

August 13, 2018

**Via regulations.gov**

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Re: Waters Advocacy Coalition Comments on the Environmental Protection Agency and U.S. Army Corps of Engineers Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodify the Pre-Existing Rules, 83 Fed. Reg. 32,227 (July 12, 2018); Docket No. EPA-HQ-OW-2017-0203

To Whom It May Concern:

The Waters Advocacy Coalition (“WAC”) submits the attached comments in response to the Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and Recodify the Pre-Existing Rules, 83 Fed. Reg. 32,227 (July 12, 2018).

WAC appreciates the opportunity to comment on this important matter.

Sincerely,



Kerry L. McGrath

Attachment



**Comments of the Waters Advocacy Coalition  
on the Environmental Protection Agency and U.S. Army Corps of Engineers  
Supplemental Notice of Proposed Rulemaking to Repeal the 2015 Clean Water Rule and  
Recodify the Pre-Existing Rules, 83 Fed. Reg. 32,227 (July 12, 2018)  
Docket No. EPA-HQ-OW-2017-0203**

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**I. Introduction**

The Waters Advocacy Coalition (“WAC” or “Coalition”) writes to provide comments in support of the Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, “the Agencies”) supplemental proposed rulemaking to repeal the 2015 Clean Water Rule (“2015 Rule” or “Rule”) and recodify the definition of “waters of the United States” (“WOTUS”) in place prior to the 2015 Rule. 83 Fed. Reg. 32,227 (July 12, 2018) (“Supplemental Repeal Notice”).

The Coalition represents a large cross-section of the nation’s construction, real estate, mining, manufacturing, forestry, agriculture, energy, wildlife conservation, and public health and safety sectors – all of which are vital to a thriving national economy and provide much needed jobs. The Coalition’s members are committed to the protection and restoration of America’s wetlands and waters, and possess a wealth of expertise directly relevant to the Agencies’ supplemental proposal to repeal the 2015 Rule.

The Coalition and its members have a long history of involvement on the critical issues concerning the scope of federal jurisdiction under the Clean Water Act (“CWA” or “Act”). We submitted robust comments on the Agencies’ 2015 Rule,<sup>1</sup> and have submitted comments on the Agencies’ previous rulemakings and guidance documents on the WOTUS definition, including: the 2011 Draft Guidance on Identifying Waters Protected by the CWA;<sup>2</sup> the 2008 Guidance Regarding CWA Jurisdiction After *Rapanos*;<sup>3</sup> the 2003 Advanced Notice of Proposed

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<sup>1</sup> Waters Advocacy Coalition, Comments on the Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, (Nov. 13, 2014, corrected Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-17921 (“WAC Comments on 2015 Rule”).

<sup>2</sup> Waters Advocacy Coalition, et al., Comments in Response to the Draft Guidance on Identifying Waters Protected by the Clean Water Act (July 29, 2011), Doc. No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011).

<sup>3</sup> American Farm Bureau Federation, et al., Comments in Response to the Guidance Pertaining to Clean Water Act Jurisdiction After the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*, (Jan. 22, 2008), Doc. No. EPA-HQ-OW-2007-0282-0204.

Rulemaking on the CWA Regulatory Definition of WOTUS;<sup>4</sup> and the original notice of proposed rulemaking to repeal the 2015 Rule.<sup>5</sup>

Many individual members of the Coalition have also submitted comments on these rulemakings and guidance documents on the definition of WOTUS. In all of these comments, we have consistently raised concerns with expansive theories of CWA jurisdiction that ignore the limits set by Congress, which have been recognized by the Supreme Court, and fail to preserve the States' traditional and primary authority over land and water use.

Members of the Coalition include:

Agricultural Retailers Association  
American Exploration & Mining Association  
American Exploration & Production Council  
American Farm Bureau Federation  
American Forest & Paper Association  
American Gas Association  
American Iron and Steel Institute  
American Petroleum Institute  
American Public Power Association  
American Road & Transportation Builders Association  
American Society of Golf Course Architects  
Associated Builders and Contractors  
The Associated General Contractors of America  
Association of American Railroads  
Association of Oil Pipe Lines  
Club Managers Association of America  
Corn Refiners Association  
CropLife America  
Edison Electric Institute  
The Fertilizer Institute  
Florida Sugar Cane League  
Golf Course Builders Association of America  
Golf Course Superintendents Association of America  
The Independent Petroleum Association of America  
Industrial Minerals Association – North America  
International Council of Shopping Centers  
International Liquid Terminals Association  
Leading Builders of America

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<sup>4</sup> Foundation for Environmental and Economic Progress, et al., Comments in Response to the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” (Apr. 16, 2003), Doc. Nos. EPA-HQ-OW-2002-0050-1816 (comments), -1829 (Exhibits), -1835 (Appendix I, corrected), -1832 (Appendix II).

