Dakota . . . I don't recall an instance in which a state agency refrained from rule-making due to processes and procedures imposed by the legislature . . . I am unaware of any instance in which an agency backed away from rule-making because it was required to conduct a takings assessment." Charles M. Carvell, Proposed Federal Rule Defining "Waters of the United States"—Comments on the Environmental Law Institute's Interpretation of North Dakota Law, at 2 (Sept. 2, 2104).

regulation is likely to affect private property rights," and require state agencies to compensate property owners in the event that regulation results in a physical or regulatory[63] taking.[64]

Fifth, ELI simply misrepresents data from some states. Some states counted in ELI's study as *not* regulating non-CWA waters actually *do* regulate non-CWA waters.[65] Finally, and most importantly, ELI misunderstands many of the state laws it references. State experts who have examined ELI's "State Profiles" (contained in the ELI Study's Appendix 2) have identified serious errors in ELI's assessments of their state's laws. In comments submitted to the docket on this proposal, for instance, the Pennsylvania Department of Environmental Protection (PA DEP) noted, "One of [PA] DEP's significant concerns with this rulemaking is EPA's unfamiliarity with existing state law programs reflected by its reliance on the ELI study, which is cited for the proposition that this rulemaking is *needed* because state programs to protect water resources are lacking, and purporting that the proposed rule will address states' regulatory loopholes. EPA has asserted that Pennsylvania is one such state. This characterization and assertion by EPA is completely erroneous and reflects a lack of due diligence and coordination with states. The ELI study fails entirely to identify codified statutes and regulations that have provided the foundation for Pennsylvania's regulatory programs for decades – in some instances for nearly half a century."[66] The letter goes on to describe Pennsylvania's wetlands permitting program and Clean Streams Law and the multiple chapters of Pennsylvania Code that comprise the state's regulatory program, demonstrating that Pennsylvania has a "significant and robust regulatory program that reaches beyond the federal Clean Water Act."[67]

For all these reasons, the ELI Study cannot be relied upon to draw legitimate conclusions about whether states are constrained from regulating non-CWA waters. In fact, states have primary authority to regulate water resources. If states have chosen not to regulate non-CWA waters, it is not necessarily because they are prevented by law. Rather, in many cases, the states have determined that certain non-CWA waters and features do not warrant regulation. Doing so would be resource intensive and states have other mechanisms in place to promote conservation. In sum, the Agencies cannot rely on false claims that states are limited in their ability to protect non-CWA waters to justify their expansive interpretation of "waters of the United States."

What's more, a one-size-fits-all federal approach to protect isolated wetlands, ephemeral drainages, and other remote waters – many of which vary considerably from state to state as a result of diverse geologic, hydrologic, and climatic conditions – is impractical. Indeed, state and local governments are far better equipped to determine how best to manage their land and water

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[63] As ELI acknowledges, "most regulations do not meet the threshold constitutional standards that would require compensation under principles of takings law." *See* ELI Study at 20.
[64] *Id.* at 20-21.
[65] ELI lists 26 states as having "no" coverage of non-CWA waters, but acknowledges in a footnote that "[e]ven for states [categorized as not regulating non-CWA waters], the state may still provide protection in coastal areas that could be construed as regulating waters more broadly than the federal [CWA]." *Id.* at 8-9, Table 1 & Note 3. Thus, by ELI's own admission, at least, nine of the states in ELI's "no" columns may, in fact, cover non-CWA waters (Alabama, Alaska, Delaware, Georgia, Hawaii, Louisiana, Mississippi, South Carolina, and Texas).
[66] Pennsylvania Department of Environmental Protection, Comments on Proposed Rulemaking: Definition of "Waters of the United States" Under the Clean Water Act, Docket No. EPA-HQ-OW-2011-0880, at 2 (Oct. 8, 2014) (original emphasis).
[67] *Id.* at 3.

resources than bureaucrats in Washington, D.C. Local governments have the most immediate knowledge of the conditions of the water bodies within their jurisdictions, and should be given the right to decide how best to regulate their local land and water resources. Moreover, because state and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit to be gained by treating the same drainage systems as jurisdictional "waters of the United States" and, in many cases, it will lead to duplicative regulation.

Importantly, the proposed rule's interpretation of "waters of the United States" is unlawful because it would result in a significant impingement on the states' traditional authority over land and water use.

iii. The Agencies have Inaccurately Portrayed *Rapanos*.

EPA and the Corps assert that they drafted the proposed rule "defining the scope of waters protected under the Clean Water Act . . . in light of the U.S. Supreme Court case . . . in *Rapanos v. United States* . . . "[68] While this may have been their intent, the Agencies have inaccurately portrayed the *Rapanos* decision which has led to improper reliance on Justice Kennedy's "significant nexus" test and complete disregard for the plurality opinion.

1. The Agencies have Wrongly Applied *Marks*.

With the proposed rule, the Agencies are redefining "waters of the United States" – a definition that has remained unchanged since the passing of the CWA in 1972 – based on *one* Supreme Court Justice's opinion in *one* case. This is a flawed approach. In *Rapanos*, four Justices joined a plurality opinion (authored by Justice Scalia) and Justice Kennedy concurred. To detect a court holding among five Justices, the so called "*Marks* formulation" requires an examination of those differing opinions that "concurred in the judgments."[69] Therefore, any holding from *Rapanos* must be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence – because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive interpretation of the CWA.[70] Justice Stevens' dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[71]

The *Marks* formulation is workable when one opinion is a *subset* of the other. For example, let us assume Justice Scalia's opinion required that, at a minimum, four factors be met before the government could assert jurisdiction over a waterbody, and Justice Kennedy's concurrence agreed with the four factors, but required a fifth factor. Then, under *Marks*, Justice Kennedy's opinion would control, because if a waterbody met all five factors, all five Justices would agree that it is jurisdictional.

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[68] 79 Fed. Reg. at 22,188.

[69] *Marks v. United States*, 430 U.S. 188, 193 (1977).

[70] *Rapanos*, 547 U.S. at 756 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id.* at 787 (Justice Kennedy, concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ….").

[71] *Id.* at 809 (Justice Stevens, dissenting) ("I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand").

Unfortunately, in *Rapanos*, one opinion is *not* a subset of the other. Therefore, to be consistent with the Supreme Court, the Agencies can only base their proposed rule on points of consensus between the two opinions that concurred in the judgment.

2. The Agencies Must Base Regulation on Commonalities between the Plurality and Justice Kennedy.

The proposed rule wrongfully applies Justice Kennedy's significant nexus standard while at the same time ignoring the plurality opinion in *Rapanos*. Throughout the proposed rule, the Agencies rely only on their misconstrued interpretation of Justice Kennedy's "significant nexus" standard and pay no attention to the plurality's "relatively permanent waters" or "continuous surface connection" standards. This is notable not only because it wrongfully applies *Marks*, but also because it is inconsistent with the current guidance whereby the Agencies determine jurisdiction based on either Justice Kennedy's standard or that of the plurality.[72] With the proposed rule, the Agencies have shifted from the guidance's "either/or" approach to a "Kennedy only" approach, but have not provided any explanation of why they now view the significant nexus test as controlling.

Under *Marks* and common law practices, the Agencies cannot wholly ignore the plurality and treat Justice Kennedy's opinion as the sole controlling holding of *Rapanos*. Nor can the Agencies rely on dissenting Justices to support the proposed rule's adoption of only Justice Kennedy's significant nexus test. The preamble notes that the four dissenting Justices in *Rapanos* would have upheld CWA jurisdiction for "all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy."[73] The opinions of the dissenting Justices, however, are irrelevant. Only those opinions that "concur in the judgments" count toward determining the "holding of the Court."[74] The dissenting Justices did not concur in the judgment, and the Agencies cannot head-count across all opinions to reach a majority.

In accordance with *Marks*, the Agencies must base today's proposal on the commonalities between Justice Kennedy's opinion and the plurality opinion. Illustrative topics of shared opinion between the plurality and Justice Kennedy's concurrence are as follows:

- **The CWA's scope is not restricted to traditional navigable waters.**
    - Plurality: "The Act's term 'navigable waters' includes something more than traditional navigable waters ...."[75] The plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters."[76]

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[72] *See* 2008 *Rapanos* Guidance.
[73] 79 Fed. Reg. at 22,192.
[74] *See United States v. Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("Dissenters, by definition, have not joined the Court's decision . . . *Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented . . . It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day."); King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").
[75] *Rapanos*, 547 U.S. at 731.
[76] *Id.* at 751.

- Kennedy Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable."[77]

- **The word "navigable," in the phrase "navigable waters," has meaning.**

  - Plurality: "[T]he traditional term 'navigable waters' … carries *some* of its original substance …."[78]
  - Kennedy Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[79] "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, 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."[80]

- **A mere hydrologic connection *cannot* provide the basis for CWA jurisdiction.**

  - Plurality: Rejecting the federal government's hydrologic connection theory in deciding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it."[81] "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition."[82]
  - Kennedy Concurrence: Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters."[83] "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[84]

- **Hypothetical, speculative, or eventual water flows do *not* support CWA jurisdiction.**

  - Plurality: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes."[85] *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[86]
  - Kennedy Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go

[77] *Id.* at 779.
[78] *Id.* at 734.
[79] *Id.* at 778.
[80] *Id.* at 779, citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
[81] *Id.* at 731.
[82] *Id.* at 736 n.7 (original emphasis).
[83] *Id.* at 778.
[84] *Id.* at 784-85.
[85] *Id.* at 739 (emphasis added).
[86] *Id.* at 742.

beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case."[87] "When ... wetlands' effects on water quality *are speculative or insubstantial*, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[88] In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims ...."[89] In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge .... *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it."[90]

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**

  - <u>Plurality:</u> As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'...."[91] And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right ...."[92]
  - <u>Kennedy Concurrence:</u> "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark* .... *This standard* presumably provides a rough measure of the volume and regularity of flow. ... *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[93]

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**

  - <u>Plurality:</u> Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We ... do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent ...."[94]

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[87] *Id.* at 780 (emphasis added).
[88] *Id.* (emphasis added).
[89] *Id.* at 786.
[90] *Id.* (emphasis added).
[91] *Id.* at 739 (emphasis added).
[92] *Id.* at 742 (original emphasis).
[93] *Id.* at 781 (emphasis added).
[94] *Id.* at 732 n.5.

"[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels."[95]

- Kennedy Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river … Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete … over a length of some 50 miles … Though this particular waterway *might satisfy the plurality's test,* it is illustrative of what often-dry watercourses can become when rain waters flow."[96]

- **As a general matter "navigable waters" and "point sources" are *not* the same thing, and normally a feature cannot be both.**

  - Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping."[97]
  - Kennedy Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could conceivably* constitute both a point source and a water."[98]

NAHB does not offer these points as an exhaustive list of all areas in which the plurality Justices and Justice Kennedy agree. Nevertheless, these examples of consensus are important and provide a superior basis for defining the term "waters of the United States" over reliance on *one* Justice's concurring opinion. The proposed rule must deem waters jurisdictional only where they satisfy both the *Rapanos* plurality standard and that of Justice Kennedy.

b. The Agencies have Relied on a Problematic Definition of "Significant" and an Inappropriate Application of the "Significant Nexus" Test.

The proposed rule alters the definition of "waters of the United States" based on several new definitions as well as a significant shift in the legal justification the Agencies use to base jurisdiction. Under current guidance, the Agencies base jurisdiction upon the scope of their authority under the Commerce Clause of the U.S. Constitution. The Supreme Court has thrice agreed that the term "waters of the United States" extends beyond traditional navigable waters.[99] However, the Court has also emphasized that "the qualifier 'navigable' is not devoid of significance."[100] In *SWANCC*, the Court held that jurisdictional determinations based on the "Migratory Bird Rule" would "invoke the outer limits of Congress' power" under the Commerce Clause.[101] The Court unanimously agreed that the Agencies could not assert CWA jurisdiction on the sole basis of use of a water by migratory birds.

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[95] *Id.* at 733 n.6.
[96] *Id.* at 769-70 (emphasis added).
[97] *Id.* at 735-36.
[98] *Id.* at 772 (emphasis added).
[99] *Riverside Bayview,* 474 U.S. at 133; *SWANCC*, 531 U.S. at 167; *Rapanos*, 547 U.S. at 751.
[100] *Rapanos*, 547 U.S. at 731.
[101] *SWANCC*, 531 U.S. at 172, 173.

Although the Agencies continue to cite the Commerce Clause in the preamble, the proposed rule changes the basis for jurisdiction in a botched attempt to align with Justice Kennedy's concurring opinion in *Rapanos*. Rather than analyzing and defining jurisdiction based solely on the extent of the federal government's ultimate authority under the Commerce Clause, the primary justification for the proposed rule is the presumed "significant nexus" the Agencies claim all "tributaries," all "adjacent waters," and many "other waters" (either alone or in combination with similarly situated waters) have with traditional navigable waters, interstate waters, and the territorial seas. In an effort to justify these claims, however, the Agencies fail to define the word "significant" and have misapplied Justice Kennedy's significant nexus test to cover more waters. In the end, this represents a sea change (no pun intended) in the underlying jurisdictional analysis. Given the Agencies' assertion that all broadly defined "tributaries" (including most ditches), all broadly defined "adjacent waters," and many "other waters" (individually or collectively) have a significant nexus with traditional navigable waters, interstate waters, or the territorial seas, many more waters will fall under jurisdiction of the CWA compared to those that actually impact interstate commerce. Indeed, by changing the means by which jurisdiction is determined, the Agencies are substantially and unlawfully expanding the jurisdictional scope of the Act.

What's more, the Agencies assert that the significant nexus that establishes federal jurisdiction can be based on the movement of not only water but also animals and plants between waters, irrespective of the transport of pollutants and the potential of those pollutants to significantly affect the chemistry, biology, and physical properties of navigable waters.

The Agencies emphasize that the "categorical finding of jurisdiction for tributaries and adjacent waters was . . . based on . . . a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw."[102] Unfortunately, this is not true. The "significant nexus" definition provided in the proposed rule is, in fact, inconsistent with both the objective of the CWA and Justice Kennedy's "significant nexus" test in *Rapanos*. Equally problematic, the Agencies cannot point to any science quantifying the point at which a connection becomes "significant," as described in Section VI. b. i. 4 and Section IX. b. ii.

i. The Agencies Rely on an Inadequate and Flawed Definition of "Significant" to Apply Justice Kennedy's "Significant Nexus" Test.

In the proposed rule, EPA and the Corps rely primarily on Justice Kennedy's significant nexus standard to assert jurisdiction over all "tributaries," all "adjacent waters," and, on a case-by-case basis, "other waters," either alone or in combination. Despite their misguided reliance on Justice Kennedy's test, the Agencies propose a definition for "significant nexus" that is inadequate, not based on science, and inappropriately equates the term "significant" with merely "more than speculative or insubstantial."

[102] 79 Fed. Reg. at 22,189.

1. The Agencies Inappropriately Equate "Significant" with Simply "More Than Speculative or Insubstantial."

For the first time, the Agencies provide a regulatory definition for "significant nexus":

> "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3)), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3). For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3)."[103]

Justice Kennedy provided that if the impact of a wetland on a traditional navigable water is "speculative or insubstantial" that wetland is not within the jurisdiction of the Agencies.[104] On the other end of the spectrum, the significant nexus test requires that the Agencies prove that the wetland in question has a significant chemical, physical, and biological effect on a traditional navigable water to fall within CWA jurisdiction.[105] Although the proposal states "[f]or an effect to be significant, it must be more than speculative or insubstantial,"[106] NAHB submits that there is a range of effects that are more than "speculative or insubstantial" and yet do not reach the threshold of "significant" (Fig. 1). Indeed, the proposed definition of "significant nexus" does not provide sufficient parameters to ensure limited use.

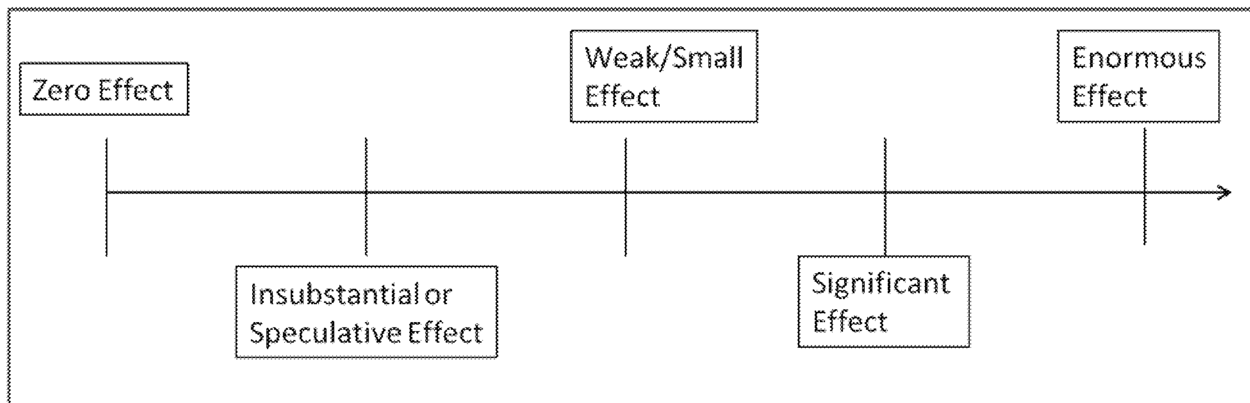

Figure 1: A range of effects exists along a gradient from zero effect to an enormous effect.

For example, a wetland could have a small effect on a traditional navigable water, but that effect would not rise to one that is significant. Under the Agencies' definition, such a wetland would be jurisdictional. This is incorrect because a small effect is not a significant one. By equating the

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[103] *Id.* at 22,199, 22,200.
[104] *Rapanos*, 547 U.S. at 780.
[105] *Id.*
[106] 79 Fed. Reg. at 22,263.

term "significant" with "more than insubstantial or speculative," the government misinterprets Justice Kennedy's *Rapanos* opinion. If the government wants to use Justice Kennedy's decision to define "waters of the United States," it must do so correctly. Therefore, the Agencies should explain that only wetlands that "significantly affect the chemical, physical, and biological integrity"[107] of a traditional navigable water are jurisdictional under the CWA. They have not done so here.

2. The Definition of "Significant Nexus" is Circular and Inadequate.

According to the proposed "significant nexus" definition, a water has a significant nexus if it significantly affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea. This construction is circular – a *significant* nexus *significantly* affects the integrity of a downstream water. This does *not* provide clarity and violates the principle of providing new and useful information. The definition fails to adequately define significant. As a result, the regulated community is left without bright lines to know under what circumstances a nexus is "significant" and under what circumstances a nexus is not "significant." Furthermore, the definition of "significant nexus" provides no guide posts on how it will be applied by the Agencies.[108]

EPA's Science Advisory Board (SAB) has voiced concerns about the inadequacy of the "significant nexus" definition provided in the proposed rule. SAB panel member Dr. Duncan Patten stated that the "[u]se of 'significantly' in the definition of 'significant nexus' is bothersome and there is little or no explanation (science or legal) of what 'significant effect' means."[109] Dr. Mark Murphy of the SAB panel commented, "The term 'significant' still needs better clarity. Non-technical significance is a vague concept, whether legally or politically approached. It is never defined in the proposed rule other than to say that it's not 'speculative' or 'insubstantial.'"[110]

Clearly, the definition of "significant nexus" provided by the Agencies is inadequate. Based on this flawed definition, the "significant nexus" test will be applied inconsistently and will result in increased uncertainty for the Agencies, the states, and the regulated community, including NAHB's members. The Agencies must go back to the drawing board to define "significant nexus" more clearly, in a more scientifically meaningful context, and in a way that can be easily and consistently replicated.

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[107] *Rapanos*, 547 U.S. at 717.
[108] In the Comprehensive Environmental Response Compensation and Liability Act of 1980, Congress defined "owner or operator" as an owner or operator. This circular definition and lack of precision has caused confusion since CERCLA was enacted. See e.g. *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust,* 32 F.3d 1364, 1368 (9th Cir. 1994) (asserting that circular definition of "owner or operator" is as helpful as "defining 'green' as 'green'").
[109] 8/14/14 SAB Comments on the Proposed Rule at 68.
[110] *Id.* at 57.

3. The Agencies Claim the Proposed Rule is Based on Science, but Assert that "Significant Nexus" is not a Scientific Term.

The Agencies claim that the proposed rule is based on science, and the Agencies' reliance on Justice Kennedy's "significant nexus" standard to assert CWA jurisdiction over all "tributaries," all "adjacent waters," and many "other waters" is abundantly clear throughout the preamble, the proposed definition, and the Appendices. Yet, the Agencies assert that "significant nexus" is "not itself a scientific term,"[111] but rather "a determination of the agencies in light of the law and science."[112] This is contradictory and confuses the very basis of the proposed rule. What's more, by claiming "significant nexus" is not a scientific term, it appears the Agencies believe it is not necessary for them to describe any methods indicating how "significant nexus" is determined or thresholds indicating when the "significant nexus" test is satisfied. NAHB disagrees.

EPA's SAB has also raised concerns about the "significant nexus" definition and its scientific shortcomings. SAB member Dr. Allison Aldous, in reviewing the scientific support for the proposed rule, stated, "[s]pecific scientifically-grounded, objective methods must be put in place to draw the line between those waters having or not having a significant nexus to other jurisdictional waters. In some cases methods and/or criteria are proposed, and often the agencies seek feedback on these approaches, implying that technical guidance will be issued after the Rule is complete. Nevertheless, evaluating the technical accuracy of the definition is difficult in the absence of clear criteria."[113]

Likewise, in comments on the adequacy of the scientific and technical basis of definitions in the proposed rule, SAB member Dr. Genevieve Ali stated, "The draft rule does include a definition for 'significant nexus'; however, I find it rather vague and subject to interpretation . . . The EPA [Connectivity Report] did not . . . explicitly discuss the notion of significance, and I find that the definition provided in the draft rule does not resolve the issue as it equates '*significant*' with '*significantly affects* the chemical, physical, or biological integrity' of a jurisdictional water, therefore never explaining what the root term 'significant' means. The proposed rule goes on to say that '*for an effect to be significant, it must be more than speculative or insubstantial,*' but it does not put forward any threshold for deciding what is *not* speculative or insubstantial. This definition of 'significant nexus' is especially problematic when it comes to the 'other waters' and the case-specific analyses needed to determine jurisdiction. The proposed rule would be more robust if the definition of 'significant nexus' itself hinted at a tangible tool or methodology to make the job of the Corps Districts more straightforward and transparent when it comes to deciding what is *not* speculative or insubstantial. I understand that the phrase 'significant nexus' is a legal term: however, this concept needs to be quantified as objectively as possible in order to secure a consistent implementation of the proposed rule."[114]

By treating the term "significant nexus" as non-scientific, the Agencies have only further muddied the waters of CWA jurisdiction. NAHB submits that if the Agencies choose to use the

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[111] 79 Fed. Reg. at 22,193.
[112] *Id.* at 22,195, 22,196.
[113] 8/14/14 SAB Comments on the Proposed Rule at 2.
[114] *Id.* at 6.

"significant nexus" standard, they are obligated to provide a clear, science-based definition of "significant nexus" that can be applied consistently and predictably.

4. The Agencies Wrongly Interpret Connectivity, and in turn "Significant Nexus," as a Binary Property rather than as a Gradient.

Waters exist along a continuum of connectivity from isolated to directly integrated with nearby waters.[115] Indeed, EPA's Office of Research and Development, EPA's SAB, and the Agencies themselves all recognize that connectivity between waters exists along such a gradient:

> ***Draft Connectivity Report:*** "Unidirectional wetlands occur along a gradient of hydrologic connectivity-isolation with respect to river networks, lakes, or marine/estuarine water bodies."[116]
>
> ***SAB Final Review of the Draft Connectivity Report:*** "The [Connectivity] Report often refers to connectivity as though it is a binary property (connected versus not connected) rather than as a gradient. In order to make the [Connectivity] Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in frequency, duration, magnitude, predictability, and consequences of those connections."[117]
>
> ***Proposed Rule:*** "There is a gradient in the relation of waters to each other, and this is documented in the [Connectivity] Report."[118]

In spite of this broad recognition, the proposal fails to acknowledge this gradient of connectivity or the points at which various connections significantly affect the chemical, physical, and biological integrity of waters and thereby satisfy Justice Kennedy's "significant nexus" test. As it is written, the proposed rule treats connectivity as a binary property (connected versus not connected) rather than a gradient.

Unfortunately, this approach fails to recognize the importance of variability in flow between waterbodies. Flow parameters are critical in determining how and to what degree a water significantly affects the chemical, physical, and biological integrity of downstream waters.[119] For example, the greater the magnitude (i.e., discharge volume) of flow, the longer the duration of flow, and the greater the frequency of flow between a water and traditional navigable waters, the greater the probability that water will significantly affect the chemical, physical, and biological integrity of downstream waters. Indeed, EPA's SAB included a figure describing this

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[115] Leibowitz, S.G. 2003. Isolated wetlands and their functions: an ecological perspective. *Wetlands* 23(3)517-531.
[116] Draft Connectivity Report at 1-12.
[117] Letter from EPA Science Advisory Board to Hon. Gina McCarthy, Subject: SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Oct. 17, 2014) at Cover Letter (hereinafter, SAB Final Review of the Draft Connectivity Report).
[118] 79 Fed. Reg. at 22,193.
[119] Poff, N.L., J.D. Allan, M.B. Bain, J.R. Karr, K.L. Prestegaard, B.D. Richter, R.E. Sparks, J.C. Stromberg. 1997. The Natural Flow Regime. *BioScience*, Vol. 47, No. 11. 769-784; Allan. J.D. and M.M. Castillo. *Stream Ecology*, Second Ed. New York: Springer, 2007. Print.

phenomenon in its final review of the draft Connectivity Report (Fig. 2), where it depicts the decreasing probability of a water to affect a downstream water as the magnitude, duration, and frequency of flow between those waters decreases.[120] Importantly, the figure indicates there is a point along the connectivity gradient where connections between ephemeral streams and non-floodplain / non-riparian wetlands become insignificant, with little or no probability of impacting downstream waters.

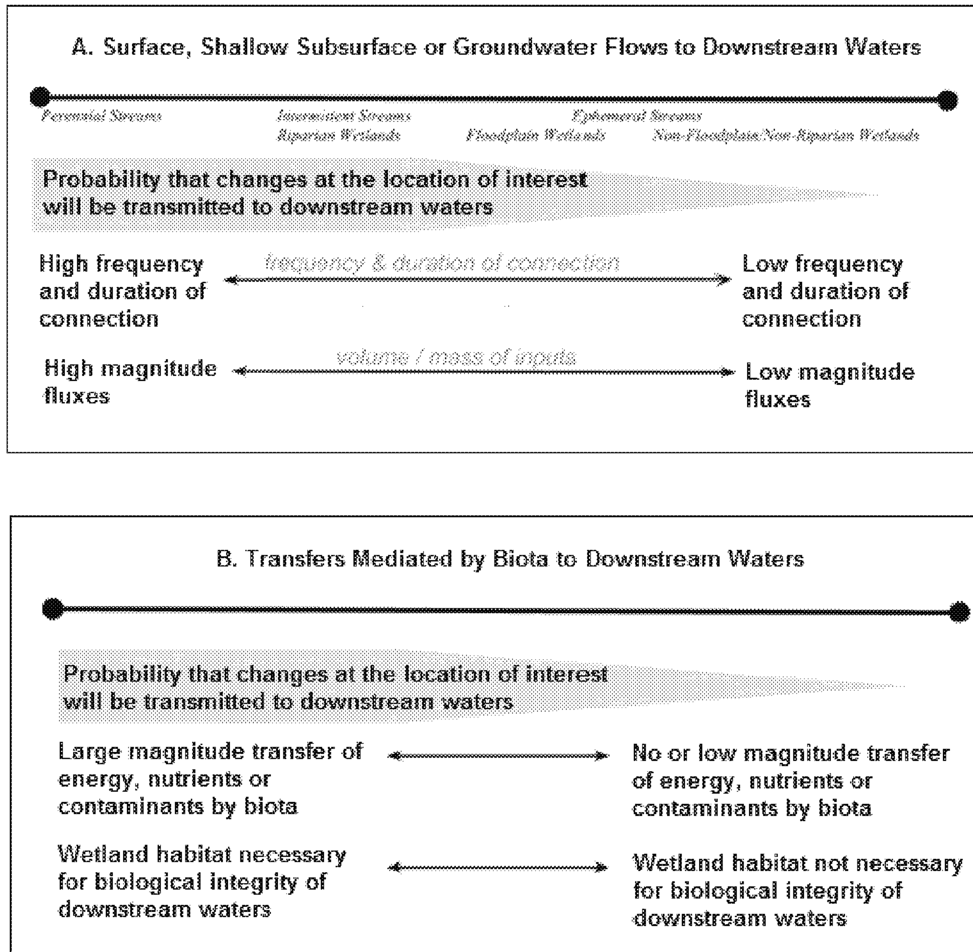

Figure 3: Hypothetical illustration of connectivity gradient and potential consequences to downstream waters. Panel A illustrates changes to downstream waters with increases in the magnitude, duration, and frequency of surface and subsurface connections. Panel B illustrates transfers mediated by biota to downstream waters. All streams (including perennial, intermittent, and ephemeral streams) have a connection to downstream waters. Within non-floodplain wetlands the degree of connectivity and implications for integrity of downstream waters vary considerably.

Figure 2: Figure 3 from EPA's Science Advisory Board's final review of the draft Connectivity Report indicating that hydrologic and biological connections between waters exist along a continuum.[121]

[120] SAB Final Review of the Draft Connectivity Report at 54.
[121] *Id.*

By failing to define "flow" and associated hydrologically and ecologically critical parameters, including magnitude, duration, and frequency, the Agencies wrongly consider all tributary flows to be equal in their ability to significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. In reality, hydrologic connectivity and the degree of subsequent physicochemical impacts on downstream waters exist along a gradient from insubstantial to significant. This gradient must be reflected in the approach the Agencies use to determine those waters that are "waters of the United States" and those that are not.

Echoing NAHB's apprehension, EPA's SAB has voiced strong concerns about the treatment of connectivity as an all-or-nothing phenomenon. In its final review of the draft Connectivity Report, the SAB as a whole stated, "the Report uses language that often suggests that connectivity is a binary property – something either present or absent, rather than a gradient. Many of the public commenters remarked that the binary perspective in the Report implies that any connectivity must significantly affect the biological, physical, or chemical integrity of downstream waters. This is not always the case. Although connectivity is known to be ecologically important even at the lower end of the gradient, the frequency, duration, predictability, and magnitude of connectivity will ultimately determine any consequences to downstream waters."[122] The SAB continued, "[T]he Report would be strengthened if it contained . . . additional review of the scientific literature that quantifies the frequency, duration, predictability, and magnitude of physical, chemical, and biological connections for each type of 'water' and *consequences of that connectivity for the physical, chemical, and biological integrity of downstream waters*, with key uncertainties made explicit. . ."[123] NAHB could not agree more.

In addition to the entire SAB, individual SAB panel members have also raised concerns regarding the binary manner in which the Agencies treat connectivity, and in turn, "significant nexus" in the proposed rule. Panelist Dr. Mazeika Sullivan commented, "[T]he collective scientific evidence indicates that there exists a gradient of connectivity between streams and wetlands and downstream waters. Although this gradient of connectivity is recognized at multiple locations in the proposed rule (e.g., 22193, 22198, 22223, 22226, 22248), this concept should figure as the conceptual backbone of the preamble in order to clearly establish the rationale for those cases where important connectivity exists and for those cases where it may not. This framework would then provide the basis on which subsequent discussion of various types of water bodies and whether or not a 'significant nexus' exists with traditional navigable water, interstate water, or the territorial seas."[124] Panelist Dr. Genevieve Ali similarly noted, "At one point in the draft rule we can read that 'a case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a 'significant nexus.'' I would be in favor of more guidance being provided within the framework of the draft rule to facilitate that 'critical point' or 'threshold' determination and there again make the process more transparent to the public."[125] Panel member Dr. Mazeika Sullivan further commented, "caution is warranted in some cases when the science may not be available to adequately determine where jurisdiction should or should not be asserted . . . Along a connectivity gradient, there may exist

[122] *Id.* at 9.
[123] *Id.* (emphasis added).
[124] 8/14/14 SAB Comments on the Proposed Rule at 84.
[125] *Id.* at 7.

threshold levels of connectivity above which downstream influences are impactful to water quality and below which they are not."[126]

The Agencies must listen to the scientific experts and adopt a gradient approach toward determining whether or not a water meets the requirements of Justice Kennedy's "significant nexus" test. This must be the approach followed by the proposed rule if it is to have a defensible basis in science. What's more, the Agencies must define thresholds along this gradient whereby connections satisfy the "significant nexus" test. Otherwise, the proposed rule wrongly reverts back to asserting jurisdiction based on the "any hydrologic connection" theory rejected by both Justice Kennedy and the plurality in *Rapanos*.

ii. Even if the Reliance on Justice Kennedy were Warranted, the Agencies have Inappropriately Applied his "Significant Nexus" Test.

The proposed rule is based upon Justice Kennedy's concurring opinion in *Rapanos*, in which he notes that "[t]he 'objective' of the Clean Water Act . . . is 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[127] To this end, Justice Kennedy's concurring opinion establishes the "significant nexus" test: whether or not "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[128] Employing Justice Kennedy's analysis, the Agencies attempt to establish jurisdiction over all waters that have a "significant nexus" in terms of their potential to affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. The application of Justice Kennedy's significant nexus standard as the sole basis for determining CWA jurisdiction, however, is problematic for several reasons.

1. Justice Kennedy's "Significant Nexus" Test Must be Applied on a Case-by-Case Basis to Avoid Unreasonable Applications of the Clean Water Act.

The "significant nexus" test, as described by Justice Kennedy, is only to be used on a case-by-case basis: "Absent more specific regulations, the Corps must establish significant nexus on a *case-by-case basis* when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the Act."[129] By asserting automatic jurisdiction over all tributaries and all adjacent waters on the *presumption* that they exhibit a significant nexus to downstream waters, the Agencies have improperly applied the test and run the risk of unreasonably applying the Act.

[126] *Id.* at 87 (emphasis added).
[127] *Rapanos*, 547 U.S. at 759 (quoting 33 U.S.C. § 1251(a)).
[128] *Id.* at 780.
[129] *Id.* at 782 (emphasis added).

2. Justice Kennedy Required the "Significant Nexus" Test to be Used for Wetlands, not all Waterbodies.

In defining the jurisdictional status of "tributaries," "adjacent waters," and "other waters," the Agencies misinterpret and wrongfully expand Justice Kennedy's "significant nexus" test beyond wetlands. The proposed rule declares that all tributaries have a significant nexus to traditional navigable waters: "With this proposed rule, the agencies conclude, based on existing science and the law, that a significant nexus exists between tributaries . . . and the traditional navigable waters, interstate waters, and the territorial seas . . . Consequently, this rule establishes as 'waters of the United States,' all tributaries . . . of the traditional navigable waters, interstate waters, and the territorial seas . . . it has been determined that as a category, [tributaries] have a significant nexus and thus are 'waters of the United States.'"[130] The proposed rule also states "that adjacent waters, *rather than simply adjacent wetlands*, are 'waters of the United States.'"[131] The Agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw. According to the proposed rule, the term "waters of the United States" also means "on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas."[132]

Unfortunately, this application of "significant nexus" is flawed. In truth, Justice Kennedy's "significant nexus" test applied only to wetlands, not tributaries, not adjacent waters, and not other waters. In *Rapanos*, Justice Kennedy opined that "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."[133] As the Corps has long recognized, wetlands have specific ecological functions, and these functions are different than the functions of tributaries or other waterbodies. Justice Kennedy was also aware of these differences, and it is unreasonable for the Agencies to expand the "significant nexus" test beyond his intent.[134] Furthermore, Justice Kennedy adopted the "significant nexus" test from *Riverside Bayview*, an earlier *wetland* case, and his *Rapanos* opinion is focused on *wetlands*.[135] Not even in dicta does he suggest the same test for other types of waterbodies. More recently, in *San Francisco Baykeeper v. Cargill Salt Division* the U.S. Court of Appeals for the Ninth Circuit squarely rejected the application of the significant nexus test to non-wetland waters, explaining that "*Rapanos*, like *Riverside Bayview*, concerned the scope of the Corps' authority to regulate adjacent *wetlands* . . ."[136] The Agencies

[130] 79 Fed. Reg. at 22,193.
[131] *Id.* (emphasis added).
[132] *Id.* at 22,193.
[133] *Rapanos*, 547 U.S. at 779 (emphasis added).
[134] *Id.* at 766.
[135] *See SWANCC*, 531 U.S. at 167 (It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*.)
[136] *See San Francisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007) (emphasis in original) (rejecting Baykeeper's argument that the Supreme Court has held that the CWA protects all waterbodies with a significant nexus to navigable waters).

must restrict the application of Justice Kennedy's "significant nexus" test only to wetlands as he intended.

3. Justice Kennedy, Citing the Objective of the Clean Water Act, Required a Physical, Chemical AND Biological Nexus to Satisfy a "Significant Nexus" Test.

Under Justice Kennedy's "significant nexus" analysis, wetlands that "significantly affect the chemical, physical, *and* biological integrity of other covered waters understood as navigable in the traditional sense" are "waters of the United States."[137] Justice Kennedy states that significant nexus "must be assessed in terms of the [CWA's] goals and purpose. Congress enacted the law to 'restore and maintain the chemical, physical, *and* biological integrity of the Nation's waters."[138] The Agencies have misread Justice Kennedy's test and Section 101(a) of the CWA by replacing the word "and" with the word "or."

Justice Kennedy used the conjunctive "and," not the disjunctive "or" to describe a "significant nexus." By interpreting "and" to mean "or," the Agencies are violating two rules of construction.[139] First, words must be given their ordinary meaning.[140] "And" is generally a conjunctive, meaning "along with or together with."[141] Second, "and" can mean "or" if using the word "and" would produce an absurd result or defeat the writers purpose.[142] However, there is no indication that Justice Kennedy would agree that a wetland is jurisdictional if it had only a biological, physical, or chemical effect on a traditional navigable water. In fact, in *Rapanos,* the government had shown that the wetlands in question had a hydrologic connection (a physical connection) to downstream waters, and yet five Justices rejected this as a basis for jurisdiction. Thus, the plain language used by Justice Kennedy requires that all three factors (physical, chemical, *and* biological) be satisfied before a wetland is jurisdictional.[143] By substituting "and" with "or" the Agencies have expanded CWA jurisdiction to waters that only significantly affect one of the three attributes of a traditional navigable water Justice Kennedy's "significant nexus" test required.

Furthermore, by replacing "and" with "or" the Agencies now claim that waterbodies that "act as sinks by retaining floodwaters, sediment, nutrients, and contaminants" (i.e., do not have a physical connection to a jurisdictional water) can have a significant nexus.[144] Thus, under the government's interpretation, if a waterbody either has or does not have a physical connection to a jurisdictional water, it can satisfy the significant nexus test. This leads to the conclusion that *all*

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[137] *Rapanos*, 547 U.S. at 780 (emphasis added).
[138] 33 U.S.C § 1251(a).
[139] NAHB recognizes that the Agencies are not interpreting the language used by Congress, but the same rules should apply when interpreting the language used by the Supreme Court. Furthermore, NAHB suspects that Justice Kennedy is well aware of the difference between "and" and "or."
[140] *E.g., Wall v. Kholi*, 131 S.Ct. 1278, 1284 (2011).
[141] *American Bankers Ins. Group v. United States*, 408 F.3d 1328, 1332 (2005); Websters Third New International Dictionary 80 (2nd ed. 2002).
[142] *E.g., Officemax, Inc. v. United States*, 428 F.3d 583, 589-90 (6th Cir. 2005).
[143] *See Bruce v. First Federal Sav. and Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 715 (5th Cir. 1988) ("The word 'and' is . . . to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear legislative intent.").
[144] 79 Fed. Reg. at 22,223.

waterbodies have a significant nexus to a jurisdictional water and are therefore themselves jurisdictional. This is clearly absurd. Justice Kennedy demanded more.

What's more, the categorical finding of jurisdiction over all tributaries and adjacent waters is not based on any scientific data generated by the Agencies for rulemaking purposes nor does the scientific literature reviewed by the Agencies, as discussed in Section IX, provide sufficient support to claim categorical jurisdiction over all tributaries and adjacent waters on the basis that they significantly affect downstream waters. Indeed, the draft Connectivity Report that the Agencies claim provides the science supporting the proposed rule only describes the *presence*, not the *significance*, of connections between streams and wetlands and downstream waters (*see* Section IX for a more in depth discussion of this topic).

4. The Broad Definition of "Water" Allows the Agencies to Wrongly Assert Biological Connections Alone can Satisfy Justice Kennedy's Significant Nexus Test and, in turn, Invalidates the *SWANCC* and *Rapanos* Holdings.

The current regulatory definition of "waters of the United States" has been on the books since 1986.[145] For the first time in nearly 30 years, the Agencies are proposing to redefine the term, and yet have only included a definition of "water" and "waters" as a *footnote* in the preamble. What's more, the Agencies are not limiting the terms "water," "waters," and "water bodies" to their traditional meanings, stating,

> "The agencies use the term 'water' and 'waters' in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms 'waters' and 'water bodies' interchangeably in this preamble. *The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features*."[146]

This is problematic on several fronts. First, in a rule defining "waters of the United States" under the CWA, it is inappropriate for the Agencies to define "water" in a mere preamble footnote. This critical definition should be part of the proposed regulatory text.

Second, the definition is overbroad and contravenes both the *SWANCC* and *Rapanos* Courts. In *SWANCC*, the Supreme Court held that the use of isolated, intrastate gravel ponds by migratory birds cannot be used to assert jurisdiction over such waters. In *Rapanos*, the Court rejected the notion that the Agencies could assert jurisdiction over wetlands adjacent to non-navigable tributaries on the basis of a mere hydrologic connection to a traditional navigable water. And yet, in the proposed rule the Agencies define "water" so broadly as to assert jurisdiction over "other waters" on the basis of biological connectivity. The Agencies cite the following as evidence of biological connectivity between "other waters" and (a)(1) through (3) waters:

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[145] 51 Fed. Reg. at 41,206 (Nov. 13, 1986).
[146] 79 Fed. Reg. at 22,191 n.3 (emphasis added).

> "Evidence of biological connectivity and the effect on waters can be found by identifying: resident aquatic or semi aquatic species present in the 'other water' and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the 'other water,' and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the 'other water.' Factors influencing biological connectivity include species' life history traits, species' behavioral traits, dispersal range, population size, timing of dispersal, distance between 'other water' and an (a)(1) through (a)(3) water, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Non-aquatic species or species such as non-resident migratory birds that are not demonstrating a life cycle dependency on the identified aquatic resources are not evidence of biological connectivity for purposes of this rule."[147]

Appendix A of the proposal goes on to provide examples of biological connections between "other waters" and (a)(1) through (3) waters:

> "'Other waters' can be biologically connected to each other and to downstream waters through the *movement of seeds, macroinvertebrates, amphibians, reptiles, birds, and mammals* . . . Generally, 'other waters' are further away from stream channels than adjacent waters, making hydrologic connectivity less frequent, and increasing the number and variety of landscape barriers over which organisms must disperse. *Plants*, though non-mobile, have evolved many adaptations to achieve dispersal over a variety of distances, including water-borne dispersal during periodic hydrologic connections, *'hitchhiking' on or inside highly mobile animals*, and more typically via *wind dispersal of seeds and/or pollen* . . . *Mammals* that disperse overland can also contribute to connectivity and can act as transport vectors for hitchhikers such as algae. . . *Invertebrates also utilize birds and mammals to hitchhike*, and these hitchhikers can be an important factor structuring invertebrate metapopulations in 'other waters' and in aquatic habitats separated by hundreds of kilometers . . . *Numerous flight-capable insects* use both 'other waters' and downstream waters; these insects move outside the tributary network to find suitable habitat for overwintering, refuge from adverse conditions, hunting, foraging, or breeding, and then can return back to the tributary network for other lifecycle needs . . . *Amphibians and reptiles* also move between 'other waters' and downstream waters to satisfy part of their life history requirements . . . *Alligators* in the Southeast, for instance, can move from tributaries to shallow, seasonal limesink wetlands for nesting, and also use these wetlands as nurseries for juveniles; subadults then shift back to the tributary network through overland movements . . . Similarly, *amphibians and small reptile species, such as frogs, toads, and newts*, commonly use both tributaries and 'other waters,' during one or more stages of their life cycle, and can at times disperse over long distances."[148]

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[147] *Id.* at 22,214.
[148] *Id.* at 22,249 (emphasis added).

The draft Connectivity Report also extensively references biological connections that can occur between water bodies.[149]

The Agencies state that connectivity is "the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by characteristics of both the physical landscape and the *biota* of the specific system . . . Connectivity for purposes of interpreting the scope of 'waters of the United States' under the CWA serves to demonstrate the 'nexus' between upstream water bodies and the downstream traditional navigable water, interstate water, or the territorial sea."[150] As a specific example, the Agencies state, "[prairie] [p]otholes . . . support a community of highly mobile organisms, from *plants to invertebrates that move among potholes and that can biologically connect the entire complex to the river network*. Based on these connections and the strength of their effects, individually or in combination with other prairie potholes in the watershed, on the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water, the agencies could conclude by rule that prairie potholes have a significant nexus and are jurisdictional."[151]

Indeed, by defining "water," "waters," and "water bodies" so absurdly as to include biological elements associated with aquatic ecosystems and stating that biological connections can be used to meet Justice Kennedy's significant nexus test, the proposed rule turns *SWANCC* and *Rapanos* on their heads.

The Supreme Court rejected the notion that migratory birds, as a result of their potential impacts on interstate commerce, could be used to assert jurisdiction over the isolated ponds in *SWANCC*. Under this proposal, however, the Agencies could assert jurisdiction over the *SWANCC* ponds if migratory birds (provided they are "resident" and "demonstrat[e] a life cycle dependency on the identified aquatic resources"), or any other plant or animal for that matter, merely has habitat in both an (a)(1) through (3) water and any other water, located anywhere. This is nonsensical. The Court already opined that asserting jurisdiction over waters based on the presence of migratory birds "push[es] the limit of congressional authority."[152] Similarly, basing jurisdiction on biological connectivity alone renders the term "navigable" in "navigable waters" meaningless. Indeed, in *SWANCC*, the Court stated, "We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute. We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited import,' 474 U.S., at 133, and went on to hold that § 404(a) extended to non navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever."[153]

In *Rapanos*, both the plurality[154] and Justice Kennedy[155] rejected the notion that waters could be deemed jurisdictional based on an "any hydrologic connection" theory. Yet, by expanding the definition of "water" in the proposal and claiming federal jurisdiction can be determined based

[149] *See* Draft Connectivity Report at 3-47, 5-16, 5-31 through 5-32, 5-73.
[150] 79 Fed. Reg. at 22,195 (emphasis added).
[151] *Id.* at 22,250 (emphasis added).
[152] *SWANCC*, 531 U.S. at 173.
[153] *Id.* at 172.
[154] *See Rapanos*, 547 U.S. at 736 n.7
[155] *See id.* at 784, 785.

upon biological connectivity alone, the Agencies would now embrace an "any *biological* connection" approach to assert jurisdiction over "other waters." If any hydrologic connection didn't cut the mustard with the *Rapanos* plurality and Justice Kennedy, it's hard to believe any biological connections including "dispersal of seed and plant fragments and . . . wind dispersal of invertebrates"[156] would suffice. To quote the *Rapanos* plurality, to assert CWA jurisdiction on the basis of biological connections between other waters and (a)(1) through (3) waters would "stretch[] the term 'waters of the United States' beyond parody"[157] and "would permit the Corps to regulate the entire country as 'waters of the United States."[158] The Agencies have clearly gone too far.

c. The Agencies have Inappropriately Expanded Clean Water Act Jurisdiction to Various Water Types in Contradiction of the Courts and Science.