<sup>5</sup> Waters Advocacy Coalition, Comments on the Proposed Repeal of 2015 Clean Water Rule and Recodification of Pre-Existing Rules (Sept. 27, 2017), Doc. No. EPA-HQ-OW-2017-0203-11027 (“WAC Comments on 2017 Proposed Repeal”).

National Association of Home Builders  
National Association of Manufacturers  
National Association of REALTORS®  
National Association of State Departments of Agriculture  
National Cattlemen’s Beef Association  
National Club Association  
National Corn Growers Association  
National Cotton Council  
National Council of Farmer Cooperatives  
National Industrial Sand Association  
National Mining Association  
National Multifamily Housing Council  
National Oilseed Processors Association  
National Pork Producers Council  
National Rural Electric Cooperative Association  
National Stone, Sand and Gravel Association  
Public Lands Council  
Responsible Industry for a Sound Environment  
Southeastern Lumber Manufacturers Association  
Texas Wildlife Association  
Treated Wood Council  
United Egg Producers  
U.S. Chamber of Commerce

Many members of the Coalition are also signatories to an industry-wide letter<sup>6</sup> regarding the effect of the Court’s decision in *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”). That letter, which is incorporated by reference here, emphasizes that the assertion of jurisdiction over the isolated ponds at issue in *SWANCC* or other similar water features – under the 2015 Rule’s theory of what constitutes a significant nexus or any other theory – is incompatible with the statutory text and Supreme Court precedent.

The Coalition supports repealing the 2015 Rule because it reaches land and waters well beyond the Agencies’ statutory authority, ignores important limits recognized by the Supreme Court, fails to preserve the States’ authority to regulate non-navigable waters, and fails to provide needed clarity and certainty on the scope of the “waters of the United States” for both regulators and the regulated community. Repealing the 2015 Rule and recodifying the pre-existing regulations would return to the Code of Federal Regulations the regulations that existed prior to the 2015 Rule and would reflect the decisions by the U.S. District Courts for the Southern District of Georgia and the District of North Dakota to enjoin the 2015 Rule in 24 states.<sup>7</sup> While the 2015 Rule will not be applicable until February 6, 2020,<sup>8</sup> the Coalition

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<sup>6</sup> Letter from the American Farm Bureau Federation, et al. to EPA and Corps re *SWANCC* (Aug. 13, 2018).

<sup>7</sup> *Georgia v. Pruitt*, No. 2:15-cv-00079, 2018 WL 2766877 (S.D. Ga. June 8, 2018) (“*Georgia*”); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

<sup>8</sup> 83 Fed. Reg. 5,200 (Feb. 6, 2018).

encourages the Agencies to move expeditiously to repeal the 2015 Rule and recodify the pre-existing regulations to ensure consistency and regulatory certainty.

Finally, WAC notes that, although repealing the 2015 Rule and the corresponding recodification of the pre-existing regulations is necessary in the near term for clarity, there are many issues with the pre-existing regulations and guidance documents that should be addressed through a new, separate rulemaking. Accordingly, the Coalition supports a separate Step 2 rulemaking to define WOTUS in a manner consistent with the statute, case law, and principles of cooperative federalism.

## II. Background

In 2014, WAC provided comments on the Agencies' proposed rule to redefine "waters of the United States." See WAC Comments on 2015 Rule. The Coalition set forth numerous concerns about the Agencies' sweeping proposal and, in particular, its exceedance of jurisdictional limitations set by the CWA and recognized in various decisions by the Supreme Court. We recommended that the Agencies withdraw the proposed rule and propose a revised WOTUS definition that is supported by the CWA, judicial precedent, and relevant science. Nevertheless, the Agencies published the final 2015 Rule on June 29, 2015, without revisions to address the numerous concerns raised by commenters. 80 Fed. Reg. 37,054 (June 29, 2015).