By asserting categorical jurisdiction over all traditional navigable waters, all interstate waters, all impoundments, all tributaries, all adjacent waters, and, on a case-by-case basis, other waters, the Agencies have unlawfully expanded the scope of CWA jurisdiction in contradiction to the Courts. What's more, the science upon which the Agencies have based this expansion is lacking.

i. The Agencies' Interpretation of Traditional Navigable Waters is Inconsistent with *Rapanos* and Prior Case Law

The proposed rule indicates that all navigable-in-fact waters qualify as "traditional navigable waters," a position that is flawed.

In the preamble, the Agencies state, "[i]f the Federal courts have determined that a water body is navigable-in-fact under Federal law *for any purpose*, that water body qualifies as a 'traditional navigable water' subject to CWA jurisdiction under 33 CFR 328.3(a)(1) and 40 CFR 230.3(s)(1)."[159] Additionally, the Agencies will assert jurisdiction if a water is "currently being used for commercial navigation, including commercial waterborne recreation (for example, boat rentals, guided fishing trips, or water ski tournaments)."[160]

There is no indication in the CWA's history that Congress intended to exponentially stretch federal authority to the extremes contemplated by the proposed rule. Congress's focus in 1972 was indeed to provide "the broadest possible constitutional interpretation"[161] of traditional navigable waters, insofar as such bodies affect navigation or provide linkages to channels of interstate commerce. However, there is simply no evidence that the CWA's founders sought to subject isolated ponds, erosional drainages, upland ditches, swales, or the like, to federal control. The Agencies' expansive interpretation does not comport with the Supreme Court test for traditional regulatory authority over "navigable waters of the United States." The proposed rule will have the effect of sweeping "virtually any land feature over which rainfall or drainage

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[156] 79 Fed. Reg. at 22,236.
[157] *Rapanos*, 547 U.S. at 734.
[158] *Id.* at 749.
[159] 79 Fed. Reg. at 22,253 (emphasis added).
[160] *Id.* at 22,200.
[161] S. Rep. No. 92-1236, at 144 (1972).

passes and leaves a visible mark," into the federal regulatory net.[162] This is not what Congress had in mind.

1. The Agencies have Failed to Heed the Limits of the Legal Test for Navigability.

It is clear that jurisdiction under the CWA covers more than just traditional navigable waters. In *Rapanos*, both Justice Scalia (writing for the four-justice plurality) and Justice Kennedy (concurring in the judgment) agreed that the CWA's scope extends beyond traditional navigable waters.[163] However, the determination of whether an aquatic feature is a traditional navigable waters is the crucial, foundational component of both the plurality's and Justice Kennedy's CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to a traditional interstate navigable water) . . ."[164] Justice Kennedy stated that "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."[165] Thus, while the CWA's purview is not coterminous with traditional navigable waters, waters deemed navigable in the traditional sense remain critical to determining the reach of Corps and EPA authority.

The proposed rule states that the phrase "traditional navigable waters" means those waters referred to in 33 CFR § 328.3(a)(1).[166] It further adds that traditional navigable waters include waters regulated as navigable waters of the United States under the Rivers and Harbors Act (RHA), but then confuses the issue by stating that such waters include waters that are "navigable-in-fact." This position is not supported by the history of federal regulation of navigable waters, the text of (a)(1) itself, or the Supreme Court's discussion of the issues in *Rapanos*.

The test for traditional regulatory authority over "navigable waters of the United States" was set forth in *The Daniel Ball*.[167] That test has two parts. The first is denoted by the use of the word "navigable" and involves a determination of whether a waterbody is "navigable-in-fact." The second is denoted by the phrase "of the United States" and involves a determination of whether the waterbody forms by itself or in conjunction with other waters, a continuous interstate highway for waterborne commerce. It is worth quoting the entire text of this test from *The Daniel Ball*, as the proposed rule leaves out the second part:

> The test by which to determine the navigability of our rivers is found in their navigable capacity. Those rivers are public navigable rivers in law which are navigable in fact. Rivers are navigable in fact when they are used, or susceptible

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[162] *Rapanos*, 547 U.S. at 725.
[163] *Id.* at 731 (Justice Scalia: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters ...."); *id.* at 799 (Justice Kennedy: "...[T]he Act contemplates regulation of certain 'navigable waters' that are not in fact navigable").
[164] *Id.* at 742 (emphasis added).
[165] *Id.* at 779 (emphasis added).
[166] 79 Fed. Reg. at 22,200.
[167] *The Daniel Ball*, 77 U.S. 557, 563 (1870).

of being used, in their 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 they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[168]

Under this test, a waterbody must be used, or be susceptible of being used, as a highway for commerce and, either by itself or in conjunction with other waters, form a continuous interstate highway for water-borne commerce in order to be deemed jurisdictional. The proposed rule fails to heed these limits.

2. Recreational Use, by Itself, is not Sufficient to Establish a Traditional Navigable Water.

One of the emerging misconceptions about traditional navigable water determinations is that recreational use alone is sufficient to demonstrate the presence of a traditional navigable water. The proposed rule feeds this misconception by allowing "boating or canoe trips for recreation or other purposes" to form the basis of a traditional navigable water determination.[169]

Appendix B of the proposed rule references two cases, *FLP Energy Marine Hydro v. FERC*,[170] and *Alaska v. Ahtna, Inc.*,[171] that the Agencies offer as evidence that recreational use demonstrates that a water is susceptible to being used for commercial navigation such that it is a traditional navigable water. In fact, neither case demonstrates that mere recreational use alone is sufficient to prove the existence of a traditional navigable water. Recreational use, to the extent it is relevant at all, is merely evidence of commercial use (if the recreational use is itself commercial) or is evidence of susceptibility of use for commercial purposes. This proposition is demonstrated in the *Ahtna* case, where the court upheld a finding of navigability of the Gulkana River based on evidence of commercial recreational use of the river. The *FPL* case, an extremely marginal case of navigability based on canoe use, likewise found that a waterbody with physical characteristics of continuous, substantial flow, plus experimental use indicated susceptibility to future use for commercial purposes. NAHB finds the Agencies' citation to these two cases is odd because neither offer any support in explaining how evidence of recreation alone could be sufficient to satisfy the definition of a traditional navigable water.

As *The Daniel Ball* makes clear, for a waterbody to be classified as a traditional navigable water, the waterbody must have been used, or be susceptible to use, as a highway for water-borne interstate commerce, as opposed to being capable of floating a boat or canoe. Subsequent decisions of the Supreme Court have refined this test, but it has remained largely unchanged for

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[168] *Id.* at 557.
[169] 79 Fed. Reg. at 22,200.
[170] *FLP Energy Marine Hydro v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002).
[171] *Alaska v. Ahtna, Inc.*, 891 F.2d 1404 (9th Cir. 1989).

more than 140 years.[172] Each of these decisions was decided before the CWA was enacted, and evidence that the standard for determining the navigability of a particular waterbody is a judicial standard, not a regulatory standard. Indeed, the term "traditional navigable water" is not found in the CWA or its implementing regulations. Once again, the proposed rule goes too far.

ii. The Agencies' Treatment of Interstate Waters Overreaches, is Inconsistent with Justice Kennedy's "Significant Nexus" Test, and Fails to Provide Regulatory Clarity.

Without support from case law or science,[173] the proposed rule accords interstate waters the same status as traditional navigable waters and considers waterbodies jurisdictional based on their connectivity to interstate waters.[174] The proposed rule does not require that interstate waters possess a significant nexus or any type of connection to traditional navigable waters.[175] In *SWANCC*, the Supreme Court clarified that Congress enacted the CWA pursuant to its "commerce power over navigation."[176] Yet, in the proposed rule, the government is asserting jurisdiction over "interstate waters, including interstate wetlands" that have no connection with navigation.[177]

The Supreme Court explained in *SWANCC* that "where an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court] expects a clear indication that Congress intended that result."[178] By asserting authority over waterbodies simply because they cross state lines, the Agencies are at the "outer limits" of congressional authority.[179] In addition, there is no "clear indication" in the CWA that Congress provided the Agencies with authority over all waterbodies in the United States that cross state lines. Therefore, the Agencies cannot automatically assume all interstate waters are jurisdictional because the CWA does not provide the Agencies such authority. Any attempt to regulate waterbodies simply because they are "interstate" must be abandoned.

More troublesome than the treatment of interstate waters themselves, however, is the fact that the Agencies propose to assert jurisdiction over waters based solely on their relationship to interstate waters, regardless of whether or not those interstate waters are navigable. Indeed, the Agencies misinterpret Justice Kennedy's significant nexus test to assert jurisdiction over "tributaries to interstate waters, waters adjacent to interstate waters, waters adjacent to tributaries of interstate waters, and 'other waters' that have a significant nexus to interstate waters."[180] Under the proposed rule, the Agencies misuse Justice Kennedy's significant nexus test to justify the

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[172] *See, e.g., Utah v. United States*, 403 U.S. 9, 10-11 (1971); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 405-09 (1940); *United States v. Utah*, 283 U.S. 64, 76-77 (1931); *United State v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 698-699 (1899).
[173] Neither the draft Connectivity Report nor the preamble's Appendix A address interstate waters let alone provide support for equating all interstate waters with traditional navigable waters.
[174] 79 Fed. Reg. at 22,262, 22,263.
[175] *Id.* at 22,200.
[176] *SWANCC*, 531 U.S. 159, 168 n.3.
[177] 79 Fed Reg. at 22,198.
[178] *SWANCC*, 531 U.S. at 172.
[179] By analogy, if a geographic or other physical feature other than a waterbody crosses a state line, Congress does not automatically posses the power to regulate it.
[180] 79 Fed. Reg. at 22,200.

assertion of categorical jurisdiction over all wetlands and waters that are connected to navigable and non-navigable interstate waters. The proposal states, "It is reasonable to assert jurisdiction over tributaries, adjacent wetlands and 'other waters' that have a significant nexus to interstate waters consistent with the framework established by Justice Kennedy in *Rapanos* for establishing jurisdiction over waters with a significant nexus to traditional navigable waters."[181] This is in fact *not* reasonable. Justice Kennedy's test required adjacent *wetlands*, not waters, to *significantly affect* the chemical, physical, and biological integrity of *other covered waters more readily understood as "navigable."*[182] Justice Kennedy demanded more to assert federal jurisdiction over an isolated Montana prairie pothole wetland, for instance, than a mere hydrologic connection between it and a nearby ephemeral stream that just so happens to cross the Montana-North Dakota state line.

Perhaps even more problematic than the fact that the proposed rule requires no connection between an interstate water and a traditional navigable water and the inappropriate use of Justice Kennedy's "significant nexus" test, is the fact that the Agencies do not even provide a definition of "interstate waters." As a result, the proposed rule again fails to provide clarity. The preamble only provides a vague footnote, stating, "'Interstate waters' . . . refers to all interstate waters including interstate wetlands."[183] This definition is imprecise and raises several questions:

- What waters are considered "interstate waters"?
- Are waters that cross tribal borders considered "interstate waters"?

The Agencies must provide a formal and precise definition of "interstate waters" to reduce regulatory confusion. Additionally, the Agencies may only assert jurisdiction over those interstate waters that are navigable pursuant to Congress's commerce power over navigation, not any water that happens to straddle state lines.

iii. The Agencies' Assertion of Categorical Jurisdiction over Impoundments is Unsupported and Likely to Cause Confusion.

Under the proposed rule, the Agencies will assert categorical jurisdiction over all impoundments of traditional navigable waters, interstate waters, territorial seas, and broadly defined tributaries. "Impoundments" is a broad, amorphous term that should not be *per se* jurisdictional. As is the case with interstate waters and wetlands, without legal or scientific support, the proposed rule asserts categorical jurisdiction over waters based on their relationship to impoundments without requiring impoundments themselves to have a significant nexus or any meaningful connection to traditional navigable waters.[184] Neither of the cases cited by the Agencies in the preamble discussion of impoundments support categorical jurisdiction over impoundments or jurisdiction over features based on their connections to impoundments.[185] Similarly, the draft Connectivity Report does not examine impoundments, and the studies cited in Appendix A, which only states

[181] *Id.*
[182] *Rapanos*, 547 U.S. at 780.
[183] 79 Fed. Reg. at 22,188.
[184] *Id.* at 22,262, 22,263.
[185] *See id.* at 22,201.

that impoundments can be subject to seepage in certain circumstances, do not demonstrate that impoundments have significant physical, chemical, and biological effects on downstream waters.[186] If an impoundment cuts off a physical connection and stops flow, for instance, then the upstream water would lack a significant nexus with downstream waters. Interestingly, the preamble does not even state that all impoundments categorically have a significant nexus with (a)(1) through (3) waters – it simply states that "impoundments have chemical, physical, and biological effects on downstream waters."[187] This is hardly a strong enough statement to support categorical jurisdiction over all impoundments and other waterbodies based on their relationship to impoundments. Nevertheless, the proposed rule asserts jurisdiction over tributaries to impoundments, wetlands and waters adjacent to impoundments, and waters adjacent to tributaries of impoundments.[188]

As is the case with interstate waters, the term "impoundment" is left undefined. This will lead to increased regulatory uncertainty regarding what is and what is not a "water of the United States." By failing to provide a definition for this critical regulatory term, the Agencies leave fundamental questions unanswered:

- What is an "impoundment"?
- Can any feature on the landscape, natural or man-made, that holds water be considered an impoundment?
- Under what circumstances do impoundments qualify for the waste treatment exclusion?
- The proposed "tributary" definition lists "impoundments" as an example of tributaries.[189] Under what circumstances will an impoundment be treated as an (a)(4) impoundment? Under what circumstances will an impoundment be treated as an (a)(5) tributary?

Left undefined, the regulation of impoundments will cause continued confusion. The Agencies must provide a formal and precise definition of "impoundment" to reduce regulatory confusion. Additionally, since the Agencies only have authority to assert jurisdiction over those impoundments that are navigable pursuant to Congress's commerce power over navigation, appropriate revisions must be made.

iv. The Agencies Wrongly Assert Categorical Jurisdiction over all Broadly Defined Tributaries.

In the proposed rule, the Agencies have for the first time provided a regulatory definition of the term "tributary":

> The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes

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[186] *See id.* at 22,235.
[187] *Id.* at 22,201.
[188] *Id.*
[189] *Id.* at 22,263.

> flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).[190]

This overbroad definition of tributaries will sweep in waters and features well beyond the reach of the Agencies' CWA authority and any commonsense definition of the word.

1. Asserting Categorical Jurisdiction over all Tributaries is Legally Indefensible.

The Agencies' categorical assertion of jurisdiction over all tributaries is inconsistent with the *Rapanos* Court and inappropriately reverts back to regulating any mere hydrologic connection.

a. The Tributary Definition Contravenes the Supreme Court in *Rapanos*.

Both the *Rapanos* plurality and Justice Kennedy raised concerns about far-reaching jurisdiction over features distant from navigable waters and carrying insignificant volumes of flow. The plurality even went so far as to chastise the Corps for extending jurisdiction to "'ephemeral streams,' 'wet meadows,' storm sewers and culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert,"[191] and in doing so, stated, "the Corps has stretched the term 'waters of the United States' beyond parody."[192] Justice Kennedy similarly criticized the Agencies' "existing standard" for tributaries which "deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses and ordinary high water mark" because this definition "leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes toward it."[193] Indeed, Justice Kennedy noted, "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however *remote* or *insubstantial*, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[194]

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[190] *Id.* at 22,199.
[191] *Rapanos*, 547 U.S. at 734.
[192] *See id.* at 734.
[193] *See id.* at 781.
[194] *Id.* at 778, 779.

Despite these clear statements and contrary to the limits of CWA jurisdiction recognized by the *Rapanos* plurality and Justice Kennedy's concurrence, the proposed definition of tributary allows for *per se* jurisdiction over features with remote proximity and tenuous connections to traditional navigable waters, including ephemeral drainages. Indeed, just like the Agencies' previous standard that the Supreme Court considered too far-reaching, the Agencies' new definition allows for categorical regulation of conveyances, drains, ditches, and ephemeral streams that have little or no relationship to traditional navigable waters. Clearly, the proposed rule's definition of tributary is over broad and ignores the limits of the CWA recognized by the Supreme Court. In the words of Justice Scalia, "[t]he plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction."[195] Yet with the over broad definition of tributary, the Agencies are again attempting to stretch the definition of "waters of the United States" beyond parody.

b. Basing the Tributary Definition on the Contribution of Flow Inappropriately Reverts Back to Regulating any Mere Hydrologic Connection – a Theory Rejected by both the *Rapanos* Plurality and Justice Kennedy.

The proposed rule designates any water a tributary and *per se* jurisdictional if it "contributes flow, either directly or through another water," to a traditional navigable water, interstate water, territorial sea, or impoundment of any of those three. By defining any water as jurisdictional by rule if it has a bed, bank, and an ordinary high water mark (OHWM) and contributes flow to such a jurisdictional water, the Agencies have disregarded the Supreme Court ruling in *Rapanos* in which five Justices rejected the notion that CWA jurisdiction applies to any water if it possesses a hydrologic connection to a traditional navigable water. Justice Kennedy opined, ". . . mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[196] He continued, ". . . a . . . ditch could . . . be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant nexus standard, is therefore necessary."[197] The *Rapanos* plurality noted, "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition."[198] The concurring Justices may not have all agreed on the test required to determine jurisdiction, but they did agree that jurisdiction should not be based on the presence of a hydrologic connection in and of itself. The Agencies must honor this commonality in the proposed rule.

By defining tributary as a feature that "contributes flow," the Agencies ignore the tests developed by the Supreme Court in *Rapanos* and wrongfully revert back to regulating any hydrologic connection. Furthermore, the Agencies disregard Justice Kennedy's "significant nexus" test by making all connections categorically jurisdictional. Such a broad overreach is impermissible.

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[195] *See id.* at 734.
[196] *Id.* at 784, 785.
[197] *Id.* at 786.
[198] *Id.* at 736 n.7 (original emphasis).

2. Lacking Scientific Support, the Agencies Wrongly Assert that All Tributaries have a Significant Nexus to Downstream Waters.

The Agencies assert that all tributaries have a significant nexus to traditional navigable waters: "With this proposed rule, the Agencies conclude, based on existing science and the law, that a significant nexus exists between tributaries . . . and the traditional navigable waters, interstate waters, and the territorial seas . . . Consequently, this rule establishes as 'waters of the United States,' all tributaries . . . of the traditional navigable waters, interstate waters, and the territorial seas . . . it has been determined that as a category, [tributaries] have a significant nexus and thus are 'waters of the United States.'"[199] The authors of the Connectivity Report, however, recognize the *decreasing* impact a water has on downstream waters with increasing distance between those waters, stating, "all else being equal, materials traveling shorter distances could enter the river with less transformation or dilution [than materials traveling longer distances],"[200] and continuing, "[h]ydrologic connectivity between streams and rivers can be a function of the distance between the two water bodies."[201] Further, Justice Kennedy recommended the Corps consider the distance of a tributary to a navigable water when making a jurisdictional determination: " . . . the Corps may choose to identify categories of tributaries that . . . due to their . . . *proximity to navigable waters* . . . are significant enough that wetlands adjacent to them are likely . . . to perform important functions for an aquatic system incorporating navigable waters."[202]

Dr. Mark Murphy of EPA's SAB also raised concerns about the assertion that all tributaries are *per se* jurisdictional, stating, "the inclusion by rule of all tributaries to traditional navigable waters is not scientifically justified by the published literature, the Connectivity report or the SAB review. Inclusion by rule violates the conclusion of the SAB review that connectivity exists as a gradient of causal phenomena that operate variably over flowpaths, and result in consequential disturbances in the watershed."[203] In other words, Dr. Murphy recognizes that not all tributaries have the same impact on downstream waters. Rather, connectivity between tributaries and traditional navigable waters exists on a gradient from insubstantial to significant. Indeed, an ephemeral stream in Arizona that only flows as a trickle several hours a year does not have the same chemical, physical, and biological effects on the Colorado River as does the Little Colorado River, a perennial tributary contributing most of the flow to the Colorado.[204] (*See* Section VI. b. i. 4. for a more detailed discussion of the Agencies' failure to recognize connectivity and significant nexus along a gradient).

Despite suggestions put forth by a United States Supreme Court Justice, an SAB panelist, and peer-reviewed science cited by a cadre of ecologists, the Agencies ignore the decreasing impact a water has on downstream waters with increasing distance between those waters. The proposed rule states, "[t]ributaries have vitally important effects on the physical integrity of (a)(1) through

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[199] 79 Fed. Reg. at 22,193.
[200] Draft Connectivity Report at 1-5.
[201] *Id.* at 3-41.
[202] *Rapanos,* 547 U.S. at 781 (emphasis added).
[203] 8/14/14 SAB Comments on the Proposed Rule at 63.
[204] Benke, A.C., and C.E. Cushing. Editors. *Rivers of North America*, Burlington, MA: Elsevier Academic Press, 2005. Print.

(a)(3) waters, contributing not only the majority of flow in these waters but affecting the structure of the waters. These effects occur . . . *even when the tributaries are significant distances from the (a)(1) through (a)(3) water*."[205] The proposed rule continues, "[t]ributaries that . . . are a *substantial distance* from the nearest (a)(1) through (a)(3) water . . . are essential components of the tributary network and have important effects on the chemical, physical, and biological integrity of (a)(1) through (a)(3) waters . . ."[206] Indeed, the Agencies have ignored the science in an aggressive effort to sweep all features with a bed, a bank, and an OHWM that contribute flow – regardless of magnitude, duration, and frequency – under the jurisdiction of the CWA. This is illogical and cannot be supported.

3. The Agencies have Expanded Clean Water Act Jurisdiction by Requiring only Three Geomorphic Traits to Meet the Tributary Definition.

According to the Agencies, a water must only have a bed, bank, and an OHWM and contribute flow, directly or indirectly, to a traditional navigable water, an interstate water, a territorial sea, or an impoundment to be a tributary. Any water meeting the tributary definition would be jurisdictional by rule. This definition is both significant and an unlawful expansion of the jurisdictional scope of the CWA, as it is overbroad and inconsistent with the Supreme Court's *Rapanos* ruling. In *Rapanos*, Justice Kennedy opined, "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark .... [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it—precludes its adoption ...."[207] He continued, "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[208]

Justice Kennedy was not alone in his opinion regarding the limited jurisdiction that should be extended to tributaries. Justice Scalia, in his four-Justice plurality, wrote ". . . the Corps interpreted its own regulations to include 'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of the 'water of the United States,' see 33 CFR section 328.3(a)(5), provided that they have a perceptible 'ordinary high water mark' . . . This interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark – even if only 'the presence of litter and debris.' 33 CFR section 328.3(e) . . . Prior to our decision in *SWANCC*, lower courts upheld the application of this *expansive* definition of 'tributaries' to such entities as storm sewers that contained flow to cover waters during heavy rainfall . . . and dry arroyos connected to remote waters through the flow of groundwater over 'centuries.'"[209] Justice Scalia continued, "Even after *SWANCC*, the lower courts have continued to uphold the Corps' *sweeping assertions of jurisdiction* over ephemeral

[205] 79 Fed. Reg. at 22,205 (emphasis added).
[206] *Id.* at 22,206 (emphasis added).
[207] *Rapanos*, 547 U.S. at 781.
[208] *Id.* at 778-779.
[209] *Id.* at 725-726.

channels and drains as 'tributaries.'"[210] The Supreme Court has interpreted a definition of "tributary" based upon the presence of an OHWM as "expansive," yet the Agencies conveniently ignore this and publicly attest on their website,[211] on official EPA blog posts,[212] during outreach with stakeholders,[213] in op-eds,[214] and in testimony at congressional hearings[215] that the proposed rule does not broaden coverage of the CWA. This is simply not true. What's more, the Agencies cite no studies supporting the premise that the presence of an OHWM indicates a channel has sufficient flow to significantly impact the chemical, physical, and biological integrity of an (a)(1) through (4) water.

The Agencies consider ephemeral features to be tributaries and jurisdictional by rule provided they meet the tributary definition: "All tributary streams, including perennial, intermittent, and *ephemeral* streams, are physically and chemically connected to downstream traditional navigable waters, interstate waters, and the territorial seas . . ."[216] The proposed rule continues, "The flow in the tributary may be *ephemeral*, intermittent or perennial . . ."[217] Indeed, asserting categorical jurisdiction over ephemeral and intermittent flow is inconsistent with current regulatory guidance which states, "'[R]elatively permanent' waters *do not include* ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard . . . "[218] By categorically asserting jurisdiction over ephemeral and intermittent streams on the purported basis that all tributaries have a significant nexus to downstream waters, the Agencies are sweeping in millions of miles of predominantly dry channels for which they are currently required to perform a significant nexus test. Indeed, of the nation's river miles reported on recent EPA maps developed by the U.S. Geological Survey, some 4.6 million miles of streams in the United States (77% of all mapped river and stream miles) are listed as ephemeral or intermittent.[219] Expanding the tributary definition will undoubtedly expand the number of waters deemed under the jurisdiction of the CWA.

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[210] *Id.* at 726

[211] *See* www.epa.gov/uswaters. Under the heading "What the Rule Does Not Do," we read, "Does not broaden coverage of Clean Water Act" (last visited Nov. 6, 2014); *see also* http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf, "The proposed rule does not expand jurisdiction [of the Clean Water Act]" (last visited Nov. 6, 2014).

[212] In a blog post EPA Office of Water Acting Assistant Administrator Nancy Stoner, entitled "Setting the Record Straight on Waters of the US," she writes, "The proposed rule does not expand jurisdiction [of the Clean Water Act]." (June 30, 2014) *available at* http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ (last visited Nov. 6, 2014).

[213] During a July 2014 stakeholder meeting with farmers in Missouri, EPA Administrator Gina McCarthy stated, "If you don't need a permit now you won't need one [under the proposed rule]."

[214] *See* EPA Administrator Gina McCarthy's Huffington Post op-ed (March 25, 2014) ("Some may think that this rule will broaden the reach of EPA regulations -- but that's simply not the case. Our proposed rule will not add to or expand the scope of waters historically protected under the Clean Water Act.") *available at* http://www.huffingtonpost.com/gina-mccarthy/clearer-protections-for-c_b_5029328.html

[215] In testimony before the House Committee on Science, Space, and Technology on July 9, 2014, EPA Deputy Administrator Robert Perciasepe stated at 1:04:40: "We're not expanding the jurisdiction of the Clean Water Act.", *available at* http://www.c-span.org/video/?320360-1/hearing-clean-water-act-regulations

[216] 79 Fed. Reg. at 22,197 (emphasis added).

[217] *Id.* at 22,202 (emphasis added).

[218] 2008 *Rapanos* Guidance at 7 (emphasis added).

[219] *See* http://science.house.gov/epa-maps-state-2013#overlay-context

Equally problematic, the science does not demonstrate that treating ephemeral features as "waters of the United States" will have benefits for downstream waters. The state of Missouri, for instance, determined based on U.S. Geological Survey analysis, that it would not set water quality standards for ephemeral streams because data do not exist to support a significant connection to aquatic uses.[220] Neither the draft Connectivity Report nor Appendix A of the preamble refute this decision, as they do not demonstrate that ephemeral features have significant chemical, physical, or biological effects on traditional navigable waters. For these reasons, ephemeral drainages should not automatically be considered "waters of the United States."

a. Identifying Geomorphic Features Needed to Meet the Tributary Definition, Particularly Ordinary High Water Mark, has Proven Difficult for the Agencies and will Increase Regulatory Uncertainty.

The proposed rule requires only the presence of a bed, a bank, and an OHWM, and the contribution of flow to a traditional navigable water, an interstate water, a territorial sea, or an impoundment for a water to meet the "tributary" definition. A bed, a bank, and an OHWM represent limited criteria to qualify water or – in instances when surface water is not present – *land* features as tributaries. Let's not forget that the CWA authorizes federal jurisdiction only over "water."[221] While these three features appear to represent a simple approach to identifying tributaries, there is in fact great variability in channel form,[222] and identifying certain tributary features can be challenging. This is particularly true with respect to OHWM.

In the absence of adjacent wetlands, OHWM is intended to determine the lateral limits of jurisdiction of non-tidal waters.[223] A 2004 Government Accountability Office (GAO) report, however, noted significant inconsistencies among Corps districts in identifying waters of the United States, particularly with respect to identifying an OHWM.[224] In "Channel Classification across Arid West Landscapes in Support of OHW[M] Delineation" the Corps states, "channel types have pronounced spatial and temporal variability in channel morphology," and "physical features found along a channel vary between types, along the length of any given stream, and through time at a single point."[225] The Corps continues, "because of the diversity and dynamics in channels, no single classification satisfies all needs or includes all channel types." OHWM, defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or

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[220] *See* Missouri Department of Natural Resources, Regulatory Impact Report In Preparation for Proposing An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards at 4, 25 (Nov. 9, 2012) *available at* http://www.dnr.mo.gov/env/wpp/docs/master-rir-wqs-112312.pdf (Based on USGS study, "A Gap Analysis for Riverine Ecosystems of Missouri" [2005], Missouri decided to designate all perennial rivers and streams, intermittent streams with permanent pools, and those waters spatially represented by the 1:100,000 scale NHD, but not ephemeral waters.)
[221] 33 U.S.C §1362(7).
[222] Dunne, T., and L.B. Leopold. *Water in Environmental Planning*. New York: W.H. Freeman and Co., 1978. Print.
[223] 33 C.F.R. 328.4(c)(a).
[224] GAO-04-297, at 3-4.
[225] U.S. Army Corps of Engineers Engineer Research and Development Center. *Channel Classification across Arid West Landscapes in Support of OHW Delineation*, Lefebvre L., R. Lichvar, K. Curtis, J. Gillrich (Jan. 2013).

other appropriate means that consider the characteristics of the surrounding areas,"[226] has been referred to as "vague" and responsible for "inconsistent interpretation of the OHWM concept" and "inconsistent field indicators and delineation practices" in a recent Corps presentation (Fig. 3).[227]

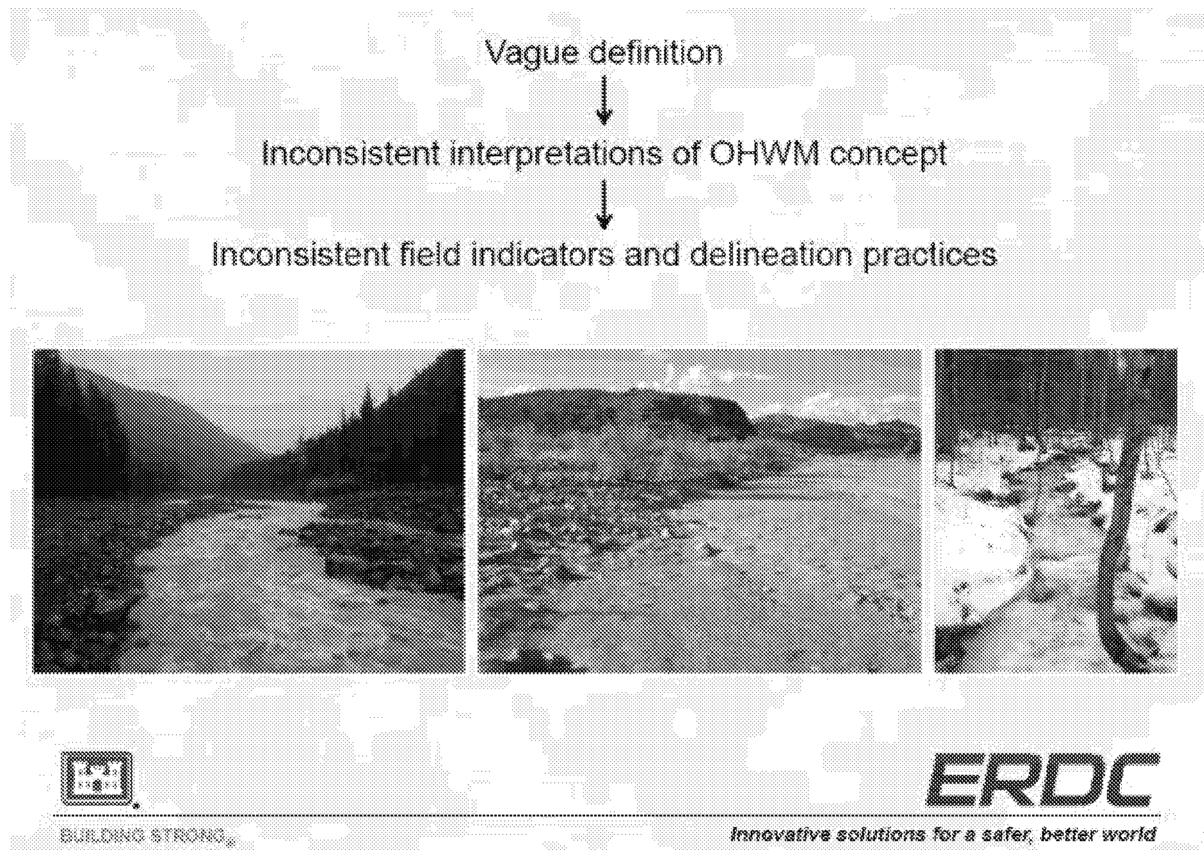

Figure 3: Slide from U.S. Army Corps of Engineers presentation dated March 4, 2014, indicating the limitations of using "ordinary high water mark" (OHWM) to identify "water of the United States."[228]

The Corps has had a particularly difficult time identifying OHWM in the arid western United States, where xeric conditions generate innumerable ephemeral and intermittent streams. In these non-perennial reaches, the flashiness of storm events and the frequent shifting of the channel morphology make it challenging to identify the OHWM.[229] Limited data and changing

[226] 33 C.F.R. § 328.3(e).
[227] Presentation by Matthew K. Mersel, U.S. Army Corps of Engineers Engineer Research and Development Center. *Development of National OHWM Delineation Technical Guidance* (March 4, 2014).
[228] Presentation by Matthew K. Mersel, U.S. Army Corps of Engineers Engineer Research and Development Center. *Development of National OHWM Delineation Technical Guidance* (Mar. 4, 2014).
[229] U.S. Army Corps of Engineers Engineer Research and Development Centers. ERDC/CRREL TR-11-12. *Ordinary High Flows and the Stage–Discharge Relationship in the Arid West Region*. Curtis, K.E., R.W. Lichvar,

flow conditions across these ephemeral and intermittent streams also increase the difficulty the Corps faces when identifying the magnitude and frequency of an ordinary high discharge at a site.[230] Although the Corps states there is "extreme variation" in ordinary high flows throughout the arid West region and OHWM is "highly variable,"[231] today's proposal nonetheless continues to rely on this problematic feature. With regard to ordinary high flow and OHWM, the Corps admits it is challenging to determine what is "ordinary" to a channel. A study by the Corps in the Arid West revealed a < 1 to 15.5 year range in flood frequency necessary to generate an OHWM in ephemeral streams.[232] In that study, the Corps stated that this "large variation in recurrence intervals for the field OHWMs makes it *impossible* to define the frequency of the ordinary high flow from gage data because the OHW[M] event is unique to each channel."[233]

Given the difficulty the Corps has had identifying OHWM under current regulatory guidance, there is substantial reason to believe the proposed rule will not clarify "waters of the United States" under the new tributary definition, and the current regulatory uncertainty surrounding the jurisdiction of the CWA will regrettably remain.

4. The Agencies' Treatment of "Breaks" along Tributaries is Inconsistent with Science and Existing Policy.

The proposed rule states that a water does not lose its status as a tributary – and thus jurisdiction by rule – if "for *any* length, there are one or more man-made breaks . . . or one or more natural breaks . . . so long as a bed, and banks, and an ordinary high water mark can be identified upstream of the break."[234] However, in preserving a water's "tributary" status regardless of the length of any number of man-made and/or natural breaks, the Agencies fail to recognize what their colleagues in EPA's Office of Research and Development acknowledge in the draft Connectivity Report, that is, the larger a break, the less likely a "tributary" is to contribute flow to a downstream traditional navigable water. Moreover, the contribution of flow from a "tributary" to a downstream water will become increasingly more difficult to quantify as the length of a break or multiple breaks increases.

Further, the proposed rule's interpretation that a tributary retains its tributary status regardless of the length of a break or breaks along its length would expand categorical jurisdiction beyond tributaries considered jurisdictional under existing guidance. The 2008 *Rapanos* Guidance states, "[a] non-navigable tributary of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or *indirectly by means of other tributaries*."[235] Indeed, under current guidance, flow from a non-navigable tributary must flow into a traditional navigable water either directly or through other *tributaries*. There is no mention of indirect flow through non-tributaries in the existing guidance, yet the proposed rule

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L.E. Dixon. (July 2011) at 1, *available at* http://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/TR-11-12_gage.pdf
[230] *See id.* at 60.
[231] *See id.* at 3, 59.
[232] *See id.* Table 4 at 24.
[233] *See id.* at ii.
[234] 79 Fed. Reg. at 22,263 (emphasis added).
[235] 2008 *Rapanos* Guidance at 6 (emphasis added).

would permit indirect contribution of flow from tributaries through non-tributary features for a water to meet the categorically jurisdictional tributary definition.

The treatment of breaks is also inconsistent with language in the preamble in which the Agencies assert that "tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks *because they are directly connected to rivers via permanent surface feature*s (channels and associated alluvial deposits) . . ."[236] This statement contradicts the tributary definition that expressly includes flow paths that are not permanent or direct.

The Agencies must remove the language pertaining to "breaks" from the tributary definition as it is inconsistent with science, existing policy, and preamble language.

5. The Agencies Fail to Define Key Terms and Describe Key Methods Necessary to Determine Whether or not a Water Meets the Tributary Definition, Thereby Increasing Regulatory Uncertainty.

The Agencies claim that the proposed rule will increase clarity as to the scope of "waters of the United States" protected under the CWA. However, they have failed to define three key terms used to determine whether or not a water meets the tributary definition and if that water is jurisdictional by rule. By not defining "bank," "flow," and "another water" the Agencies have not increased clarity regarding the jurisdictional scope of the CWA, yet have provided more hooks with which to claim authority.

a. The Agencies Fail to Define Critical Parameters Needed to Identify the "Bank" of a Tributary.

In addition to the challenges associated with identifying the OHWM, NAHB finds it troublesome that no parameters or bright lines are identified to objectively quantify the point at which a "bank" occurs and a water exhibits one of the three geomorphic characteristics necessary to meet the definition of tributary. For instance, the proposed rule explicitly excludes "non-wetland swales" from jurisdiction and differentiates non-jurisdictional non-wetland swales from jurisdictional tributaries in that non-wetland swales are "non-channelized, shallow trough-like depressions that carry water mainly during rainstorms or snowmelt" – a definition that could possibly be used to define many of the "tributaries" the Agencies seek to regulate.[237] According to the proposal, however, a non-channelized "swale" becomes a "tributary" at the point at which it becomes channelized; that is, when it exhibits a bank. While the Agencies claim the proposed rule provides clarity to regulated entities as to whether individual water bodies are jurisdictional, without a clearly defined threshold for bank, the point at which a non-jurisdictional swale becomes a jurisdictional tributary is left to speculation (Fig. 4). This will add unnecessary regulatory confusion, and make it difficult for home builders and others in the regulated community to know with certainty whether or not a water is under federal jurisdiction. At a

[236] 79 Fed. Reg. at 22,227 (emphasis added).
[237] *Id.* at 22,219.

minimum, the Agencies must define bank within the tributary definition in order to provide any semblance of clarity.

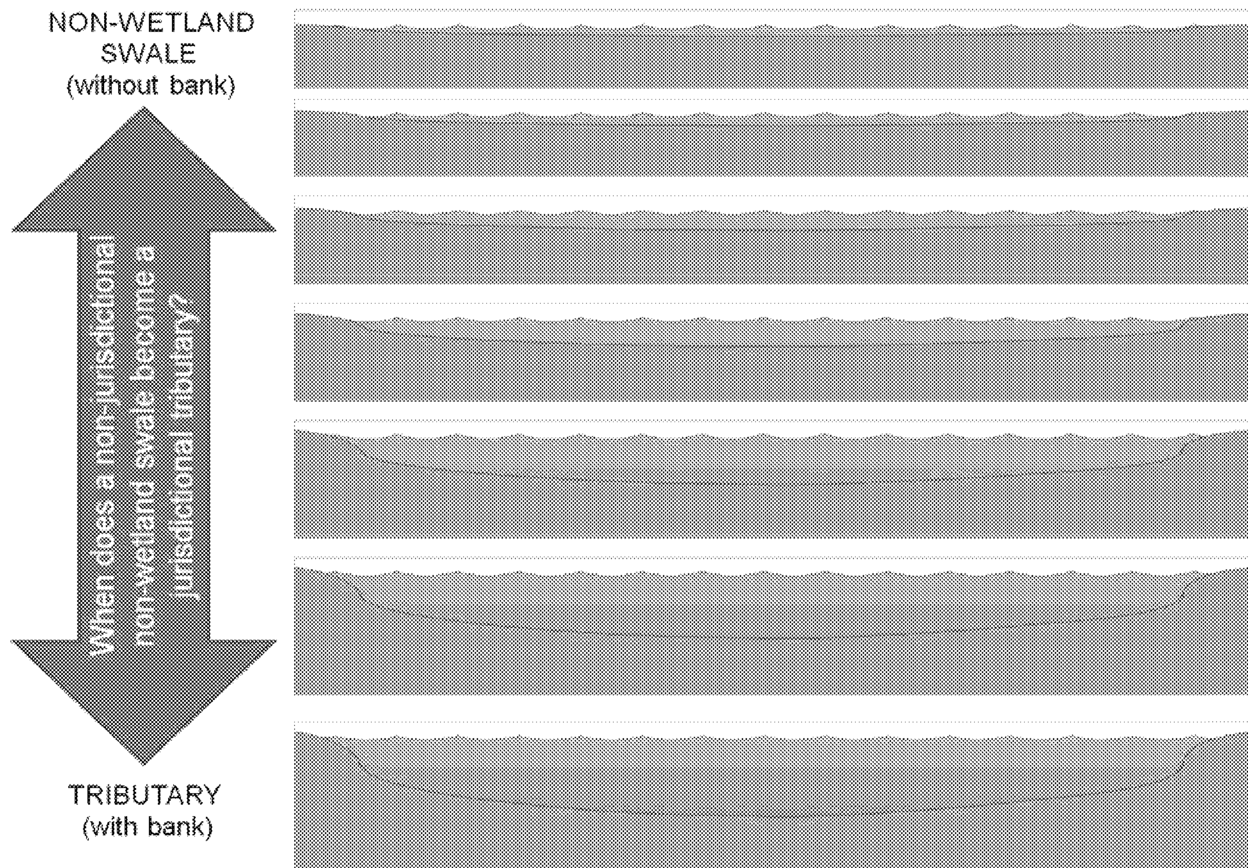

Figure 4: The Agencies assert that features with a bed, a bank, and an OHWM are tributaries and categorically jurisdictional. Non-wetland swales that lack a bank, however, are explicitly excluded from CWA jurisdiction. Without defining the point at which a geomorphic feature exhibits a bank, the Agencies have not provided clarity as to whether a feature is a jurisdictional tributary or a non-jurisdictional non-wetland swale.

b. The Agencies Fail to Define "Flow" and Associated Ecologically Critical Parameters.

In addition to the case law inconsistencies related to the contribution of flow, the tributary definition fails to describe and define critical scientific streamflow parameters. Flow, a "master variable" defining stream structure and function[238] and arguably one of the most well studied parameters in lotic ecology, is undefined. In one of the most oft-cited papers in stream ecology, entitled "The Natural Flow Regime," Dr. LeRoy Poff and colleagues state, "streamflow quantity

[238] Poff, N.L., J.D. Allan, M.B. Bain, J.R. Karr, K.L. Prestegaard, B.D. Richter, R.E. Sparks, J.C. Stromberg. 1997. The Natural Flow Regime. *BioScience*, Vol. 47(11):769-784.

and timing are critical components of water supply, water quality and the ecological integrity of river systems. Indeed, streamflow, which is strongly correlated with many critical physicochemical characteristics of rivers, such as water temperature, channel geomorphology, and habitat diversity, can be considered a master variable that . . . regulates the ecological integrity of flowing water systems."[239] Dr. Poff et al. describe a widely accepted framework highlighting the central importance of flow magnitude, frequency, duration, timing, and rate of change on the ecological integrity of stream ecosystems (Fig. 5).