Immediately following promulgation of the 2015 Rule, numerous interested parties, including 31 states, filed petitions for review, which were consolidated in the U.S. Court of Appeals for the Sixth Circuit. Many other challenges were also filed in various district courts. Every court that has reviewed the merits of the 2015 Rule has found that it is likely to be unlawful. The U.S. District Court for the District of North Dakota stayed the 2015 Rule in thirteen states<sup>9</sup> prior to its effective date. The North Dakota district court found the States were "likely to succeed" on their challenge because "it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule," and that the Rule "likely fails to meet" Justice Kennedy's significant nexus standard. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051, 1055 (D.N.D. 2015). Just weeks after the Rule became effective in the other parts of the country, the Sixth Circuit issued a nationwide stay of the Rule, finding that petitioners had demonstrated a substantial likelihood of success on the merits of their challenges to the Rule, including claims that the Rule was not validated by the science and was inconsistent with Justice Kennedy's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). See *In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015), order vacated on other grounds by *In Re U.S. Dept. of Defense*, 713 F. App'x 489 (6th Cir. 2018). The Sixth Circuit noted that the nationwide stay would "temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule." *Id.* at 808. Also, while the 2015 Rule was stayed, the Sixth Circuit ordered the Agencies to continue to implement the regulations defining the term "waters of the United States" that were in effect immediately before the effective date of the 2015 Rule. *Id.* Though "imperfect," this decades-old program provides a measure of certainty and predictability. *Id.* (describing the "familiar" pre-2015 Rule regime).

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<sup>9</sup> Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

In September 2017, in response to the Agencies' original proposed rule to repeal the 2015 Rule ("Step 1"), the Coalition filed comments in support of the Agencies' action.<sup>10</sup> In those comments, the Coalition described how the final 2015 Rule was inconsistent with Supreme Court precedent, failed to preserve the States' authority to regulate non-navigable waters, and failed to provide needed clarity and certainty regarding the scope of "waters of the United States" for both regulators and the regulated community. In November 2017, the Coalition also filed comments in response to the Agencies' "Step 2" notice seeking input from stakeholders and the public on how to revise the definition of "waters of the United States." 82 Fed. Reg. 40,742 (Aug. 28, 2017).<sup>11</sup> The Coalition recommended that the Agencies adhere to a number of specific principles as they develop a new definition, including, for example, preserving the States' primary authority over land and water use, giving effect to the operative term "navigable," and drawing reasonable and narrow bright lines for federal jurisdiction based on legal and policy considerations, informed but not dictated by the science.

As the Supreme Court considered whether the courts of appeals have original jurisdiction to review challenges to the 2015 Rule, the Agencies issued a proposed rule to add an applicability date to the 2015 Rule ("Applicability Rule") extending two years from the date of final action on the proposal. 82 Fed. Reg. 55,542 (Nov. 22, 2017). Given the uncertainty of the Sixth Circuit's nationwide stay, and to avoid the potential for confusion if the nationwide stay was lifted, the Coalition filed comments in support of the Agencies' proposal to add an applicability date. The Agencies' final rule set a new applicability date of February 6, 2020. 83 Fed. Reg. 5,200 (Feb. 6, 2018).

On January 22, 2018, the Supreme Court held that the 2015 Rule is subject to direct review in the district courts, *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 624 (2018), and the Sixth Circuit lifted the nationwide stay soon thereafter. *See In re Dep't of Def. & EPA Final Rule*, 713 F. App'x 489 (6th Cir. 2018).

As litigation resumed in the district courts, a second district court agreed that challenges to the 2015 Rule are likely to succeed on the merits. On June 8, 2018, the U.S. District Court for the Southern District of Georgia issued an order enjoining the Rule in an additional eleven states,<sup>12</sup> bringing the total number of states where the 2015 Rule cannot be applied to 24. The district court agreed with the plaintiff States, finding that they demonstrated a likelihood of success on the merits of their claims, including their claim that the 2015 Rule failed to meet the standards set forth in *Rapanos* and *SWANCC*. Indeed, even under Justice Kennedy's concurring opinion in *Rapanos*, the Southern District of Georgia found that the 2015 Rule likely went too far. Thus, as the Agencies' supplemental notice recognizes, all of the courts that have considered the merits of the 2015 Rule have indicated that it is likely to be unlawful and to exceed the Agencies' CWA authority.

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<sup>10</sup> WAC Comments on 2017 Proposed Repeal.

<sup>11</sup> Waters Advocacy Coalition, Comments on the Request for Written Recommendations Regarding the Definition of "Waters of the United States" Under the Clean Water Act" (Nov. 28, 2017), Doc. No. EPA-HQ-OW-2017-0480-0601.

<sup>12</sup> Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin.