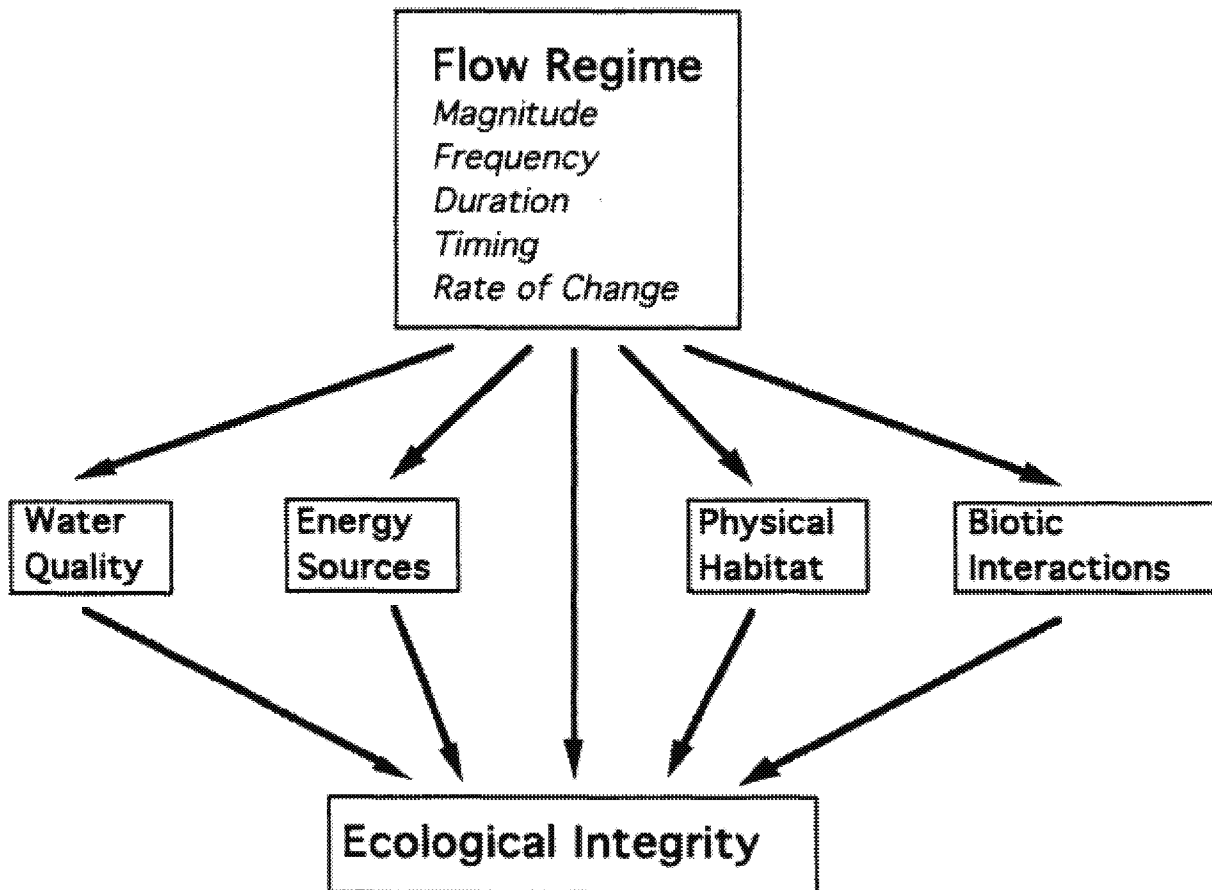

Figure 5: The "natural flow regime" framework highlighting the central importance of flow magnitude, frequency, duration, timing, and rate of change on the ecological integrity of stream ecosystems.[240]

Streamflow is commonly described in lotic ecology according to the flow parameters Dr. Poff and his colleagues described in 1997. Yet, the proposed rule – which the Agencies purport to be based on the "best available science"[241] – provides *no* descriptors to define flow. In *Rapanos*, Justice Kennedy suggested the Corps consider flow volume when determining the jurisdiction of

[239] *Id.* at 769.
[240] *Source: id.* at 770.
[241] 79 Fed. Reg. at 22,202.

tributaries: " . . . the Corps may choose to identify categories of tributaries that, due to their *volume of flow* . . . are significant enough that wetlands adjacent to them are likely . . . to perform important functions for an aquatic system incorporating navigable waters."[242] Yet the Agencies have failed to heed this advice.

Flow parameters are critical toward determining the degree to which a water significantly affects the chemical, physical, and biological integrity of traditional navigable waters.[243] For example, the greater the magnitude (i.e., discharge volume) of flow, the longer the duration of flow, and the greater the frequency of flow between a water and a traditional navigable water, the greater the probability that water will significantly affect the chemical, physical, and biological integrity of a traditional navigable water. Indeed, EPA's SAB included a figure describing this phenomenon in its final review of the draft Connectivity Report (*see* Fig. 2 above), where it depicts the decreasing probability of a water to affect a downstream water as the magnitude, duration, and frequency of flow between those waters decreases.[244] Yet, the draft Connectivity Report and the proposed rule both interpret hydrologic connectivity among waters as binary – that is either connected or not connected – when connectivity and subsequent chemical, physical, and biological impacts between waterbodies occur along a gradient.[245]

By failing to define flow and associated hydrologically and ecologically critical parameters, including magnitude, duration, and frequency, the Agencies wrongfully consider all tributary flows to be equal in their ability to significantly affect the chemical, physical, and biological integrity of traditional navigable waters. In reality, hydrologic connectivity and the degree of subsequent physicochemical impacts on downstream waters exist along a gradient from insubstantial to significant. This gradient must be reflected in the approach the Agencies use to determine those waters that are "waters of the United States" and those that are not. (*See* Section VI. b. i. 4. for further discussion of the gradient of connectivity and, in turn, significant nexus).

i. The Agencies Fail to Describe Methods to Quantify Contributions of Flow to an (a)(1) through (4) Water.

To meet the definition of tributary, and subsequently be jurisdictional by rule, a water must contribute flow, either directly or through another water to a traditional navigable water, interstate water, territorial sea, or impoundment. The Agencies, however, have proposed no methods to quantify the contribution of flow from tributaries to downstream waters. This causes particular concerns related to how the Agencies will determine if a water contributes flow in those instances where a break occurs along the length of a tributary. For example, what if flow from the tributary goes subsurface or evaporates along the length of the break? If 100% of the flow entering the break infiltrates to a deep groundwater aquifer or evaporates along the length of the break, the upstream tributary is in fact not contributing flow to a downstream (a)(1) through (4) water and thus would not meet the definition of tributary.

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[242] *Rapanos*, 547 U.S. at 781 (emphasis added).
[243] Poff *et al.* at 770; Allan. J.D. and M.M. Castillo. *Stream Ecology*, 2nd ed. New York: Springer, 2007. Print.
[244] SAB Final Review of the Draft Connectivity Report at 54.
[245] Leibowitz, S.G. 2003. Isolated wetlands and their functions: an ecological perspective. *Wetlands* 23(3):517-531.

Similarly, both water quantity and quality change along stream reaches and tributary networks. In fact, the draft Connectivity Report recognizes that "streams and rivers are not pipes," and because of this, "water can be lost from the channel through evaporation and bank storage and diluted through downstream inputs." [246] Additionally, the draft Connectivity Report states, "if geographically isolated unidirectional wetlands have surface water outputs [which would be defined as tributaries if they possess a bed, bank, and OHWM and contribute flow to an (a)(1) through (5) water] . . . *the probability that surface water will infiltrate or be lost through evapotranspiration increases with distance*."[247]

Without methods to determine if a water actually contributes flow, the Agencies will likely rely on visual assessments alone. Clearly, the presence of a bed, a bank, and an OHWM and surface flow in an Arid West ephemeral stream channel could be mistaken for a contributing flow when in fact the water flowing across the landscape does not contribute flow to a downstream traditional navigable water, interstate water, territorial sea, or impoundment. As an example, we highlight research that has been conducted by the United States Department of Agriculture at the Walnut Gulch Experimental Watershed in southeastern Arizona. The Walnut Gulch watershed is characterized by a dense network of ephemeral stream channels (Fig. 6).

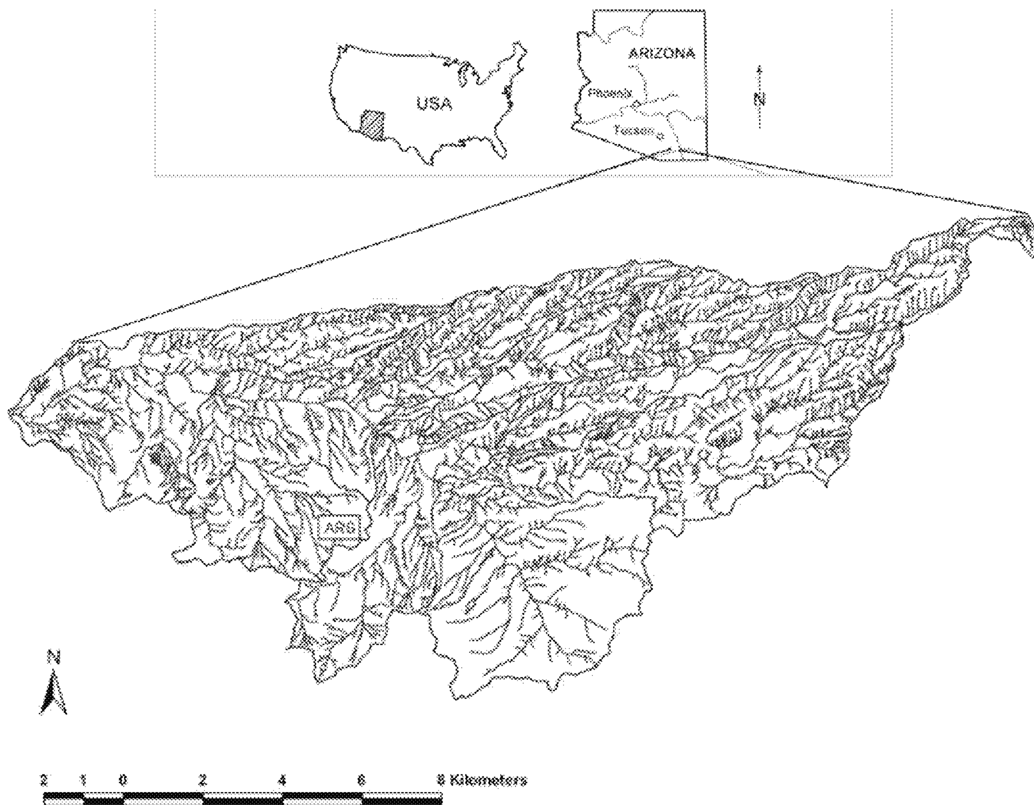

Figure 6: Ephemeral stream network in Walnut Gulch watershed (near Tucson, Arizona).[248]

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[246] Draft Connectivity Report at 3-23 and 3-41.
[247] *Id.* at 3-42.
[248] *Modified from* Walnut Gulch Experimental Watershed Research Brochure. United States Department of Agriculture, Agricultural Research Service, and Southwest Watershed Research Center (October, 2003), at 17.

The Walnut Gulch watershed is classified as semi-arid, and receives an average of 13.8 inches of rain per year. When it does rain, both the ground and the air are very "thirsty." As a result, an overwhelming amount of the precipitation is lost to groundwater (i.e., infiltration) or the sky (i.e., evaporation). The below figure shows the water balance for the Walnut Gulch watershed (Fig. 7).

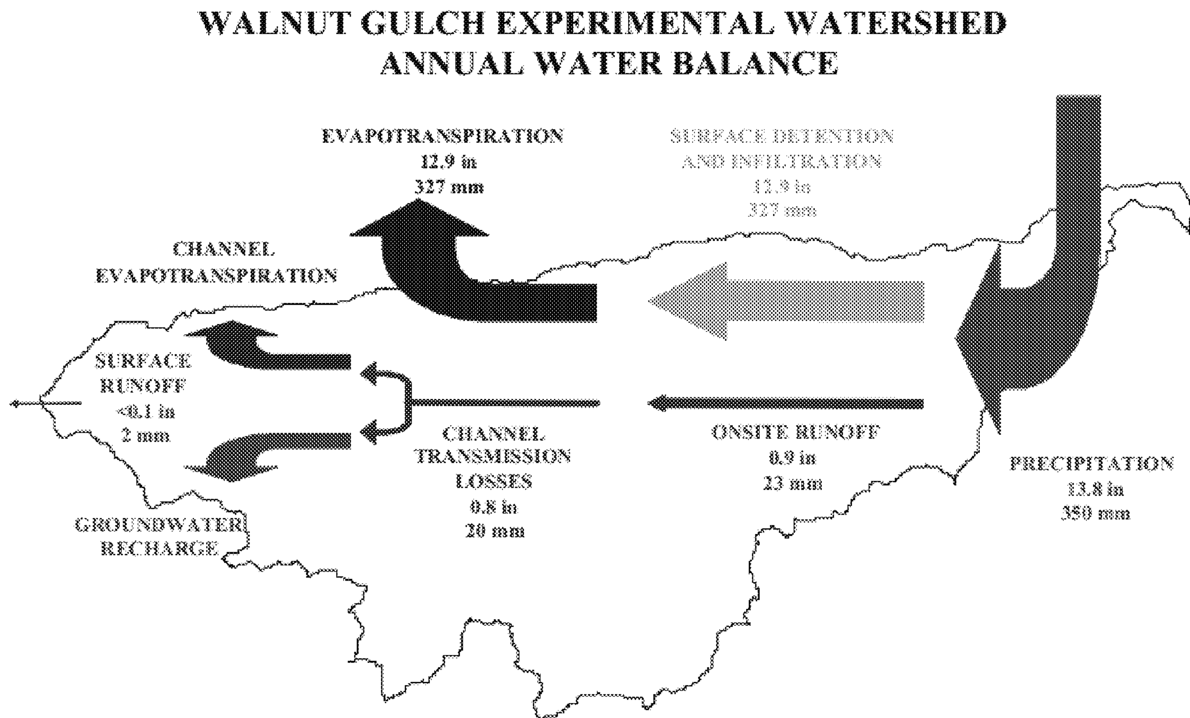

Figure 7: Walnut Gulch watershed annual water balance.[249]

The take home from Fig. 7 is that while 13.8 inches of rain falls on the watershed annually, less than 0.1 inches travels as streamflow down the network. Of the rain that falls on the watershed – a network of hundreds of miles of ephemeral channels with beds, banks, and OHWMs – only 0.5% flows to downstream waters! Across the Walnut Gulch watershed and, indeed much of the arid Western United States, most stream flows traverse dry channels. As water flows over these "thirsty" channels, even more flow volume is lost to transmission losses, or infiltration to stream banks and groundwater (Fig. 8). The landscape is highly dissected by a dense dry channel network (Fig. 6) providing significant opportunity for transmission losses. In a recent report on non-perennial streams in the arid and semi-arid Southwestern United States, EPA and USDA scientists note, "Numerous authors have documented substantial transmission losses in ephemeral streams, frequently to such an extent that flows infiltrate completely before reaching the watershed outlet (Keppel and Renard, 1962; Aldridge, 1970)."[250] Without describing

[249] *Source: Id.* at 21.
[250] Levick, L., J. Fonseca, D. Goodrich, M. Hernandez, D. Semmens, J. Stromberg, R. Leidy, M. Scianni, D. P. Guertin, M. Tluczek, and W. Kepner. 2008. The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest. U.S. Environmental Protection Agency and

methods to determine the contribution of flow from these so-called "tributaries," a bed, a bank, an OHWM, and the mere *presence* of flow might be wrongfully interpreted as meeting the proposed definition of tributary. It is critical that the Agencies describe methods that will be used to distinguish the *presence* of flow *in* a channel from the *contribution* of flow *from* that channel *to* an (a)(1) through (4) water.

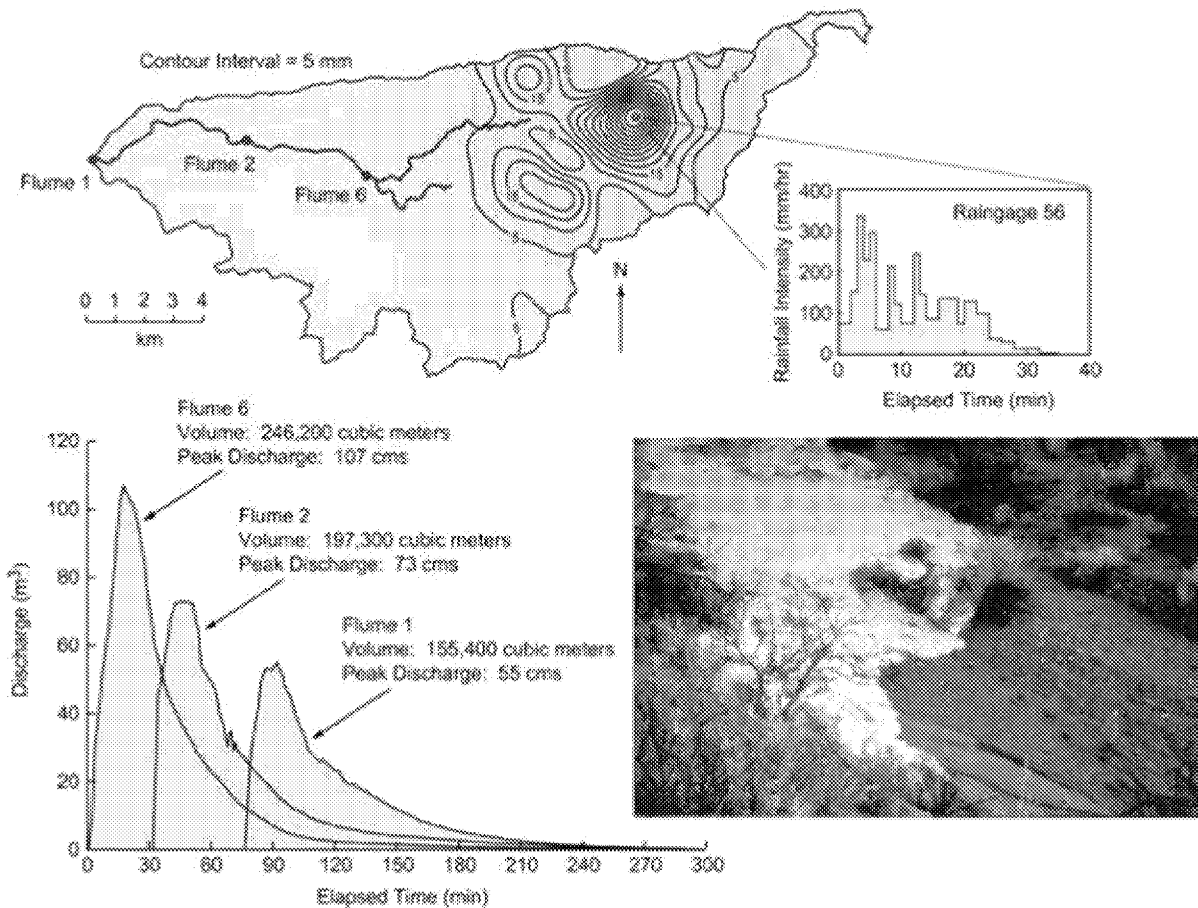

Figure 8: An example of transmission losses in Walnut Gulch watershed. The August 27, 1982 storm was isolated in the NW portion of the watershed (**top panel**). The runoff measured at Flume 6 (**left peak**) amounted to 2.46 x $10m^3$. Runoff then traversed 4.2 km of dry streambed between Flume 6 and Flume 2, resulting in significant infiltration losses (**middle peak**). During the course of the 6.6 km from Flume 2 to Flume 1, the peak discharge was further reduced (**right peak**). The image in the **bottom right** depicts an advancing flow front down the dry channel.[251]

USDA/ARS Southwest Watershed Research Center, EPA/600/R-08/134, ARS/233046, at 33, citing: Keppel, R.V. and K.G. Renard. 1962. Transmission losses in ephemeral stream beds. *Journal of the Hydraulics Division*, ASCE, v. 8, n. HY3, p. 59-68; Aldridge, B.N. 1970. Floods of November 1965 to January 1966 in the Gila River Basin, Arizona and New Mexico, and adjacent basins in Arizona; US Geological Survey Water-Supply Paper 1850-C, 176 p.

[251] *From id.* at 18.

Indeed, the importance of quantifying flow is noted in the existing guidance: "For purposes of demonstrating a connection to traditional navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water."[252] The Agencies must propose scientific methods to quantify the contribution of flow from a water to an (a)(1) through (4) water. Determining if a water contributes flow to a downstream water should not be made based on visual identification alone, precisely because "streams and rivers are not pipes." This is particularly true in arid regions, as noted in the Walnut Gulch example (*see* Section VI. c. iv. 5. b. i.), and in instances where a break(s) exist between the water and the downstream water (*see* Section VI. c. iv. 4.)

c. The Agencies Fail to Define "Another Water."

A water satisfies the definition of tributary if it has a bed, bank, and OHWM and contributes flow, either directly or through *another water*, to an (a)(1) through (4) water. Again, the Agencies have failed to define a critical term within the tributary definition. In this instance, they have not defined "another water." Left undefined, "another water" is left open to limitless interpretation. For example, if 100% of the surface water in an ephemeral stream with a bed, bank, and OHWM in the Arid West evaporates to water vapor, condenses on tiny particles in the air to form a cloud, and then falls from the cloud as rain into the Colorado River, it has contributed flow to a traditional navigable water; it would meet the tributary definition. Let's say manmade aqueducts and tanker trucks collect water from a waterbody and deliver it to a drinking water reservoir during a period of drought. Those aqueducts and trucks have contributed flow. Would the water from which the drinking water was collected meet the tributary definition? As another example, a USGS study of the Delmarva Peninsula found that groundwater return times (the time required for recharge at the water table to return to a stream through groundwater) can take from years to decades.[253] If an ephemeral stream on the Delmarva Peninsula recharges groundwater and only returns to a downstream tributary some 60 years later, has it contributed flow and met the tributary definition?

Is "another water" synonymous with the Agencies' overbroad definition of "water" provided in footnote 3 of the preamble? In other words, does "another water" include "chemical, physical, and biological features" associated with water bodies as traditionally understood? If so, if a muskrat associated with a tributary (which would meet the overbroad footnote definition of "water") drinks water from that tributary, travels to a downstream (a)(1) through (4) water, and urinates therein, the muskrat has functioned as "another water" to contribute flow to an (a)(1) through (4) water.

While these hypotheticals may seem farfetched, without defining "another water," the contribution of flow necessary to meet the tributary definition can result from any two atoms of hydrogen combined with one atom of oxygen that together make their way to any downstream (a)(1) through (4) water. This is absurd. "Another water" must be defined if the Agencies intend the proposed rule to provide clarity to the "waters of the United States" definition.

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[252] 2008 *Rapanos* Guidance at 10.
[253] Sanford, W.E., and J.P Pope. Quantifying Groundwater's Role in Delaying Improvements to Chesapeake Bay Water Quality. *Environ. Sci. Technol.* 2013, 47, 13330−13338.

6. The Tributary Definition Unlawfully Includes Ditches.

The proposed rule explicitly includes ditches in its definition of tributaries. The Agencies state that "a tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and *ditches* not excluded."[254] Ditches are only excluded from the definition of "waters of the United States" if they meet one of two very limited exclusions. Excluded ditches are those "that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and those "that do not contribute flow, either directly or through another water," to an (a)(1) through (4) water.[255]

The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the country. Historically, most ditches have not been regulated as "waters of the United States" under the CWA. Because ditches are expressly included in the tributary definition, all ditches with a bed, bank, and OHWM that contribute flow to an (a)(1) through (4) water will be *per se* jurisdictional unless they meet one of the two narrow exclusions. The categorical regulation of ditches represents an expansion from current practice and an impingement on traditional state and local authority over water and land use. Additionally, ditches are already specifically identified as point sources in CWA Section 502(14) and therefore are protected under CWA Section 402.[256] In other words, they do not need to be regulated as "waters of the United States" for the Agencies to ensure their protection.

The Agencies have historically taken the position that ditches are not "waters of the United States," but they have gradually expanded claims of jurisdiction over ditches without any change in the law. The Corps's 1975 regulations stated that "[d]rainage and irrigation ditches have been excluded" from CWA jurisdiction.[257] Their 1977 regulations read similarly: "[M]anmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition."[258] The preamble of the 1977 regulations indicated that ditches, if they were to be regulated at all, were meant to be regulated as point sources and not "waters of the United States": "[N]ontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402."[259]

Nevertheless, the Agencies' position on ditches has shifted over time, beginning in the mid- to late- 1980s, when they began treating ditches as "waters of the United States" in the context of Section 404 on a case-by-case basis, using OHWM and the Migratory Bird Rule tests.[260] The preamble of the 1986 regulations continued to maintain the exclusion for ditches stating, "We generally do not consider [drainage and irrigation ditches excavated in dry land] to be 'Waters of

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[254] 79 Fed. Reg. at 22,263 (emphasis added).
[255] *Id.*
[256] 33 C.F.R. § 1362.14; 33 C.F.R. § 1342.
[257] 40 Fed. Reg. 31,320 and 31,321 (July 25, 1975).
[258] 42 Fed. Reg. 37,112 (1977).
[259] *Id.* at 37,127.
[260] *See* e.g., 65 Fed. Reg. at 12818, 12823, 12824 (Mar. 9, 2000) (In the 2000 nationwide permit [NWP] regulations, the Corps's disapproval of jurisdiction shrank to "ditches constructed entirely in upland areas," finding that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States.)

the United States.'"[261] However, the same regulations included a provision for the Corps to assert regulatory authority on a "case-by-case" basis to claim jurisdiction after all.[262] Similarly, EPA had historically refrained from regulating ditches as "waters of the United States," and did not even discuss the possibility that ditches might be "waters of the United States" until 1988 when they included reservation of "case-by-case" authority to regulate upland ditches as "waters of the United States" under Section 404. It's clear the Agencies, without any congressional authorization, have incrementally expanded claims of jurisdiction over ditches. To make matters worse, the proposed rule goes even further.

With the proposed tributary definition, the Agencies claim of jurisdiction over ditches has expanded exponentially. For the first time, the Agencies are categorically regulating ditches under all CWA programs. In the past, the Agencies have said that, for the purposes of the Section 404 program, *some* ditches could be regulated as "waters of the United States" *on a case-by-case basis*.[263] Indeed, that is a far cry from categorically regulating *all* ditches as "waters of the United States" under *all* CWA programs, unless they meet one of two very narrow exclusions. Under the proposed rule, the Agencies will regulate all ditches with a bed, bank, and OHWM that contribute flow to a traditional navigable water, interstate water, territorial sea, or impoundment.[264] This includes irrigation ditches, roadside ditches, MS4 ditches and other stormwater conveyance ditches. Treating all of these features, many of which are in place to meet the goals of the CWA, as *per se* jurisdictional for the purpose of all CWA programs will vastly expand CWA jurisdiction. Adding insult to injury, even if ditches do not meet the tributary definition, the proposed rule allows for them to be jurisdictional as either "adjacent waters" or "other waters."

Regulating ditches is not what Congress had in mind when enacting the CWA or what the Supreme Court deemed prudent in *Rapanos*. The Agencies' overbroad treatment of ditches as tributaries indeed stretches the term "waters of the United States" beyond parody.

7. Defining Wetlands as Tributaries is Absurd and will Increase Regulatory Confusion.

Although the Agencies claim the proposed rule provides increased clarity regarding what waters are and are not "waters of the United States," the very definitions used to describe categorically jurisdictional waters only further muddy the waters.

For instance, the Agencies' definition of tributary contradicts itself. In the preamble, the Agencies state, "[a] tributary is a longitudinal surface feature that results from directional surface water movement and sediment dynamics demonstrated by the presence of bed and banks, bottom and lateral boundaries, or other indicators of OHWM."[265] Later, under the definitions section of the proposed rule, the Agencies basically reiterate the preamble, stating, "the term tributary means a water physically characterized by the presence of a bed and banks and ordinary high

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[261] 51 Fed. Reg. at 41,217.
[262] *Id.*
[263] *Id.*
[264] 79 Fed. Reg. at 22,262, 22,263.
[265] *Id.* at 22,202.

water mark . . . which contributes flow . . ."[266] to an (a)(1) through (4) water. Immediately following the requirement for these physical traits, however, the definition disagrees with itself, stating, "wetlands, lakes, and ponds are tributaries (*even if they lack a bed and banks or ordinary high water mark*) . . ."[267]

This turn of events makes no sense. First, this definition differs from the definition of tributary provided in the draft Connectivity Report as well as the description provided in the preamble. Which one is to be believed? Second, it is nonsensical to state that a tributary requires a bed, bank, and OHWM and then suggest that a tributary may lack these *defining* features. Fortunately, the Agencies specifically request comment on whether wetlands, lakes, and ponds should be considered tributaries. The answer is a resounding "no." The Agencies must correct this inconsistency by simply removing wetlands, lakes, and ponds from the tributary definition.

NAHB, along with several EPA SAB panel members, note these waterbodies would already be jurisdictional under the proposed "adjacent waters" definition.[268] Wetlands, lakes, and ponds are lentic ecosystems and not commonly considered tributaries – not by freshwater ecologists or the Merriam-Webster Dictionary.[269] Clearly, the Agencies should not define wetlands as tributaries. It is inconsistent with the Agencies' own definition, scientific literature, and common sense and will unnecessarily increase regulatory confusion.

What's more, inclusion of wetlands in the tributary definition would render the Supreme Court's ruling in *Riverside Bayview* laughable. *Riverside Bayview* addressed the question whether the CWA authorizes the Corps to assert jurisdiction over wetlands adjacent to traditional navigable waters. The Supreme Court ruled in *Riverside Bayview* that adjacent wetlands are jurisdictional.[270] By defining wetlands as tributaries, a wetland adjacent to a wetland that is itself adjacent to a tributary in the traditional sense would be jurisdictional by rule because the intervening wetland would be deemed a tributary. This "stepping stone" interpretation of wetlands as tributaries could be extended indefinitely to wetlands far removed from traditional navigable waters if a string of a wetland adjacent to a wetland adjacent to a wetland – and so on – exists between the wetland in question and a tributary in the traditional sense. Surely this was not what the Supreme Court had in mind in *Riverside Bayview*. It is quite plain and simple: wetlands are not tributaries and tributaries are not wetlands.

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[266] 79 Fed. Reg. at 22,263.
[267] *Id.* at 22,263 (emphasis added).
[268] SAB Chair Dr. Amanda Rodewald and SAB panel member Dr. Mazeika Sullivan both assert that wetlands should not be included in the tributary definition as wetland jurisdiction is already be addressed under the adjacent waters definition (8/14/14 Preliminary comments from individual members of the SAB Panel for the Review of the EPA Water Body Draft Connectivity Report).
[269] EPA Office of Research and Development scientists define tributary as "a stream or river that flows into a higher-order stream or river" Draft Connectivity Report at A-20; In 8/14/14 preliminary comments from individual members of the SAB Panel for the Review of the EPA Water Body Draft Connectivity Report at 10, Dr. Genevieve Ali commented, "I am not sure that the majority of the literature supports the categorization of run-of stream wetlands and lakes as tributaries, especially since the majority of the literature defines tributaries as longitudinal features that have directional flow"; Tributary [Def. 2]. (n.d.). In *Merriam-Webster Online*, Retrieved October 8, 2014, from http://www.merriam-webster.com/dictionary/tributary
[270] *Riverside Bayview*, 474 U.S. at 121.

v. The Agencies Wrongly Assert Jurisdiction over all Broadly Defined "Adjacent Waters."

The proposed rule provides an expanded definition of "adjacent" to assert categorical jurisdiction over all waters, including wetlands, that are bordering, contiguous, or neighboring any (a)(1) through (5) water. This is inconsistent with *Rapanos* and existing regulation. What's more, the definitions associated with the term "adjacent" are vague and will increase the scope of jurisdiction and regulatory uncertainty.

1. The Concept of "Adjacent" Has Been Unlawfully Modified and Expanded to Include All Waters.

The Agencies state that the term adjacent means "bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters,'"[271] and that "*all waters*, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundments or tributaries"[272] are jurisdictional by rule. The concept of "adjacent *waters*" is new and represents an unlawful modification and expansion of the term "waters of the United States."

Operating under the 2008 *Rapanos* Guidance, the Corps currently asserts jurisdiction over wetlands adjacent to traditional navigable waters in accordance with 1986 Corps regulations.[273] Jurisdictional authority over adjacent wetlands stems from *Riverside Bayview* and *Rapanos*, in which the jurisdictional status of wetlands adjacent to traditional navigable waters and tributaries of traditional navigable waters was in question. At issue in *Riverside Bayview* was the jurisdictional status of wetlands that actually abut Black Creek, a traditional navigable water and tributary of Lake St. Clair in Macomb County, Michigan. The Court ruled unanimously that the Corps has authority to "require permits for the discharge of fill material into *wetlands* adjacent to 'waters of the United States.'"[274] Additionally, all Justices agreed that "a definition of 'waters of the United States' encompassing all *wetlands* adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [Clean Water] Act."[275]

Whereas the Supreme Court considered the jurisdictional status of wetlands adjacent to navigable waters in *Riverside Bayview*, it was not until *Rapanos* that the Court opined on the jurisdictional status of wetlands adjacent to non-navigable waters. Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands. However, the plurality concluded that the Agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of

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[271] 79 Fed. Reg. at 22,268.
[272] *Id.* at 22,193 (emphasis added).
[273] 2008 *Rapanos* Guidance at 1; 33 C.F.R. 328.3(c).
[274] *Riverside Bayview*, 474 U.S. at 139 (emphasis added).
[275] *Id.* at 135 (emphasis added).

water"[276] connected to traditional navigable waters, and to "*wetlands* with a continuous surface connection to" such relatively permanent waters.[277]

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals. Justice Kennedy agreed with the plurality that the term "waters of the United States" extends beyond waterbodies that are traditionally considered navigable, but found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and instead proposed a different standard for evaluating CWA jurisdiction over wetlands.[278] Justice Kennedy concluded that wetlands are "waters of the United States" "if the *wetlands*, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, *wetlands'* effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[279]

Clearly, at issue in both *Riverside Bayview* and *Rapanos* was the jurisdiction of adjacent *wetlands* – not adjacent rivers, not adjacent streams, not adjacent seeps, not adjacent ponds, not adjacent lakes, not adjacent puddles, not adjacent swales . . . not adjacent *waters*. More recently, in *San Francisco Baykeeper v. Cargill Salt Division* the U.S. Court of Appeals for the Ninth Circuit held that adjacent non-wetlands are *not* subject to CWA regulation.[280] In fact, since 1986 "wetlands [not waters] adjacent to waters" have been defined as "waters of the United States."[281] And yet, in the proposed rule, the Agencies have disregarded critical case law and defined "all *waters*, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5)" as "waters of the United States."[282] This is an unlawful and expansive modification of the jurisdictional scope of the CWA and not supported by case law. The Agencies must rewrite (a)(6) to read "All wetlands adjacent to a water identified in paragraph (a)(1) through (5) of this section."

2. The Concept of "Adjacent" Has Been Unlawfully Modified and Expanded with the Addition of the Over Broad Definition of "Neighboring."

Under the existing 2008 *Rapanos* Guidance, the term "adjacent" means "bordering, contiguous, or neighboring."[283] Indeed, this definition has remained unchanged since regulations were penned in 1986. With the proposed rule, however, the Agencies have modified and expanded the definition of adjacent by subsequently defining the term "neighboring" within the adjacent definition. According to the proposed rule the term neighboring "for purposes of the term 'adjacent' . . . includes waters located within the riparian area or floodplain of a water identified

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[276] *Rapanos*, 547 U.S. at 739.
[277] *Id.* at 742 (emphasis added).
[278] *See id.* at 779; *Id.* at 776.
[279] *Id.* at 780 (emphasis added).
[280] *San Francisco Baykeeper v. Cargill Salt Division,* 481 F.3d 700 (9th Cir. 2007).
[281] 33 C.F.R. § 328.3(c).
[282] 79 Fed. Reg. at 22263 (emphasis added).
[283] 2008 *Rapanos* Guidance at 5.

in paragraphs (a)(1) through (5) . . . or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[284]

This expanded definition of "adjacent" was never contemplated in the CWA and is not permitted by prior case law. In *Riverside Bayview*, the respondents' property was "part of a wetland that actually abuts a navigable waterway."[285] The Supreme Court "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States" and unanimously agreed the respondent in *Riverside Bayview* was required to have a permit.[286] At issue in *SWANCC* was the jurisdictional status of isolated ponds, and the Court, recounting *Riverside Bayview* stated, "[t]he Court expressed no opinion on the question of the Corps' authority to regulate wetlands *not adjacent* to open water [in *Riverside Bayview*], and the statute's text will not allow extension of the Corps' jurisdiction to such wetlands here."[287] Indeed, the Court recognized that the wetlands in *Riverside Bayview* "actually abut[ted]" and were "inseparably bound up with" Black Creek and were thus adjacent and jurisdictional. However, the Court held that the isolated ponds in *SWANCC* were *not adjacent* to a traditional navigable water and *not jurisdictional,* stating, "In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that *the text of the statute will not allow this*."[288] Clearly, *SWANCC* revealed that the jurisdictional scope of the CWA is not without limit.

What's more, in *Rapanos* the plurality noted, "because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters '*neighboring*' traditional navigable waters and their tributaries."[289] Here, the *Rapanos* plurality characterized the wetlands that "*actually abut*" and were "*inseparably bound up with* the 'waters' of the United States" in *Riverside Bayview* with the term "*navigable*." Indeed, to extend the meaning of "adjacent" by expanding the definition of "navigable" to include all waters in vaguely defined floodplains and riparian areas as well as those waters connected to any (a)(1) through (5) water by the slightest shallow subsurface hydrologic connection or confined surface hydrologic connection would stretch the definition of "adjacent" beyond parody. The Supreme Court has already shut down such sweeping assertion of federal authority in *SWANCC* and *Rapanos*. That the Agencies would now try to assert *categorical* jurisdiction over so-called "neighboring" waters shows their complete disregard for the highest court in the land.

3. The Agencies will Impermissibly Assert Jurisdiction over all Waters within the Riparian Areas and Floodplains of all (a)(1) through (5) Waters.

Under the proposed definition of "adjacent waters," all waters, including wetlands, that happen to fall within vaguely defined riparian areas and floodplains of all (a)(1) through (5) waters are

[284] 79 Fed. Reg. at 22,263.
[285] *Riverside Bayview,* 474 U.S. at 135.
[286] *SWANCC*, 531 U.S. at 167, citing *Riverside Bayview*, 474 U.S. at 134.
[287] *Id.* at 160 (emphasis added).
[288] *Id.* at 168 (emphasis added).
[289] *Rapanos*, 547 U.S. at 726 (emphasis added).

per se jurisdictional. This will result in a dramatic expansion of waters under the Agencies' control. Additionally, vague definitions of "riparian area" and "floodplain" will result in unpredictable and inconsistent application of the Act, leading to increased regulatory confusion. Finally, the science to support categorical jurisdiction over all waters and wetlands within riparian areas and floodplains of (a)(1) through (5) waters is sorely lacking.

a. Categorically Asserting Jurisdiction over all Waters within the Riparian Area and Floodplain Will Dramatically Expand Jurisdiction of the Clean Water Act.

Even though the Agencies have not defined the floodplain parameters they will use to assert jurisdiction, it is clear that millions of acres of land could be affected. In addition to the regulatory uncertainty associated with the definitions, floodplains can be massive, extending miles from the banks of large rivers and coastlines. For instance, the floodplain of the Mississippi River south of St. Louis, Missouri, widens to a distance of nearly 50 miles.[290] Further south, the Lower Mississippi Alluvial Valley (Fig. 9) covers some 24 million acres (roughly the size of the state of Indiana) of relatively flat, weakly dissected alluvial plain, comprised of natural levees, basins and flats, point bar formations, terraces, tributary floodplains, and depressional wetlands.[291] Even the 100-year floodplains mapped by FEMA illustrate that wetlands, ponds, lakes, and headwater streams that could be considered "adjacent" to traditional navigable waters can be separated from one another by tens of miles (Fig. 10). By categorically defining all waters that lie within the floodplain as "neighboring" and "adjacent," the Agencies have significantly expanded the definition of "waters of the United States." This is absurd and unlawfully and inexplicably expands the concept of "adjacent" as it pertains to CWA case law (e.g., *Riverside Bayview* and *Rapanos*).

Additionally, the proposed rule defines any water within the riparian area of an (a)(1) through (5) water as jurisdictional by rule. Yet, because riparian area refers to land – "[r]iparian areas are transitional areas between aquatic and *terrestrial* ecosystems . . ."[292] – it is not clear what areas are being targeted. Of particular concern is the reasoning within the draft Connectivity Report, which goes so far as to cite studies of soil water in the riparian zone. For example, work by Dr. Tracie-Lynn Nadeau and Dr. Mark Rains notes "much of the temporal [hydrologic] storage [in stream networks] is in upland [riparian] soils."[293] Do the Agencies intend to assert jurisdiction over riparian areas based on soil water found therein? Is water within riparian area soils, or floodplain soils for that matter, a water of the United States? NAHB thinks not, but the Agencies' direction is not so clear.

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[290] Fremling, C. R., J. L. Rasmussen, R. E. Sparks, S. P. Cobb, C. F. Bryan, and T. O. Claflin. 1989. Mississippi River fisheries: A case history. Pages 309–351 in D. P. Dodge, editor. Proceedings of the International Large River Symposium. Canadian Special Publication of Fisheries and Aquatic Sciences 106, Ottawa, Ontario.
[291] Stanturf, J.A., E.S. Gardiner, P.B. Hamel, M.S. Devall, T.D. Leininger, and M.E. Warren. 2000. Restoring bottomland hardwood ecosystems in the Lower Mississippi Alluvial Valley. *Journal of Forestry*. 98(8):10-16.
[292] 79 Fed. Reg. at 22,263 (emphasis added).
[293] Nadeau, T-L, and M.C. Rains. 2007. Hydrological connectivity between headwater streams and downstream waters: how science can inform policy. *Journal of the American Water Resources Association*. Vol. 43: 118-133.

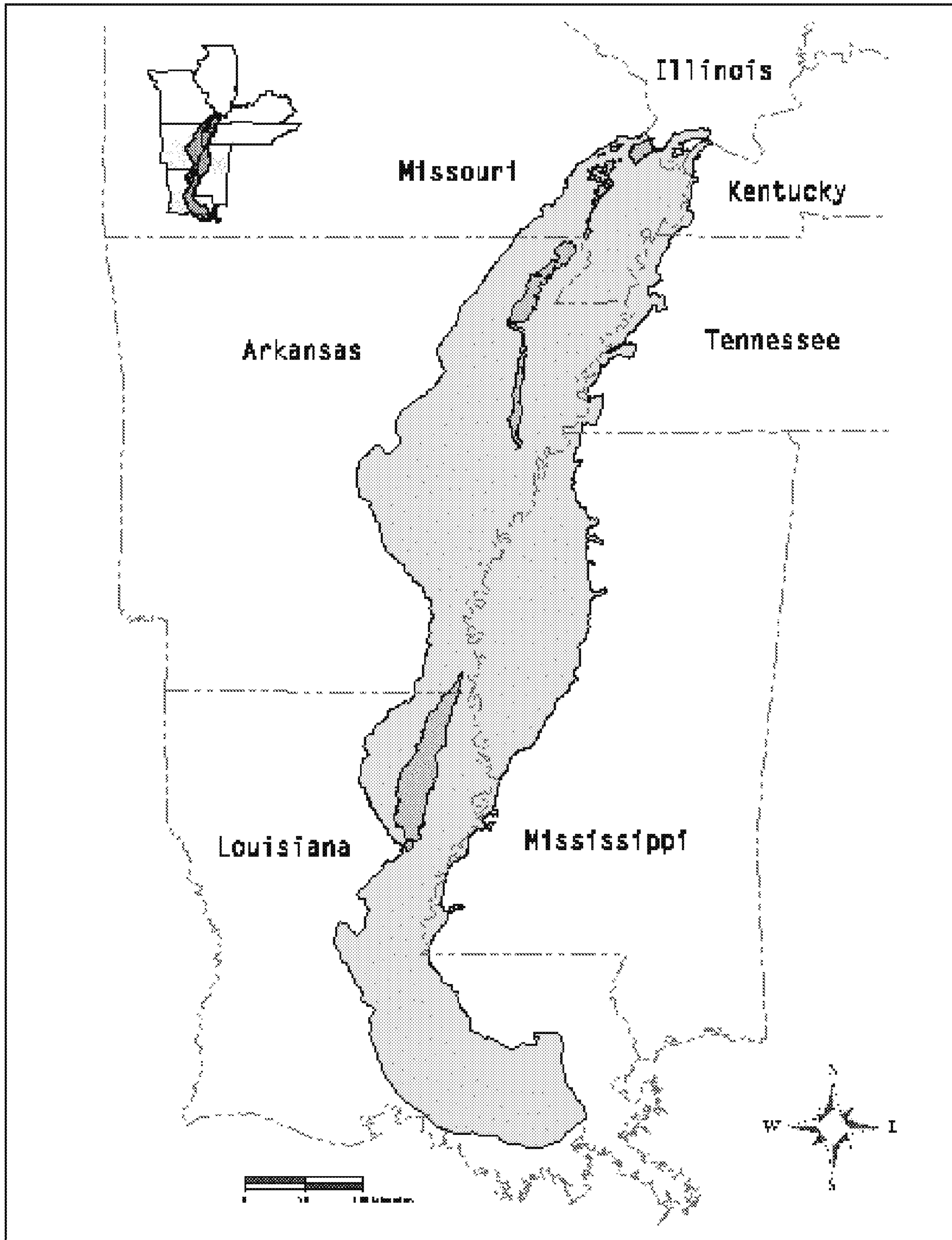

Figure 9: Geographic extent of the Mississippi River alluvial valley.[294]

[294] *Source:* Twedt, D., D. Pashley, C. Hunter, A. Mueller, C. Brown, B. Ford. September 1999. Partners in Flight: Bird Conservation Plan for the Mississippi Alluvial Valley, *available at* http://www.partnersinflight.org/bcps/plan/MAV_plan.html

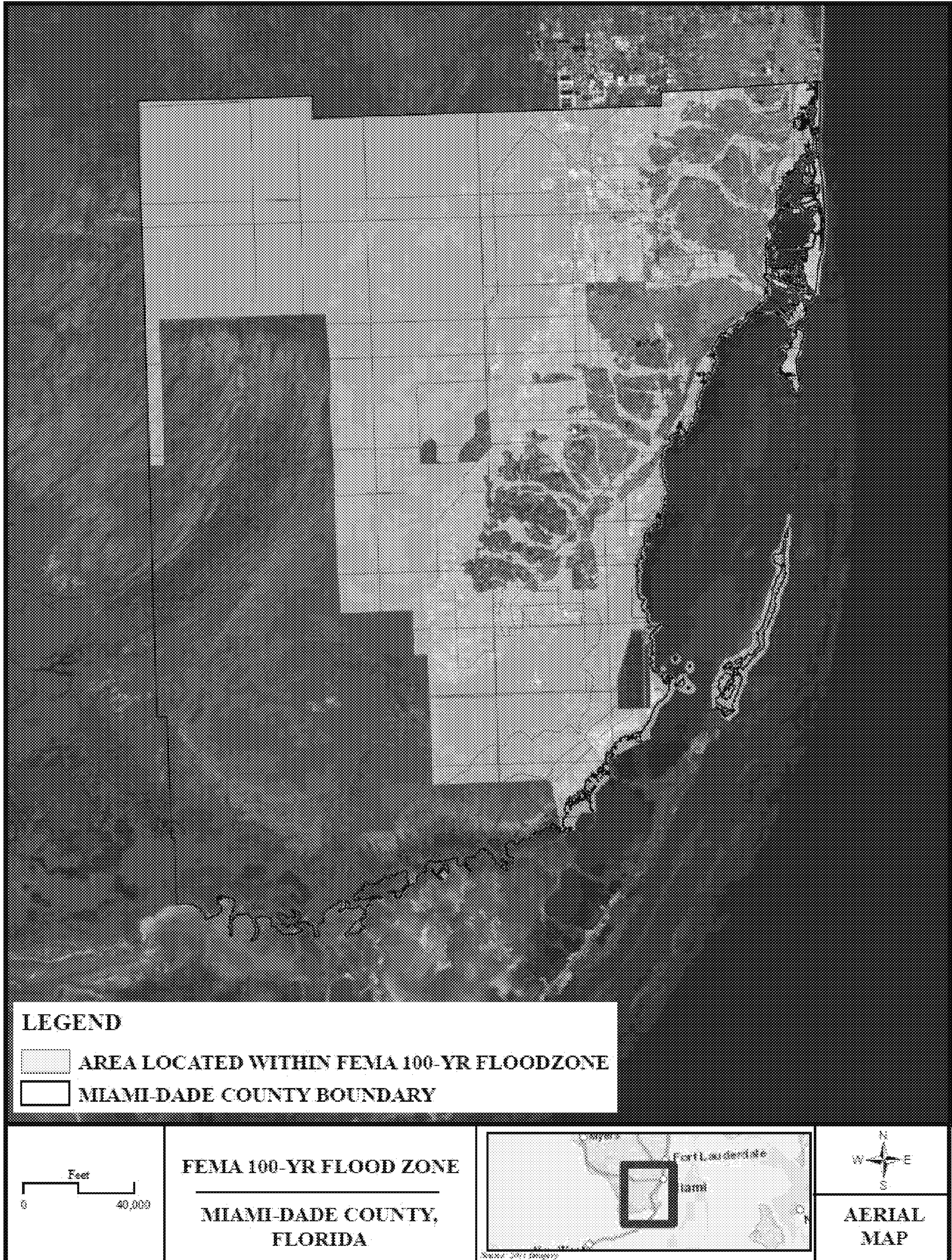

Figure 10: FEMA 100-Yr Flood Zone, Miami-Dade County, Florida.

b. The Definitions of "Riparian Area" and "Floodplain" will Create Confusion and Increase Regulatory Uncertainty.

Under the proposed rule, the Agencies will assert categorical jurisdiction over all waters located within the riparian area or floodplain of any traditional navigable water, interstate water, territorial sea, impoundment, or tributary. For the first time, the Agencies provide regulatory definitions for "riparian area" and "floodplain." According to the proposed rule, riparian area means "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems."[295] Floodplain is defined as "an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows."[296]

The new definitions for "riparian area" and "floodplain" will create confusion and increase regulatory uncertainty because they are purely scientific in nature and will be applied based on the Agencies' "best professional judgment."[297] What's more, key terms within the riparian area and floodplain definitions, including "ecological processes," "plant and animal community structure," "exchange of energy and materials," "present climatic conditions" and "moderate to high water flows" are left undefined. A landowner will not be able to look at a map and objectively know the extent of the "riparian area" or "floodplain" on his property or a property he is considering purchasing. Rather, he will have to wait until a field inspector from the Corps walks the property and subjectively determines the reach of the riparian area and/or floodplain. Definitions based on science rather than engineering and maps will lead to increased uncertainty about what waters are and are not "neighboring" and, in turn, are considered "adjacent waters" subject to CWA jurisdiction.

Adding to the confusion, the Agencies cannot seem to make up their minds. At one point in the preamble, the Agencies appear to embrace the flood frequency interval as a basis for identifying the floodplain:

> "There is, however, variability in the size of the floodplain, which is dependent on factors such as the *flooding frequency* being considered, size of the tributary, and topography. As a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower *frequency flood* when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher *frequency flood* when determining adjacency for a larger stream. When determining whether a water is located in a floodplain, the agencies will use best professional judgment to determine which *flood interval to use (for example, 10 to 20 year flood interval zone*). The agencies request comment on whether the rule text should

[295] 79 Fed. Reg. at 22,263.
[296] *Id.* at 22,263.
[297] *Id.* at 22,208.

provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water."[298]

But then reject the use of a flood interval, stating it is not ecologically based:

> "It should be noted that 'floodplain' as defined in today's proposed rule *does not necessarily equate to the 100-year floodplain* as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule. Flood insurance rate maps are based on the probability of a flood event occurring (e.g., 100-year floods have a 1% probability of occurring in a given year or 500 year-floods have a 0.2% probability of occurring in a particular year). *Flood insurance rate maps are not based on an ecological definition of the term 'floodplain,' and therefore may not be appropriate for identifying adjacent wetlands and waters for the purposes of CWA jurisdiction.*"[299]

The definitions of "riparian area" and "floodplain" should be based on engineering standards and include measurable parameters, both spatial and temporal, in order for these terms to have meaning in a practical sense and to be applied as consistently as possible.

EPA's SAB has voiced concerns about the vague floodplain definition as well. SAB panel member Dr. Emily Bernhardt commented that the Agencies should be "more explicit about how a floodplain . . . [is] defined" as this would "allow for more consistent application of the rule."[300] Dr. Michael Josselyn also voiced concerns about the floodplain definition:

> "By definition, all wetlands within the floodplain would be considered jurisdictional under the Proposed Rule. However, there is ambiguity in the definition of floodplain within the Draft Science Report and the Proposed Rule—both of which state that it is an area of sediment deposition and subject to flooding during moderate to high flood events. However, at present, there is no definition of what that flooding frequency means except the brief statement in the Proposed Rule that the agencies will use Best Professional Judgment and generally use something between a 10 and 20 year flood event. In another section, the Proposed Rule also states that 'floodplain as defined in today's proposed rule does not necessarily equate to the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). However, the FEMA defined floodplain may often coincide with the current definition proposed in this rule.' Thus, there is considerable confusion over what the Proposed Rule is stating would be included within the category of floodplain wetlands subject to jurisdiction."[301]

NAHB agrees.

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[298] *Id.* at 22,209 (emphasis added).
[299] *Id.* at 22,236 (emphasis added).
[300] 8/14/14 SAB Comments on the Proposed Rule at 15.
[301] *Id.* at 27.

Adding to the challenge of identifying the extent of any given floodplain, beyond the active floodplain may exist abandoned terraces. These abandoned terraces, typically at higher elevations, are a consequence of channel gradient changes resulting from either decreases or increases in sediment loads. These changes isolate previous channels and floodplains above the newly established channel. In arid stream systems, abandoned terraces sometimes are easy to distinguish since they are high above the active channel. However, in systems with limited relief it may be difficult to distinguish the active floodplain.[302] In these cases, Corps staff could improperly delineate the floodplain well beyond its true extent, thereby erroneously classifying any waters that happen to fall within the expanded limits as "waters of the United States."

The vague definitions of riparian area and floodplain do not increase clarity of the jurisdictional scope of the CWA. As written, these definitions are inadequate and will lead to regulatory confusion. The Agencies are urged to remove the definition of "neighboring" and the associated "floodplain," "riparian area," "shallow subsurface hydrologic connection," and "confined surface hydrologic connection" terms and definitions from the proposed rule and maintain the existing definition of "adjacent." This will reduce regulatory uncertainty while simultaneously complying with congressional intent, case law, and existing guidance.

c. The Science to Support the Conclusion that all Waters within the Riparian Area and Floodplain are "Waters of the United States" is Lacking.

The Agencies claim the proposed rule is supported by conclusions from the draft Connectivity Report. Although the proposed rule would assert categorical jurisdiction over "waters located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the portion of the draft Connectivity Report addressing the impact of riparian areas and floodplains on downstream waters is incomplete, as it highlights findings from studies of riparian areas and floodplains, not necessarily wetlands or waters therein. Indeed, the authors of the draft Connectivity Report admit,

> "Although ample literature is available on riparian and floodplain wetlands . . . most papers on riparian areas and floodplains do not specify whether the area is a wetland . . . This situation creates a dilemma, because limiting our literature review to papers that explicitly describe the area as a wetland would exclude a major portion of this body of literature and greatly restrict our discussion of wetland science. Alternatively, if we include papers that do not explicitly classify the area as a wetland, we could mistakenly incorporate results that are relevant only to upland riparian areas. Our response to this dilemma was to survey the riparian literature broadly and include any results and conclusions that we judged were pertinent to riparian/floodplain wetlands."[303]

This is problematic for two reasons. First, the draft Connectivity Report draws conclusions about the ecological and hydrological importance of wetlands within the riparian area and floodplain on downstream waters when the studies claimed to support these conclusions may or

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[302] Dunne, T., and L.B. Leopold. *Water in Environmental Planning*. New York: W.H. Freeman and Co., 1978. Print.
[303] Draft Connectivity Report at 5-3, 5-5.

may not even include wetlands. Relying on such studies is irresponsible and fails to meet even basic requirements of scientific integrity.

Second, the proposed rule will assert categorical jurisdiction over waters, including wetlands, in the riparian areas and floodplains of traditional navigable waters, interstate waters, territorial seas and impoundments and tributaries of those waters when the draft Connectivity Report only presents conclusions from studies of riparian areas and floodplains that *may* have included *wetlands*, not *waters*. This is similarly suspect and even SAB members have voiced concerns over the categorical assertion of jurisdiction over all waters in the riparian area and floodplain. SAB panel member Dr. Mazeika Sullivan commented, "Inasmuch as I understand that the agencies are seeking to reduce the burden of many case-specific situations, caution is warranted in some cases when the science may not be available to adequately determine where jurisdiction should or should not be asserted . . . I do not believe that current scientific evidence supports asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian zone."[304] Clearly, the scientific evidence to support the categorical jurisdiction of all waters within riparian areas and floodplains of (a)(1) through (5) waters is insufficient.

Furthermore, although hydrologic connectivity between wetlands within the floodplain and riparian area varies as a function of distance, the Agencies propose to assert jurisdiction over all waters within these vaguely defined zones without regard to their distance to an (a)(1) through (5) water. The draft Connectivity Report, indeed, states, "connectivity with the river will generally be higher for riparian/floodplain wetlands located near the river's edge compared with riparian/floodplain wetlands occurring near the floodplain edge."[305] While this would appear to be fairly straight forward, the Agencies disregard this simple fact by treating all waters in the riparian area and floodplain the same: categorically jurisdictional.

4. The Agencies will Impermissibly Assert Jurisdiction over all Waters Exhibiting a "Shallow Subsurface Hydrologic Connection" or a "Confined Surface Hydrologic Connection" to an (a)(1) through (5) Water.

The Agencies define any water connected to an (a)(1) through (5) water by a "shallow subsurface hydrologic connection" or a "confined surface hydrologic connection" as "adjacent" and therefore *per se* jurisdictional. This assertion runs afoul of the Supreme Court decisions, will result in increased regulatory uncertainty, and is unsupported by science. Additionally, the Agencies fail to define any methods to identify or quantify a "shallow subsurface hydrologic connection." And, while the proposed rule states that shallow subsurface hydrologic connections are themselves not "waters of the United States," they can be used to assert jurisdiction over those waters they connect. This is, indeed, a significant overreach.

[304] 8/14/14 SAB Comments on the Proposed Rule at 87.
[305] Draft Connectivity Report at 3-42, 3-43.

a. Regulating "Adjacent Waters" Based upon the Mere Presence of a "Shallow Subsurface Hydrologic Connection" or a "Confined Surface Hydrologic Connection" to an (a)(1) through (5) Water is Inconsistent with *Rapanos*.

In its review of the draft Connectivity Report, EPA's SAB notes the large spatial and temporal variability in hydrologic flowpaths, including subsurface flows.[306] According to the SAB, spatial and temporal scales are "critical aspects of connectivity and its role in maintaining the chemical, physical, and biological integrity of downgradient waters."[307] This sentiment rightly echoes Justice Kennedy's assertion that not all hydrologic connections are significant. Yet, the Agencies have ignored both the science and the case law that they argue support the proposed rule by requiring only the *presence* of a shallow subsurface or confined surface hydrologic connection between a water and an adjacent water to assert jurisdiction by rule.

While a subsurface or confined surface hydrologic connection may indeed occur between a wetland outside of the floodplain or riparian area and an (a)(1) through (5) water, the connection may be so "remote and insubstantial" as to fail Justice Kennedy's "significant nexus" test. Without defining critical subsurface or confined surface flow parameters, including those governed in part by topographic slope, distance between the waters in question, and – in the case of subsurface flows – the hydrologic connectivity of the soils through which the water passes, the Agencies' vague definitions of "shallow subsurface hydrologic connection" and "confined surface hydrologic connection" provide them jurisdiction over any water on the sole basis of a mere hydrologic connection. Both the plurality and Justice Kennedy demanded more in *Rapanos*.

b. The Agencies Fail to Adequately Define the New "Shallow Subsurface Hydrologic Connection" and "Confined Surface Hydrologic Connection" Concepts, Thereby Generating Increased Regulatory Uncertainty.

The Agencies assert that a water is "neighboring" and, in turn, "adjacent" and jurisdictional by rule if it is connected to a jurisdictional water via a "shallow subsurface hydrologic connection" or a "confined surface hydrologic connection." Although the preamble states "a shallow subsurface hydrologic connection is lateral water flow through a shallow subsurface layer, such as can be found in steeply sloping areas with shallow soils and soils with a restrictive horizon that prevents vertical water flow, or in karst systems,"[308] a formal definition is not provided. Additionally, the proposal fails to adequately define "confined surface hydrologic connection," only stating "confined surface connections consist of permanent, intermittent, or ephemeral surface connections through directional flowpaths . . . A directional flowpath is a path where water flows repeatedly . . . "[309] If water flows downhill (i.e., along a flowpath) after every rainfall (i.e., repeatedly) and across any otherwise dry land surface to an (a)(1) through (5) water,

[306] SAB Final Review of the Draft Connectivity Report, Figure 1 at 22.
[307] *Id.* at 21.
[308] 79 Fed. Reg. at 22,242.
[309] *Id.* at 22,208.

would that flowpath be considered a "confined surface hydrologic connection" that could be used to assert jurisdiction over any wetland, pond, or stream? Indeed, the "confined surface hydrologic connection" definition is vague at best; the regulated community can only assume the term means something less than "tributary."

Although the Agencies claim the proposed rule will clarify what waters are protected under the CWA, regulating waters based upon connections that cannot be seen does not provide clarity. Before NAHB's members purchase a parcel of land, they and/or their environmental consultant, engineer, or other team members walk the property to identify wetlands, streams, and other water features that may be subject to CWA Section 404 permits. In instances where a large percentage of a property falls under the jurisdiction of the CWA, a land developer or builder might not make the purchase. Most surface water features including wetlands, ponds, lakes, and streams can be spotted while walking a property. Subsurface water features, however, cannot be readily seen. If a property has unseen subsurface hydrologic connections that render additional waters on that site jurisdictional, the builder / developer might have taken on a financial burden due to the permit, mitigation, and project delay costs he had no ability to anticipate. NAHB members, as well as all other regulated industry personnel, cannot identify waters they can't see.

Beyond the lack of clarity regarding the very *existence* of shallow subsurface hydrologic connections, critical parameters associated with these out-of-sight flowpaths are left undefined thereby creating additional uncertainties. For example, the depth at which "shallow subsurface" hydrologic connections become "groundwater" connections is not defined. This is crucial because shallow subsurface hydrologic connections can be used to determine jurisdiction of an "adjacent" water whereas groundwater connections "do not satisfy the requirement for adjacency."[310] Currently, only a vague, qualitative distinction between shallow subsurface water and groundwater is provided: "Shallow subsurface connections are distinct from deeper groundwater connections . . . in that the former exhibit a direct connection to the water found on the surface in wetlands and open waters."[311] Unfortunately, this fails to adequately or clearly distinguish the two and adds uncertainty to the definition of "waters of the United States." After all, deep groundwater can exhibit a direct connection to water found on the surface, as is the case with springs, groundwater seeps, and geysers, for instance.

Without defined parameters, how will the Agencies or property owners determine where shallow subsurface water stops and groundwater begins? This ambiguity presents a particularly interesting case in the surficial aquifer system of the Southeastern United States. Given the extent of the surficial aquifer underlying large portions of Florida, Georgia, and South Carolina (Fig. 11), the movement of water within the surface aquifer (Fig. 12), and the often minimal depth to ground water across the region (Fig. 13), will all waters in the entirety of the southern half of Florida meet the definition of "waters of the United States" based on "shallow subsurface hydrologic connections" to "adjacent" jurisdictional waters? NAHB believes not, as it is clearly unreasonable to interpret Justice Kennedy's "significant nexus" to such an extent. Yet, as the proposed rule is written, this would not be a stretch.

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[310] *Id.* at 22,208.
[311] *Id.*

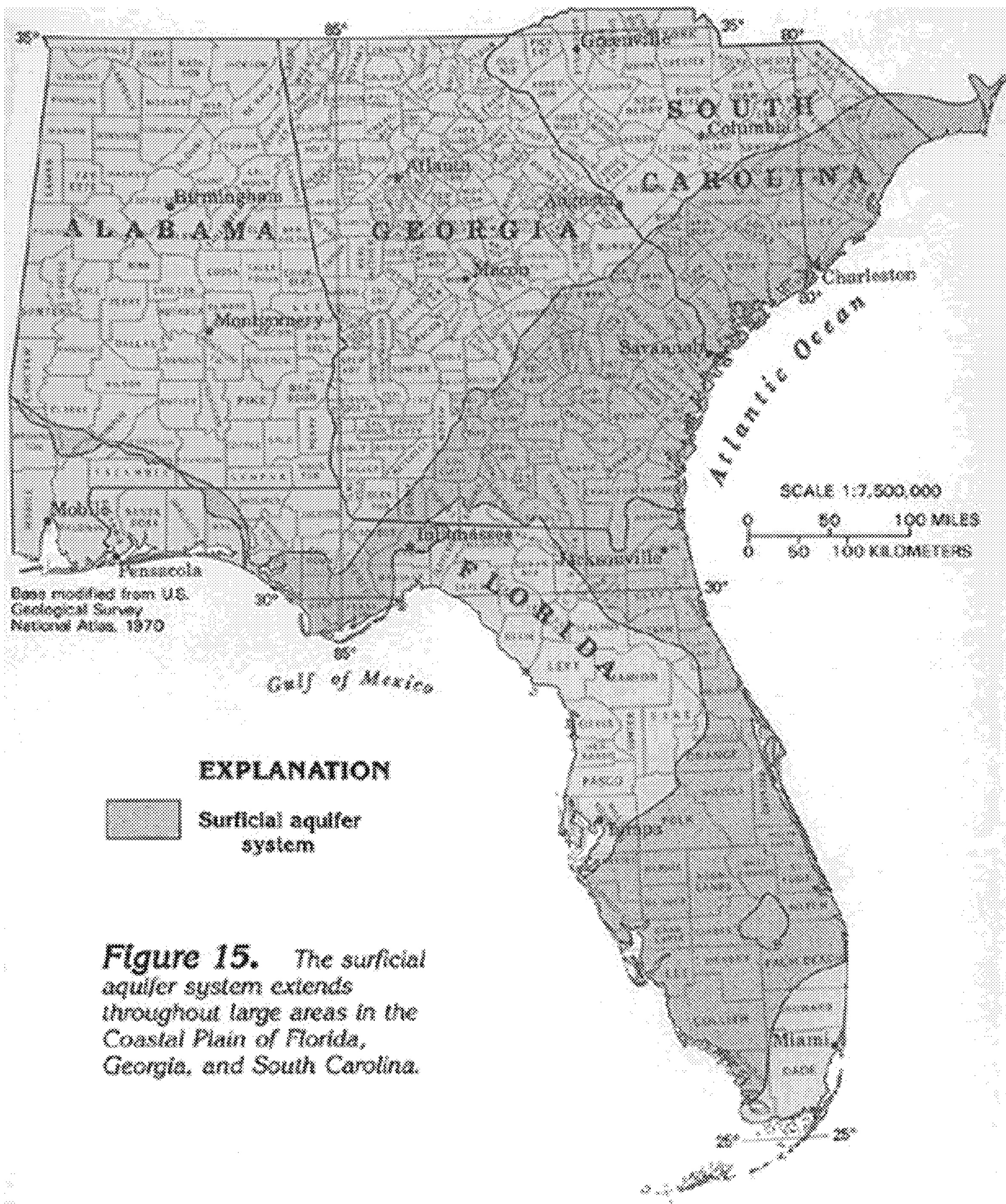

Figure 11: Extent of the surficial aquifer system of the Southeastern U.S.[312]

[312] *Source*: United States Geological Survey Ground Water Atlas of the US, Alabama, Florida, Georgia, and South Carolina - HA 730-G. J.A. Miller. 1990. Figure 15.

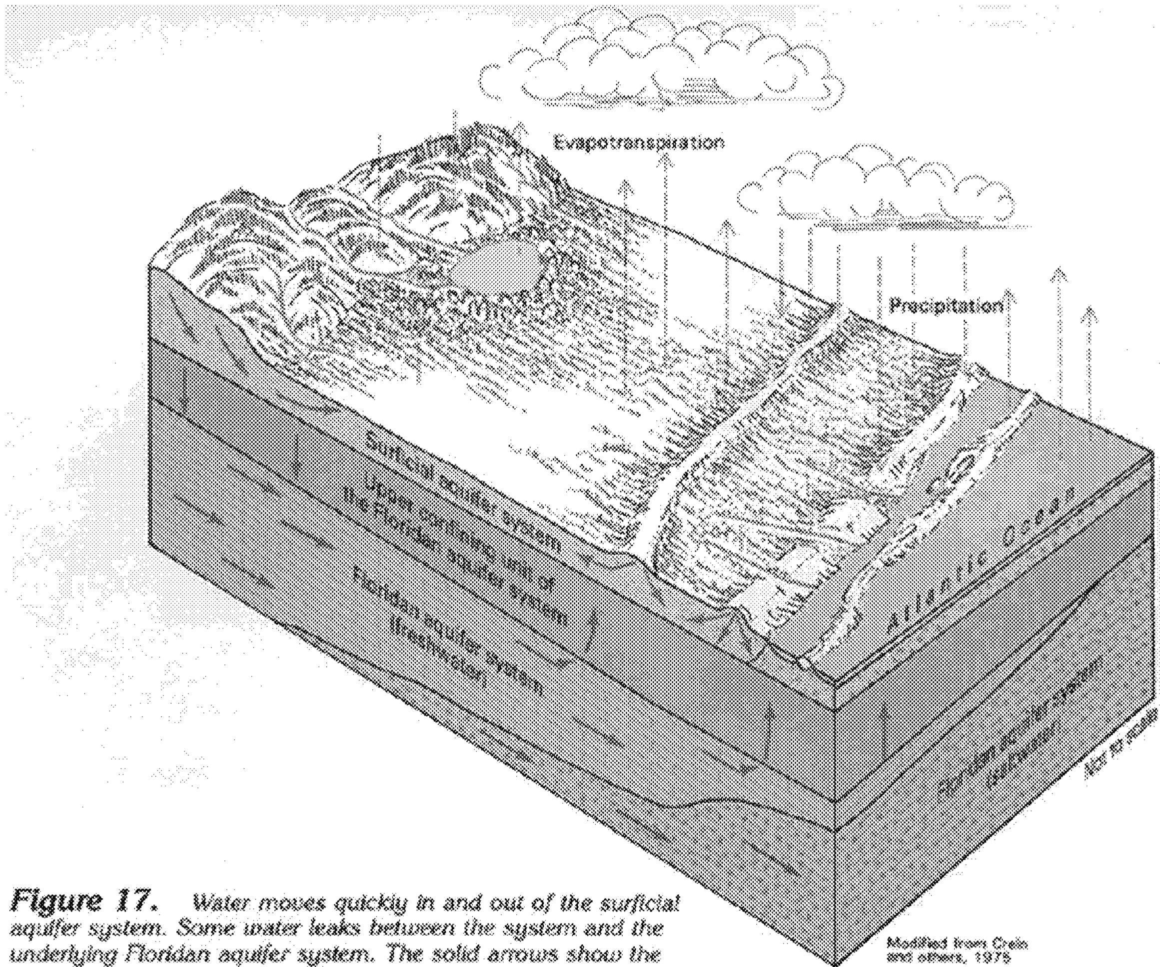

Figure 17. Water moves quickly in and out of the surficial aquifer system. Some water leaks between the system and the underlying Floridan aquifer system. The solid arrows show the general direction of ground-water movement.

Figure 12: Groundwater processes in the surficial aquifer system of the Southeastern U.S.[313]

[313] *Source*: *id.* Figure 17.

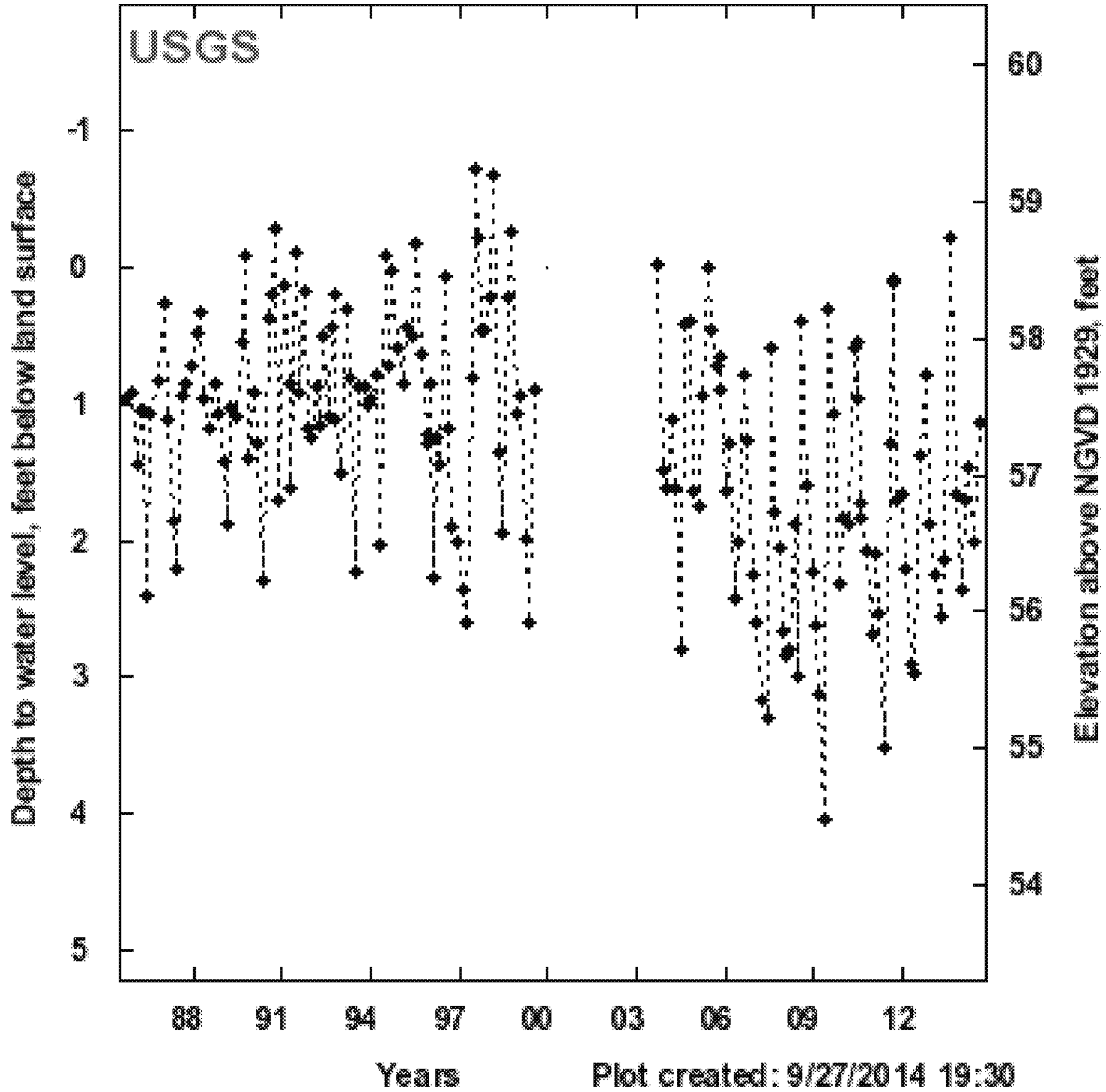

Figure 13: Periodic measurements of depth to water level at USGS well site 270157081203101 - H-15A near Palmdale, FL between 10/08/85 and 6/12/14. Latitude 27°02'02", Longitude 81°20'33" [314]

[314] *Source*: United States Geological Survey well data from http://groundwaterwatch.usgs.gov/ site 270157081203101 – H-15A. Accessed 9/27/14.

Additionally, more challenges arise because the proposed rule fails to define critical flow parameters associated with "shallow subsurface hydrologic connections" or "confined surface hydrologic connections," including rate of shallow subsurface flow, travel distance along a shallow subsurface flowpath, volume of shallow subsurface flow, and duration of shallow subsurface flow. Each of these flow parameters is critical in determining the chemical, physical, and biological impact these "hydrologic connections" may have on an "adjacent" water (*see* Section VI. c. iv. 5. b.).

To illustrate the importance of defining these critical subsurface flow parameters, let us consider the impact of soil type on the rate of water flow through a soil matrix. Table 1, which has been modified from EPA Method 9100 to include the number of days required for water to travel a distance of 100 feet within each soil matrix type, provides soil hydraulic conductivity values in feet per day (ft d^{-1}).[315] The values highlighted in yellow indicate the range of hydraulic conductivities from less than 0.001 ft d^{-1} (clay) to greater than 600 ft d^{-1} (well sorted coarse gravel).

To put these values in context, it would take a molecule of water more than *274 years* to travel 100 feet through a clay confining layer underlying an isolated playa lake (*see* Fig. 14). As another example, a USGS study of the Delmarva Peninsula found that groundwater return times (the time required for recharge at the water table to return to a surface water through groundwater) can take from years to decades.[316] If an isolated Delmarva Bay wetland recharges shallow groundwater that only surfaces downstream some 60 years later, does this meet the "shallow subsurface hydrologic connection" that would constitute the wetland jurisdictional by rule?

The draft Connectivity Report acknowledges the "magnitude and transit time of groundwater flow from a wetland to other surface waters depends on the intervening distance and the properties of rock or unconsolidated sediments between the water bodies."[317] Nowhere in the proposed rule, however, is a spatial or temporal threshold provided by which shallow subsurface hydrologic connections or confined surface hydrologic connections can be used to define "neighboring." Lacking these critical thresholds, the Agencies have proposed to extend the jurisdiction of the CWA well beyond parody.

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[315] *Modified from* EPA Method 9100: Saturated Hydraulic Conductivity, Saturated Leachate Conductivity, and Intrinsic Permeability (September 1986) at 28, 29.
[316] Sanford, W.E., and J.P Pope. 2013. Quantifying Groundwater's Role in Delaying Improvements to Chesapeake Bay Water Quality. *Environ. Sci. Technol.* 47:13330-13338.
[317] Draft Connectivity Report at 5-24.

Table 1: Hydraulic conductivities in feet per day estimated from grain size descriptions. Values in parenthesis indicate number of days required for water to travel 100 feet. Highlighted values indicate a range of hydraulic conductivities from clay to well sorted coarse gravel.

Grain-Size Class or Range	Degree of Sorting			Silt Content		
	Poor	Moderate	Well	Slight	Moderate	High
Fine-Grained Materials						
Clay	Less than 0.001 (> 100,000 days; > 274 years)					
Silt, clayey	1 to 4 (100 to 4)					
Silt, slightly sandy	5 (20)					
Silt, moderately sandy	7 to 8 (14.3 - 12.5)					
Silt, very sandy	9 to 11 (11.1 - 9.1)					
Sandy silt	11 (9.1)					
Silty sand	13 (7.7)					
Sands and gravels						
Very fine sand	13 (7.7)	20 (5)	27 (3.7)	23 (4.3)	19 (5.3)	13 (7.7)
Very fine to fine sand	27 (3.7)	27 (3.7)	-	24 (4.2)	20 (5)	13 (7.7)
Very fine to medium sand	36 (2.8)	41-47 (2.4 - 2.1)	-	32 (3.1)	27 (3.7)	21 (4.8)
Very fine to coarse sand	48 (2.1)	-	-	40 (2.5)	31 (3.2)	24 (4.2)
Very fine to very coarse sand	59 (1.7)	-	-	51 (2)	40 (2.5)	29 (3.4)
Very fine sand to fine gravel	76 (1.3)	-	-	67 (1.5)	52 (1.9)	38 (2.6)
Very fine sand to medium gravel	99 (1)	-	-	80 (1.3)	66 (1.5)	49 (2)
Very fine sand to coarse gravel	128 (0.8)	-	-	107 (0.9)	86 (1.2)	64 (1.6)
Fine sand	27 (3.7)	40 (2.5)	53 (1.9)	33 (3)	27 (3.7)	20 (5)
Fine to medium sand	53 (1.9)	67 (1.5)	-	48 (2.1)	39 (2.6)	30 (3.3)
Fine to coarse sand	57 (1.8)	65-72 (1.5 - 1.4)	-	53 (1.9)	43 (2.3)	32 (3.1)
Fine to very coarse sand	70 (1.4)	-	-	60 (1.7)	47 (2.1)	35 (2.9)
Fine sand to fine gravel	88 (1.1)	-	-	74 (1.4)	59 (1.7)	44 (2.3)
Fine sand to medium gravel	114 (0.9)	-	-	94 (1.1)	75 (1.3)	57 (1.8)
Fine sand to coarse gravel	145 (0.7)	-	-	107 (0.9)	87 (1.1)	72 (1.4)
Medium sand	67 (1.5)	80 (1.3)	94 (1.1)	64 (1.6)	51 (2)	40 (2.5)
Medium to coarse sand	74 (1.4)	94 (1.1)	-	72 (1.4)	57 (1.8)	42 (2.4)
Medium to very coarse sand	84 (1.2)	98-111 (1.0 - 0.9)	-	71 (1.4)	61 (1.6)	49 (2)
Medium sand to fine gravel	103 (1)	-	-	84 (1.2)	68 (1.5)	52 (1.9)
Medium sand to medium gravel	131 (0.8)	-	-	114 (0.9)	82 (1.2)	66 (1.5)
Medium sand to coarse gravel	164 (0.6)	-	-	134 (0.7)	108 (0.9)	82 (1.2)
Coarse sand	80 (1.3)	107 (0.9)	134 (0.7)	94 (1.1)	74 (1.4)	53 (1.9)
Coarse to very coarse sand	94 (1.1)	134 (0.7)	-	94 (1.1)	75 (1.3)	57 (1.8)
Coarse sand to fine gravel	116 (0.9)	136-156 (0.7)		107 (0.9)	88 (1.1)	68 (1.5)
Coarse sand to medium gravel	147 (0.7)	-	-	114 (0.9)	94 (1.1)	74 (1.4)
Coarse sand to coarse gravel	184 (0.5)	-	-	134 (0.7)	100 (1)	92 (1.1)
Very coarse sand	107 (0.9)	147 (0.7)	187 (0.5)	114 (0.9)	94 (1.1)	74 (1.4)
Very coarse sand to fine gravel	134 (0.7)	214 (0.5)	-	120 (0.8)	104 (1)	87 (1.1)
Very coarse sand to medium gravel	1270 (0.1)	199-227 (0.5 - 0.4)	-	147 (0.7)	123 (0.8)	99 (1)
Very coarse sand to coarse gravel	207 (0.5)	-	-	160 (0.6)	132 (0.8)	104 (1)
Fine gravel	160 (0.6)	214 (0.5)	267 (0.4)	227 (0.4)	140 (0.7)	107 (0.9)
Fine to medium gravel	201 (0.5)	334 (0.3)	-	201 (0.5)	167 (0.6)	134 (0.7)
Fine to coarse gravel	245 (0.4)	289-334 (0.3)	-	234 (0.4)	189 (0.5)	144 (0.7)
Medium gravel	241 (0.4)	231 (0.4)	401 (0.2)	241 (0.4)	201 (0.5)	160 (0.6)
Medium to coarse gravel	294 (0.3)	468 (0.2)	-	294 (0.3)	243 (0.4)	191 (0.5)
Coarse gravel	334 (0.3)	468 (0.2)	602 (0.2)	334 (0.3)	284 (0.4)	234 (0.4)

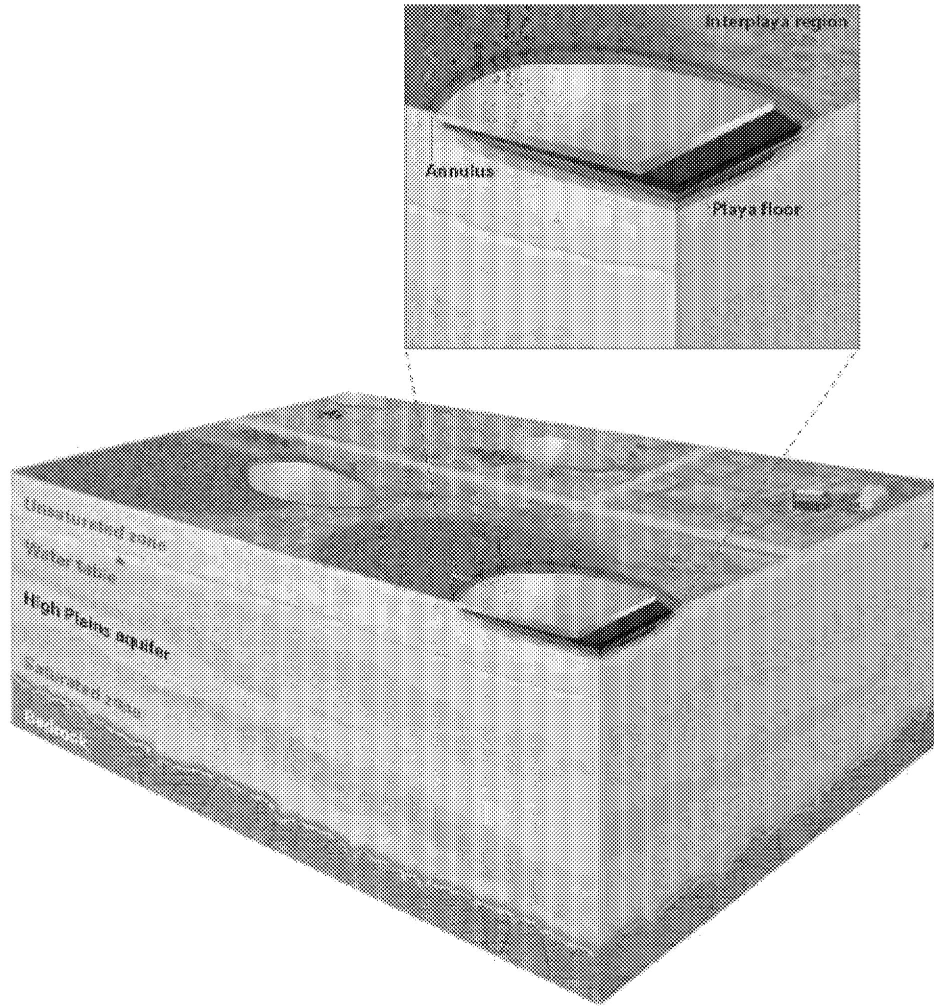

Figure 14: Playa characteristics include a clay rich floor and an annulus, the sloped surface at a playa's margin.[318]

c. The Science to Support the Inclusion of Waters with Shallow Subsurface or Confined Surface Hydrologic Connections to (a)(1) through (5) Waters as Categorically Jurisdictional is Lacking.

Even if a water falls outside of the subjectively defined riparian area or floodplain, it can still meet the Agencies' definition of "neighboring" and, in turn, "adjacent" if it has a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection" to an (a)(1) through (5) water. This assertion is problematic, in that the proposed rule is purported to be based on the conclusions of the draft Connectivity Report, yet the authors of the Report clearly

[318] *Source:* Gurdak, JJ, and Roe, CD, 2009, Recharge rates and chemistry beneath playas of the High Plains aquifer—A literature review and synthesis: U.S. Geological Survey Circular 1333, 39 p.

state, "The literature we reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings."[319] In the SAB review of the draft Connectivity Report, the SAB recommends EPA use the term "non-floodplain wetlands" in place of "unidirectional wetlands."[320] Following this definitional change, the authors of the draft Connectivity Report, though they have reviewed more than 1,000 pieces of peer-reviewed literature on the connectivity of streams and wetlands on downstream waters, admit they do not have enough evidence to *even generalize* about connections between wetlands outside of the floodplain and (a)(1) through (5) waters.

Despite this dearth of evidence, the Agencies are proposing categorical jurisdiction over non-floodplain waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to an (a)(1) through (5) water and claim the proposed rule is supported "by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other open waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those downstream waters [i.e., the draft Connectivity Report]."[321] This is illogical and flies in the face of any attempt to justify the rule via sound science. What's even more surprising, the Agencies cite verbatim the draft Connectivity Report statement regarding the lack of sufficient information to generalize about the impact of non-floodplain wetlands on downstream waters in Appendix A of the proposed rule.[322] While the Agencies attest the proposed rule is grounded in science, they seem to be telling two different stories.

Furthermore, according to EPA's SAB, subsurface connectivity represents an on-going research need for EPA. In its review of the draft Connectivity Report, the SAB recommends that EPA "consider where along [a] gradient the [groundwater] connections are of sufficient magnitude to impact the integrity of downstream waters. This may represent an *important research need for the agency*. Past this threshold, groundwater connections will need to be evaluated on a case-by-case basis."[323] If subsurface connections are still an important research need for EPA, how do EPA and the Corps justify using "shallow subsurface hydrologic connections" to determine that an "adjacent" water significantly impacts the chemical, physical, and biological integrity of an (a)(1) through (5) water? Rather than amassing a smattering of 1,000 pieces of existing scientific literature to understand the *potential* of streams and wetlands to impact downstream waters, EPA's Office of Research and Development should have conducted new research to address the *actual* spatial and temporal variability associated with the point at which "adjacent" waters pass the "significant nexus" test. EPA has failed to complete this critical task. Until the Agency does so, the science to support this proposed rule will remain deficient.

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[319] *Id.* at 1-10, 1-11.
[320] SAB Final Review of the Draft Connectivity Report at 5.
[321] 79 Fed. Reg. at 22,190.
[322] *Id.* at 22,225.
[323] SAB Final Review of the Draft Connectivity Report at 55 (emphasis added) (Note, in SAB's June 5, 2014 draft review of the Draft Connectivity Report at 56, the panel originally stated "This represents an important research need for the agency." The word "may" has since been added to this sentence).

d. The Connectivity Report and the Proposed Rule Fail to Describe Methods to Identify and/or Quantify a "Shallow Subsurface Hydrologic Connection."

According to the proposed rule, if a water is connected to an (a)(1) through (5) water by a "shallow subsurface hydrologic connection," that water meets the "neighboring" and, in turn "adjacent" definition and is a "water of the United States." Yet, neither the draft Connectivity Report nor the proposed rule describes methods to identify and/or quantify shallow subsurface flow. Moreover, both documents acknowledge that measuring shallow subsurface hydrologic connectivity is challenging. The proposed rule states that shallow subsurface connections are "difficult to identify and document," and "given a [water] for which a surface water connection cannot be observed, it is difficult to assess its degree of connectivity with the river network without site-specific data."[324] The draft Connectivity Report asserts that measuring connections between non-floodplain wetlands "typically requires time- and resource-intensive field studies that have limited geographic scope."[325] The fact that the Agencies and their staff scientists admit that identifying shallow subsurface connections is "difficult," "time intensive," and "resource intensive" yet do not describe any methods to measure these connections that could be used to assert CWA jurisdiction represents a significant shortcoming.

Additionally, and of particular concern among the regulated community, is that the challenge associated with measuring shallow subsurface hydrologic connections suggests that the burden to disprove a jurisdictional determination based on shallow subsurface connectivity to an "adjacent" water will not only be prohibitively expensive and time consuming, but will be squarely placed on the landowner's shoulders. Although the Agencies cannot suggest a consistent or repeatable method of tracking or tracing such connections, they may consider it reasonable to place landowners in the position of disproving a negative? Put quite simply, the onus to disprove a jurisdictional determination must not be placed on the regulated community. At the 2014 annual meeting of the Association of Clean Water Administrators, Walt Baker, Water Quality Division Director for the Utah Department of Environmental Quality, agreed that the Agencies should be responsible for producing the evidence needed to make a positive "water of the United States" determination. Mr. Baker said, "Unless there is evidence to the contrary, the presumption should be that all waters aren't jurisdictional."[326] NAHB could not agree more.

Clearly, there are numerous challenges in defining, identifying, and measuring shallow subsurface connections. Additionally, considering the lack of science to demonstrate their impact on the chemical, physical, and biological integrity of downstream waters, there is no doubt that the use of subsurface connections is suspect. Given these infirmities, the Agencies must remove shallow subsurface hydrologic connections from consideration.

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[324] 79 Fed. Reg. at 22,210 and 22,226.
[325] Draft Connectivity Report at 6-7.
[326] Amena H. Saiyid, Bloomberg BNA Daily Environmental Report. "Corps, Not Permit Applicants, Should Bear Burden of Proving Jurisdiction, Official Says" (Aug. 7, 2014).

e. **It is Impermissible to Exploit a Non-"Water of the United States" to Assert Clean Water Act Jurisdiction.**

The Agencies explicitly state that "shallow subsurface flows are not 'waters of the United States,'" yet they "may provide the connection establishing jurisdiction."[327] Likewise, non-jurisdictional features such as rills, gullies, and non-wetland swales "may still serve as a confined surface hydrologic connection between an adjacent wetland or water" and an (a)(1) through (5) water.[328] And, finally, while riparian areas and floodplains are not, in and of themselves jurisdictional, they can be used to demonstrate adjacency.

The original intent of the CWA was to exercise Congress's traditional commerce power over navigation, not flight paths or flyways, not surface transportation routes, but navigable waterways. The use of non-jurisdictional connections to establish adjacency or a significant nexus not only turns that intent on its side, it also has no limits. The proposed rule essentially allows for all waters to be jurisdictional based on virtually any connections – whether or not those connections have anything to do with water or navigability or commerce. This amounts to the "any hydrologic connection" theory rejected in *Rapanos* and hardly clarifies jurisdiction. The agencies must eliminate the use of dry lands and excluded waters as a basis for jurisdiction.

5. **The Agencies Fail to Establish Critical Spatial and Temporal Parameters under the "Neighboring" Definition, Thereby Leaving the Scope of *per se* Jurisdictional "Adjacent Waters" without Limit.**

The new "neighboring" definition extends the jurisdiction of the CWA well beyond the limits of the historical "adjacent" definition and those set by the Court. Moreover, the Agencies have not defined any spatial or temporal parameters associated with "neighboring," thereby leaving the scope of *per se* jurisdictional "adjacent waters" without limit. To clarify the jurisdictional scope of the CWA, the Agencies must define the flow parameters associated with "neighboring," including magnitude, frequency, duration, and travel distance. Indeed, EPA's Office of Research and Development recognizes the effect of distance on the likelihood a water will significantly impact the ecological integrity of another water. The draft Connectivity Report states, "[i]f geographically isolated unidirectional wetlands have surface water outputs . . . the probability that surface water will infiltrate or be lost through evapotranspiration increases with distance" and continues, "[a]ll things being equal, wetlands with shorter distances to the stream network will have higher hydrologic and biological connectivity than wetlands located farther from the same network."[329] In other words, the farther a so-called "neighboring" and therefore "adjacent" water is from an (a)(1) through (5) water, the less likely it is to significantly affect the chemical, physical, and biological integrity of that water; the less likely it is to exhibit a significant nexus.

The Agencies acknowledge the effect of distance on a "significant nexus" between waters in the proposed rule: "[t]he scientific literature recognizes the role of hydrologic connections in supporting a substantial chemical, physical, or biological relationship between water bodies, but

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[327] 79 Fed. Reg. at 22,208.
[328] *Id.* at 22,204.
[329] Draft Connectivity Report at 3-42 and 3-43.

this relationship can be reduced as the distance between water bodies increases."[330] Yet, they only pay lip service to this relationship, stating "[i]n circumstances where a particular water body is outside of the floodplain and riparian area of a tributary, but is connected by a shallow subsurface hydrologic connection or confined surface hydrologic connection with such tributary, the agencies will . . . assess the distance between the water body and tributary in determining whether or not the water body is adjacent . . . The agencies recognize that in specific circumstances, the distance between water bodies may be sufficiently far that even the presence of a hydrologic connection may not support an adjacency determination."[331] While the Agencies may think that is a reasonable approach, as they retain the ability to make whatever jurisdictional call they believe to be prudent, the regulated community is left in the dark without bright line thresholds used to determine whether or not a water "neighbors" and is "adjacent" to an (a)(1) through (5) water and as a result is or is not under the jurisdiction of the CWA.

a. The Agencies Inappropriately Call upon the Regulated Community to Define the Limits of "Neighboring" and, in turn, "Adjacency."

Rather than defining parameters to clarify the extent of "adjacency," the Agencies lean on the regulated community for input: "Commenters should support where possible from scientific literature any suggestions for additional clarification of current explicit limits on adjacency, such as a specific distance or a specific floodplain interval."[332] This is problematic for several reasons. First, it reveals that the Agencies have failed to conduct the research necessary to determine when and under what conditions a significant nexus occurs between an "adjacent" water and an (a)(1) through (5) water. This research should have been completed prior to developing the proposed rule. Second, by suggesting commenters refer to the scientific literature to clarify limits on adjacency, the Agencies undermine the import of the draft Connectivity Report to inform the proposed rule. If EPA's Office of Research and Development, which spent over four years developing the draft Connectivity Report, was unable to clarify critical limits of adjacency, how are commenters expected to do so during a 207 day comment period? Third, it is unlikely many commenters will have the requisite expertise to knowingly review and provide meaningful input, much less have access to prohibitively expensive journal subscriptions needed to review much of the scientific literature. The Agencies have failed to do the new research needed to inform the proposed rule and are now asking commenters to do the heavy lifting. This is inappropriate. The Agencies should withdraw the proposed rule until they have the data necessary to clearly define the limits of "adjacency."

vi. The Agencies' Proposed Treatment of "Other Waters" Allows for Sweeping Jurisdiction over Isolated Features and State Waters, is not Supported by the Science, and is Generally Confusing.

Beyond the categorical jurisdiction the Agencies will assert over (a)(1) through (6) waters, the Agencies propose to take jurisdiction over "other waters" and wetlands on a case-specific basis "provided those waters alone, or in combination with other similarly situated waters, including

[330] 79 Fed. Reg. at 22,211.
[331] *Id.* at 22,207, 22,208.
[332] *Id.* at 22,209.

wetlands, located in the same region, have a significant nexus" with a traditional navigable water, interstate water, or territorial sea.[333] This "other waters" category represents a catch-all provision that expands the potential scope of the CWA to any waters *in* the United States – not waters *of* the United States. The "other waters" category impermissibly allows for jurisdiction over isolated waters and non-wetland waters based on aggregation of all "other waters" in a watershed. What's more, the "other waters" category is defined using ambiguous terms and concepts that will lead to increased regulatory confusion.

1. The "Other Waters" Category Allows for Overbroad Assertion of Jurisdiction Over Isolated Features with Little or No Connection to Traditional Navigable Waters.

The Agencies' proposed "other waters" category is designed to capture any wet feature that cannot be found categorically jurisdictional under the "tributary" or "adjacent water" provisions. Under the proposed rule, the Agencies will assert jurisdiction over "other waters, including wetlands," that "alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus" to a traditional navigable water, interstate water, or territorial sea.[334] As is the case with "adjacent waters," the Agencies do not explain which "waters" may be considered (a)(7) "other waters." The preamble simply states that "other waters" "do not meet the criteria of any of the categories of waters in (a)(1) through (a)(6), and also are not one of the waters and features excluded . . . in section (b)."[335] As discussed in Section VI. c. vi., the "other waters" category violates *SWANCC* by allowing for assertion of jurisdiction over isolated waters, such as prairie potholes or industrial ponds, that have little or no connection to traditional navigable waters. Indeed, by extending jurisdiction beyond (a)(6) "adjacent waters" to (a)(7) "other waters," the Agencies contravene the *SWANCC* ruling in which the Supreme Court held, "In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water [i.e., 'other waters']. But we conclude that *the text of the statute will not allow this*."[336]

With the proposed aggregation of all "similarly situated" waters in a watershed, the proposed rule allows for regulation of waters that are not proximate to traditional navigable waters. Under the proposed rule, the Agencies will find that "other waters" have a significant nexus, and are therefore jurisdictional, if the "either alone or in combination with other *similarly situated* waters in the region (i.e., the *watershed* that drains to the nearest [traditional navigable water, interstate water, or territorial sea]), significantly affect[] the chemical, physical, or biological integrity" of a traditional navigable water, interstate water, or territorial sea.[337] The Agencies will find waters to be "similarly situated" when they "perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so they can be evaluated as a *single landscape unit* . . ."[338]

[333] *Id.* at 22,263.
[334] *Id.*
[335] *Id.* at 22,211.
[336] *SWANCC*, 531 U.S. at 167-168 (emphasis added).
[337] 79 Fed. Reg. at 22,263 (emphasis added).
[338] *Id.* (emphasis added).

Importantly, not all features within a "single landscape unit" are similarly situated. The preamble suggests that other waters could be similarly situated even if they are located in different landforms, have different elevation profiles, and have different soil and vegetation characteristics, so long as they "perform similar functions" and are located "sufficiently close" to a "water of the United States" to allow them to collectively function together.[339] This interpretation stretches the concept of "similarly situated" beyond reason and would allow the Agencies to find that essentially every feature within a watershed is "similarly situated" and therefore can be aggregated to assess jurisdiction.

Furthermore, the proposed "other waters" standard is problematic because the "case-by-case" significant nexus analysis touted by the Agencies for "other waters" is not really a case-by-case analysis. Indeed, the Agencies propose to evaluate similarly situated waters within a watershed "as a group."[340] They will aggregate all similarly situated "other waters" within a watershed to determine if, when combined, all of those waters have a significant nexus with a traditional navigable water, interstate water, or territorial sea.[341] The Agencies will *not* perform an individual analysis on the feature at issue unless they cannot make a finding that there are "similarly situated" features in the region. As noted above, if "other waters" that are located in different landforms, have different elevation profiles, and have different soil and vegetation characteristics, can all be treated as "similarly situated," it seems unlikely that the Agencies would ever be in a situation where they could not find similarly situated features in the region. Clearly, the "other waters" analysis described in the preamble can hardly be characterized as a "case-by-case" analysis.

In addition, the Agencies note that information relevant to finding that an "other water" has a significant nexus "need not always be specific to the water whose jurisdictional status is being evaluated," but instead can be based on "regional and national studies of the same type of water" or a "desktop" analysis.[342] If the Agencies intend to make significant nexus determinations remotely, they have read all meaning out of Justice Kennedy's test.

The end result of the proposed process for evaluating "other waters" will be the assertion of jurisdiction over many isolated features that, like the isolated, non-navigable ponds at issue in *SWANCC*, are a far cry from the "waters of the United States" to which the CWA extends.

2. Aggregating "Other Waters" to Assert Collective Jurisdiction over "Similarly Situated Waters" Goes far Beyond what the Supreme Court Anticipated.

For the first time in the Act's history, the Agencies propose to assert jurisdiction over waterbodies under a new watershed aggregation approach that is overbroad and inconsistent with *Rapanos*. Under Justice Kennedy's "significant nexus" standard, wetlands are "waters of the United States" if they "alone or in combination with similarly situated lands *in the region*" have

[339] *Id.* at 22,213.
[340] *Id.* at 22,211.
[341] *Id.*
[342] *Id.* at 22,214.

a significant nexus to navigable waters.[343] As discussed above, NAHB disagrees with the emphasis that the Agencies place on Justice Kennedy's test. But even if the "significant nexus" test drives determinations for jurisdictional waters, the new watershed aggregation treatment of "other waters" goes far beyond what the Supreme Court anticipated. Justice Kennedy's reference to wetlands "in the region" did not specifically refer to those that "fall within the same watershed." Indeed, the proposed rule contains no definition of watershed. In a footnote, rather, the Agencies discuss the term "region" as the basis upon which to base the aggregation of similarly situated waters and define the "region" as the watershed of the traditional navigable water, interstate water, or territorial sea.[344] Obviously, such a watershed could cover a very large area. EPA's SAB panelist Dr. Michael Josselyn noted that the watershed of the nearest navigable waters "could be a very large area that may drain significant portions of a single State."[345] Even small Hydrologic Unit Code (HUC)-10 watersheds, which the preamble recommends for use in the arid West,[346] typically range in size between 40,000 and 250,000 acres (i.e., ~ 60 to 390 mi^2).[347] As Dr. Josselyn noted, "It would be hard to argue that including all the [waters] within such a large area in one grouping would not have an effect on downstream water."[348]

Under the proposed rule, the Agencies will make significant nexus determinations based on the aggregation of waters that are many miles apart from each other and have distinctly different relationships with the traditional navigable water and, therefore, are not reasonably within the same region. What's more, the Agencies introduce confusion by using "region" and "watershed" interchangeably in the proposed rule. Indeed, even the members of the SAB have seemed confused by the definition of "region." SAB Chair, Dr. Amanda Rodewald, asked, "Is it appropriate to use 'in the region' and 'watershed' interchangeably? In general, regions seem to include many watersheds."[349] NAHB is equally as perplexed. Yet, the Agencies assert the proposed rule provides clarity.

The watershed aggregation approach also appears inconsistent with the analysis rejected in *Rapanos*. As discussed above, both the plurality and the Kennedy concurrence agreed that a mere hydrologic connection (like this watershed-based approach) may not provide the basis for CWA jurisdiction.[350] In his concurrence, Justice Kennedy rejected the Agencies' assertion of jurisdiction over non-navigable waters based on "any hydrologic connection" to navigable waters, and repeatedly cautioned that "remote," "insubstantial," "speculative," or "minor" flows are insufficient to establish a "significant nexus."[351] Instead, Justice Kennedy's concurrence directs the Agencies to make these determinations on a "case-by-case basis" that reflects "the

[343] *Rapanos*, 547 U.S. at 780 (emphasis added).
[344] 79 Fed. Reg. at 22,199.
[345] 8/14/14 SAB Comments on the Proposed Rule at 25.
[346] 79 Fed. Reg. at 22,212.
[347] U.S. Geological Survey and U.S. Department of Agriculture, Natural Resources Conservation Service, 2009, Federal guidelines, requirements, and procedures for the national Watershed Boundary Dataset: U.S. Geological Survey Techniques and Methods 11–A3, 55 p.
[348] 8/14/14 SAB Comments on the Proposed Rule at 25.
[349] *Id.* at 79.
[350] *Rapanos*, 547 U.S. at 731, 736 n.7, 778, 784.
[351] *Id.* at 778-79 ("[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.").

significance of the tributaries to which the wetlands are connected," a "measure of the significance of [the hydrologic connection] for downstream water quality," and "the quantity and regularity of flow in the adjacent tributaries."[352] Indeed, the Agencies recognized the importance of proximity to navigable waters, and the amount and regularity of flow in their 2008 guidance following *Rapanos*.[353] What's more, this guidance states "'[s]imilarly situated' wetlands include all wetlands adjacent to the same tributary." Clearly, defining similarly situated lands in the region as broadly as those within the same watersheds represents a substantial expansion of CWA jurisdiction well beyond *status quo*.

Additionally troublesome, this new watershed aggregation approach marginalizes the distance, amount, and regularity of flow in the significant nexus determination by potentially distributing those parameters among different waters. To give effect to the regularity of flow as an important factor in determining significant nexus for streams, for example, the proposed rule should, at a minimum, develop certain specific criteria tied to water-level gauging and the ability to support aquatic organisms for a specified minimum period of time. As today's proposal is written, however, a water could be jurisdictional despite its remoteness – possibly located hundreds of miles from the nearest traditional navigable water – and the irregularity of its flow. Thus, the Agencies' instruction to aggregate all "similarly situated" waters within a watershed to evaluate a water's significant nexus to traditional navigable waters, interstate waters, and territorial seas expands the significant nexus analysis far beyond what Justice Kennedy intended. Indeed, Justice Kennedy's own application of the significant nexus test in *Rapanos* did not contain any aggregation of wetlands in the same watershed. He did not instruct the lower courts to determine jurisdiction over the wetlands at issue based on the aggregate impacts of nearby wetlands or other wetlands in the region. Rather, he instructed the lower courts to apply an individual significant nexus test and to examine the distance, quantity, and regularity of flow for each wetland at issue.[354]

The watershed aggregation approach is also inconsistent with recent case law. In 2011, the Fourth Circuit "urge[d] the Corps to consider ways to assemble *more concrete evidence of similarity* before again aggregating such a broad swath of wetlands," and remanded that decision to the Corps to articulate a "significant nexus" between that "broad swath of wetlands" and the navigable water located several miles away.[355] Clearly, the Agencies cannot assert jurisdiction over waters using watershed aggregation, or any other aggregation approach for that matter.

3. The "Other Waters" Provision Completely Removes the Concept of "State" Waters.

With new and overbroad definitions of "tributary," "adjacent," and "neighboring," the Agencies arguably have impinged on states' rights to manage their land and water resources (*see* Section X. d.). By claiming jurisdiction over "other waters" on a so-called "case-by-case" basis, there is

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[352] *Id.* at 782, 784, 786.
[353] 2008 *Rapanos* Guidance at 10 ("Principal considerations when evaluating significant nexus include the volume, duration, and frequency of flow of water in the tributary and the proximity of the tributary to navigable water.")
[354] *See Rapanos*, 547 U.S. at 784-787.
[355] *Precon Development Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 293-95 (4th Cir. 2011) (emphasis added).

absolutely no question that the Agencies are seeking to redefine "waters of the *states*" as "waters of the United States." After asserting categorical federal jurisdiction over (a)(1) through (6) waters and, on a case-by-case basis, federal jurisdiction over "other waters," what waters are left to the states? As is clearly indicated by the plain text reading of the goals and polices enumerated in the CWA, Congress intended "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources."[356] Arguably, under this construct, there must be a point at which federal authority ends and state authority begins. Can the Agencies point to any waters (aside from those explicitly excluded in the proposed rule) that would be a water of the state and not a water of the United States?

4. The Science to Support the Impact of "Similarly Situated Waters" on Jurisdictional Waters is Inconclusive.

The Agencies claim their "decision on how best to address jurisdiction over 'other waters' in the final rule will be informed by the final version of the EPA's Office of Research and Development synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters" – that is, the draft Connectivity Report.[357] And while the draft Connectivity Report suggests "the effects of downstream waters need to be considered in aggregate,"[358] the authors present no scientific evidence to support "aggregation" as a relevant concept in connectivity or how much aggregation, both spatially and temporally, among similarly situated waters is needed to have a "significant nexus" with downstream waters. In fact, the draft Report only concludes, "The contribution of material by a particular stream and wetland might be small, but the aggregate contribution by an entire class of streams and wetlands (e.g., all ephemeral streams in the river network) *might* be substantial."[359] The draft Report states, "making quantitative assessments of the importance of individual stream and wetland resources within the entire river systems is difficult."[360] In fact, the draft Connectivity Report does not present *any* research comparing the impact of individual waters relative to aggregated waters on the chemical, physical, or biological integrity of downstream waters. The concept of aggregation is clearly based on speculation, not science.

Moreover, the authors of the draft Connectivity Report caution against generalizing about connectivity, and – although not explicitly stated – significant nexus, among aggregated wetlands: "Our review, which includes numerous case studies of unidirectional wetland systems . . . underlines the need to *avoid generalizations* about either connectivity or isolation based on insufficient information, *especially wetland type or class* (e.g., prairie pothole) or geographical isolation."[361] Likewise, members of EPA's SAB have also cautioned against asserting jurisdiction over "other waters" in aggregate. Panelist Dr. Michael Gooseff recognized the challenge associated with aggregating "other waters" to determine jurisdiction over "similarly

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[356] 33 U.S.C § 1251(b).
[357] 79 Fed. Reg. at 22,189.
[358] Draft Connectivity Report at 3-27.
[359] *Id.* at 3-27 (emphasis added).
[360] *Id.* at 3-29.
[361] *Id.* at 6-3 (emphasis added).

situated waters" based on a collective "significant nexus" to (a)(1) through (3) waters, commenting, " . . . the variety of these ['other waters'] and the potential connection types, strengths, and frequencies will determine both whether and how significant any connection [between 'other waters' and (a)(1) through (3) waters] could be. This variety of possibilities makes it *difficult if not impossible to broadly categorize connection type and significance*."[362] Panelist Dr. Genevieve Ali also noted, " . . . the issue with 'other waters' is that they can be . . . strongly connected or strongly isolated from downstream waters depending on the prevailing conditions. This makes the assessment of 'significant nexus' particularly difficult . . . I don't think that it would be possible to determine that certain additional subcategories of [other] waters are jurisdictional by rule."[363] Dr. Michael Josselyn of the SAB panel also recognized the challenge of asserting jurisdiction over an aggregated group of "other waters," noting, "There is considerable geologic, vegetative, and topographic variation within [a watershed] and the determination of what constitutes similarity among the tributaries within that region would be difficult. The Panel Report requested that the Corps and EPA 'more explicitly address the cumulative effects of streams and wetlands on downstream waters and the spatial and temporal scales at which functional aggregation should be evaluated'[[364]] and I recommend that this be re-emphasized in our review of the Proposed Rule."[365]

What's more, in the preamble of the proposed rule, the Agencies *themselves* recognize the spatial and temporal variability of connectivity among "other waters" within a watershed, stating, "For 'other waters,' connectivity varies within a watershed and over time, making it difficult to generalize about their connections to, or isolation from, traditional navigable waters, interstate waters, and the territorial seas."[366] Despite the lack of evidence, admonition from EPA's scientists and members of the SAB, and their very own recognition that it is "difficult to generalize" about connections between "other waters" and (a)(1) through (3) waters, the Agencies propose aggregation of "similarly situated waters" to infer collective significant nexus and, in turn, jurisdiction of each individual water.

Considering there is little to no evidence supporting aggregate "significant nexus" of "similarly situated waters," it is clear that proving the cumulative significant chemical, biological, and physical effects of individual waters on downstream waters will be overly burdensome for the Agencies. Of greater concern, however, is that *disproving* a "significant nexus" call based on aggregation will be even more challenging for the regulated community (for more on this topic, *see* Section VII. b.) Until the Agencies present sound scientific support and methods to aggregate the impacts of "other waters" to determine jurisdiction of the CWA, they must be held to regulating waters individually.

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[362] 8/14/14 SAB Comments on the Proposed Rule at 20 (emphasis added).
[363] *Id.* at 13.
[364] Letter from EPA's SAB to the Hon. Gina McCarthy, Subject: SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (June 6, 2014) at 2.
[365] 8/14/14 SAB Comments on the Proposed Rule at 26.
[366] 79 Fed. Reg. at 22,197.

5. The Agencies' Proposed Process for Evaluating "Other Waters" is Confusing and, as a Result, its Application will be Inconsistent and Unpredictable.

In addition to allowing for regulation of features that are beyond the scope of the CWA, the proposed approach to evaluating "other waters" is complex, confusing, and likely to lead to unpredictable and inconsistent results. NAHB finds the following ambiguities to be of particular concern:

- *Water* – The Agencies' vague footnote explanation of "waters" that can be "waters of the United States" based on adjacency is essentially limitless.[367] What is an "other water"? Is it any wet feature that the Agencies could not assert jurisdiction over as a tributary or adjacent water?

- *In the region* – The rule proposes to interpret "in the region" to mean the watershed that drains to the nearest traditional navigable water, interstate water, or territorial sea.[368] But the preamble recognizes that use of the watershed may not be appropriate in the arid West where a single point of entry watershed can be very large, and recommends a modified approach based on mapping catchments to be evaluated in combination.[369] If the watershed standard is not appropriate for a significant portion of the country, why use it? When is it appropriate to use this modified approach? Only in the arid West? Whenever single entry watersheds are very large? What do the Agencies view as a "very large" watershed?

- *Similarly situated* – The proposed rule suggests that waters are "similarly situated" when they "perform similar functions" and are located "sufficiently close together or sufficiently close to a water of the United States so they can be evaluated as a single landscape unit."[370] This definition is anything but clear. What does it mean to "perform similar functions" or "function together"? If, for example, two features both provide habitat for birds, is that enough to determine they "perform similar functions"? How many functions must they have in common to meet that criterion? Must the features be "sufficiently close" to *any* "water of the United States," or must they be "sufficiently close" to a traditional navigable water, interstate water, or territorial sea? How close is "sufficiently close"? What is a "single landscape unit"? These terms are hardly clear. And if all of these determinations are simply left to the judgment of the regulators, there will not be predictability or consistency in "other waters" jurisdictional determinations. Likewise, there will not be certainty.

- *Aggregation* – The preamble states, "How these 'other waters' are aggregated for a case-specific significant nexus analysis depends on the functions they perform and their spatial arrangement within the 'region' or watershed."[371] Is there any limit to this? Precisely

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[367] *See id.* at 22,191 n.3.
[368] *Id.* at 22,212.
[369] *Id.*
[370] *Id.* at 22,263.
[371] *Id.* at 22,211.

which waters and wetlands will be aggregated is unclear. Will all wet features that are not jurisdictional under categories (a)(1) through (6) be aggregated together? Will wetlands be aggregated with non-wetland features? Will a prairie pothole be aggregated only with other prairie potholes in the watershed? The preamble further states that if a water is not "similarly situated" with other waters, it will not be aggregated, but will be assessed individually.[372] Under what circumstances would waters *not* be deemed similarly situated? Under what circumstances would a water have to be assessed individually?

In addition to the multiple ambiguities associated with the "other waters" provision, NAHB finds it troublesome that, while the Agencies assert that the proposed rule will increase clarity, they admit that evaluating "other waters" will require "flexibility." The proposal specifically states, "The agencies do not propose absolute standards such as flow rates, surface acres, or a minimum number of functions for 'other waters' to establish a significant nexus. A determination of the relationship of 'other waters' to traditional navigable waters, interstate waters, and the territorial seas, and consequently the significance to these waters, requires sufficient flexibility to account for the variability of conditions across the country and the varied functions that different waters provide."[373] Without bright lines or standards of any kind regarding when "other waters" either individually or as a group will be considered to have a significant nexus with an (a)(1) through (3) water, however, how is a home builder to know if the isolated pond on the property he just purchased is a "water of the United States"? Indeed, the "other waters" provision falls well short of providing the clarity the Agencies claim.

6. The Alternative Treatments of "Other Waters" Presented in the Preamble are Similarly Overreaching and Unsupported by Science.

For all of the reasons discussed above, the proposed "other waters" standard will lead to broad assertions of jurisdiction over isolated features that have no meaningful connection with traditional navigable waters. Yet, many of the alternative options presented by the Agencies would have similarly overreaching results and are likewise unsupported by the science. The Agencies request public comment on four alternative approaches for "other waters":[374]

(1) determine that "other waters" within particular "ecoregions" or "hydrologic-landscape regions" are similarly situated by rule and have a significant nexus;

(2) determine by rule that certain additional subcategories of "other waters" (e.g., prairie potholes, western vernal pools) are jurisdictional;

(3) determine that no "other waters" are similarly situated; and

(4) determine that all other waters in a watershed are similarly situated.

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[372] *Id.* at 22,213.
[373] *Id.* at 22,198.
[374] *See id.* at 22,215 – 22,217.

The Agencies state that they "might adopt any combination" of these "other waters" alternatives for the final rule.[375] But alternatives (1), (2), and (4), which would each allow for categorical jurisdiction over "other waters" in some way, are just as, if not more, overreaching than the proposed rule's approach. And, as the SAB panel has recognized, these alternative approaches are not supported by the science.[376] The ecoregion approach, for example, could render an entire watershed jurisdictional, thereby greatly increasing the need for Corps permits. Likewise, Dr. Michael Josselyn of the SAB panel commented, "The Proposed Rule acknowledges that there are many issues that have not been resolved by the Draft Science Report on how similarly situated wetlands may be addressed and proposes a number of ways to either classify wetlands into various types or to use ecoregions. These aggregations have the advantage of being simple to apply by regulators; however, they are likely not entirely valid from a scientific standpoint."[377] NAHB agrees.

7. "Other Waters" should not be Regulated Under the Proposed Rule.

Waters and wetlands that do not fit within the Agencies' already overbroad (a)(1) through (6) categories should not be regulated under the CWA. The Agencies should eliminate proposed provision (a)(7), and consistent with *SWANCC*, all "other waters" should be excluded from jurisdiction. If the Agencies insist on regulating "other waters," they should require a true case-by-case analysis of the feature at issue to assess if the science supports a determination that the feature in question shares a meaningful relationship with traditional navigable waters and should therefore be regulated as a "water of the United States."

vii. The Proposed Exclusions are Limited in Scope and Confusing.

Although NAHB supports the Agencies' listing of the types of waters that are categorically not jurisdictional and the clarification that these excluded waters cannot be recaptured if they satisfy the rule's other provisions, the exclusions contained in the proposed rule are unclear and wholly inadequate. Although we support the proposal to maintain exclusions for waste treatment systems, it is disappointing that the Agencies have not taken this opportunity to provide some much needed clarity on the applicability of these exclusions. Of the new exclusions, some are so narrow as to be nearly impossible to satisfy. Others are not defined or are unclear. Moreover, the exclusions of certain waters rings somewhat hollow when the preamble asserts that these excluded features can serve as links that can render connected features jurisdictional under the "adjacent waters" or "other waters" categories. Practically speaking, these exclusions provide little relief from the broad reach of the proposed rule's (a)(1) through (7) categories.

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[375] *Id.* at 22,215. As discussed in Section X. a., the Administrative Procedure Act requires that the final rule does not deviate too sharply from the proposal. The Agencies cannot adopt any of these proposed alternatives without fully developing these options and their underlying scientific support so that the public can meaningfully comment.
[376] *See,* e.g., 8/14/14 SAB Panel Comments on Proposed Rule at 12 (comments of Dr. Genevieve Ali) (Expressing concern about regulating subcategories of "other waters," noting "I . . . do not think that the currently available scientific literature supports that approach."); *id.* at 64 (comments of Dr. Mark Murphy) ("Stated briefly, a jurisdiction by rule of 'other waters' is intractable because science does not support such a distinction.")
[377] *Id.* at 29.

1. The Waste Treatment Systems Exclusion is Unclear and has been Unpredictable in Practice.

Today's proposal excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act."[378] The Agencies state that they do not propose any changes to this exclusion and in fact are not even accepting comments on it, but its applicability has been anything but clear.[379] The following are just a sample of some of the ambiguities associated with the waste treatment systems exclusion:

- *Waste treatment system* – What do the Agencies consider to be a waste treatment system? Does the exclusion include ditches and conveyances that connect to treatment ponds? Does it include features that manage or store but do not treat water? Does it include stormwater retention basins? The Agencies must define "waste treatment systems." They should also clarify that all on-site maintenance of water, including transport, storage, treatment, and use, are non-jurisdictional. Indeed, any discharges into waters of the United States that result from these activities are already covered under CWA Section 402.

- *"Designed to meet the requirements of the Clean Water Act"* – Is the exclusion limited to waste treatment units that were specifically designed to satisfy CWA obligations? Does the exclusion extend to waste treatment systems that were created before the enactment of the CWA? What if the system was installed before the CWA but was modified later to ensure the facility was able to comply with its NPDES permit? What if a feature was designed and used for treatment, but the owner has now ceased to use it for that purpose? What if the feature was installed to meet the requirements of a local or state ordinance and not the CWA? Because of the confusion and limits the phrase "meet the requirements of the Clean Water Act" places on the waste treatment system exclusion, the phrase should be removed.

- *Man-made basins or ponds* – Man-made basins and ponds serve a myriad of environmental and process purposes and do so in an environmentally responsible manner (e.g., fracking ponds). To render theses systems "waters of the United States" would make them prohibitively expensive and would altogether eliminate their viability. The waste treatment system exclusion should extend to man-made basins.

In the context of the CWA, the waste treatment exclusion makes imminent sense, but the value and practicalities of the exclusion could be quickly lost. NAHB urges the Agencies to engage with stakeholders who rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds it. After having these critical stakeholder discussions, the Agencies should propose a revised rule that addresses the waste treatment systems exclusion and provides much needed clarity for regulators and the regulated community.

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[378] 79 Fed. Reg. at 22,263.

[379] *Id.* at 22,190 ("Because the agencies do not address the exclusions from the definition of 'waters of the United States' for waste treatment systems and prior converted cropland or the existing definition of 'wetlands' in this proposed rule the agencies do not seek comment on these existing regulatory provisions").

a. The Waste Treatment Systems Exclusion Should Explicitly State that Municipal Separate Storm Sewer Systems (MS4s), Green Infrastructure, and Stormwater Management Facilities are Excluded.

The proposed rule's waste treatment systems exclusion falls short of explicitly excluding municipal separate storm sewer systems (MS4s) and other infrastructure designed to treat stormwater. Off the record, the Agencies have stated that these features are not "waters of the United States," but unofficial statements carry no regulatory weight.[380] Instead, specific language should be included in the regulation itself.

i. MS4s are not "Waters of the United States."

Municipal separate storm sewer system (MS4) infrastructure is defined as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" owned and operated by a state or municipality which "discharges to waters of the United States" and is "[d]esigned or used for collecting or conveying storm water."[381] The National Pollutant Discharge Elimination System (NPDES) program regulates stormwater discharges from MS4s, construction activities, and industrial activities. The Phase I MS4 requirements, issued in 1990, direct medium and large cities and certain counties with populations of 100,000 or more to obtain NPDES permit coverage for their stormwater discharges. There are approximately 750 Phase I MS4s. Phase II MS4s whose requirements were issued in 1999, include small MS4s in urbanized areas, as well as small MS4s outside the urbanized areas that are designated by the permitting authority. Like Phase I MS4s, they too must obtain NPDES permit coverage for their stormwater discharges. There are roughly 6,700 Phase II MS4s.[382]

In the comprehensive and exhaustive proposed rule, nowhere do the Agencies mention MS4s, much less the elaborate CWA regime that governs and regulates these systems across the United States. The Agencies must address the interplay between the MS4 stormwater program and waters of the United States coverage. Indeed, the proposed rule's strong intent to provide as much certainty to the regulated public and the regulators demands clarification on the jurisdictional status of MS4s.

NAHB urges the Agencies to clarify that MS4s are "point sources" regulated under CWA Section 402, and are not also waters of the United States.[383] Additionally, MS4s are waste treatment systems and, accordingly, should be categorically excluded from the reach of waters of the United States. The CWA's regulatory scheme, for all its detail, is quite simple: the Act prohibits the discharge of pollutants from point sources to navigable waters unless authorized by

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[380] EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, September 2014 Q & A).

[381] 40 C.F.R. § 122.26(b)(8).

[382] *See* http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm

[383] Similarly, any ditch or other feature upstream of the MS4 or any other NPDES outfall should also not be considered a jurisdictional "water of the United States."

a permit.[384] The term "'point source' means any discernible, confined and discrete *conveyance*, including but not limited to any pipe, *ditch*, channel, tunnel, . . . from which pollutants are or may be discharged. . . ."[385] The CWA further provides that "'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters *from* any point source. . . ."[386] The Act thus contemplates that point sources are not themselves "navigable waters," but instead are "discrete conveyances" for conveying pollutants to navigable waters.[387] The proposed rule ignores this distinction and may potentially and improperly define some well-recognized point sources as waters of the United States.

Similarly, the Agencies should clarify that no permit is necessary to contribute pollutants that are conveyed to a local government-owned MS4.[388] Otherwise, the Agencies will upset the CWA framework by requiring a permit for "discharging" pollutants to a "point source," which is well beyond the Agencies' CWA authority.[389] For example, the proposed rule defines tributaries in such a broad manner as to potentially cover ditches that flow into MS4s, which Congress designated as point sources subject to CWA Section 402(p).[390]

Treating MS4s, and the ditches that convey runoff to them, as waters of the United States would mark a 180-degree turn from the Agencies' traditional practice. For example, in the 1990 preamble to EPA stormwater regulations, EPA made clear that stormwater runoff *into* municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States.[391] EPA has "always addresse[d] such discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges *to* waters of the United States.'"[392]

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[384] 33 U.S.C. § 1311(a) (prohibiting the "discharge of any pollutant[s]" unless permitted elsewhere in the CWA).
[385] 33 U.S.C. § 1362(14) (emphasis added).
[386] 33 U.S.C. § 1362(12) (emphasis added).
[387] *See also Rapanos*, 547 U.S. at 735 ("The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories;" "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'").
[388] These systems are owned and operated by public entities, including states, local governments, and special governments created under state law, such as sewer districts, flood control districts, or drainage districts.
[389] The Act authorizes the Agencies to control "discharges" of pollutants to navigable waters. A "discharge" covers only the "addition of any pollutant to navigable waters *from* any point source;" not a discharge from a point source to a point source. 33 U.S.C. § 1362(12) (emphasis added).
[390] Congress amended the CWA in 1987 and added section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges. *See* 33 U.S.C. § § 1342(p)(3)(B), (4). The history of the MS4 permit program and its phased approach for regulation of municipalities based on their population size is summarized in *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 841-42 (9th Cir. 2003). According to EPA, approximately 70 percent of the nation's population lives within an urbanized area subject to EPA's MS4 regulations. *See* U.S. EPA, Fact Sheet 2.2 (EPA 833-F-00-004), *Storm Water Phase II Final Rule, Urbanized Areas: Definition and Description* (Dec. 1999, rev. Dec. 2005), *available at* http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm.
[391] 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) ("[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program.").
[392] *Id.* (emphasis added).

Similarly, in 2005, EPA confirmed that MS4s are "by definition" *not* CWA "navigable waters."[393] The Agencies must continue that trend.

Moreover, the case law makes clear that "a two-permit regime is contrary to the statute and the regulations ... [and] would cause confusion, delay, expense, and uncertainty in the permitting process."[394] The Supreme Court concluded "that, when a permit is required to discharge fill material, *either* a § 402 *or* a § 404 permit is necessary."[395] The same principle holds true here – where a point source like an MS4 (including ditches flowing to the MS4) is regulated under Section 402 of the Act, it is contrary to the statute, the case law, and common sense to also treat that ditch as a water of the United States. While off the record the Agencies assert it is not their intent to regulate MS4s as waters of the United States, the proposed rule is broad enough to create confusion.[396]

As point sources, MS4s are local government-owned systems that are required to control the volume of stormwater while reducing the discharge of pollutants therein. Congress conceived of this framework so that, "[r]ather than regulate individual sources of runoff, such as churches, schools and residential property, . . . the NPDES permitting requirement [operates] at the municipal level to ease the burden of administering the program."[397] Because states and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit or administrative efficiency gained by treating the same drainage systems as jurisdictional waters. Classifying MS4s as waters of the United States would disrupt state and local government programs that maintain, manage, and treat stormwater discharges under CWA Section 402(p).

Case law and the Agencies' long-standing position on MS4s are also consistent with how these systems operate. MS4s are waste treatment systems for sediment and other pollutants, and thus they should be excluded from the definition of waters of the United States. Under EPA regulations and the proposed rule, waste treatment systems are *not* waters of the United States. [398] Instead, they are "manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States."[399] Because MS4s collect stormwater runoff and remove pollutants, including sediment, from

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[393] Memorandum from A. Klee, Former General Counsel, and B. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators at 18 n.18 (Aug. 5, 2005) ("Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers"), *available at* http://www.epa.gov/ogc/documents.htm.
[394] *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2474 (2009) (Op. by Kennedy, J.).
[395] *Id.* (emphasis added).
[396] September 2014 Q and A at 5. ("Question 13: Will stormwater management systems permitted under the CWA, commonly called MS4s, become "waters of the US" under the proposed rule? ANSWER: No. The proposed rule does not change the status of an MS4 under the CWA. The proposed rule does not regulate any types of waters that are not regulated under the current rule. We are eager to work with stakeholders and the public to ensure the final rule reflects this intent.")
[397] *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 636 F.3d 1235, 1247 (9th Cir. 2011). The Ninth Circuit quoted Senator Wallop, who called the alternative approach an administrative nightmare: "'[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.'" *Id.* (citing 131 CONG. REC. 15616, 15657 (Jun. 13, 1985)).
[398] 40 C.F.R. § 122.2 (defining waste treatment systems); 79. Fed. Reg. at 22,263.
[399] 40 C.F.R. § 122.2 (defining waste treatment systems).

stormwater runoff, they operate as waste treatment systems and are, therefore, not jurisdictional waters.

Even more problematic, if MS4s are treated as waters of the United States, all CWA programs will apply to them. States will then be required, among other things, to monitor water quality, designate beneficial uses, establish water quality standards, and establish TMDLs for any part of an MS4 under the jurisdiction of the CWA. Additionally, a Section 404 permit could be required to perform necessary maintenance and repair on MS4s that are wrongly deemed waters of the United States. The time and money it will take to obtain Corps permits to repair or maintain ditches and conveyances within an MS4 will cost local governments extra time and money while simultaneously jeopardizing public infrastructure and safety.

A more common sense approach is to treat MS4s and those entities that release pollutants through them like publicly owned treatment works (POTWs) and to treat those that introduce pollutants into them as part of the POTW. Under this approach, discharges from the point source (i.e., the MS4) are appropriately permitted under Section 402, and no permit is required for persons to discharge into the point source, as is consistent with the Act. Those entities who introduce pollutants to the MS4, which then discharges the pollutants to navigable waters, must then comply with the requirements that the MS4 establishes. Indeed, this is the basic structure EPA has created within the Section 402 program and there is no need to change it now.

Because conveyances within an MS4 or that convey pollutants through an MS4 could readily meet the proposed rule's broad tributary definition, many MS4s and/or other components could be treated as waters of the United States rather than as point sources. The Agencies must confirm that point sources, such as MS4s, that are regulated by CWA Section 402 are not "waters of the United States." One way to do so is to specifically include MS4s in the waste treatment system exclusion.

ii. Green Infrastructure Features are not "Waters of the United States."

EPA defines green infrastructure as a means of "protecting and restoring natural landscape features and using natural systems (or systems engineered to mimic natural processes) to manage rain water as a resource," and touts its many benefits, including increased climate resiliency, reduced urban heat island effects, lowered building energy demands, and sustainable communities.[400] The Agency "supports expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically sustainable communities" and sees green infrastructure as part of its "strategic agenda to protect waters."[401] Additionally, President Obama's Council on Climate Preparedness and Resilience promotes green infrastructure, stating, "By weaving natural processes into the built environment, green infrastructure provides not only stormwater management, but also improved water quality,

[400] *See* www.epa.gov/greeninfrastructure (last accessed Nov. 6, 2014).
[401] EPA, "A Strategic Agenda to Protect Waters and Build More Livable Communities Through Green Infrastructure" (April 2011) *available at* http://water.epa.gov/infrastructure/greeninfrastructure/upload/gi_agenda_protectwaters.pdf

greenhouse gas reduction, flood mitigation, and recreational opportunities."[402] To further promote its widespread use, EPA along with HUD, DOT, USDA, DOI, DOD, and DOE recently announced the development of a broad-based, multi-sector Green Infrastructure Collaborative, and in 2015, EPA plans to provide green infrastructure technical assistance grants to at least 25 communities.[403] Clearly, there is broad federal support of green infrastructure.

In spite of this, EPA and the Corps do not recognize green infrastructure features, including rain gardens and low impact development stormwater management, under the waste treatment systems exclusion. This omission is unsettling to NAHB's 140,000 members, who regularly employ low impact development devices and other stormwater waste control technologies to reduce runoff and associated pollutant discharges from construction sites. The Agencies must acknowledge that on-site stormwater control systems do not contain waters of the United States and, furthermore, are explicitly excluded from CWA jurisdiction under the waste treatment systems exception.

Regrettably, the closest the Agencies have come to suggesting green infrastructure is excluded from CWA jurisdiction came in the form of an unofficial Q & A regarding the proposed rule that EPA posted on its website in September 2014:[404]

> [QUESTION] 22. Is my rain garden regulated as a 'water of the US' under the proposal?
>
> ANSWER: No. Rain gardens and similar green infrastructure would not be regulated under the proposed rule because they are not wetlands or built in waters protected by the CWA.

EPA's answer is problematic for several reasons. First, and most importantly, if this is truly the case, why haven't the Agencies included green infrastructure and similar stormwater management devices explicitly under the proposed rule's waste treatment systems exclusion? Indeed, this informal Q & A is *not* a regulatory document and will not be published in the CFR. What's more, under the proposed broad definitions of "tributary," "adjacent waters," and "other waters," green infrastructure and other stormwater management features could quite readily be deemed waters of the United States, either categorically or on a case-by-case basis. For instance, if a bioswale that conveys stormwater to downstream waters meets the overbroad tributary definition, it would be a water of the United States. Similarly, if a stormwater infiltration pond is constructed in the floodplain or riparian area of an (a)(1) through (5) water, it would be categorically jurisdictional. Second, green infrastructure devices, namely rain gardens, although they may not have wetland characteristics (e.g., wetland hydrology, wetland plants, and hydric soils) when first constructed, can readily develop these traits over time – traits that can actually help them perform better in reducing flows and removing pollutants. Further, contrary to EPA's answer in the Q & A, rain gardens and bioswales are commonly built within wet weather

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[402] Office of the President, Priority Agenda: Enhancing the Climate Resilience of America's Natural Resources. Council on Climate Preparedness and Resilience (October 2014) at 34, *available at* http://www.whitehouse.gov/sites/default/files/docs/enhancing_climate_resilience_of_americas_natural_resources.pdf

[403] *Id.* at 42.

[404] September 2014 Q & A at 6.

conveyances that could meet the Agencies' proposed "tributary," "adjacent waters," or "other waters" definitions. So, to state that green infrastructure features are not waters of the United States because they are "not wetlands or built in waters protected by the CWA" is relatively cold comfort for the regulated community.

Equally troublesome is that while EPA proclaims green infrastructure's many environmental and economic benefits, by not explicitly excluding green infrastructure from CWA jurisdiction, the Agencies create a disincentive to employ such practices. If rain gardens, bioswales, and other stormwater treatment devices are waters of the United States, landowners and operators will have to obtain costly and time intensive permits in order to perform simple maintenance on them including the removal of sediment and debris. This will be unnecessarily burdensome. Additionally, many green infrastructure devices will be left unmaintained while the applicant awaits a permit, leading to reduced effectiveness of the features and increased pollutant loading to downstream waters.

Home builders in Houston, Texas, recognize this conundrum in their comment letter on the proposed rule.[405] Houston is known as the Bayou City. The City, Harris County, and the drainage districts with authority over development in this region have begun to embrace a wide variety of low impact development and green infrastructure as the best method to accommodate drainage. Houston has awoken to the fact that being the Bayou City gives it a unique corridor system for a wide range of desirable urban and suburban uses that both relies upon and promotes better water quality. But if rain gardens, bioswales, and biofilters become waters of the United States as a result of today's proposed jurisdictional expansion, these green initiatives will require costly permits for routine maintenance and impose unwarranted burdens on the state (e.g., development of water quality standards, water quality monitoring requirements, development of TMDLs for green infrastructure features not attaining water quality standards). Ultimately, the use of green infrastructure will come to a screeching halt.

Additionally, if green infrastructure features are waters of the United States, all other CWA programs will apply to them. As a result, states will, among other requirements, have to monitor water quality, designate beneficial uses, establish water quality standards, and establish TMDLs for any green infrastructure features under the jurisdiction of the CWA. This is absurd.

The Agencies must confirm that green infrastructure features, such as rain gardens, bioswales, and treatment wetlands, are not waters of the United States. Additionally, the Agencies should specifically include green infrastructure features in the waste treatment system exclusion.

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[405] Letter from the North Houston Association, the West Houston Association, and the Woodlands Development Company to the Proposed Rule "Definition of 'Waters of the United States' Under the Clean Water Act" docket.

Sierra Club v. EPA 18cv3472 NDCA Tier 7 ED_002061_00065183-00111

iii. Stormwater Treatment Ponds and Other Stormwater Management Facilities are not "Waters of the United States."

Construction site operators must secure an NPDES stormwater permit (general or individual) before discharging stormwater to a surface water of the United States or an MS4.[406] The most significant component of NPDES construction stormwater permits is the Storm Water Pollution Prevention Plan (SWPPP), which identifies sediment and erosion control measures necessary to protect water quality. Historically, the preferred method of treating stormwater under a SWPPP has been through the use of on-site retention or detention ponds, infiltration trenches, or other conveyance systems. These man-made ponds and trenches are designed to slow concentrated runoff and trap sediment to protect receiving streams, lakes, and other downstream waterbodies. Without an explicit exclusion, however, stormwater treatment ponds and conveyances could be deemed "waters of the United States" because they meet the Agencies' overbroad "tributary," "adjacent waters," and/or "other waters" definitions.

Indeed, without a stormwater exclusion, the courts have on several occasions ruled that these features – although they are designed specifically to treat pollutants and protect downstream waters – are "waters of the United States." In *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502 (N.D.Cal.), the district court rejected a claim that a pond formed from an abandoned gravel mining pit was a waste treatment system exempt from coverage under the CWA. Although the pond served as a percolating filter for wastewater received from the defendant's waste treatment facility, the pond "itself was not 'designed' to meet the requirements of the Clean Water Act or 'designed' to be part of the waste-treatment system."[407] Also noteworthy was the fact that the pond preexisted both the CWA and construction of the waste treatment plant.[408]

On appeal, the Ninth Circuit affirmed, holding that the pond fell outside the exemption "because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system."[409] The Court added that the exception "was meant to avoid requiring dischargers to meet effluent discharge standards for discharges into their own *closed system* treatment ponds."[410] Stormwater ponds are constructed with an outflow and are *not* closed systems; they contribute flow to downstream waters.

The case of *West Virginia Coal Ass'n v. Reilly*, 728 F.Supp. 1276 (S.D.W.Va.1989), addressed whether sedimentation ponds constructed in streams were "waste treatment systems" excluded from the definition of "waters of the United States." Plaintiffs had challenged EPA's decision to

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[406] 33 U.S.C. §§ 1311-1342.
[407] 2004 WL 201502 at 11.
[408] *Id.*
[409] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007). *See also California Sportfishing Protection Alliance v. California Annonia Company*, 2007 WL 273847, at 6 (E.D.Cal) (holding that the "key question" for the court in determining whether stormwater pooling in a manmade detention pond qualifies for the waste treatment system exception was whether the pond is a "treatment system covered by a valid NPDES permit").
[410] *Id.* at 1032 (citing 45 Fed. Reg. 48,620 [July 21, 1980]).

overrule state approval of several NPDES permits authorizing in-stream sedimentation ponds. EPA claimed that the ponds were inconsistent with the CWA and state water quality standards.[411] The court deferred to EPA's interpretation of the CWA and position that "the 'waters of the United States' over which EPA has regulatory control cannot be removed from the purview of the Clean Water Act merely by impounding those waters."[412]

A general purpose of the "waste treatment system" exclusion is to encourage the development of innovative waste treatment technologies and further the goals of the CWA. Absent the exclusion, construction site operators would be punished. In addition to the required CWA Section 402 NPDES permit covering construction-related stormwater discharges exiting a site, construction site operators would be forced to secure a Section 404 dredged or fill material permit for discharges *into* their own stormwater control systems. Furthermore, stormwater impoundments might be interpreted as artificially created "waters of the United States," imposing additional regulatory burdens on construction site operators and surrounding landowners. This perverse outcome is inconsistent with the common sense interpretation of the Agencies "waste treatment systems" exclusion.

Additionally, stormwater treatment ponds could be deemed to not be "waters of the United States" because they are settling basins and thereby meet exclusion (b)(5)(ii):

> "The following are not 'waters of the United States' . . . Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, *settling basins*, or rice growing."[413]

Stormwater ponds and other stormwater management techniques function to slow down the flow of water from a development, parking lot, roadway, etc., by collecting the water in a basin and governing outflow to the stream network to better mimic natural stream hydrology. In the process, runoff is slowed down, and pollutants, including sediment and sorbed nutrients (e.g., phosphorus, organic matter) and contaminants (e.g., heavy metals) that enter the pond or other treatment facility, settle out. Additionally, biota (e.g., plants, animals, microorganisms) within the stormwater ponds can account for biological uptake of excess nutrients and dissolved contaminants. EPA notes, "[w]et [stormwater] detention ponds provide both storm water quantity and quality benefits, and provide significant retrofit coverage for existing development. Benefits include decreased potential for downstream flooding and stream bank erosion and improved water quality due to the removal of suspended solids, metals, and dissolved nutrients."[414] What's more, saturated stormwater pond soils can enhance the reduction of nitrate,

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[411] *West Virginia Coal Ass'n*, 728 F.Supp. at 1,279.
[412] *Id.* at 1,283. *See also Ohio Valley Environmental Coalition v. U.S. Army Corps*, 2007 WL 2200686, at 12 (S.D.W.Va.) (rejecting the Corps position that construction of treatment ponds in stream segments previously classified as "waters of the United States" cause protected waters to temporarily lose that status and qualify for the "waste treatment system" exception because they assist in the discharge of pollutants).
[413] 79 Fed. Reg. at 22,263 (emphasis added).
[414] EPA, Storm Water Technology Fact Sheet: Wet Detention Ponds. Office of Water. EPA 832-F-99-048. (Sept. 1999) at 1, 2, *available at* http://water.epa.gov/scitech/wastetech/upload/2002_06_28_mtb_wetdtnpn.pdf

otherwise responsible for downstream eutrophication and algal blooms, to inert gaseous nitrogen via denitrification.[415]

According to case law and lacking an explicit exclusion, these ubiquitous treatment ponds would not meet the existing waste treatment exclusion. Similarly, because exclusion (b)(5)(ii) includes the phrase "used *exclusively* for such purposes as stock watering, irrigation, settling basins, or rice growing," a stormwater pond used for any other purpose (e.g., recreation, aesthetics) may not meet the artificial lakes or ponds exclusion. At a minimum, the word "exclusively" must be removed from this exclusion for it to have any practical application.

The vast majority of stormwater systems used to control both the quality and quantity of stormwater discharges from construction sites form waste treatment systems and function as settling basins. These systems are specifically "designed" to be incorporated in an NPDES permit as detailed in a site-specific SWPPP. They are man-made, typically constructed separate and apart from existing waters of the United States, and do not themselves create new waters of the United States.

Conversely, as "waters of the United States," stormwater ponds would be subject to all CWA programs (*see* Section VII. a.), and routine maintenance would require expensive and burdensome CWA permits (e.g., dredging sediment would require a Section 404 permit and application of mosquito pesticides would require a Section 402 permit). This would create regulatory headaches with no ecological benefits.

For these reasons, the Agencies must explicitly exclude stormwater systems from the definition of "waters of the United States."

2. The Agencies have Provided only Two Very Narrow Exclusions for Ditches.

The Agencies have explicitly included ditches in the tributary definition within the proposed rule. That said, the proposed rule provides two exclusions whereby ditches would not be "waters of the United States": (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (2) ditches that do not contribute flow, either directly or through another water, to an (a)(1) through (4) water.[416] Contrary to the Agencies' statements about the proposed rule's treatment of ditches, however, the two exclusions are narrow in scope and lacking in clarity. Indeed, in practice, it is unlikely that these exclusions will release many ditches from jurisdiction.

The ambiguous language of these exemptions leaves their interpretation subject to the broad discretion and subjectivity of the Agencies. The following key concepts affecting the scope of the exemptions are left undefined or unclear:

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[415] *See* Groffman, P.M., E.A. Holland, D.D. Myrold, G.P. Robertson, and X. Zou. 1999. Denitrification. In: *Standard soil methods for long-term ecological research* (Robertson, G.P., D.C. Coleman, C.S. Bledsoe, and P. Sollins, eds.). Oxford University Press, New York. Soil saturation creates anaerobic conditions that promote facultative microbial reduction of nitrate-N to gaseous N (NO, N_2O, and N_2) in a process called denitrification.
[416] 79 Fed. Reg. at 22,263.

- *Ditch* – The Agencies do not provide a definition of "ditch." What features qualify as ditches? Are all man-made or man-altered features ditches? How is a ditch distinguished from an ephemeral drainage or gully? How is a ditch distinguished from a tributary, especially if it has a bed, bank, and OHWM?

- *Uplands* – To qualify for the first ditch exemption, one must show that a ditch was excavated wholly in uplands for its entire length. The Agencies have not provided a regulatory definition of "upland" while various definitions of "upland" exist.[417] Is anything that does not qualify as a wetland considered an upland? Are floodplain areas uplands?

- *For the entire length* – From the language of the proposed "tributary" definition, it appears that breaks, whether man-made or natural, along the length of ditches do not segment them for purposes of analyzing whether they meet the upland ditch definition. Could part of a ditch that crosses a wetland be jurisdictional while another part of the same ditch excavated in upland be excluded? What about a 100 mile long ditch? If it crosses one wetland over a length of several feet, is the entire ditch jurisdictional?

- *Drains only upland* – Because the Agencies have not provided a definition of "uplands," this qualifier does not provide clarity. What if a ditch was constructed in wetlands but now drains only uplands (i.e., the ditch has drained the wetland)?

- *Does not contribute flow* – Ditches that do not contribute flow to an (a)(1) through (4) water qualify for exclusion (b)(4). What if a ditch contributes flow only during an extreme event? What if it contributes flow for only several hours a year?

Dr. Michael Josselyn of EPA's SAB has voiced concerns about the limited ditch exclusions as well, stating, "[t]he exclusion for ditches seems quite narrow. If it is meant to exclude roadside ditches, for example, the ditch must be entirely constructed in uplands and drain only uplands. This could mean that a highway drainage ditch, even though constructed mostly through wetlands, but perhaps impacting wetlands or streams along 1-2% of its length would then be considered a 'water of the US'. The Draft Science Report did not address this issue as it focused on natural streams and wetlands."[418] SAB panelist Dr. Mark Murphy similarly expressed confusion regarding the ditch exclusions, commenting, "[i]t is not obvious why ditches that flow only in response to rainfall runoff, aka ephemeral ditches, are excluded by rule yet ephemeral streams are included by rule."[419]

Aside from the ambiguities, each of the ditch exclusions is very narrow and it is unlikely many ditches will actually meet these requirements. Moreover, with these exemptions, the burden is

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[417] For instance, the Draft Connectivity Report defines "uplands" to mean: "(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition." Draft Connectivity Report at A-21. Yet, in the September 2014 Q & A at 6, the EPA stated, "Under the rule, an "upland" is any area that is not a wetland, stream, lake or other waterbody."
[418] 8/14/14 SAB Panel Comments on the Proposed Rule at 29.
[419] *Id.* at 65.

placed wholly on the applicant to prove that his/her ditch is not a "water of the United States." For the upland ditch exclusion, the applicant will have to show through historical data (e.g., photographs, topographic maps, prior delineations) that the ditch was excavated wholly in uplands for its entire length and prove that the ditch drains only uplands.[420] But most ditches carry flow, contain standing water, and drain areas that have water because the very purpose of ditches is to convey water away from areas susceptible to ponding or saturation (e.g., farm fields, roadways, parking lots, etc.). NAHB expects that the likelihood of a ditch meeting the first exclusion would be low. Similarly, it will be nearly impossible to find a ditch that does not contribute flow to a traditional navigable water, interstate water, territorial sea, or impoundment. As noted by Dr. Mark Murphy of the SAB panel, "Given enough rain, all ditches have the potential to contribute flow to a downslope waterbody, even in a topographically closed basin. Thus it would be impossible to meet these criteria . . ."[421]

Indeed, these exclusions are so narrow that it is hard to believe they are even real. Can the Agencies point to a ditch that is not a "water of the United States" under the proposed rule? If so, NAHB asks that they provide examples of ditches that would qualify for these exclusions.

3. The Agencies' Rationale for Deeming Puddles Outside the Scope of Clean Water Act Jurisdiction is Equally Applicable for Ephemeral Drainages.

Although not expressly listed in the excluded features, the preamble states that puddles are not waters of the United States because a puddle "exists for only a brief period of time before the puddle evaporates."[422] But the same is often true of many ephemeral drainages (*see* Figs. 6 - 8, for example), which are considered categorically jurisdictional. It is not clear why ephemeral drainages are jurisdictional while puddles are not. In addition, the preamble's treatment of puddles raises other questions:

- How do the Agencies distinguish between a "puddle," which is not regulated and a "water," which is regulated?
- How big must a puddle be to be a "water"?
- Can a puddle be regulated as an "adjacent water" if it is in the floodplain of a traditional navigable water? Why or why not?
- What provision in the rule can the Agencies point to that would prevent the assertion of jurisdiction over puddles as "adjacent waters" or "other waters"?

Indeed, the very fact that the preamble has to explain that puddles are not waters of the United States illustrates the broad and far reaching jurisdiction that could be asserted under the proposed

[420] 79 Fed. Reg. at 22,203.
[421] 8/14/14 SAB Panel Comments on the Proposed Rule at 65.
[422] 79 Fed. Reg. at 22,218.

rule. Likewise, the fact that the Agencies have provided a specific exclusion for swimming pools indicates their knowledge of the absurd reach of the proposed rule.[423]

4. The Proposed Rule Draws an Arbitrary Distinction between Erosional Features and Ephemeral Drainages.

The Agencies propose to exclude gullies, rills, and non-wetland swales, and yet do not provide definitions for any of those terms. The preamble states that the Agencies specifically seek comment on "how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional."[424] Indeed, this raises many questions:

- How are regulators and the regulated community to identify gullies, rills, and non-wetland swales?
- What is the difference between erosional features and ephemeral drainages? The Agencies provide no scientific basis for distinguishing between them.
- Indeed, if these features are so similar, why are erosional features categorically excluded and ephemeral drains are categorically jurisdictional? After all, all rivers and streams exist because the force of flowing water has eroded sediment downstream to form a channel. Dr. Luna Leopold, one of the most noted river scientist of the modern era, put it best when he and his colleagues described rivers as the "gutters down which flow the ruins of continents."[425]

The different treatment of these predominantly dry features appears to be entirely arbitrary. The Agencies should exclude ephemeral streams from jurisdiction as well as erosional features like gullies, rills, and non-wetland swales. Indeed, the USGS even recognizes gullies as "synonymous with ephemeral [streams]."[426]

VII. Practical Considerations of the Proposed Rule are Lacking.

Changing the definition of "waters of the United States" under the CWA will have multiple practical implications that go well beyond mere words on a page. The term "waters of the United States" applies to all parts of the CWA and its programs and triggers specific costly state requirements and federal actions. What's more, the new definitions will increase regulatory uncertainty and adversely impact CWA permitting processes. Regrettably, the Agencies fail to consider the significant ramifications of the proposal.

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[423] *Id.* at 22,263.
[424] *Id.* at 22,219.
[425] Leopold, L.B., M.G. Wolman, J.P. Miller. *Fluvial Processes in Geomorphology*. San Francisco: Freeman, 1964. Print.
[426] USGS National Hydrography Dataset Newsletter Vol. 5, No. 4, February 2006 by Jeff Simley.

a. The Proposed Rule will have Major Impacts on all Clean Water Act Programs.

Throughout the preamble to the proposed rule and in supporting documentation discussing and evaluating the definitional change of "waters of the United States," the Agencies focus almost exclusively on the change's impacts on the CWA Section 404 program. But the Agencies propose to substitute their new definition of "waters of the United States" throughout the CWA's regulations, which will result in broadened scope and additional obligations for *all* CWA programs. The term "navigable waters" is used throughout the CWA and its regulations 135 times. The term "waters of the United States" is used 98 times. To put it succinctly, the scope of the definition of "waters of the United States" dictates the scope of the CWA's programs.

Despite this fact, the Agencies have failed to consider the significant implications of this major change on the full suite of the CWA's programs. For example, nowhere in the preamble to the proposed rule are any impacts to Section 303 water quality standards (WQS) and total maximum daily loads (TMDLs), Section 311 oil spill prevention, Section 401 state certification, Section 404 (dredged or fill material permits), or Section 402 (*e.g.*, individual permits, industrial stormwater general permits, construction stormwater general permits, pesticide general permits) programs discussed. Instead, some, though not all, of these programs are discussed only as evidence as to why the Agencies' expanded scope of regulation under the proposed definition is reasonable.[427]

As all industries impacted by the CWA are aware, even with the current jurisdictional reach, the Agencies cannot process permits in a timely fashion. The substantially expanded jurisdiction proposed by the rule will require considerable additional federal and state resources to process permit applications and otherwise implement the affected programs. In addition, considerably increased agency budgets will be required to meet these requirements. Without consideration of these practical impacts, the proposed rule essentially sets the Agencies up for failure, and sets home builders and all other regulated entities up for increased delays in project development and increased expenses for navigating any project through requisite CWA permitting.

i. The Proposed Rule will Result in Increased Clean Water Act Section 404 Permitting Requirements.

Section 404 of the CWA requires a permit for the discharge of dredged or fill material into waters of the United States.[428] The proposed rule's expansive definition of waters of the United States will result in more activities triggering the Section 404 permitting requirements. Features such as ditches, all waters in floodplains and riparian areas, and isolated waters, which were not previously considered jurisdictional, will now be covered by the proposed rule.[429] Any

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[427] *See,* e.g., 79 Fed. Reg. at 22,254 – 22,259 (arguing that the history of the water quality standards program demonstrates that the CWA regulates interstate waters without reference to navigability, among other things). Of course, such an ends justify the means argument is unsupportable. *See Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.,* 514 U.S. 122, 135-136 (1995) (such arguments are the "last redoubt of losing causes"; no law pursues its purpose at all costs; instead, every law "proposes, not only to achieve certain ends, but also to achieve them by particular mean" set out in the text).

[428] 33 U.S.C. § 1344.

[429] *See* 79 Fed. Reg. at 22,193.

discharge of dredged or fill material into these newly jurisdictional features will first require the project proponent to obtain a CWA Section 404 permit. The onslaught of new permits will burden the Corps permit writers and state water quality officers, and delays will plague property owners and businesses.

Further, under the proposed rule, permittees will likely face increased mitigation requirements because unavoidable impacts to newly jurisdictional features and waters would require additional mitigation. Corps regulations require compensatory mitigation through mitigation banks, in-lieu fee mitigation, or permittee-responsible mitigation, to offset unavoidable impacts to waters of the United States authorized through CWA Section 404 permits.[430] Such mitigation is not only costly, but it is also difficult in many instances to obtain the requisite number of available mitigation credits or to create such credits onsite or nearby. The increase in jurisdiction and associated mitigation requirements could cause a run on mitigation bank credits, making them more expensive and difficult to obtain. As explained in Dr. David Sunding's review of EPA's Economic Analysis, EPA's estimate of the increased mitigation costs are far too low and lack proper documentation and explanation.[431] In reality, the proposed rule's expanded definition of "waters of the United States" will result in a significant increase in mitigation costs, placing a heavy burden on project proponents.

In addition, the inherent uncertainty of the rule will increase costs and impose substantial burdens on compliance. The Agencies acknowledge that jurisdictional uncertainty increases paperwork, costs, and time while decreasing a business' willingness to invest, yet have not done enough to address this impact.[432] As discussed throughout these comments, the proposed rule suffers from a lack of clarity in many critical respects and will not reduce uncertainty or unpredictability in CWA implementation. Among other ambiguities, the proposed rule fails to provide a quantifiable method for determining "significant nexus;" fails to define "upland," "perennial flow," and other key terms; and leaves important determinations (e.g., floodplain interval, shallow subsurface flow) to the agencies' "best professional judgment." These and other uncertainties will produce confusion over whether a feature is a "water of the United States" and whether a facility must seek a Section 404 permit for work that impacts the feature. Confusion over the definition will increase costs to comply with Section 404, complicate project design and engineering efforts designed to avoid jurisdictional impacts, and increase the likelihood of unintended illegal discharges. In addition, as a result of the proposed rule's uncertainties, Section 404 permittees may be subject to additional enforcement actions and citizen suits.

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[430] 33 C.F.R. § 332.

[431] Dr. David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States" (May 15, 2014) at 18,19 (hereinafter, Sunding Review of EPA's Economic Analysis), *available at* http://www.nam.org/Issues/Environment/Water-Regulations/WOTUS-Economic-Report-FINAL.aspxWOTUS-Economic-Report-FINAL.pdf

[432] EPA, Economic Analysis of Proposed Revised Definition of Waters of the United States, at 10 (March 2014) (hereinafter, EPA Economic Analysis), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-0003

ii. The Proposed Rule will Result in Increased Clean Water Act Section 401 Water Quality Certification Requirements.

Under the CWA, an applicant for a federal license or permit to conduct any activity that may result in a discharge to waters of the United States (*e.g.*, a Section 402 or 404 permit) must provide the federal agency with a Section 401 certification.[433] The certification, made by the state, declares that the discharge will comply with applicable provisions of the Act, including water quality standards. A state's water quality standards specify the designated use of a water body (e.g., for drinking water supply or recreation), pollutant limits necessary to protect the designated use, and policies to ensure that existing water uses will not be degraded by pollutant discharges.

Section 401 provides states with two distinct powers: one, the power indirectly to deny federal permits or licenses by withholding certification; and two, the power to impose conditions upon federal permits by placing limitations on certification. Generally, Section 401 certification has been applied to hydropower projects seeking a license from the Federal Energy Regulatory Commission (FERC) and to dredge and fill activities in wetlands and other waters that require permits from the Corps (CWA Section 404). It also is applied to permit requirements for industrial and municipal point source dischargers (CWA Section 402).

Under the proposed overbroad definition of waters of the United States, more waters will be subject to federal permits. As a result, states with already limited budgets will have to devote additional resources toward certifying those permits. This will increase the burdens already placed on states under Sections 303 and 305 of the Act. What's more, the time necessary to complete the state certification process only increases project delays for the permit applicant. And, in a worst case scenario, the state can deny the federal permit all together, stopping a home builder or land developer in his/her tracks.

iii. The Proposed Rule will Result in Increased Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) Permitting Requirements.

Under the proposed rule, any channelized features that contribute flow, including man-made features, are jurisdictional tributaries.[434] An NPDES permit is required for the discharge of any pollutant from any point source into "waters of the United States."[435] Thus, an NPDES permit would be required for the discharge of a pollutant from a point source into any system or feature covered by the proposed expanded "waters of the United States" definition, such as ephemeral streams, ditches, and other man-made conveyances. Moreover, with the proposed rule's substitution of the new "waters of the United States" definition in 40 C.F.R. § 122.2, an NPDES permit will be required for stormwater discharges for newly covered features, including MS4 ditches and other stormwater conveyances. Ditches and conveyances, including those used for collecting and conveying stormwater, could be regulated as *both* point sources and as "waters of

[433] 33 U.S.C. § 1341.
[434] *See* 79 Fed. Reg. at 22,263.
[435] 33 U.S.C. §§ 1311, 1342.

the United States."[436] In other words, flow *into* the feature or system would be regulated as well as discharges *from* the system. This will result in the need for additional permits, duplicative regulation, and an increased risk of third party litigation.

As discussed in more detail below, as "waters of the United States," these features would be subject to the CWA Section 303 water quality standards (WQS), including numeric effluent limitations.[437] For features that do not meet water quality standards, a total maximum daily load (TMDL) must be established.[438]

In addition, as "waters of the United States," even routine maintenance on ditches and stormwater conveyances or other actions taken to comply with NPDES permit requirements (e.g., changing pH, dredging out sediments, or building a structure to take samples) could now require either a Section 402 or 404 permit. For example, the installation of baffles and weirs to facilitate removal of pollutants such as sediment in stormwater (as required by stormwater permits) would now require complex Section 404 permitting procedures. Further, the stormwater program *requires* the construction of ditches and stormwater retention ponds to manage stormwater. If stormwater BMPs are treated as "waters of the United States," this will result in a never-ending cycle of regulation. Ultimately, these more burdensome permitting requirements will result in increased costs and delays, but result in little or no environmental benefit.

Similarly, the transfer of stormwater from one stormwater conveyance to another stormwater conveyance may trigger permitting requirements because each conveyance could be considered to be both a point source and a "water of the United States" under the proposed rule. With the state of the Water Transfers Rule (regulation in which EPA codified its position that NPDES requirements do not apply to water transfers from an area where water is available to another area where water is scarce) in flux, this could lead to multiple permits required throughout a stormwater system.[439] These increased permitting requirements may lead to lengthier permitting delays. For example, if the proposed rule is made final and the EPA water transfers rule is ultimately vacated, the Central Arizona Project (CAP) would be regulated under the NPDES program and would need to obtain a permit to discharge into a traditional "water of the United States," such as Lake Pleasant.[440] Additionally, CAP could be required to obtain separate permits each time it introduces water into the CAP system. CAP anticipates that, "[i]n both instances, CAP could be required to treat waters as it moves into and out of the CAP system

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[436] *See* 33 U.S.C. § 1362(14) (a point source is a discernible, confined and discrete conveyance – which includes ditches).
[437] 33 U.S.C. § 1311(b)(1)(C); § 1313(e)(3)(A).
[438] 33 U.S.C. § 1313(d).
[439] National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i) (2008)) (hereinafter Water Transfers Rule); *See Catskill Mountains, et al. v. United States EPA*, Nos. 08—CV-5606 (KMK), 08—CV-8430 (KMK), 2014 WL 1284544 (S.D.N.Y. Mar. 28, 2014).
[440] The Central Arizona Project is a water provision system that brings about 1.5 million acre-feet of Colorado River water per year to Pima, Pinal, and Maricopa counties (the counties in which Arizona's most populous cities are located, such as Phoenix and Tucson). It has an approximately 336-mile long system of aqueducts, tunnels, pumping plants, and pipelines. *See* http://www.cap-az.com/; *See also* Central Arizona Project, Action Brief, "Discussion and Consideration of Action to Adopt Position on the Proposed Rule, 'Definition of Waters of the United States Under the Clean Water Act' (the 'Proposed Rule')" (June 5, 2014).

based on differences in the chemical, biological, or physical characteristics of the source and receiving water."[441] Because "treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive," this outcome would be "disastrous" for CAP and other water delivery systems across the country and their customers.[442]

Similarly, the proposed rule captures tributaries that have been channelized or otherwise altered to create water delivery systems (or water reuse systems) that could now be subject to CWA regulation (including, but not limited to, CWA Section 303 and 404 requirements noted elsewhere in this section). And, in light of the proposed "adjacent waters" definition, which includes all waters in floodplain and riparian areas, holding and recharge ponds that are part of such systems also would be jurisdictional. For example, regulators may have no choice but to require an NPDES permit for storm flows that are diverted to basins for possible water supply or a Section 404 permit for maintenance activities. Thus, the entire CAP, for example, likely would be considered a "water of the United States," and a Section 404 permit would be required for maintenance within the canal. Any state, tribal, federal, or regulated community costs related to regulating and/or permitting these areas have not been considered.

The cost of NPDES permitting requirements already has affected small businesses and cities and, in some instances, the permits are cost prohibitive. For example, the court-ordered requirement for an NPDES permit for mosquito spraying is impacting public health with jurisdictions having to decide whether to pay for the cost of the permit or not spray. Many have had to make the hard fiscal choice of not spraying because of the cost of obtaining and operating pursuant to a permit. In recent years, cities like Brewerton, Alabama, Orchard City, Colorado, and Cedaredge, Colorado, could not spray for mosquitoes due to the high costs and liability associated with NPDES permits. Western Slope and Delta County, Colorado, have also expressed concerns about citizen lawsuits along with issues finding aerial spraying companies to perform vector control due to liability and costs. The city of Laramie, Wyoming, struggled with the increased costs of mosquito control due to the increase its applicators had to charge due to NPDES permits. Oregon's Department of Environmental Quality had to halt invasive species treatments for the same reason. EPA and the Corps' proposed rule will cause even more cities and small businesses applying pesticides to struggle with high permit costs.

Even if the Agencies do not intend to extend jurisdiction to features such as ditches within MS4s and other stormwater conveyances under the proposed rule, the ambiguity in the rule is sure to invite third party challenges. The CWA clearly allows for citizen suits over discharges that EPA and the Corps have decided not to regulate.[443] Here, the Agencies have left ambiguity in the proposed rule with respect to items such as where the discharge point is, when a point source is discharging to a "water of the United States," the definition of "ditch," the definition of "upland," and the extent to which the rule would reach internal conveyances that are not included in existing NPDES permits. As in *Baykeeper*, the ambiguities in the proposed rule would leave the Agencies and stakeholders vulnerable to citizen suits.

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[441] *See id.*
[442] *Id.*
[443] *See,* e.g., *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007) (citizen suit alleging illegal discharge within an industrial facility into ponds that the agencies declined to assert jurisdiction over).

iv. The Proposed Rule will Result in Increased Clean Water Act Sections 303, 304, and 305 State Water Quality Standards Requirements.

States must set water quality standards (WQS) for all "waters of the United States."[444] States typically develop WQS for general categories of waters, which may or may not cover the features and waters that are newly jurisdictional under the proposed rule. As a result of the proposed rule, each state will be required to determine whether features previously not considered "waters of the United States" are now in fact "waters of the United States," and make assessments as to what, if any, existing water quality standards are applicable. Performing these tasks is very expensive and time consuming.

With respect to the Section 303 WQS/TMDL program, after acknowledging that states and tribes incur costs developing, monitoring, and assessing WQS and TMDLs, the Agencies state that it is their position that "an expanded assertion of jurisdiction would not have an effect on annual expenditures."[445] To support that conclusion, the Agencies assert that states typically only develop WQS for general categories of waters, which currently cover the types of waters that would be jurisdictional under the proposed rule and which would not change. The Agencies go on to concede that what would change is "whether or not those standards apply."[446] This concession undermines the Agencies' conclusion that the impact of the proposed rule would be cost-neutral. In reality, the more waters that are jurisdictional, the greater the costs to the states.[447]

If states rely on their existing water quality standards for the newly jurisdictional features, they will have to employ similar uses and criteria to protect features that were not intended to be protected under those designated uses or criteria (e.g., a state could have to apply uses and criteria they set for lakes to newly jurisdictional ditches or industrial ponds for lack of a more applicable existing category). On the other hand, if states do not want to rely on existing state water quality standards, they will have to develop new water quality standards for these types of features. This process would require baseline data gathering to determine appropriate uses for these newly jurisdictional features. Again, the more waters that are jurisdictional, the greater the cost to the states. For example, the proposed rule's assertion of jurisdiction over all waters within a floodplain or riparian area will now mean that numerous features and waters that were previously considered isolated (and therefore not "waters of the United States"), would now be "waters of the United States." All of these areas would need to be analyzed and addressed by states under the WQS program.

A complete analysis of the impact of the proposed rule on the WQS program is even more critical in light of EPA's proposed rule entitled *Water Quality Standards Regulatory Clarifications* (hereinafter, WQS Rule).[448] The WQS Rule, if finalized as proposed, would

[444] 40 C.F.R. § 131.3(i).
[445] EPA Economic Analysis at 5; *see also id.* at 25 (describing the impact to the section 303 program as "cost-neutral").
[446] *Id.* at 6.
[447] For example, just under the proposed rule's definition of "neighboring," features within entire riparian areas and floodplains would now be considered adjacent, and thereby jurisdictional. All of these areas would need to be analyzed and addressed by States and tribes under the WQS/TMDL program.
[448] 78 Fed. Reg. 54,518 (Sept. 4, 2013) ("WQS Rule").

create a rebuttable presumption that the highest uses specified in Section 101(a)(2) (*i.e.*, fishable, swimmable) of the CWA are attainable uses for any "waters of the United States" by default, thereby forcing state and tribal regulators to prove otherwise should they believe it appropriate. To rebut the presumption, a state must perform a burdensome use attainability analysis for waters it does not believe can meet the "fishable, swimmable" goal. Such a showing would create significant additional costs for states and tribes, assuming they would be unwilling to capitulate to the rebuttable presumption.[449] Given that the proposed rule seeks to encompass ephemeral streams and all matter of ditches not subject to the limited exclusions, the proposed rule in concert with the WQS Rule will dramatically increase WQS/TMDL program costs for states and tribes. Regrettably, none of these costs are discussed or evaluated by the Agencies.

By way of example, under Kansas state law, ephemeral streams are not "classified" waters because the state "finds it wholly unnecessary and wasteful of limited state program resources to set water quality standards, issue wastewater permits, assess impairment, and develop TMDLs for surface drainage features that may have flowing or standing water no more than a few days each year."[450] EPA has approved Kansas's WQS program, which does not designate uses or assign water quality criteria for ephemeral streams.[451] If, as proposed, ephemeral drainages are now considered "waters of the United States," Kansas estimates an increase from 30,620 stream miles to 134,338 stream miles for which the state must set WQS and comply with other CWA requirements.[452] As the maps in Fig. 15 demonstrate, this increase is dramatic.

Similarly, CWA Section 305(b)(1)(A) requires states to submit a water quality report biennially that includes a description of the water quality of all "waters of the United States" in the state and an analysis of the extent to which they meet water quality goals.[453] And under Section 303(d), states are required to develop lists of impaired waters (waters that are too degraded to meet the WQS set by the state).[454] For impaired waters, states must develop TMDLs, which are calculations of the maximum amount of a pollutant that a waterbody can receive and still safely meet WQS.[455] Any increase in jurisdictional waters for which WQS are developed necessarily triggers greater costs for states and tribes to monitor and assess whether these newly jurisdictional waters are meeting WQS. Assuming waters are not meeting WQS, the TMDL development process is triggered at even greater costs. And yet, the Agencies suggest that the TMDL process is cost-neutral because EPA allows states and tribes to prioritize TMDL development and to develop TMDLs over time. This assertion is misplaced. Prioritization and delay do not neutralize or somehow lessen the impact of additional costs – they only shift those costs to the future, which generally would result in the necessary activities costing more.

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[449] This is to say nothing of the additional costs the WQS Rule's highest attainable use showing will compel.
[450] *See* Comments of the Hon. Sam Brownback, Governor of Kansas, on EPA and Army Corps of Engineers Guidance Regarding the Identification of Waters Protected by the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0409 (July 14, 2011).
[451] Letter from Leo J. Alderman, EPA, Director, Waters, Wetlands, and Pesticides Division, to Roderick L. Bremby, Secretary, Kansas Department of Health and Environment (Nov. 3, 2003).
[452] Mike Tate and Tom Stiles, Kansas Department of Health and Environment, Presentation on Waters of the United States (May 2, 2014) at slide 10.
[453] 40 C.F.R. § 130.10(a)(1).
[454] 40 C.F.R. § 130.10(b)(2).
[455] 40 C.F.R. § 130.7.

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As an example, the park ditch in Pinellas County, Florida, (Fig. 16), which provides no environmental or human benefits other than flood control, is not currently considered to be a "water of the United States", but would be under the proposed rule.[456] As noted above, EPA's WQS Rule would establish a presumption that the attainable use for this ditch is "fishable, swimmable" unless the state conducts an expensive and time-consuming scientific analysis to demonstrate that attaining that use is infeasible. Assuming the state did not have the resources to rebut the presumption, it could be forced to develop a TMDL for this ditch. Using current TMDLs for nitrogen and phosphorous as a gauge, the Florida Stormwater Association estimates that the cost to attain hypothetical "fishable, swimmable" uses in the ditch would be $31,351,460.[457] While this example may seem extreme, it unfortunately falls comfortably within the scope of the proposed rule, when viewed in light of other mandatory CWA program requirements.

In addition to flawed rulemaking, the Agencies' casual dismissal of the impacts the proposed rule will have on states and their WQS/TMDL programs is troubling. The proposed rule's expanded "waters of the United States" definition would require each state to expend significant resources to satisfy its WQS/TMDL obligations, thereby straining its already limited resources. This process would result in the needless expenditure of large amounts of the public's tax dollars on newly jurisdictional features, such as ditches and ephemeral drainages, while providing little or no environmental benefit.

In addition to increased costs to comply with WQS/TMDL requirements, states and regulated entities are also more vulnerable to third party litigation. For example, in 2007, pursuant to a settlement agreement, the state of Missouri and EPA agreed that Missouri was not required to set WQS for its ephemeral waters. Despite EPA's approval, Missouri later had to defend its WQS against a third party. A group filed a citizen suit challenging Missouri's WQS, arguing that Missouri's WQS did not meet the requirements of the CWA because they failed to designate uses and set water quality criteria for *all* of Missouri's waters.[458] In October 2014 and arguably in response to EPA pressure and the overbroad proposed definition of "tributary," the Missouri Department of Natural Resources listed previously unclassified waters, including "ephemeral aquatic habitat," in the state's new WQS.[459] EPA Region 7 approved this change, and EPA Regional Administrator Karl Brooks said, "EPA . . . applauds Missouri's decision to protect previously unclassified lakes and streams for uses specified in the Clean Water Act's long-standing requirements to assign designated uses and corresponding criteria to all waters of the United States in Missouri."[460] Did Missouri have any other choice? Did EPA defend its earlier approval or share in litigation costs? What's more, according to the USGS maps recently

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[456] Florida Stormwater Association, "Proposed Regulations on Waters of the United States: Assessment of Impacts." (July 25, 2014) at 13, *available at:* http://www.florida-stormwater.org/assets/MemberServices/Advocacy/Regulatory/wotus%20-%20fsa%20summary%207-25-14.pdf

[457] *Id.* at 14.

[458] *Missouri Coalition for the Environment v. Jackson*, No. 10-04167 (Feb. 16, 2012) (suit was filed against EPA and the State of Missouri intervened to defend its WQS).

[459] EPA Region 7 letter from Karen A. Flournoy (Director, Water, Wetlands and Pesticides Division) to Sara Parker Pauley (Director, Missouri Department of Natural Resources) (Oct. 22, 2014) at 2, *available at* http://www.epa.gov/region7/newsevents/legal/pdf/uw-rule-action-10-22-2014.pdf

[460] Chris Whitley, EPA Region 7 News Release, EPA Region 7 Issues Decision Letter on the State of Missouri's Proposed Changes to Water Quality Standards (Oct. 23, 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/names/r07_2014-10-23_epa-r7-decision-ltr-mo-prop-chgs-wqs

released by EPA, 94,416 miles of the 169,048 total stream miles (56%) identified across Missouri do not flow year round.[461] Under the proposed "tributary" definition and Missouri's newly approved WQS, Missouri could be required to develop WQS and associated TMDLs for nearly 100,000 miles of newly minted intermittent and ephemeral "waters of the United States." The Agencies and states will face similar threats of litigation and burdensome CWA requirements based on the additional WQS/TMDL obligations that the proposed rule will trigger. Yet the Agencies have not considered these facts.

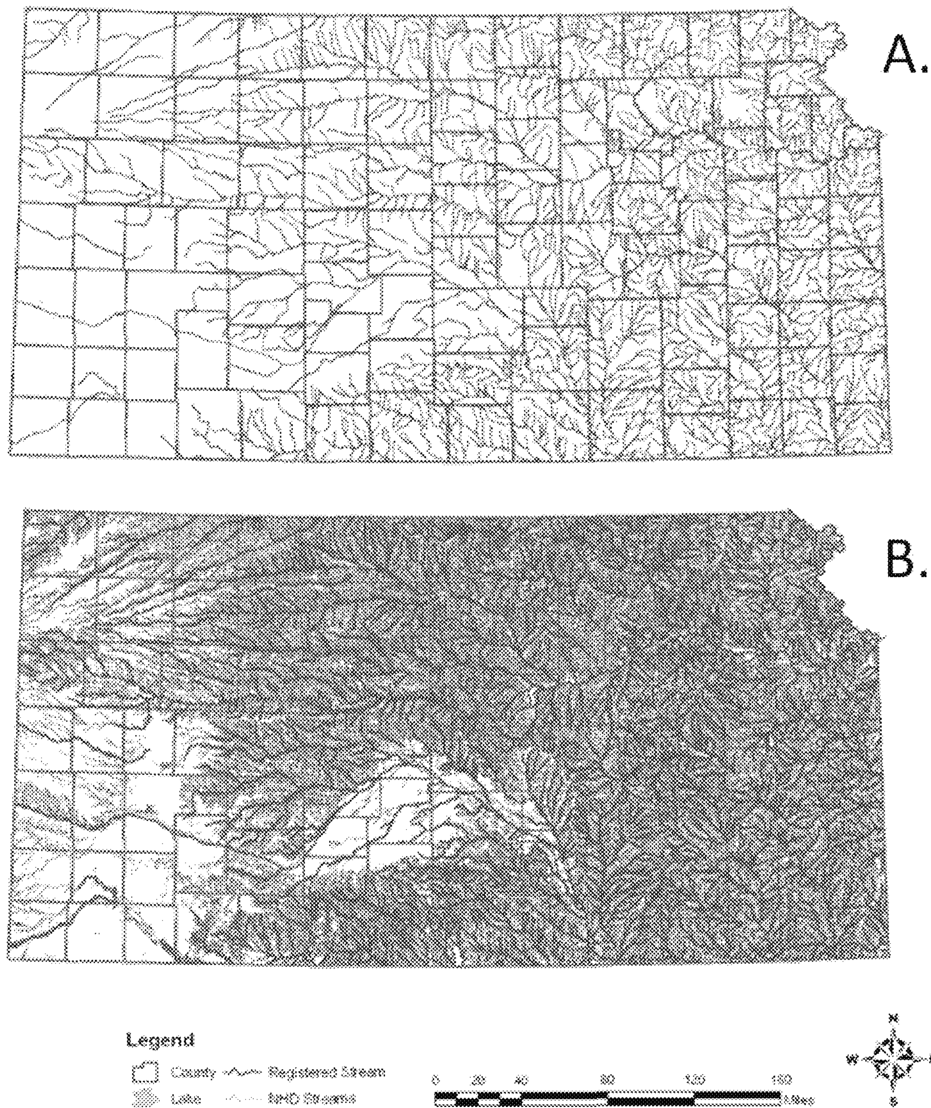

Figure 15: A) Extent of perennial streams in Kansas total an estimated 30,620 miles. B) Extent of perennial and non-perennial streams in the state total an estimated 134,338 miles.[462]

[461] *See* http://science.house.gov/epa-maps-state-2013#overlay-context

[462] *Source*: Mike Tate and Tom Stiles, Kansas Department of Health and Environment, Presentation on Waters of the United States (May 2, 2014) at slides 11, 12.

Figure 16: Pinellas Park Ditch #5 discharges directly into a wetland that discharges into "Joe's Creek." Joe's Creek is currently a water of the United States. The park ditch is a conveyance managed as part of the Pinellas Park Water Management District, which was created in 1976 by the Florida State Legislature to manage the primary stormwater drainage/flood control system for a portion of central Pinellas County. The ditch provides no environmental or human benefits, other than flood control. It is not now considered to be a water of the United States, but would be considered to be such under the proposed rule.[463]

v. The Proposed Rule will Result in Increased Clean Water Act Section 311 Spill Protection Requirements.

Under CWA Section 311, facilities with oil storage capacity that, due to their location, have a potential to discharge to "waters of the United States" must prepare and implement a Spill Prevention, Control, and Countermeasures (SPCC) Plan.[464] Due to the proposed rule's increased jurisdictional scope covering most ditches and manmade impoundments, as well as all features in floodplains and riparian areas, many facilities, particularly in the arid West, will need SPCC Plans that did not need them before. Facilities that already have SPCC Plans also would be affected because many have plans that rely on the use of on-site ditches or impoundments to collect spilled oil and prevent it from reaching "waters of the United States." The proposed

[463] *Source*: *Id* at 13.
[464] 40 C.F.R. § 112.

rule's classification of those ditches and impoundments as "waters of the United States" would undermine current spill control plans and vastly expand planning, compliance, and cleanup costs.

The Agencies concede that the proposed rule will increase the number of facilities subject to CWA Section 311.[465] Yet, to calculate the potential impacts, they simply suppose that perhaps 1,000 facilities that previously questioned CWA jurisdiction would now require SPCC plans, and conclude that the cost of that compliance would be $11.7 million. They further state that despite costs, most facilities simply chose to comply without regard to whether they otherwise would be required to do so. The benefits of this compliance, the Agencies state, outweigh any costs.[466] The Agencies' suggestion that the cost of the proposed rule on the Section 311 program can be estimated based on a supposed number of facilities that previously may have questioned CWA jurisdiction is wrong. It is unreasonable to assume that there is any reliable correlation between the scope of CWA jurisdiction under the expanded definition of "waters of the United States" and operators that may have, in the past, determined, based on any number of business factors, to assert that they were not subject to the Section 311 program. As with the other CWA programs, the Agencies have not given adequate consideration to the proposed rule's impacts on the Section 311 spill protection program.

b. The Proposed Rule Changes the Process by which a Jurisdictional Determination is Made and Shifts the Burden of Proof onto the Regulated Community.

The proposed rule's categorical assertions of jurisdiction over all "tributaries" and all "adjacent waters" shift the burden of proof for permit decisions and jurisdictional determinations onto the regulated community. Under current practice, the Agencies must "document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus," including the physical indicators of flow and information regarding the functions of the tributary and any adjacent wetlands.[467] The Agencies must also "explain their basis" for finding a significant nexus.[468] Indeed, several courts have ruled that a positive jurisdictional determination of a water body requires some evidence of a nexus and its significance, "[o]therwise, it would be impossible to engage meaningfully in an examination of whether a wetland had 'significant' effects or merely 'speculative or insubstantial' effects on navigable waters."[469] Additionally, as described by Justice Kennedy in *Rapanos*, the significant nexus test only applies to adjacent wetlands and may only be applied on a case-by-case basis.[470]

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[465] EPA Economic Analysis at 29.
[466] *Id.* at 30.
[467] 2008 *Rapanos* Guidance at 11.
[468] *Id.*
[469] See *Precon Development Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 294 (4th Cir. 2011); *Benjamin v. Douglass Ridge Rifle Club*, 673 F.Supp.2d 1210, 1220 (D. Or. 2009); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *Environmental Protection Information Center v. Pacific Lumber Company*, 469 F.Supp.2d 803, 823 (N.D. Cal. 2007).
[470] In *Rapanos*, Justice Kennedy opined that "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." *Rapanos*, 547 U.S. at 779 (emphasis added). And, Justice Kennedy continued, "the Corps must establish significant nexus on a *case-by-case basis* when seeking to regulate *wetlands* based on *adjacency* to nonnavigable tributaries, in order to avoid unreasonable applications of the [Clean Water] Act." *Id.* at 782 (emphasis added).

But, under the proposed rule with its categories of *per se* jurisdictional waters, the Agencies no longer have to make a showing of evidence to prove a nexus is significant. What's more, they incorrectly apply Justice Kennedy's significant nexus test to all waters and show no regard for the test's case-by-case application. As a result, the proposed rule effectively shifts the burden of proof to the public to prove that the water or feature at issue *does not* meet the proposed rule's overbroad "tributary" or "adjacent water" definitions. As demonstrated by the numerous vagaries and uncertainties in the definitions and exclusions, this will not prove to be an easy task.

For example, a home builder who believes a ditch on her property is not a jurisdictional tributary will have to try to prove to the Agencies that the ditch qualifies for one of the narrow ditch exemptions. She will have to show, through historical evidence, such as photographs, prior delineations, or topographic maps, that her ditch was excavated wholly in uplands for its entire length, drains only uplands, and has less than perennial flow, or that the ditch does not contribute flow to a jurisdictional water. Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. And if a home builder believes an isolated wetland that happens to lie in the subjectively defined floodplain of a traditional navigable water does not have a significant nexus with that water, he would have to challenge the very Code of Federal Regulations itself. The Agencies do not acknowledge the massive burden this imposes on applicants. What's more, the Agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public. The Agencies must remain responsible for producing the evidence needed to make a positive "water of the United States" determination. Otherwise, many more cases will have to go through the administrative appeals process in order to have a wrongful jurisdictional determination removed. This will not increase efficiency or reduce delay as the Agencies claim.

c. The Proposed Rule will Adversely Impact Clean Water Act Permitting Processes.

The expansive definition of "waters of the United States" under the proposed rule will result in more CWA permit applications, an increased permit backlog, and further limit the applicability of the Nationwide Permit program. Additionally, the proposal does not address how existing permits will be treated if the rule becomes final.

i. The Proposed Rule will make it more Challenging to Obtain Nationwide Permits, Resulting in a Surge of Individual Permits.

As a result of the expansive "tributary," "adjacent waters," and "other waters" definitions, the proposed rule will increase the number of CWA permits landowners will need to obtain. What's more, the proposed rule will increase the need for individual permitting because fewer activities will qualify for general permits. Nationwide permits (NWPs) are available under CWA Section 404(e) for activities which are "similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."[471] Each NWP has a maximum acreage threshold that can be disturbed pursuant to that permit. For example, NWP 12 allows for discharges of dredged or fill material for the construction, maintenance, repair and removal of utility lines that will not result in the loss of

[471] 33 U.S.C. § 1344(e).

greater than 1/2-acre of waters of the United States for each single and complete project.[472] With more features and areas considered waters of the United States it will be increasingly difficult to avoid and minimize impacts, many activities will exceed the NWP threshold, and applicants will be forced to rely on individual permits. Individual permits are much more costly than general permits. In 2002, the average cost to prepare an NWP application was $35,954, but the average cost to prepare an individual permit application was $337,577.[473] In the ten-plus years since these costs were calculated, it is certain that they have increased considerably.

An increased number of individual permits also means increased delays for permit applicants and increased workloads for permit writers. While an NWP may take up to ten months to obtain, it can take over two years to obtain an individual permit.[474] And a large increase in individual permit applications is likely to overwhelm Corps and state staff, further increasing delays. These delays will result in lost opportunity costs for stakeholders. For instance, home builders and land developers often obtain construction and development loans to finance their projects. The terms and conditions of these loans can require the builder or developer to begin repayment as early as six months after issuance. If a project requires an individual permit, the applicant may not even be able to get a project off the ground before he/she needs to begin repaying the loan needed to fund it. Without question, the costs and delays associated with more individual permits due to the expanded scope of federal jurisdiction will disrupt the ability of home builders and land developers to do business. More broadly, the increased costs and delays associated with individual permitting could thwart development and maintenance of critical infrastructure, such as highways, railroads, and utility lines that previously would have relied heavily on general permits.

NAHB's concerns are bolstered in light of *National Association of Home Builders v. Army Corps of Engineers*, in which the D.C. Circuit Court of Appeals found that a revised CWA definition had the effect of restricting developers' eligibility for general wetland permits, forcing them to apply for more burdensome and costly individual permits in many more situations.[475] Indeed, today's proposed changes to the "waters of the United States" definition could jeopardize the future of the entire NWP program.

ii. The Proposed Rule does not Address what to do with Existing Clean Water Act Permits (i.e. "Grandfathering").

The proposed rule does not address grandfathering issues or how the rule's changes would affect existing or pending jurisdictional determinations (JDs). The Agencies must clarify that previously issued JDs and CWA permits, as well as pending JDs and CWA permits, will not be reopened or changed based on the new rule.

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[472] 77 Fed. Reg. 10,184, 10,271 (Feb. 21, 2012).
[473] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulations by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J, 59 at 74 (2002) (analyzing permit costs and demonstrating that the cost difference is even more significant with larger projects) (hereinafter, Sunding and Zilberman Economics of Environmental Regulations) *available at* http://are.berkeley.edu/~sunding/Economcs%20of%20Environmental%20Regulation.pdf
[474] *Id.* at 76.
[475] *National Association of Home Builders v. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005).

Importantly, a federal agency may not enact a regulation with a retroactive effect unless Congress conveys that authority in express terms.[476] Some courts have held that an administrative rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[477] The proposed rule would adopt new standards for defining jurisdiction. To avoid unlawful retroactive application, the Agencies must clarify that previously issued JDs and CWA permits will not be reopened to reconsider jurisdiction under the new standards.

In addition, new requirements should not be applied retroactively to JD and permit applicants who have invested substantial efforts under the previous standards. The Corps and EPA have done this in the past. With the 2008 Mitigation Rule, for example, the Agencies provided that the final rule would apply only to permit applications received *after* the effective date of the rule and provided the district engineer discretion to make determinations under the previous standards where applying the new rules to a particular project would "result in substantial hardship to a permit applicant."[478] The same standard should apply here.

In outreach meetings, the Agencies have stated that existing JDs issued by the Corps will continue to be valid and that the Agencies will not be re-reviewing existing, valid determinations.[479] But it is not entirely clear what this means, nor is there any statement in the preamble confirming that this is the Agencies' intent. In fact, in a June 30, 2014 EPA blog post by Nancy Stoner, the Agencies stated, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations."[480] Now, without any indication or notice that the June 30 post has been revised, the Stoner blog post no longer contains this statement. Have the Agencies changed their position on revising previous determinations?

The Agencies should make it clear that the rule will not open previously issued JDs or CWA permits under any circumstances. In addition, the Agencies' statements fail to address JDs and permit applications that are already pending (and may be close to being issued). It would be unfair to applicants and regulators who have already put a great deal of time and money into the permit process if they had to start over based on the new rule. Accordingly, the Agencies must clarify that decisions on pending JDs and permit applications will be made based on existing law and will not be subject to the new rule.

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[476] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[477] *National Mining Ass'n v. U.S. Dep't of Interior*, 177 F.3d 1 (D.C. Cir. 1999); *Assoc. of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992).
[478] 73 Fed. Reg. 19,594, 19,608 (Apr. 10, 2008).
[479] For example, on a stakeholder call with the Association of Clean Water Administrators (ACWA) regarding the proposed "waters of the United States" rule, EPA stated, "The agencies haven't figured out grandfathering, but they don't intend to do anything retroactively to anyone who has been issued permits." ACWA, State-EPA Co-regulator Call #2 on Waters of the U.S. (June 12, 2014).
[480] Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014), *available at* http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/ (Note: the original text of the blog entry is *available at* http://www.bayjournal.com/article/setting_the_record_straight_on_waters_of_the_us).

d. The Proposed Rule will have Adverse Impacts on Other Federal Programs.

Before the Agencies can issue any CWA permit, they must first comply with other federal statutes, including Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. These additional requirements can be particularly burdensome, further delaying permits and adding to the already steep regulatory costs home builders must incur.

i. Increases in Clean Water Act Permits will Trigger Additional Endangered Species Act Section 7 Consultations.

The Endangered Species Act (ESA) requires all federal agencies to consult with the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration (collectively referred to as the Service) whenever a proposed federal action may adversely affect an endangered species or designated critical habitat.[481] A jurisdictional determination by the Corps and obtaining a CWA Section 404 wetlands permit is clearly covered by the ESA's regulatory definition of a *federal action,* which includes all activities or programs of any kind authorized, funded, or carried out by federal agencies including granting of licenses and permits.[482] Once the ESA's Section 7 consultation requirements have been triggered by the federal action, the Corps, along with the Service, must complete the ESA Section 7 consultation process prior to issuing the CWA permit. The ESA Section 7 consultation process has two separate routes: informal and formal consultation.

During an informal consultation, the Corps, with input from the Service, has 180 days to prepare a biological assessment that identifies whether or not the issuance of the CWA Section 404 permit is likely to adversely affect an endangered species or adversely modify designated critical habitat. Once the Corps has completed the a biological assessment, the Service has 30 days to review it to determine whether the proposed action is likely to adversely affect an endangered species or adversely modify designated critical habitat. If the issuance of the proposed CWA Section 404 permit is likely to adversely affect an endangered species or adversely modify critical habitat, formal consultation is required.[483]

During the formal consultation process, the Service has 90 days to prepare a Biological Opinion (hereinafter, BiOp) that contains the Service's opinion on whether or not the federal permit, as proposed, is likely to jeopardize the continued existence of an endangered species, or result in the destruction or adverse modification of critical habitat. The BiOp must include a summary of all the information the Service has based its opinion upon, a review of the potential effects of the proposed permit on the species or critical habitat, and a "jeopardy" or "no jeopardy" determination. If the Service concludes the issuance of the CWA permit is likely to jeopardize the continued existence of an endangered species, or adversely modify designated critical habitat (e.g., a "jeopardy biological opinion") the Service must identify reasonable and prudent alternatives (RPAs) that if adopted, will reduce and/or mitigate the impacts so that the issuance of the permit is not likely to jeopardize the continued existence of an endangered species (e.g.,

[481] 50 C.F.R. § 402.03.
[482] 50 C.F.R. § 402.02.
[483] 50 C.F.R. § 402.12(k)(2).

"no jeopardy biological opinion").[484] If the Corps agrees to adopt all the RPAs contained in the BiOp, they become binding terms and conditions of the proffered permit. Typically, these RPAs involve reducing the size of proposed land development projects (i.e., loss of buildable lots) and providing additional species monitoring and reporting. Once accepted, the Service will issue the Corps and the permit applicant an "incidental take statement," which exempts both parties from the ESA Section 9 "take" prohibitions.[485]

The ESA Section 7 consultation process, as it is currently implemented, is onerous and problematic, making it the subject of numerous oversight reports by the Government Accountability Office (GAO). A 2004 report titled "Endangered Species – More Federal Management Attention is needed to Improve the Consultation Process," evaluated the existing Section 7 consultation program and found a great deal of confusion regarding roles and responsibilities between the various federal action agencies (e.g., EPA, the Corps, US Forest Service [USFS]) and the Services during the Section 7 consultation process. Furthermore, GAO found it impossible to determine with any certainty the extent of the delays within the Section 7 consultation process because the Services failed to track, monitor, or report the significant amount of time spent before the federal action agency formally began the consultation process.[486] This confusion and failure to keep track of actions frequently results in excessive permitting delays impacting federal agencies and private landowners alike. For example, a review by FWS following GAO's recommendations found that routine CWA Section 404 nationwide permits issued by the Corps for private dock building activities had been delayed by over two years, costing private landowners approximately $10,000 in additional construction costs per permit.[487]

In addition, there has been increasing concern about the agencies' abilities to keep up with demand and meet their statutory deadlines. In 2009, the FWS reported to Congress on the rapid increase in the number of consultations (informal and formal) the Service had performed over the prior decade. In short, FWS reported the number of consultations performed in FY 1999 was 40,000, however, by FY 2006, the total number of annual consultations had increased by greater than 50% to 67,000.[488] The Service has also reported insufficient staffing capacity with the Agencies to handle the current ESA Section 7 consultation workload resulting in additional permitting delays. Deeming additional areas as jurisdictional under the CWA will only make matters worse.

As EPA and the Corps further expand the scope of federal jurisdiction under the CWA by proposing definitions like "tributaries" and "adjacent waters" including all waters found within floodplains and riparian areas, landowners whose property contains such features will need to obtain CWA Section 404 wetlands permits. If the Service has designated those same areas as critical habitat under the ESA, obtaining a federal CWA Section 404 permit will be contingent on getting through the ESA's Section 7 consultation process. Importantly, it is the determination

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[484] 50 C.F.R. § 402.14(h).
[485] 50 C.F.R. § 402.14(i).
[486] GAO (2004) *More Federal Management Attention Is Needed to Improve the Consultation Process*, GAO-04-93, *available at* http://www.gao.gov/docsearch/repandtest.html, page 12.
[487] GAO (2003). *Despite Consultation Improvements in the Pacific Northwest, Concerns Persist About the Process*, GAO-03-949T. Washington D.C. page 12.
[488] U.S. FWS, F.Y. 2009 Budget Request, U.S. FWS website, http://www.fws.gov/budget/, page ES-19.

of federal jurisdiction under the CWA that triggers these ESA requirements in areas designated as critical habitat. If one pictures two nearly identical properties one of which is deemed jurisdictional and the other is not, it is only the one under CWA jurisdiction that is also implicated under ESA. Landowners whose property becomes subject to ESA's Section 7 consultation process due to the necessity of obtaining CWA Section 404 permit face significant permitting delays and additional compensatory measures under the ESA. At a minimum, EPA and the Corps must consider the economic impact stemming from the expanded scope of CWA jurisdiction and the greater number of ESA Section 7 consultations.

ii. Increased Number of Clean Water Act Permits will Trigger Additional National Historic Preservation Act Section 106 Requirements.

With the expansive "tributary," "adjacent waters," and "other waters" definitions in the proposed rule, more waters will be deemed jurisdictional under the CWA, in turn requiring more federal permits for land development, home building, and other activities on private property. In addition to prompting ESA Section 7 consultation, federal CWA permits trigger burdensome requirements under the National Historic Preservation Act (NHPA) of 1966.

Section 106 of the NHPA requires federal agencies issuing permits or providing funds for projects to consider the effects of those projects on properties included in or eligible for inclusion in the National Register of Historic Places.[489] As such, any project that involves CWA Section 404 permits will require the Corps to consider the impacts of the project on historic resources. Historic properties may include prehistoric or historic districts, sites, buildings, structures, objects, sacred sites, and traditional cultural places.

Before issuing any CWA permit, the Corps must first determine whether the issuance of the permit could affect an historic property. If so, the Corps must identify the appropriate State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) to consult with during the process. The Corps must also plan to involve the public, and identify other potential consulting parties. If the Corps finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with the permit. Alternatively, if the agency finds that historic properties are present, it proceeds to assess possible adverse effects. If the Corps and the SHPO/THPO agree that there will be no adverse effects, the Corps can proceed with the permit and any agreed-upon conditions. If, however, the Corps and the SHPO/THPO find that there are adverse effects, or if the parties cannot agree and the Advisory Council on Historic Preservation (ACHP) determines that there will be adverse effects, the Corps begins consultation to seek ways to avoid, minimize, or mitigate the adverse effects. The Corps then consults to resolve adverse effects with the SHPO/THPO and others, including local governments, permit or license applicants, and members of the public. Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed-upon measures that the Corps will require the permittee to take to avoid,

[489] 16 U.S.C. § 470a.

minimize, or mitigate the adverse effects. The requirements contained within the MOA are incorporated into the CWA permit.[490]

While the goal of NHPA Section 106 is to complete the evaluation of whether the proposed project may affect an historic property early in the process to ensure minimal impacts on that property, satisfaction of many of the requirements can be time consuming and costly to the permit applicant. Delays in project scheduling between the Corps, SHPO/THPO, the public, and other involved parties are common. This will only add to the costs and delays home builders face when trying to conduct their daily business.

Indeed, many cities and towns have historically been built along river floodplains. With the expanded definition of "neighboring" that automatically asserts jurisdiction over any water or wetland within the floodplain, many projects in metropolitan areas that include a pond, small stream, or ditch would now require a CWA Section 404 permit. And, in the event the project has the potential to impact an historic property, which may be commonplace in older cities, those permits could be held up or even denied as the Corps works through the NHPA Section 106 process.

VIII. The Economic Analysis Supporting the Proposed Rule is Inadequate.

Agencies are subject to a number of statutes and executive orders (E.O.s) that direct them to conduct specific types of economic analyses to accompany proposed rules. As EPA recognizes in its Economic Analysis of Proposed Revised Definition of Waters of the United States, "estimates of the economic costs and benefits that may indirectly be imposed on governments and regulated entities can help inform the public and policymakers of some of the implications associated with this proposal."[491] Despite this recognition, the Agencies' have developed an economic analysis of the proposed rule that relies on a flawed methodology for estimating the extent of newly-jurisdictional waters, uses dated and incomplete cost figures, and underestimates the impact of the proposed definitional change. Contrary to the analysis, the proposal will have a significant impact on the home building industry and will negatively impact housing affordability.

a. EPA's Economic Analysis of the Proposed Rule is Fundamentally Flawed.

There are numerous problems with the methodology followed to complete the economic analysis that render it unreliable. For example, it only addresses and studies the "other waters" category of CWA jurisdiction and assumes the jurisdictional status of tributaries and wetlands will not change. To make this determination, the Corps performed a sample review of 262 project files from the Corps' ORM2 database "isolated waters" category. All 262 records are considered outside the scope of CWA jurisdiction under current regulatory guidance, but the Agencies predicted that only 17% of these "isolated waters" would be subject to CWA jurisdiction under the proposed rule. Further, given that very little detail is provided to describe exactly how this comparison was completed or how and if the ORM2 data is an appropriate source for making

[490] 33 C.F.R. § 325, Appendix C to Part 325, "Procedures for the Protection of Historic Properties."
[491] EPA Economic Analysis at 2.

such an assessment, the public is left with virtually no recourse but to believe the agencies. This complies with neither the Administrative Procedure Act nor the "transparency" and "reproducibility" standards of the Federal Information Quality Act. Equally troubling, the Agencies did not conduct a similar sample review to determine how jurisdiction might change for other jurisdictional categories of waters (i.e., "tributaries" or "adjacent waters," as newly and broadly defined). This is unfortunate, as it is clear that the status of many of these areas will change, as well, including those wetlands located within floodplains that are not proximate to a traditional navigable water and would not have likely been considered jurisdictional before, but would be under the proposal.

Similarly, economist Dr. David Sunding, the Thomas J. Graff Professor at the University of California-Berkeley's College of Natural Resources, acknowledges the unreliable data sample the EPA uses in the Analysis:

> "The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. Construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in artificially-low number of applications and affected acreage. Even if the percent increase in added permits is correct, using the number or permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector."[492]

Much of the other data used, however, is equally problematic, as many are dated and/or incomplete. Indeed, rather than collecting data specific to support this rulemaking, the Agencies are attempting to meld the data they have into the forms they need to fill. For example, the permit cost estimates are over 20 years old and have not even been adjusted for inflation. Many of the mitigation costs are so low as to be laughable. Further, those estimates were provided at a very different time in the housing industry, so are hardly reflective of today's realities. Likewise, although EPA acknowledges that the sponsors of many private sector as well as public sector projects that are subject to CWA Section 404 permitting can also incur non-trivial permitting time costs and/or impact avoidance and minimization costs, the compliance costs for those categories are not estimated because "there is not a defensible, ready basis for estimating these costs." [493] Just because the data are not readily available does not give the agencies an out. Such a response is absurd and results in the calculation of incremental costs that is wholly deficient.

Finally, EPA uses a flawed methodology for its calculation of benefits. EPA's Analysis adopts an all-or-nothing approach to assessing benefits by assuming that all wetlands affected by the proposed rule's definitional change would be filled. On the flipside, EPA makes the assumption that the proposed rule would preserve or mitigate land if federal jurisdiction is extended by the rule. These unrealistic assumptions contribute to an inflated benefits calculation.

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[492] Sunding Review of EPA's Economic Analysis at 10.
[493] EPA Economic Analysis at 14.

It is clear that the Economic Analysis has major flaws in approach, methodology and data. Indeed, the fact that EPA readily states that "the economic analysis is necessarily based on readily available information and the resulting cost and benefit estimates are incomplete,"[494] should give anyone pause. And it has. According to Dr. Sunding, "the errors and omissions in EPA's study are so severe as to render it virtually meaningless."[495] EPA must withdraw the Economic Analysis and prepare an adequate study of this major change to the CWA. Yet again, the Agencies are painting an inaccurate picture of how this regulation will impact small businesses.

b. The Agencies Use an Incorrect Baseline to Estimate the Economic Impacts of the Proposed Rule.

In the preamble of the proposed rule, the Agencies claim that because "this proposed rule is narrower than that under the existing regulations . . . fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations," and "[a]s a consequence , this action . . . will not have a significant adverse economic impact on a substantial number of small entities . . ."[496] The "existing regulations" that the Agencies reference here is the 1986 rule defining "waters of the United States."[497] Yet, in EPA's Economic Analysis, the Agencies assess the regulation with respect to current practice under the 2008 *Rapanos* Guidance and determine the rule will increase CWA jurisdiction by approximately 3%. The Agencies' claims in the preamble and the Economic Analysis contradict one another.

The proper baseline from which to assess the proposed rule's economic impact, as guidance from OMB's Office of Information and Regulatory Affairs (OIRA) substantiates, is that of current practice. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis and states that "[t]he baseline should be the best assessment of the way the world would look absent the proposed action."[498] The 1986 regulation has been abrogated by both *SWANCC* and *Rapanos* and is no longer in use. Indeed, the Agencies are currently operating under guidance issued in December 2008 which sought to bring jurisdictional determinations in line with these cases. By using the 1986 regulation as the baseline to certify the proposed rule will not have a significant economic impact on a substantial number of small entities grossly underestimates the costs associated with the proposed rule. The Agencies must compare the costs associated with the proposal to those incurred under the *status quo* 2008 *Rapanos* Guidance.

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[494] *Id.* at 2.
[495] Sunding Review of EPA's Economic Analysis at 2.
[496] 79 Fed. Reg. at 22,220.
[497] 51 Fed. Reg. at 41,206.
[498] Office of Management and Budget, Circular A-4, Subject: Regulatory Analysis (September 17, 2003) at 15, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf

c. The Proposed Rule will Impose Significant and Unnecessary Costs on Already Heavily Regulated Home Builders.

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

Because compliance costs for regulations are often incurred prior to home sales, builders and developers have to essentially finance these additional carrying costs until the property is sold – costs that increase home prices. With increased housing prices in response to additional regulations (*see* Section VIII. d.), it may take longer for the home to sell. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day. Today's proposal only adds to the headwinds that our industry faces.

The picture becomes more stark when considering the time and cost it takes to obtain a CWA Section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[499] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant, ranging from an estimated $24,989 to $49,207 per acre nationwide.[500] Perhaps even more costly, however, can be the act of discharging dredge or fill material (knowingly or not) into a water of the United States without a Section 404 permit.[501] When considering these excesses and risk of non-compliance, it becomes clear that there needs to be a necessary balance between protecting the nation's water resources and allowing citizens to build and develop their land.

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under the CWA programs and others. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approvals. This requires time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting liabilities could delay or eventually kill a real estate deal, infrastructure upgrade, or construction of a new school or town hall. If the proposed rule is

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[499] Sunding and Zilberman Economics of Environmental Regulations at 81.
[500] EPA Economic Analysis at 12.
[501] *See*, e.g., *Sackett v. U.S. EPA*, 566 U.S. __, 132 S.Ct. 994 (2012) (property owner who planned to build a home and cleared land received a Compliance Order from EPA asserting that the property was jurisdictional wetlands in which the owner had placed illegal fill material. The property owner was ordered to restore the site to its original condition and pay up to $75,000 per day for the illegal discharge of pollution).

finalized in its current form, the ability to sell, build, expand, or retrofit structures and properties will suffer notable setbacks, including added cost and delays for development and investment.

Oftentimes, home builders will be at the mercy of the Agencies. Builders will have to request a jurisdictional determination from the Corps to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determination requests, across all industries, will result in greater permitting delays as the Agencies are flooded with paperwork.

In addition, many federal statutes tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain other permits. If more areas are considered jurisdictional, more CWA permits will be required. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act and National Historic Preservation Act (*see* Section VII. d.). Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. Lengthened permitting times will include an increased number of meetings, formal and informal hearings, and appeals. These federal consultations are just another layer of red tape that the federal government has placed on small businesses and it is doubtful the Agencies will be equipped to handle this inflow.

d. The Proposed Rule will Detrimentally Impact Housing's Role in the Economy and Ultimately, Housing Affordability.

The impact of home building and housing on the national economy – in good times and bad – should not be underestimated. Residential construction, including the building of new structures as well as the remodeling of existing ones, has direct, positive impacts on the U.S. economy. The most obvious impacts are the work opportunities created in the housing industry, as well as in other industries that provide products or services to home builders and buyers. Workers are employed to directly engage in the construction activity. Jobs are generated in the industries where lumber, concrete, lighting fixtures, heating equipment, and other products that go into a home are produced. More jobs are created when real estate agents, lawyers, and brokers provide services to home builders and home buyers. Other economic impacts include the revenues generated for federal and local governments. The incomes of workers are subject to federal, state and Social Security taxes. Profits made by the business owners are similarly taxed. Beyond this, states often impose sales taxes on material sold to home builders, and many local jurisdictions levy fees for approving building permits and extending utility services.

Home building typically is considered to include single family, multifamily, modular / manufactured housing, remodeling, land development and support industries. In 2014 Q3, all housing accounted for 15.3% of the nation's annual Gross Domestic Product (GDP).[502] Housing contributes to the GDP in two basic ways: through private residential investment, and through consumption spending on housing services. Residential investment includes construction of new single family and multifamily structures, residential remodeling, production of manufactured

[502] *Housing's Contribution to Gross Domestic Product*, National Association of Home Builders Web Page, last accessed Nov. 14, 2014, available at www.nahb.org/generic.aspx?sectionID=784&genericContentID=66226&print=true

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homes, and brokers' fees. Consumption spending on housing services includes the amount of rent paid by tenants, the imputed value of housing services to home owners, and the amount paid to hotels by households for housing services. Breaking down housing's share of the country's output by home building and personal consumption, the 2014 Q3 data show that home building is responsible for 3.1% of the GDP and housing services contribute 12.2%.[503] Clearly, the home building industry is an important engine in the nation's economy.

Housing is an equally important contributor to state economies. Many states are reliant on housing as an engine of economic growth and the source of state income. The largest contribution of housing to states' economies is by the ongoing services provided by the housing stock that was previously constructed by the home building industry. In the case of rental housing this contribution can be measured directly through rent paid by tenants. Similarly, the impact of the housing sector on local economies can be equally significant. Home building generates income and jobs for local residents, as well as revenue for local governments. Home building also imposes costs on local governments that supply education, police and fire protection, and other public services to support the new homes. As a general estimate, NAHB research shows that the construction of 100 single family homes employs 297 individuals, generates $28 million in income, and produces $11.0 million in taxes and fees.[504]

Importantly, residential construction not only creates income for those employed in the industry, but also for those working in industries supplying inputs to home builders and remodelers. Often these suppliers are located in neighboring or other states. For this reason, home building not only contributes to local economies in the states where it takes place, but also stimulates economic activity across state borders. According to the Bureau of Economic Analysis (BEA), there are more than fifty industries that supply products and services to construction. Miscellaneous professional, scientific and technical services, retail trade, manufacturing of fabricated metal, nonmetallic mineral and wood products are the largest contributors of inputs used in residential construction. NAHB research estimates this contribution amounts to 2.5% of state income, nearly as much as residential construction itself. Thus, housing not only provides jobs, income, and opportunities, it also more than pays for itself by generating important state and local revenues.

As home building opportunities are stifled, however, the trickle-down effects can be felt over wide swathes of the economy. In areas that will see the most changes in jurisdiction as a result of the proposed rule, those effects could be significant. Anticipated results include decreased building opportunities, delayed projects, and higher priced products, among others. Unfortunately, this industry knows all too well the effects of price fluctuations. Even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers. Such buyers are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. An analysis done by NAHB illustrates

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[503] *Id.*

[504] *Impact of Home Building and Remodeling on the U.S. Economy*, National Association of Home Builders Web Page, last accessed Nov. 14, 2014, available at http://www.nahb.org/generic.aspx?sectionID=784&genericContentID=227858

the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationally, this price difference means that when a median new home price increases from $225,000 to $226,000, 232,447 households can no longer afford that home. This is not a good outcome for anyone.

IX. The Scientific Basis of the Proposed Rule is Suspect.

The Agencies claim that the proposed rule is supported by science and the draft Connectivity Report developed by EPA's Office of Research and Development that discusses the connectivity and effects of stream and wetlands on downstream waters. The Agencies have also assembled an external review panel, the Science Advisory Board (SAB), to comment on the adequacy of the science to support the conclusions reached in the draft Connectivity Report and the proposed rule itself. However, the scientific basis for the proposed rule is inadequate and the manner in which the Agencies have engaged the SAB has been inappropriate.

a. The Agencies have Based the Proposed Rule on Inadequate Science.

EPA's Office of Research and Development prepared a draft peer-reviewed synthesis of published peer-reviewed scientific literature discussing the nature of connectivity and effects of streams and wetlands on downstream waters, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." In the preamble, the Agencies assert the proposed rule is "supported by a body of peer-reviewed scientific literature on the connectivity of tributaries, wetlands, adjacent open waters, and other waters to downstream waters and the important effects of these connections on the chemical, physical, and biological integrity of those on downstream waters."[505] Appendix A of the preamble purportedly summarizes currently available scientific literature and the draft Connectivity Report that are part of the administrative record for the proposal and explains how this scientific information supports the proposed rule.

The draft Connectivity Report makes broad conclusions regarding the concept of connectivity, asserting that wetlands and streams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters. However, the Report merely documents the *presence* of such connections and falls short of providing the basis for concluding to what extent such connections may or *may not* be of sufficient type, breadth, or magnitude to *significantly affect* downstream waters. Providing criteria by which the Agencies could determine when a water has a substantial effect on another water is crucial to any subsequent regulatory or policy determination of what constitutes a "significant nexus." The Agencies claim, "[t]he data and conclusions in the [draft Connectivity] Report concerning the strength of the relevant connections and effects of certain types of waters on downstream waters provide a foundation for the Agencies' determination that certain waters have effects on the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the

[505] 79 Fed. Reg. at 22,190.

territorial seas that are 'significant' and thus constitute a significant nexus."[506] This is simply not true; the draft Connectivity Report presents *no* analysis of connectivity "significance."

Asking the right questions is a central tenet and first step of any rigorous scientific inquiry. Regrettably, the draft Connectivity Report fails to address the right questions, and therefore does not adequately inform decisions about CWA jurisdiction based on specific thresholds at which waters, in accordance with Justice Kennedy's significant nexus test, "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[507] Until the draft Connectivity Report, or any final report, addresses questions about the *significance* of connectivity and not merely the *existence* of connectivity, the Report is of little value in supporting the proposed rule. In fact, the draft Connectivity Report serves only as an academic exercise highlighting *ad nauseam* what grade-schoolers learn when they are taught the water cycle, that is: water flows downhill.

Although the draft Connectivity Report does little to acknowledge the need to link connectivity with significant effects on downstream integrity, the need for such a link is clearly evident in the scientific literature. As an example of this recognized knowledge gap, Dr. Mary Freeman and colleagues, in one of the publications reviewed in the draft Connectivity Report, argue that linkages between headwaters and downstream ecosystems must be considered to understand large-scale issues such as hypoxia in the Gulf of Mexico and the global loss of biodiversity.[508] At the same time, these authors recognize the importance of identifying thresholds of significance with respect to downstream effects: "Given the complexity of hydrologic connections, it is essential that political and legal determinations of *thresholds of connectivity* (for purposes of Clean Water Act jurisdiction) be informed by scientific understanding of headwater stream effects on ecological functions at larger scales."[509] It is regrettable that the authors of the draft Connectivity Report would reference this literature to support the already widely accepted fact that headwaters are hydrologically connected to downstream waters, yet overlook the more critical call for science to better elucidate under what circumstances these connections significantly affect the integrity of downstream ecosystems. Rather than conducting a review of existing scientific literature that merely highlights the existence of connections between streams and wetlands and downstream waters, the Agencies must focus their efforts on developing the science needed to define the thresholds of significance. Without these data, the existing science fails to adequately support the proposed rule.

Echoing NAHB's concerns, EPA's SAB, in its review of the draft Connectivity Report delivered to EPA Administrator Gina McCarthy on October 17, 2014, voiced apprehensions about the Report's failure to identify when connections do and do not significantly impact downstream integrity: "the Report would be strengthened if it contained . . . additional review of the scientific literature that quantifies the frequency, duration, predictability, and magnitude of physical, chemical, and biological connections for each type of 'water' and *consequences of that*

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[506] *Id.* at 22,196.
[507] *Rapanos*, 547 U.S. at 780.
[508] Freeman, M.C., C.M. Pringle, C.R. Jackson. 2007. Hydrologic connectivity and the contribution of stream headwaters to ecological integrity at regional scales. *Journal of the American Water Resources Association* 43(1):5-14.
[509] *Id.* at 7 (emphasis added).

connectivity for the physical, chemical, and biological integrity of downstream waters, with key uncertainties made explicit . . ." [510] Additionally, in the cover letter transmitting its review, the SAB notes, "[t]he Report often refers to connectivity as though it is a binary property (connected versus not connected) rather than as a gradient. In order to make the Report more technically accurate, the SAB recommends that the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and consequences of those connections." [511] It's clear from SAB's review that significant revisions to the draft Connectivity Report are needed to not only improve the scientific rigor of the Report, but more critically its usefulness in a regulatory context.

i. The Connectivity Report Fails to Cite Scientific Studies Supporting the Categorical Jurisdiction over All Streams and Most Man-Made Waters.

NAHB is concerned that the Agencies' proposed "tributary" definition would assert categorical jurisdiction over all streams, including perennial, intermittent, and ephemeral streams, while the science referenced in the draft Connectivity Report focuses largely on third and fourth order perennial streams, not first or second order intermittent and ephemeral streams of which many are not considered jurisdictional under existing guidance. [512] SAB panel member Dr. Michael Josselyn notes that as a result of these limited data, "the regulatory definition may extend further inland where connectivity has not been as well studied or documented. As we know from public comments, the inland extent of federal jurisdiction is a significant concern and the functions associated with these initial drainages are based on scientific information from larger, higher order features. These low order features may have flow for only a few hours or days following storm events and are the most likely candidates for being on the low end of the gradient where effects on downstream systems are lowest or minimal. Because of the importance of the issue on the extent of federal jurisdiction in these headwaters, the science needs to be more substantial than currently demonstrated in the Draft Science Report." [513] NAHB agrees with Dr. Josselyn and suggests the Agencies must provide sufficient data documenting the significant effect low order intermittent and ephemeral streams have on downstream waters before prematurely asserting categorical jurisdiction over these largely dry-land features.

What's more, while the proposed rule would categorically assert jurisdiction over many man-made features including most ditches, industrial ponds, canals, and stormwater conveyances under the "tributary," "adjacent waters, and "other waters" definitions, the draft Connectivity Report does not address the significance of man-made features on downstream waters. Nonetheless, the Report implies that during wet seasons, swales, roadside ditches, and surface field drainages are connected to perennial streams. [514] However, the Report cites no studies supporting this implication. It is clear that the science supporting federal jurisdiction over such man-made features – indeed many of which are designed to manage excess runoff, supply water

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[510] SAB Final Review of the Draft Connectivity Report at 9.
[511] *Id.* at Cover Letter.
[512] *See* 2008 *Rapanos* Guidance.
[513] 8/14/14 SAB Comments on the Proposed Rule at 23.
[514] Draft Connectivity Report Figure 3-10 at 3-19.

for drinking, agricultural, and industrial needs, or treat wastewater – is unsupported and the Agencies must acknowledge this.

ii. The Concepts Presented in the Connectivity Report will Increase Regulatory Confusion.

NAHB is concerned that concepts presented in the draft Connectivity Report, or any similar final report, will only serve to increase regulatory confusion. As an example, let us compare the definitions of "tributary," "riparian area," "floodplain," and "wetland" provided in the draft Connectivity Report to those in the proposed rule (Table 2):

Table 2. Comparison of definitions in the Draft Connectivity Report and the Proposed Rule.

Term	Draft Connectivity Report Definition	Proposed Rule Definition[515]
Tributary	A stream or river that flows into a higher-order stream or river.[516]	A water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3). A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4).
Riparian Area	Transition areas or zones between terrestrial and aquatic ecosystems that are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect water bodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems. Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.[517]	An area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.
Floodplain	A level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events.	An area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

[515] 79 Fed. Reg. at 22,199.
[516] Draft Connectivity Report at A-20.
[517] *Id.* at A-14.

	Floodplains formed under historic or prehistoric climatic conditions can be abandoned by rivers and form terraces.[518]	
Wetland	An area that generally exhibits at least one of the following three attributes (Cowardin et al., 1979): (1) is inundated or saturated at a frequency sufficient to support, at least periodically, plants adapted to a wet environment; (2) contains undrained hydric soil; or (3) contains nonsoil saturated by shallow water for part of the growing season.[519]	Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

This comparison makes it clear that the draft Connectivity Report was written with different notions of what constitutes each of these geomorphic features relative to what the Agencies have in mind in the proposed rule. This is particularly disconcerting considering the Connectivity Report is purported to serve as the scientific underpinning of the proposed rule. Using different definitions in the proposed rule and the scientific report that is intended to support it causes confusion and suggests the Agencies are trying to fit a square peg in a round hole. Further, it completely undermines the validity of the Report as a reasonable basis for the rule. For example, the draft Connectivity Report states that a tributary is a stream or river that flows into a higher order stream or river, while the proposed rule expands the definition to include wetlands, lakes, and ponds that contribute flow. This will only serve to add regulatory confusion, not clarity.

In addition to the confusion the differences in definitions present, the Connectivity Report will cause regulatory uncertainty by suggesting waters have potential functions that can affect downstream systems. The draft Connectivity Report states that even if a stream or wetland is not currently performing a function, it has the *potential* to provide that function and, "[a]lthough *potential* functions do not actively affect downstream waters, they *can* play a critical role in protecting those waters from *future* impacts"[520] Thus, the Report suggests that even if a system has no demonstrable functional linkage to downstream waters at present, it should be assessed from the perspective of all the *potential* functions it could provide under other conditions. However, the significant nexus test cannot be based on speculative potential effects.[521] Indeed, reliance on potential functions will not only add substantial uncertainty to the regulatory process, it is completely inappropriate and unsupported.

iii. The Draft Connectivity Report, or any Similar Final Report, Cannot be used to Support the Proposed Rule.

The draft Connectivity Report, or any similar final report, cannot be used to support a proposed rule that improperly asserts that the scope of the CWA is essentially unlimited. It is undisputed that the Supreme Court rejected the EPA's and the Corps' pre-*Rapanos* interpretation of CWA authority based on a "mere hydrologic connection" theory. A proposed rule that attempts to return CWA jurisdiction to the pre-*Rapanos status quo* using the Connectivity Report's findings of the mere *presence* of hydrologic connectivity would be contrary to the limits that Congress and the Courts have established and would be an improper use of the Report in the rulemaking

[518] *Id.* at A-5.
[519] *Id.* at A-22.
[520] *Id.* at 3-27 (emphasis added).
[521] *Rapanos*, 547 U.S. at 780.

process. Ultimately, until or unless the Agencies can provide a sound scientific basis for making significant nexus determinations that recognize a gradient of connectivity, the proposed rule will have little science on which to rest.

b. EPA's Use and Treatment of the Science Advisory Board has been Problematic.

The timing and manner in which the Agencies have engaged the SAB have been questionable and disconcerting. This is particularly problematic considering the proposed rule is purported to be supported by science.

i. The Agencies have Inappropriately Engaged the Science Advisory Board.

In 1978, Congress directed EPA to establish an SAB to provide scientific advice to the agency Administrator.[522] The SAB is authorized to review the quality and relevance of the scientific information used as the basis for agency regulations. NAHB is concerned that EPA and the Corps have engaged the SAB inappropriately.

On September 17, 2013, EPA and the Corps announced that a proposed rule defining the scope of CWA jurisdiction had been sent to the Office of Management and Budget (OMB) for interagency review.[523] On the very same day, EPA submitted its draft Connectivity Report to its SAB for peer review. Although the proposed rule that was sent to OMB stated, "[t]his draft rule takes into consideration the current state-of-the-art peer reviewed science reflected in the [draft Connectivity Report],"[524] the proposed rule was drafted *before* the SAB had an opportunity to review the Connectivity Report. In fact, the SAB did not even convene for the first time until December 16, 2013 – 91 days after the proposed rule was sent to OMB.[525]

The proposed rule states that the draft Connectivity Report is under review by the SAB, and the rule will not be finalized until that review and the final Report are complete.[526] Yet, in the proposed rule, the Agencies state they have interpreted the scope of "waters of the United States" in the CWA based on "the information and conclusions in the [draft Connectivity] Report."[527] This suggests the Agencies have little regard for the SAB's comments and scientific input, and that the outcomes of the proposed rule have been pre-determined. In disregarding the SAB's expert comments on the draft Connectivity Report during the proposed rulemaking phase yet stating a rule will not be made final until the SAB has reviewed the Report, the Agencies have undermined the critical role of the SAB and scientific review in a rulemaking process that claims to be based on the best available science. The proposed rule states, "The [Connectivity] Report summarizes and assesses much of the currently available scientific literature that is part of the

[522] 42 U.S.C. § 4365.
[523] *See* http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2040-AF30#1
[524] EPA Press Release (Sept. 2013), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345
[525] 78 Fed. Reg. at 58,536.
[526] 79 Fed. Reg. at 22,190.
[527] *Id.* at 22,196.

administrative record for this proposal, and informs the agencies *during* this rulemaking."[528] Yet, the draft Connectivity Report should have been reviewed and finalized in order to inform the Agencies *before* this rulemaking.

Indeed, even SAB panel members have voiced concerns over this cart-before-the-horse approach the Agencies have taken. SAB panel member Dr. Mark Murphy stated, "I must say I am puzzled as to why EPA has decided to release the proposed rule before receipt of our review of the Connectivity Report . . . I hardly expected that the draft [rule] would be released to the public before our review [of the Connectivity Report]. The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are 'hardened' . . . The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB—just a few minor additions . . . In point of fact, the SAB Review suggested that some major additions be made to the Connectivity Report."[529]

Additionally, the Administrative Procedure Act (APA) requires federal agencies to reveal for public evaluation "the technical studies and data upon which the agency [relies in its rulemaking]."[530] By releasing and taking comment on the proposed rule before the Connectivity Report is final, the Agencies have failed to comply with the APA (*see* Section X. a. for a more thorough discussion of the Agencies' failure to comply with the APA).

ii. EPA's Charge Questions to the Science Advisory Board in Reference to the Connectivity Report are Inadequate.

The draft Connectivity Report concludes that streams and most wetlands are connected to and exert an influence on downstream waters. In preparation for soliciting the SAB's input, EPA developed Charge Questions, which can be summarized as follows:[531]

(1) Comment on the overall clarity and technical accuracy of the Connectivity Report.

(2) Was the most relevant published peer-reviewed literature included and correctly summarized?

(3) Identify studies that should be added or deleted.

(4) Are the conclusions supported by available science?

(5) Suggest alternative wording for conclusions and findings that are not fully supported.

Unfortunately, these questions are simply a broad-brush attempt at getting the SAB to take a cursory look at the draft Connectivity Report. They do not provide the SAB panel with the

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[528] *Id.* (emphasis added).
[529] 8/14/14 SAB Comments on the Proposed Rule at 56.
[530] *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir.)
[531] Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence – Technical Charge to External Peer Reviewers at 2 – 3.

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context needed so that their review would address key concepts that would better present the science needed to inform policy specific to CWA jurisdiction. Just as the draft Connectivity Report falls short of identifying the significance of connections between streams and wetlands and downstream waters, EPA's charge questions to the SAB responsible for reviewing the Report fail to inquire about the scientific significance of such connections on the integrity of downstream waters.

Concerned that EPA failed to ask the SAB panel the questions needed to support the proposed rule, the U.S. House of Representatives Committee on Science, Space, and Technology (hereinafter, House Science Committee), pursuant to its authority under the Environmental Research, Development and Demonstration Authorization Act, posed additional charge questions to the SAB requesting they evaluate the *significance* of connections on downstream waters.[532] Regrettably, EPA dismissed Congress's letter and additional charge questions, claiming the questions "go beyond the scientific review that is the expert technical panel's statutory focus."[533] This makes little sense. The EPA specifically chose a panel of 26 wetland and stream scientists to review a report that the Agencies knew would be used to support its proposal, yet did not allow that panel of esteemed experts to conduct an unbiased scientific review. What is particularly concerning is that one SAB panel member noted, "During the SAB Review, the [SAB] panel was explicitly told not to discuss the definition of significance . . ." [534]

At issue in the proposed rule is the significant nexus waters, including wetlands, have on the chemical, physical, and biological integrity of downstream waters. Yet the Connectivity Report and the questions posed to the SAB charged with reviewing the legitimacy of the Report to support the proposed rule fall well short of seeking to obtain the evidence necessary for the Agencies to assert federal jurisdiction over "tributaries," "adjacent waters," or "other waters" based upon Justice Kennedy's significant nexus standard. Furthermore, EPA's arrogance in ignoring Congress's charge questions to the SAB and directing the SAB not to discuss the significance of hydrologic connections on downstream waters is regrettable.

NAHB believes the SAB should be charged with determining whether or not the Connectivity Report provides the necessary guidance to determine if a water has a significant nexus to a traditional navigable water and, if so, the point at which a connection becomes "significant." Only then will the Agencies be able to determine if the Connectivity Report provides the necessary information to properly apply Justice Kennedy's significant nexus test to "tributaries," "adjacent waters," and "other waters." Without this information, the Connectivity Report only serves to support the regulation of waters based on the presence of any "mere hydrologic connection." Both the Plurality and Justice Kennedy demanded more in *Rapanos*.

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[532] 42 U.S.C. § 4365; Letter from Rep. Lamar Smith (Chairman, House Committee on Science, Space, and Technology) and Rep. Chris Stewart (Chairman, Subcommittee on Environment) to Dr. Amanda Rodewald (Chair, SAB Panel for Review of the EPA Water Body Connectivity Report) and Dr. David Allen (Chair, EPA SAB) (Nov. 6, 2013).

[533] Letter from Laura Vaught (EPA Associate Administrator) to Rep. Chris Stewart (Chairman, Subcommittee on Environment) (Dec. 16, 2013).

[534] 8/14/14 SAB Comments on the Proposed Rule at 58.

iii. EPA Unlawfully Intercepted Questions Congress Posed to the Science Advisory Board.

In addition to the procedural flaws associated with proposing a rule before the supporting science was reviewed, EPA unlawfully intercepted questions posed to the SAB by the House Science Committee. In his opening statement at the July 9, 2014 House Science Committee hearing entitled "Navigating the Clean Water Act: Is Water Wet?", Chairman Lamar Smith (R-Texas) stated, "The EPA wrote its new 'waters of the U.S.' rule without even waiting for the expert advice of the Agency's own Science Advisory Board. The Science Advisory Board exists to provide independent advice to the EPA and to Congress. It is the job of these experts to review the underlying science. Not only did the EPA publish its rule before the [Science Advisory] Board had an opportunity to review the report, but when [the House Science] Committee sent official questions to the [Science Advisory] Board as its review began, the EPA stepped in to prevent the experts from responding."[535] Questioning EPA Deputy Administrator Robert Perciasepe, Chairman Smith stated, "[The House Science Committee] submitted several questions to the Science Advisory Board that were intercepted by the EPA, and the Science Advisory Board was not allowed to answer our questions. That's not the way I read the law. We don't have to get the EPA's permission for the Science Advisory Board to give us answers to our questions . . . The law doesn't allow you to screen the Science Advisory Board's answers or to intercept our questions . . ."[536] This Administration has consistently touted the importance of science and transparency in its operations, yet today's proposal abandons any precept of openness in exchange for expediency. Ignoring the SAB, refusing to answer the House Science Committee's questions, and issuing a proposed rule prior to SAB's review of the Connectivity Report certainly gives the impression that the Agencies have inappropriately predetermined the outcome of this rulemaking. Such an outcome serves no one. The Agencies must coordinate open and transparent lines of communication between the SAB and those who will be impacted by the proposed rule, including providing opportunities for meaningful comment.

X. The Agencies Failed to Comply with Key Procedural Requirements.

Among the myriad of Constitutional, statutory, judicial, scientific, economic, and practical concerns surrounding the proposed rule, the Agencies have failed to comply with key procedural rulemaking requirements, including the Administrative Procedure Act, the Regulatory Flexibility Act, Executive Order 12,866, Executive Order 13,132, and Executive Order 13,536. Additionally, the Agencies have violated the Data Quality Act.

a. The Agencies Failed to Comply with the Administrative Procedure Act.

The Agencies are thwarting important requirements of the Administrative Procedure Act (APA) and frustrating the public's opportunity for meaningful notice and comment by proposing the

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[535] Statement of Chairman Lamar Smith (R-Texas) Hearing on Navigating the Clean Water Act: Is Water Wet? (July 9, 2014).

[536] Rep. Lamar Smith (Chairman, House Committee on Science, Space, and Technology) statements during House Science Committee Hearing "Navigating the Clean Water Act: Is Water Wet?" (July 9, 2014).

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rule prior to finalizing the Connectivity Report and repeatedly issuing, outside of the APA process, *ad hoc* explanations and other documents critical to the rule.

Within the last three months of the comment period alone, the Agencies have released the following:

- a series of agency blog posts that provide new policy interpretations of the proposed rule's language;
- new Corps reports that detail policies and national challenges associated with defining the term "ordinary high water mark," the most critical term for defining "tributary" under the proposed rule;
- Science Advisory Board comments pointing out problems with the draft Connectivity Report and the rule; and
- USGS maps that depict perennial, intermittent, and ephemeral streams across the nation.

The APA does not allow the Agencies to keep altering the regulatory landscape throughout the rulemaking process. Indeed, the public cannot be expected to provide meaningful comment on a moving target. Additionally, a federal agency shall "maintain a flexible and open minded attitude toward its own rules,"[537] and yet EPA and the Corps have prejudged the proposal's outcome. As such, NAHB calls on the Agencies to immediately withdraw the proposed rule for the following important reasons:

i. The Agencies Continue to Issue New Materials Explaining the Proposed Rule, Creating a Moving Target for Public Comment.

Since the proposed rule was issued on April 21, 2014, the Agencies have continued to issue new documents, blog posts, Q & A documents, and webinars offering new explanations of key terms in the proposed rule and new reasoning to support their proposed assertions of CWA jurisdiction. To make matters worse, much of this *ad hoc* information is inconsistent with the material provided in the official rulemaking docket. It is very difficult for the public to comment on the proposed rule when the Agencies keep changing their story and adding new (and often conflicting) information as the comment period progresses.

For example, the term "upland" is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded from the definition of "waters of the United States." In stakeholder discussions throughout the comment period, the Agencies have acknowledged that they have not proposed a definition of "upland." Now, a recent Q & A document, issued by the Agencies on September 9, 2014, provides a new definition of "upland:" "Under the rule, an 'upland' is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction."[538] This new

[537] *McClouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (interpreting 5 U.S.C. § 553; internal quotations omitted).
[538] September 2014 Q & A at 5.

definition of "upland" is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? It is unrealistic and inappropriate to hold the public responsible for tracking the Agencies' blog posts and *ad hoc* statements to piece together the meaning of key regulatory terms under the proposed rule.

Similarly, the EPA-prepared economic impact analysis located in the rulemaking docket estimates that "the proposed rule increases overall jurisdiction under the CWA by 2.7%."[539] Now, in the September 2014 Q & A document, the Agencies back away from that estimate and provide a conflicting analysis based on an entirely new baseline, stating, "When the proposed rule is compared to the agencies' existing regulations, however, the proposed rule reflects a substantial reduction in waters protected by the CWA . . . ."[540] Despite this new estimate, it is not evident that the Agencies have revised their economic impact analysis since they decided that the relevant baseline of comparison is "the existing regulations." If the Agencies are disregarding EPA's Economic Analysis in the rulemaking docket, should the public do the same? Again, how is the public to comment?

The APA requires federal agencies, when undertaking a proposed rulemaking, to provide the public with an adequate description of the subjects and issues to be addressed under the proposed rule within the Federal Register notice.[541] However, EPA has continued to change its position on key elements of the proposed rule (e.g., providing an *ad hoc* definition for "upland" and releasing statements that contradict the findings contained within the agency's own economic analysis on potential increases in federal jurisdiction). Because EPA has taking these actions *after* publishing the proposed rule in the Federal Register, the public is effectively unable to understand the proposal's true scope or impact. The APA requires federal agencies to provide this information to the public within the proposed rule itself.[542]

ii. Without Public Notice or Opportunity for Comment, the Agencies Are Developing Policies on Key Components of the Proposed Rule, Such as the Ordinary High Water Mark, through Other Efforts.

The identification of an OHWM is the lynchpin concept of the proposed rule's "tributary" definition, but the meaning of this key term is still in flux. Despite the uncertainty within the proposal, in August 2014, the Corps' Engineer and Research Development Center (ERDC) released two new guidance documents regarding "ordinary high watermark" (OHWM): (1) A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States, and (2) A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification.[543]

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[539] EPA Economic Analysis at 12.
[540] September 2014 Q & A at 3.
[541] 5 U.S.C. § 553(b).
[542] 5 U.S.C. § 553(c).
[543] Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), http://acwc.sdp.sirsi.net/client/search/asset/1036027

Separate from the proposed rulemaking, the Agencies are redefining OHWM without the required public notice and comment. The proposed rule's preamble asserts that the 33 C.F.R. § 328.3(e) definition of OHWM "is not changed by [the] proposed rule."[544] Yet, the two August 2014 OHWM guidance documents indicate that the Agencies are developing a new OHWM standard. These guidance documents essentially ignore the regulatory definition at § 328.3(e) and create a new method for determining OHWM based on the delineation of an "active channel signature" through the use of three primary indicators—topographic break in slope, change in sediment characteristics, and change in vegetation characteristics. In effect, the other physical indicators explicitly referenced in § 328.3(e) are superfluous under this new methodology. This is a clear change in regulatory practice and will have a substantial effect on how CWA jurisdiction is interpreted. Given the fact that these guidance documents were issued during the proposal's comment period demonstrates that their timing was not a coincidence. Any efforts to redefine OHWM or any other key term in the Agencies' proposed "waters of the United States" definition must be part of this rulemaking. The Agencies may not segment key components of the proposed "waters of the United States" definition and address them separately to avoid APA notice-and-comment requirements.

Moreover, a review of the OHWM guidance documents issued by the Corps demonstrates that, contrary to the Agencies' statements in the context of the "waters of the United States" rule, determination of the OHWM is anything but simple or clear. In various blog posts, stakeholder calls, and statements released by the Agencies during the comment period, the Agencies have touted the OHWM as "well-known" and "easy to observe and document."[545] But, as described in Section VI. c. iv. 3. a., the recent Corps statements and publications paint a different picture. In March 2014, the Corps recognized that OHWM is a "vague definition," leading to "inconsistent interpretation of [the] OHWM concept," and "inconsistent field indicators and delineation practices."[546] Likewise, the Corps' Western Mountains OHWM Guidance states that "OHWM delineation in non-perennial (i.e., intermittent and ephemeral) streams can be especially challenging" and notes that "it is often difficult to determine what constitutes ordinary high water and to interpret the physical and biological indicators established and maintained by ordinary high water flows."[547] For these reasons, the Corps' National OHWM Review recognizes the "need for nationally consistent and defensible regulatory practices" and suggests that "a comprehensive framework is needed."[548] NAHB agrees, but such a framework should only be developed through the proper channels, including APA compliance.

(hereinafter, Western Mountains OHWM Guidance); Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), http://acwc.sdp.sirsi.net/client/search/asset/1036026 (hereinafter, National OHWM Review).

[544] 79 Fed. Reg. at 22,202.

[545] *See,* e.g., Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014). *Available online:* http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/

[546] Presentation by Matthew K. Mersel, U.S. Army Engineer Research and Development Center, Development of National OHWM Delineation Technical Guidance (March 4, 2014)

[547] Western Mountains OHWM Guidance at 1-2.

[548] National OHWM Review at 1-2.

iii. The Science Advisory Board has Raised Concerns with Significant Components of the Proposed Rule, and EPA has not Released a Final Connectivity Report.

NAHB reiterates its concern, raised in Section X. a. 3., with the Agencies' preparation of a draft rule before the foundational science is peer-reviewed and final. This is even more important given that the SAB panel has recommended significant changes to the draft Connectivity Report and, if EPA intends to be responsive to those concerns, the final Connectivity Report will substantially differ from the draft that has been made available to the public.[549] In order to provide for meaningful public comment under the APA, federal agencies must disclose the data or other material on which they rely to make a final decision. Indeed, participation is not meaningful if an agency bases its action on information that is not available to the public.[550]

On September 2, 2014, the SAB panel released comments on the adequacy of the scientific and technical basis of the proposed rule.[551] The SAB panel members raised a number of serious concerns about the proposed rule's definitions and categories of regulation. For example, "Panel members generally found that the term 'significant nexus' was poorly defined . . . and that the use of the term 'significant' was vague."[552] Panel members also questioned the adequacy of scientific support for several of the rule's definitions and exclusions. For instance, "[p]anelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included."[553] Substantial changes to the proposed rule and the draft Connectivity Report are needed to address these important concerns raised by the SAB panel. To comply with the APA, the Agencies must allow the public the opportunity to comment on the final report.[554]

iv. The USGS Maps Recently Released Depict Only a Portion of the Land and Waters Subject to Federal CWA Jurisdiction Under the Proposed Rule.

During the comment period, there has been significant discussion over EPA maps that rely on data from the U.S. Geological Survey (USGS) and appear to depict the scope of CWA jurisdiction.[555] NAHB commends Rep. Lamar Smith and the U.S. House of Representatives Committee on Science, Space, and Technology, for making these maps publicly available and requesting that EPA enter the maps and related information into the rulemaking docket.[556]

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[549] *See* SAB Final Review of the Draft Connectivity Report.
[550] *See United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d. Cir. 1977).
[551] Memorandum from Dr. Amanda D. Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report, to Dr. David Allen, Chair, EPA Science Advisory Board, Comments to the chartered SAB on the adequacy of the scientific and technical basis of the proposed rule titled "definition of 'waters of the United States' under the Clean Water Act" (Sept. 2, 2014), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/F6E197AC88A38CCD85257D49004D9EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf (hereinafter, SAB Panel Comments on the Proposed Rule).
[552] SAB Panel Comments on Proposed Rule at 6.
[553] *Id.* at 7.
[554] *See* 5 U.S.C. § 553(c).
[555] *See* http://science.house.gov/epa-maps-state-2013#overlay-context.
[556] *See* Letter from the Hon. Lamar Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to the Hon. Gina McCarthy, Administrator, U.S. EPA (Aug. 27, 2014).

Unfortunately, these maps are just the tip of the iceberg, as they depict only a fraction of the land and waters that could be deemed categorically jurisdiction under the proposed rule.

In yet another blog post, EPA states that these USGS maps "do not show the scope of waters . . . proposed to be covered under EPA's proposed rule" and "cannot be used to determine Clean Water Act jurisdiction—now or ever."[557] But why not? The proposed rule explicitly states that the Agencies intend to treat all perennial, intermittent, and ephemeral streams as *per se* jurisdictional (no case-specific analysis), and the preamble indicates that the Agencies will identify tributaries using USGS maps and other appropriate information.[558] How, then, can the Agencies claim that these USGS maps do not show the scope of streams subject to federal CWA jurisdiction under the proposed rule?

Indeed, these maps indicate a total of approximately 8.1 million miles of perennial, intermittent, and ephemeral streams across the 50 states, all of which could be categorically regulated as tributaries under the proposed rule. What's more, these maps show only a subset of the land and waters that would be jurisdictional, because they do not depict all of the other features, such as ditches and adjacent ponds, that would be categorically jurisdictional, or "other waters" that could be jurisdictional if the Agencies find a significant nexus. These USGS maps, and EPA's casual dismissal of their significance, demonstrate that, as suggested by Rep. Lamar Smith, the public is "getting the run-around" and has not been provided with significant information needed to meaningfully comment on the proposed rule.

v. The Agencies have Manipulated the Rulemaking in Ways that are Designed to Prejudge its Outcome.

Throughout the entirety of the comment period, the Agencies have shown strong bias against the proposed rule's critics and have unlawfully prejudged its outcome. EPA Administrator Gina McCarthy has attempted to delegitimize certain questions and concerns about the proposal by publicly referring to them as "ludicrous" and "silly."[559] EPA has even gone so far as to create a website called "Ditch the Myth," declaring the proposed rule "clarifies protection under the Clean Water Act . . ."[560] EPA's Office of Water has also suggested that those who "choose clean water" should support their proposed rule,[561] thereby insinuating that the proposal's critics oppose clean water. NAHB and its members have been advocates of the CWA since its inception and recognize the Act has helped our Nation make significant strides in improving the quality of our waters. To suggest we and any others who oppose this fundamentally flawed and unlawful proposal do not value clean water is insulting.

Additionally, EPA's social media advocacy in favor of the propose rule prejudices the rulemaking process. EPA's own staff have sought public support to influence the agency's view

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[557] *See* Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), *available at* http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/.

[558] 79 Fed. Reg. at 22,202.

[559] Chris Adams, *EPA Sets Out to Explain Water Rule that's Riled U.S. Farm Interests*, McClatchy DC (July 9, 2014), *available at* http://www.mcclatchydc.com/2014/07/09/232809_epa-sets-out-to-explain-water.html?rh=1

[560] *See* http://www2.epa.gov/uswaters/ditch-myth

[561] *See* Travis Loop, Do You Choose Clean Water? Greenversations: An Official Blog of the U.S. EPA (Sept. 9, 2014), *available at* http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/

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of the proposed rule,[562] and EPA Office of Water's Twitter account has essentially become a lobbyist for the proposal.[563] It is hard to believe this rulemaking has been conducted in accordance with the APA and its objective that federal agencies "benefit from the expertise and input of the parties who file comments with regard to [a] proposed rule" and "maintain a flexible and open minded attitude toward its own rules."[564] What's more, the Agencies' actions raise serious questions about compliance with the Anti-Lobbying Act.[565]

b. The Agencies Failed to Comply with the Regulatory Flexibility Act.

Recognizing that small businesses are frequently disproportionately impacted by federal regulations, Congress enacted the Regulatory Flexibility Act (RFA) in 1980. The RFA requires federal agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, including small businesses, small non-profit enterprises, and small local governments.[566] The RFA applies to any rule subject to notice and comment rulemaking under Section 553(b) of the Administrative Procedure Act (APA) or any other law. When an agency issues a rulemaking proposal, the RFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) or certify the proposal will not have a significant impact on a substantial number of small entities. The Agencies have erroneously certified the proposed rule.

i. The Agencies' Certification that the Proposed Rule Will not have a Significant Economic Impact on a Substantial Number of Small Entities Lacks a Sufficient "Factual Basis."

Section 605 of the RFA allows an agency, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.[567] A certification must include, at a minimum, a description of the affected entities and an estimate of the cost of the impacts that clearly justifies the "no impact" certification.

In addition, under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act ("SBREFA"),[568] each covered agency that is required to prepare an IRFA must first notify the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) and provide information on the proposal's potential impacts on small entities and the

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[562] EPA's Office of Water launched a "Thunderclap" campaign entitled "I choose clean water" on Sept. 9, 2014, asking the public to support the proposed rule. *See* https://www.thunderclap.it/projects/16052-i-choose-clean-water
[563] *See* https://twitter.com/EPAwater.
[564] *McClouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (interpreting 5 U.S.C. § 553; internal quotations omitted).
[565] *See* 18 U.S.C. § 1913 (prohibiting the use of appropriated federal funds for the "personal service, advertisement, telegram, telephone, letter, printed or written matter, or other service, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation").
[566] 5 U.S.C. § 601-612.
[567] 5 U.S.C. § 605.
[568] 5 U.S.C. § 609.

type of small entities that may be affected. Under SBREFA, EPA must analyze proposed regulations for significant impacts on a substantial number of small entities ("SISNOSE"). If EPA concludes that the proposed rule has no SISNOSE, then it does not need to conduct a SBREFA/RFA analysis. If it does not conduct a SBREFA/RFA analysis, then it must publish a certification and its justification in the *Federal Register*.

Regrettably, the Agencies have bypassed the safeguards of the RFA by certifying that no SISNOSE will occur with the proposed rule to define waters of the U.S. under the Clean Water Act.[569] When certifying no SISNOSE, SBREFA requires the Agencies to include the factual basis for the certification, which is subject to judicial review under an arbitrary and capricious standard.[570] According to SBA guidance, an adequate "factual basis" for a "no SISNOSE" certification should include, at a minimum:

1. Description and number of affected entities under the rule;

2. The estimated economic impacts on small entities subject to the rule;

3. Criteria for determining whether the estimated impacts will be "significant" (*e.g.*, results in insolvency or has a disproportionate effect on small businesses);

4. Criteria for determining whether any estimated significant impacts will affect a "substantial" number of small entities (*e.g.*, small businesses as a percentage of entities significantly affected or total number of affected small businesses);

5. A description of the assumptions and uncertainties used in the economic impacts analysis; and

6. A clear certification statement.[571]

Rather than complete this exercise and properly analyze all six factors, the Agencies attempt to justify their SISNOSE by stating, "The scope of regulatory jurisdiction in this proposed rule is narrower than that under existing regulations . . . Because fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required."[572] The Agencies then apparently use this "fact" as evidence as to why no further inquiry regarding the required six factors is included. NAHB disagrees, as the "factual basis" for supporting this certification is sorely lacking.

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[569] 79 Fed. Reg. at 22,220.
[570] *Southern Offshore Fishing Ass'n v. Daley*, 55 F.Supp. 2d 1336 (M.D. Fla. 1999).
[571] SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (May 2003) ("SBA RFA Guidance") at 8-10.
[572] 79 Fed. Reg. at 22,220.

For example, there is little evidence that the Agencies even considered, much less conducted any analysis regarding impacts to small businesses specific to this rulemaking. In developing the robust factual basis for a no SISNOSE certification, one determination (numbers 3 and 4 above) is whether the estimated impacts will be "significant" and if they will affect a "substantial" number of small entities. In doing so, EPA guidance suggests that SISNOSE *clearly* exists when the EPA rule creates compliance costs equal to or greater than 3% of sales[573] for 1000 small business entities or for greater than 20% of the regulated industry.[574] Conversely, EPA guidance suggests that *clearly* no SISNOSE exists if the rule creates compliance costs below 1% of sales for 100 small business entities or for less than 20% of the regulated industry. Rules with impacts falling between these clear extremes may require further analysis before they can be certified as having or not having SISNOSE. Such further analyses include, for example, analyzing cost pass-through, examining profits or profit margins, measuring the financial health of entities, and comparing relative impacts on small entities versus large entities.[575] The Agencies have produced no evidence of having performed any of these tests or analyzed any of these outcomes, yet have certified that this rule will have no significant economic impact on a substantial number of small entities absent any factual data and amid significant evidence to the contrary.

NAHB is not alone in its sentiments regarding the Agencies' wrongful certification. Indeed, the U.S. Small Business Administration (SBA) Office of Advocacy (Advocacy), the independent voice for small businesses and the watchdog for the RFA, believes "EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act . . . because it would have direct, significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that EPA conduct a [SBAR] panel before proceeding any further with this rulemaking."[576]

ii. Completing an Initial Regulatory Flexibility Analysis would have Revealed Significant Impacts and Triggered a Small Business Advocacy Review Panel.

When an agency issues a rulemaking proposal, the RFA requires it to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) which will "describe the impact of the proposed rule on small entities."[577] Specifically, the IRFA is to address the reasons then agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable

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[573] Percent revenue can be used as an alternative to sales, where sales data are not available. Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act (November 2006) (hereinafter, RFA Guidance for EPA Rulewriters) Table 2 at 24.
[574] *Id.* at 21-29. Similar tests are recommended for assessing impact on small governmental jurisdictions (annualized compliance costs as percentage of annual government revenues) and small nonprofit organizations (annualized compliance costs as percentage of annual operating expenditures).
[575] *Id.* at 29-30, 32; *see also* SBA RFA Guidance at 17.
[576] Small Business Administration Office of Advocacy Comment on "Definition of 'Waters of the United States' Under the Clean Water Act" Proposed Rule (October 1, 2014) at 1.
[577] 5 U.S.C. § 603(a).

statutes which minimize any significant economic impact of the proposed rule on small entities.[578]

Given the vast impacts stemming from the revised definition of waters of the United States, it is clear the Agencies should have conducted an IRFA to truly assess the impact this rule will have on small business entities. A more thorough analysis of the proposal would have revealed the disproportionate burdens that this rule places on small entities, including small home builders, and would have triggered the requirement to convene a Small Business Advocacy Review (SBAR) panel.

The home building industry is largely dominated by small businesses, with our average builder member employing 11 employees. Because the nature of the home building industry involves substantial earth-moving activities and because EPA and the Corps have historically asserted such broad jurisdiction over "waters of the United States," NAHB members must often obtain CWA Section 402 permits and meet state Section 303(d) requirements to be allowed to discharge stormwater into a "water of the United States" and Section 404 dredge and fill permits for their home building projects. Under the expanded "waters of the United States" definition in the proposed rule, the number of permits home builders need to obtain will increase substantially, along with associated permit fees, costly project delays, and expensive mitigation and avoidance costs. Unfortunately, the compliance burdens these new requirements will impose will be significantly greater for small businesses. It was the recognition of these disproportional impacts that led Congress to enact the RFA in the first place, including the requirement to obtain input from small businesses *prior* to publishing a proposed rule.

Importantly, if an agency completes an IRFA, it must also convene a Small Business Advocacy Review (SBAR) panel, made up of representatives from EPA, Advocacy, Office of Management and Budget, and small entities. The purpose of the SBAR panel process is to collect information and feedback from the small entity representatives (SERs) on different regulatory approaches being considered by the agency so that the agency can find less onerous ways to regulate small entities while still achieving the goal of its regulation. A report of the panel's findings is issued. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required if the panel report warrants any changes.[579]

For a rule of this magnitude, the small business voice must be heard, yet the Agencies have failed to provide that platform. Indeed, after largely ignoring small entities throughout this rulemaking process, EPA invited selected small entity representatives to participate in a meeting, that was held just one week before the then-October 20th comment deadline, to "provide input" on the proposed rule. The meeting was held October 15, 2014, at EPA headquarters, but without Corps staff present. This was too little too late. As in the past,[580] invitations to this meeting were sent to a very limited list of small entity participants. What's more, the meeting was not

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[578] 5 U.S.C. § 603(c).
[579] 5 U.S.C. § 609(b) (1) through (6)
[580] As explained in EPA's "Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of 'Waters of the United States,'" EPA held one small entity outreach meeting to discuss the 2011 Draft Guidance. The 2011 meeting was open to only a limited number of participants and EPA has wholly ignored the feedback it received from small business entities during that meeting.

open to the public. Ultimately, the meeting was a feeble attempt by the Agencies to give the appearance of engaging with small entities – it was no more than window dressing. In no way does it satisfy the Agencies' obligations under SBREFA to consider impacts of the proposed rule on small businesses or to obtain input on a number of options.

NAHB asks the Agencies, in light of their wrongful certification of the proposed rule under the RFA, to: 1) acknowledge the proposed rule will have significant adverse economic impacts on a substantial number of small entities; 2) withdraw the proposed rule; 3) conduct an initial regulatory flexibility analysis and associated Small Business Advocacy Review panel; and 4) consider a less burdensome alternative interpretation of the definition of "water of the United States" before proposing a new rule.

c. The Agencies Failed to Comply with Executive Order 12,866.

The proposed rule fails to comply with Executive Order (E.O.) 12,866, entitled "Regulatory Planning and Review,"[581] which lays out the basic processes and considerations for federal rulemakings. Pursuant to E.O. 12,866, each agency is to identify and assess available alternatives to direct regulation and alternative forms of regulation to reduce costs and burdens. Agencies must also assess the costs and benefits of proposed regulations and only adopt those whose benefits justify their costs. Importantly, E.O. 12,866 also requires agencies to base regulatory decisions "on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation."[582]

Unfortunately, the proposal falls short on all counts. EPA's Economic Analysis for the proposed rule, for example, is cursory, grossly underestimates the costs, and is not based on the best reasonably obtainable economic information. Likewise, as discussed in Section IX., the proposed rule is not based on the best reasonably obtainable scientific information. Equally troubling, despite the Order's clear directive that agencies' avoid undue interference with state, local, and tribal governments, the proposal meddles with the federal/state balance and confuses the question of which entity ultimately has authority over any given water.

E.O. 12,866 also requires each agency to "draft its regulations to be simple and easy to understand, with the goal of minimizing the potential uncertainty and litigation arising from such uncertainty."[583] As highlighted throughout these comments, the language of the proposed rule is far from clear. It is vague and ambiguous and invites litigation arising from the substantial uncertainty and agency deference.

The Agencies have not complied with E.O. 12,866 and must withdraw and revise the proposed rule to meet its requirements.

d. The Agencies Failed to Comply with Executive Order 13,132.

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[581] 58 Fed. Reg. 51,735 (Sept. 30, 1993).
[582] *Id.* § 1(b)(7).
[583] *Id.* § 1(b)(12).

Executive Order (E.O.) 13,132, entitled "Federalism," was issued by President Clinton in 1999 with the objective of guaranteeing the Constitution's division of governmental responsibilities between the federal government and the states. E.O. 13,132 establishes requirements for policies that have "federalism implications," meaning those with "substantial direct effects on the States."[584] In short, E.O. 13,132 requires federal agencies to consult with state and local officials on policies that have federalism implications and determine whether federal objectives can be attained by other means. Importantly, this consultation is to take place early in the process of developing the proposed regulation.

In an effort to subvert the requirements of E.O. 13,132, the Agencies state that the proposed rule "will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."[585] This is simply not true. The proposed rule defines those waters subject to federal jurisdiction of the CWA. The statute is, in fact, co-administered by the states. It was the intent of Congress to preserve states' rights and responsibilities to jointly administer the Act with the federal agencies: "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 . . . of land and water resources . . ."[586] The statute continues, "It is further policy of Congress that nothing in this [Act] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[587] With the proposed rule, the Agencies wrongfully interpret "waters of the United States" to include all intrastate and interstate waters, including ephemeral streams and isolated wetlands that may be dry a majority of the time, thereby disregarding congressional intent and undermining states' responsibilities and rights to control land and water resources within their borders.

Despite and in apparent disregard for the clear federalism implications, EPA and the Corps have proposed today's rule without sufficient consultation with the states as required under E.O. 13,132. By expanding the definitions of "tributary," "adjacent waters," and "other waters," the federal Agencies will undoubtedly impinge upon state authority to manage their land and water resources, as many waters that were once within the purview of the states will now become federalized. As co-regulators of water resources, states must be fully consulted and engaged in any process that will affect the management of their waters. While EPA and the Corps have provided briefings to inform states that rulemaking is underway, the conversations to date have not been sufficiently detailed to constitute the substantive, collaborative consultation as required by E.O. 13,132. In fact, EPA's idea of consultation consists of "three in-person meetings and two phone calls in the fall and winter of 2011."[588] A proposed rule of this magnitude and with obvious federalism implications demands more.

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[584] 64 Fed. Reg. at 43,255 (Aug. 10, 1999).
[585] 79 Fed. Reg. at 22,220.
[586] 33 U.S.C. § 1251(b).
[587] 33 U.S.C. § 1251(g).
[588] 79 Fed. Reg. at 22,221.

What is even more troubling is the fact that many states raised concerns about the process far before the rule was even published – in other words, while the Agencies had time to address them, but EPA and the Corps failed to act. Western states, in particular, voiced concerns that individual states would not have the opportunity to provide substantive feedback until after EPA and the Corps had developed a proposed rule and published it for public comment in the Federal Register.[589] The substantial differences in hydrology, geography, and legal frameworks in the West require significant consultation with each state to determine how the proposed rule will be implemented in order to avoid misinterpretations and unintended consequences. The potential for unintended consequences further underscores the need for EPA and the Corps to avail themselves of the states' on-the-ground knowledge of their unique circumstances by giving as much weight and deference as possible to the states' collective and individual comments, concerns, priorities, and needs. It is not only Western states who believe consultation has been inadequate. The Association of Clean Water Administrators (ACWA), which has representatives from all fifty states, raised concerns that the Agencies did not adequately consulted with the states early on in the rulemaking process.[590]

EPA and the Corps have yet to adequately engage the states regarding state needs, perspectives, or expertise in developing the proposed rule. The Agencies should have conducted this type of consultation with the states prior to beginning the rulemaking process and before submitting a proposed rule to OMB. It is exactly this end result that E.O. 13,132 was designed to avoid. The Agencies must now withdraw the proposed rule and conduct the necessary collaboration and consultation with states as required by E.O. 13,132.

e. The Agencies Failed to Comply with Executive Order 13,536.

The proposed rule fails to comply with Executive Order (E.O.) 13,563, titled "Improving Regulation and Regulatory Review."[591] That order states: "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[592] It specifically calls for regulations to be cost effective and cost justified, transparent, coordinated, flexible and science driven, and largely instructs the agencies to comply with E.O. 12,866, which was issued in 1993 and has historically provided the blueprint for agencies to follow when considering and adopting rules.

Further, recognizing the regulatory burdens suffered by small businesses and the need to reduce their impacts, President Obama simultaneously issued E.O. 13,563 and the *Memorandum on Regulatory Flexibility, Small Business, and Job Creation*, which directs the agencies to fully consider the needs of, and impacts of their actions on, small businesses. For example, the Memorandum states: "[e]ach agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small

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[589] Letter from Western Governors' Association Chairman Gov. John Hickenlooper and Vice Chairman Gov. Brian Sandoval to the Hon. Gina McCarthy and the Hon. Jo-Ellen Darcy (March 25, 2014), *available at* http://westgov.org/component/docman/doc_download/1794-clean-water-act-rulemaking?Itemid=53

[590] Letter from Michael Fulton (ACWA President) to Mr. Ken Kopocis and Ms. Jo Ellen Darcy, Re: *Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule: Docket ID No. EPA–HQ–OW–2011–0880* (Nov. 12, 2014).

[591] 76 Fed. Reg. at 3,821 (Jan 21, 2011).

[592] *See* E.O. 13,563 §§ 2, 5.

communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." To do so, the Memorandum directs all federal agencies, when proposing new regulations, to include regulatory flexibilities for small businesses such as extended compliance dates, simplified reporting requirements, or even regulatory exemptions. Furthermore, the Memorandum states, "whenever an executive agency chooses, for reasons other than legal limitations, not to provide such flexibility to a proposed or final rule that is likely to have a significant economic impact on a substantial number of small entities, it should explicitly justify this decision not to do so in the explanation that accompanies that proposed or final rule."[593]

Clearly, the Memorandum is intended to remind the federal agencies of their statutory obligations under the RFA and under E.O. 13,563 to fully consider and afford regulatory flexibilities to small businesses. Moreover, the Memorandum goes a step further to mandate that whenever a federal agency fails to provide flexibility to small businesses under a proposed or final rule, it must justify why it did not do so. The Memorandum clearly recognizes the crucial role small businesses play in any future economic recovery and instructs all federal agencies to ensure their existing and future regulations are done in a cost-effective, innovative, and flexible manner so as not to stifle economic growth among small businesses.

In drafting the proposed rule to define "waters of the United States," however, it appears that the Agencies chose to ignore or avoid their obligations under E.O. 13,563 and the Memorandum. Specifically, as noted in Section IX., the proposed rule is not supported by the science. And fundamentally, as noted throughout these comments, the proposed rule will *not* provide predictability or reduce uncertainty. Moreover, there is no evidence that the Agencies made a reasoned determination that the proposed rule's environmental benefits (if any) will justify its jobs, development, and consumer cost burdens. Additionally, it is clear that the Agencies have not tailored the proposed rule to impose the least burden on society nor have they taken into account the cost of cumulative regulations affecting stakeholders.

Equally problematic, there are no considerations for small businesses. A 2010 study funded by the U.S. Small Business Administration examined the proportional costs of federal regulations upon smaller firms (*i.e.*, firms with 20 or fewer employees) as compared to larger firms.[594] The study found that these firms pay 40 percent more in compliance costs per employee than firms with more than 500 workers.[595] The researchers found that this disproportionate compliance cost results from the fact that most federal environmental regulations impose identical recordkeeping, reporting, and compliance costs on all firms. Smaller companies, including most home builders, cannot easily spread the compliance costs across a larger number of regulated activities and typically must rely on expensive outside professional consultants to help them demonstrate compliance with technical permitting and reporting requirements. Unfortunately, the proposed rule does nothing to alleviate these challenges and, in fact, will only make them

[593] 76 Fed. Reg. at 3,828 (Jan. 21, 2011).
[594] Crain, N.V. and Crain, M.W., *The Impact of Regulatory Costs on Small Firms*, September 2010, at iv, retrieved on November 13, 2014, from http://www.sba.gov/sites/default/files/advocacy/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full)_0.pdf.
[595] *Id.* at 9.

worse. The proposed rule is riddled with ambiguities and prospective implementation problems. The Agencies have not crafted a revised definition of "waters of the United States" that "imposes the least burden on society" as required by E.O. 13,563 or that adequately considers and minimizes impacts on small businesses. Such a result is unacceptable.

f. The Agencies Violated the Federal Information Quality Act.

To ensure the consistent use of high quality data and information in government decision-making, federal information quality requirements were adopted by Congress in § 515 of the 2001 Treasury and General Government Appropriations Act.[596] The Information Quality Act (IQA) was supplemented by OMB's Information Quality Guidelines, which served as a model for each agency's implementing guidelines. Under OMB's Information Quality Guidelines, "influential information" (*i.e.*, information having or likely to have important public policy or private sector impacts) must include sufficient "transparency" about data and methods such that the analytic results are "reproducible" by a qualified member of the public. Also, influential information concerning risks to human health, safety, or the environment must meet the new more stringent standard of quality from the 1996 Safe Drinking Water Act.[597]

Under this requirement, the Agencies are required to use only the "best available, peer reviewed science" and "best available methods."[598] For this reason, they must ensure that any technical or scientific studies or information used in developing any new regulation meets this data quality standard. Regrettably, much of the information the Agencies have used to support the rule and that has been disseminated before and after the proposed rule was published violates the IQA. Examples include:

- **The Connectivity Report is an incomplete draft and does not meet the "objectivity" definition.**

  According to the IQA, federal agencies must ensure and maximize the objectivity of the information they disseminate. Objectivity refers to whether disseminated information is being presented in an "accurate, clear, *complete*, and unbiased manner."[599] The Agencies claim the proposed rule is supported by the Connectivity Report, which underscores the fact that the Report is indeed "influential scientific information."[600] Yet the Report is an *incomplete draft* and thus does not satisfy the objectivity requirement of the IQA. The Agencies should not have proposed the rule until the influential scientific basis supporting it was fully reviewed by the SAB and finalized.

- **The inclusion of all waters in the riparian area and floodplain as *per se* jurisdictional is not supported by the scientific literature. The discussion of riparian**

[596] Information Quality Act of 2001, Pub. L. 106-554 (2001).
[597] 42 U.S.C. § 300g-1(b)(3)(A) and (B).
[598] *See, e.g.*, U.S. Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008 (October 2002) at 22..
[599] 67 Fed. Reg. at 8,459 (Feb. 22, 2002).
[600] *Id.* at 8,452.

areas and floodplains in the draft Connectivity Report is biased and of limited utility.

Under the IQA, the information disseminated by any federal agencies must be presented in an "unbiased manner."[601] Additionally, the federal agencies are required to ensure and maximize the "utility" or the "usefulness of the information" they distribute. Unfortunately, the information pertaining to riparian areas and floodplains within the draft Connectivity Report is both biased and of little utility. Although the proposed rule would assert categorical jurisdiction over waters located within the riparian area or floodplain of a any (a)(1) through (5) water, the portion of the draft Connectivity Report addressing the impact of riparian areas and floodplains on downstream waters highlights findings from studies of riparian areas and floodplains, *not necessarily wetlands or waters therein*. Indeed, the authors of the draft Connectivity Report admit, "Although ample literature is available on riparian and floodplain wetlands . . . most papers on riparian areas and floodplains *do not specify whether the area is a wetland* . . . This situation creates a dilemma, because limiting our literature review to papers that explicitly describe the area as a wetland would exclude a major portion of this body of literature and greatly restrict our discussion of wetland science. Alternatively, if we include papers that do not explicitly classify the area as a wetland, we could mistakenly incorporate results that are relevant only to upland riparian areas. Our response to this dilemma was to survey the riparian literature broadly and include any results and conclusions that we judged were pertinent to riparian/floodplain wetlands."[602]

By claiming certain studies were pertinent to riparian/floodplain wetlands without the necessary data included in the original studies, the authors have biased this portion of the study. How did the authors of the Connectivity Report determine which studies were and were not pertinent? Indeed, "*the fact that the use of original and supporting data and analytic results have been deemed 'defensible' by peer-review procedures does not necessarily imply that the results are transparent and replicable.*"[603]

Additionally, the conclusions the draft Connectivity Report authors reach about the importance of riparian and floodplain wetlands on downstream waters are of limited utility because these "findings" are based on studies that may or may not even have included wetlands. This is *not* useful information. Perhaps most egregious, however, is the fact that the authors of the Report misrepresent their findings in the Report's Summary of Major Conclusions,[604] and the Agencies use this misinformation in the

[601] *Id.* at 8,459.
[602] Draft Connectivity Report at 5-3, 5-5 (emphasis added).
[603] 67 Fed. Reg. at 8,455.
[604] In the Summary of Major Conclusions, the Draft Connectivity Report at 1-3 states, "Wetlands and open-waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers (e.g., wetlands and open-waters in riparian areas and floodplains) are physically, chemically, and biologically connected with rivers via the export of channel-forming sediment and woody debris, temporary storage of local groundwater that supports baseflow in rivers, and transport of stored organic matter. They remove and transform excess nutrients such as nitrogen and phosphorus (P). They provide nursery habitat for breeding fish, colonization opportunities for stream invertebrates, and maturation habitat for stream insects. Moreover, wetlands in this landscape setting serve an important role in the integrity of downstream waters because they also act as sinks by retaining floodwaters,

preamble of the proposed rule, stating, "The Report . . . concludes that wetlands and open waters in floodplains of streams and rivers and in riparian areas . . . have a strong influence on downstream waters."[605] In turn, they use this as support to include all waters (not just wetlands) located within the riparian area or floodplain of any (a)(1) through (5) as automatically jurisdictional. This is clearly not supported by the studies of riparian areas and floodplains included in the draft Connectivity Report.

- **The information the Agencies have disseminated regarding the non-riparian area and non-floodplain waters is contradictory.**

  Even if a water falls outside of the subjectively defined riparian area or floodplain, it can still meet the Agencies' definition of "neighboring" and, in turn, "adjacent" if it has a "shallow subsurface hydrologic connection" or "confined surface hydrologic connection" to an (a)(1) through (5) water.[606] This assertion is problematic, in that the proposed rule is purported to be based on the conclusions of the draft Connectivity Report, yet the authors of the Report clearly state, "The literature we reviewed does not provide sufficient information to evaluate or generalize about the degree of connectivity (absolute or relative) or the downstream effects of wetlands in unidirectional landscape settings [i.e., non-riparian area and non-floodplain waters]."[607] Adding to the contradiction, the Agencies cite verbatim the draft Connectivity Report statement regarding the lack of sufficient information to generalize about the impact of non-floodplain wetlands on downstream waters in Appendix A of the proposed rule.[608] By disseminating contradictory information, the Agencies have only added to the confusion surrounding the proposed rule. Indeed, this information is neither accurate nor clear and thereby violates the IQA.[609]

- **The supposed peer review of the draft Connectivity Report was hijacked.**

  The agency's IQA guidelines typically require the use of the "best available science" that relies on "peer-reviewed studies with data collected by standard and accepted methods." Under both OMB's and EPA's Information Quality Guidelines, information that has been subject to formal peer review is presumed to be of sufficient quality to meet the test of objectivity under the guidelines. This requirement bolsters EPA's Peer Review Policy that generally requires independent peer review of all scientific or technical work products that are used to support a significant rulemaking such as establishing nationally-applicable definition of waters of the United States.

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sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters." Yet, the body of the Draft Connectivity Report at 5-3, 5-4 states that the authors are not even certain the riparian area and floodplain studies they summarize even included wetlands (let alone open-waters).

[605] 79 Fed. Reg. at 22,196.

[606] *Id.* at 22,263.

[607] Draft Connectivity Report at 1-10, 1-11.

[608] 79 Fed. Reg. at 22,225.

[609] *See* 67 Fed. Reg. at 8,459 (Information disseminated by any federal agency must be "presented in an accurate, clear, complete, and unbiased manner").

Unfortunately, although EPA assembled the SAB panel to review and provide input on the draft Connectivity Report, the limited scope of the panel's review, EPA's reluctance to revise its charge questions, and the Agency's refusal to address the additional questions posed by Members of Congress only ensured that the peer review would not be credible. As a result, much, if not most, of the scientific, technical, and economic information being disseminated by the Agencies in this rulemaking proposal, including the draft Connectivity Report and Economic Analysis does not meet the information quality guidelines and has not been independently peer reviewed.

- **The Economic Analysis the Agencies use to support the proposed rule does not meet the "objectivity" requirement of the IQA and is of limited utility.**

According to the IQA, "'objectivity' involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods."[610] Unfortunately, the information disseminated in the Economic Analysis is biased and far from objective.

First, EPA only reviewed how the proposed rule would change jurisdiction and costs associated with the "other waters" category relative to current regulatory policy. In an exercise, the Corps performed a sample review of project files from the Corps' Operation and Maintenance Business Information Link Regulatory Module (ORM2) database's "isolated waters" category. The Agencies did not do a similar sample review to determine how jurisdiction might change for other jurisdictional categories of waters (i.e., "tributaries" or "adjacent waters," as newly and broadly defined). The economic impacts associated with these categorically jurisdictional waters are omitted from EPA's analysis.

Second, EPA biased the analysis by using an incorrect baseline to estimate the economic impacts of the proposed rule. In the preamble, the Agencies claim that because "this proposed rule is narrower than that under the existing regulations . . . fewer waters will be subject to the CWA under the proposed rule than are subject to regulation under the existing regulations," and "[a]s a consequence , this action . . . will not have a significant adverse economic impact on a substantial number of small entities . . ."[611] The "existing regulations" that the Agencies reference here is the 1986 rule defining "waters of the United States."[612] Yet, in EPA's Economic Analysis, the Agencies assess the regulation with respect to current practice under the 2008 *Rapanos* Guidance and determine the rule will increase CWA jurisdiction by approximately 3%. The Agencies' claims in the preamble and the Economic Analysis contradict one another. The proper baseline from which to assess the proposed rule's economic impact, as guidance from OMB's Office of Information and Regulatory Affairs (OIRA) substantiates, is that of current practice. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis and states that "[t]he baseline should be the best assessment of the

[610] *Id.* at 8,459.
[611] 79 Fed. Reg. at 22,220.
[612] 51 Fed. Reg. at 41,206.

way the world would look absent the proposed action."[613] The 1986 regulation has been abrogated by both *SWANCC* and *Rapanos* and is no longer in use. Indeed, the Agencies are currently operating under guidance issued in December 2008, which sought to bring jurisdictional determinations in line with these cases.[614] By using the 1986 regulation as the baseline to certify the proposed rule will not have a significant economic impact on a substantial number of small entities grossly underestimate the costs associated with the proposed rule.

Third, EPA biased the economic analysis of CWA Section 404 costs by relying on permitting cost data that are nearly 20 years old and not adjusted for inflation. It likewise has provided incomplete information, as EPA admits that the costs of time delays and avoiding and minimizing impacts is not included. Ultimately, the biased nature and the use of incomplete data in the Economic Analysis fail to render it useful in supporting the proposed rule. In a review of EPA's Economic Analysis of the proposed rule, Dr. David Sunding highlighted the limited utility of the study, stating, "the errors and omissions in EPA's study are so severe as to render it virtually meaningless."[615]

- **The Agencies have disseminated off the record information in the form of blog posts and Q & A's that add to the confusion surrounding the proposed rule and are of limited utility.**

  During the public comment period, the Agencies have published official agency blog posts and posted multiple Q and A's about the proposed rule. This information has, at times, been at odds with the information in the proposed rule itself, has been revised without explanation, or has provided new statements and definitions regarding the scope of jurisdiction under the CWA that are not included in the rulemaking documents.

  For example, following the release of USGS maps developed for the EPA and depicting the extent of perennial, intermittent, and ephemeral streams across the United States,[616] Tom Reynolds, EPA Associate Administrator of the Office of Public Affairs, stated in a blog post entitled "Mapping the Truth," "EPA has never and is not now relying on maps to determine jurisdiction under the Clean Water Act . . . While these maps are useful tools for water resource managers, they cannot be used to determine Clean Water Act jurisdiction – now or ever."[617] And yet, the preamble of the proposed rule states that "tributary connection[s] may be traced using . . . U.S. Geological Survey maps . . ."[618] These two statements are in direct conflict with one another, leaving the public and the regulated community unclear as to how EPA and Corps use existing USGS maps to help determine CWA jurisdiction.

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[613] Office of Management and Budget, Circular A-4, Subject: Regulatory Analysis (September 17, 2003) at 15, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf
[614] *See* 2008 *Rapanos* Guidance.
[615] Sunding Review of EPA's Economic Analysis at 2.
[616] *See* http://science.house.gov/epa-maps-state-2013#overlay-context
[617] Tom Reynolds, Mapping the Truth, EPA Connect Blog (Aug. 28, 2014), *available at* http://blog.epa.gov/epaconnect/2014/08/mapping-the-truth/
[618] 79 Fed. Reg. at 22,202.

In another official EPA blog post, Nancy Stoner, then Acting Assistant Administrator for the Office of Water, originally wrote, "Any existing jurisdictional determination issued by the Corps will continue to be valid, and we will not re-review existing, valid determinations."[619] Now, without any indication or notice that the June 30 Q & A document has been revised, the blog post no longer contains that statement. Have the Agencies changed their position on grandfathering? Will existing jurisdictional determinations be grandfathered or will they not be?

In September 2014, EPA posted a Q & A about the proposed rule on its website.[620] In the document, EPA defines "upland" and stresses that MS4s and green infrastructure features are not waters of the United States.[621] Yet, none of this information is included in the proposed rule itself. What then is the utility of this document? Indeed, it carries no regulatory clout.

Ultimately, by making available blog posts and Q and A documents that contradict language in the proposed rule itself, change without notice or explanation, and add critical new information regarding the scope of CWA jurisdiction, the Agencies have disseminated information that does not paint an "accurate, clear, [and] complete" picture as required by the IQA.[622] What's more, if these are intended to be influential pieces of information regarding CWA jurisdiction, they will be of limited utility unless included in the proposed rule.

The collection and evaluation of data is the cornerstone to developing and implementing any meaningful and legitimate regulation. Likewise, those data must be of sufficient quality and transparency that the public can provide meaningful input and comment during the rulemaking process. In fact, the Obama Administration has taken great strides to improve the transparency, quality and legitimacy of the data and information upon which regulations are based. Unfortunately for the proposed rule, the Agencies have failed on all counts. Because of the significant and persistent violations of the IQA, the entire rulemaking is in jeopardy. These countless failings must be corrected before the Agencies contemplate any final rule.

XI. Conclusion

There is no doubt that aquatic ecosystems including wetlands, navigable waters, and non-navigable waters serve important ecological, economic, and societal functions. Their protection is necessary and has long been provided by a cooperative effort between the federal government and the individual states as described by Congress in 1972 when it passed the Clean Water Act into law. For the first time in nearly 30 years, however, EPA and the Corps are proposing to change the regulatory definition of "waters of the United States" and in turn expand the federal scope of jurisdiction under the Act. While the Agencies assert the proposed definitional change

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[619] Nancy Stoner blog entry, Setting the Record Straight on Waters of the U.S. (June 30, 2014), *available at* http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/
[620] *See* September 2014 Q & A.
[621] *Id.* at 5, 6.
[622] 67 Fed. Reg. at 8,459.

clarifies the scope of the Act and does not expand federal jurisdiction, in fact today's proposal introduces entirely new regulatory definitions for "tributary," "neighboring," "floodplain," "riparian area," and "significant nexus" that are riddled with ambiguities that will increase regulatory uncertainty and yet so expansive as to sweep countless ephemeral drainage features, stormwater treatment devices, man-made ditches, and isolated ponds – waters that have historically been protected as waters of the *states* – into the federal regulatory net.

For years, landowners and regulators alike have been saddled with continued uncertainty regarding the scope of federal jurisdiction under the CWA. However, the proposed rule would vastly increase federal regulatory power over private property and trigger issues and results that the Agencies have not even considered under the proposed rule. Such proposed changes are not consistent with the original legislative intent of the CWA, represent a marked departure from Supreme Court decisions, and raise significant constitutional, procedural, and practical questions. If implemented, new responsibilities will be imposed, costs borne, and the rights and responsibilities of private property owners curtailed by the new regulations, leading to further and unwarranted impacts on the housing industry, local economies, and state prerogatives.

For these reasons, NAHB strongly believes that the scope of federal authority under the CWA must be determined by Congress. At a minimum, given the numerous additional shortcomings associated with today's proposal, the Agencies must withdraw the proposed rule and repropose it only after its many constitutional, judicial, legal, economic, scientific, practical, and procedural infirmities have been addressed and rectified.