The 2015 Rule has been stayed in 24 states, but the flawed regulatory text remains in the Code of Federal Regulations. While the Applicability Rule delays the implementation of the 2015 Rule until February 2020, the Applicability Rule has been challenged in several district courts.<sup>13</sup> No court has yet ruled on the merits of the challengers' claims, but a decision from any one of these courts finding the Applicability Rule to be unlawful, in whole or part, could result in the untenable situation where the 2015 Rule is stayed in some states by court order, and would otherwise go into effect in other states not subject to a court stay and where parties have prevailed on their challenges to the Applicability Rule.

For numerous reasons, WAC agrees that the 2015 Rule should be repealed and that the pre-existing regulations should be re-codified. In these comments, we explain the key reasons that the Agencies should repeal the 2015 Rule and respond to many of the proposed conclusions and inquiries put forward in the Agencies' Supplemental Repeal Notice.

### **III. The 2015 Rule Should Be Repealed Because it Exceeds the Agencies' Authority Under the CWA.**

The CWA is grounded in federalism. Congress granted EPA and the Corps very specific, limited powers to regulate "navigable waters," defined as "the waters of the United States." 33 U.S.C. § 1362(7). With CWA § 101(b), Congress recognized and sought to preserve the States' traditional and primary authority over land and water use. 33 U.S.C. § 1251(b). Consistent with Congress's objectives, any "waters of the United States" definition should preserve the States' traditional and primary authority over land and water use and provide clarity sufficient to allow states to identify which waters are and are not subject to federal CWA regulation.

In line with the CWA's statutory objectives, the Supreme Court has recognized important limits on CWA geographic jurisdiction. When Congress enacted the CWA, it intended to exercise its traditional "commerce power over navigation," *SWANCC*, 531 U.S. at 168 n.3, and "to regulate *at least some* waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (emphasis added); *SWANCC*, 531 U.S. at 171-72. But the Supreme Court emphasized that Congress's use of the term "navigable waters" reflects a fundamental limit on the Agencies' permitting authority, *SWANCC*, 531 U.S. at 171 (citing *Riverside Bayview*, 474 U.S. at 138 n.11), and the term "navigable" has at least some import and must be given effect. *SWANCC*, 531 U.S. at 172. In contrast with these principles, the 2015 Rule ignores and misinterprets the statutory and constitutional limits recognized by the Supreme Court, reads the term "navigable" out of the statute, and adopts an overly expansive view of federal CWA authority. Thus, the Agencies should repeal the 2015 Rule.

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<sup>13</sup> *State of New York v. Pruitt*, No. 18-cv-1030 (S.D.N.Y. Feb. 6, 2018); *NRDC v. EPA*, No. 18-cv-1048 (S.D.N.Y. Feb. 6, 2018); *S.C. Coastal Conservation League v. Pruitt*, No. 18-cv-330 (D.S.C. Feb. 6, 2018); *Waterkeeper Alliance, Inc. v. Pruitt*, No. 18-cv-3521 (N.D. Cal. June 13, 2018).

**A. The 2015 Rule Is Inconsistent with Statutory and Constitutional Limits on CWA Jurisdiction Recognized by the Supreme Court’s Holdings in *Riverside Bayview*, *SWANCC*, and *Rapanos*.**

As the Agencies note in the Supplemental Repeal Notice, Congress’ authority to regulate navigable waters derives from its power to regulate the “channels of interstate commerce” under the Commerce Clause. 83 Fed. Reg. at 32,233. In *Riverside Bayview*, the Supreme Court considered whether CWA jurisdiction extends beyond the waters traditionally regulated by the federal government to include wetlands abutting navigable waters. The Court found that the Act’s definition of “navigable waters” as “the waters of the United States” indicated an intent to regulate “at least some waters” that were not navigable in the traditional sense, and the Court upheld Corps jurisdiction over wetlands that “actually abut[] ... a navigable waterway.” 474 U.S. at 133, 135. In reaching this decision, the Court reasoned that Congress, in adopting the 1977 amendments to the 1972 Act, had acquiesced to the Corps’ assertion of jurisdiction over such wetlands. *Id.* at 136-38; *SWANCC*, 531 U.S. at 170-71. But the wetlands at issue abutted navigable water, and the Court reached its decision in part because it viewed the wetlands as a component of the navigable water, with a dividing line between the two that was difficult to determine. 474 U.S. at 134. Thus, the Court’s decision did not reduce the importance of “navigable” waters as the core of EPA and Corps jurisdiction under the Act; rather, the Court recognized that those waters may include abutting wetlands.

Later, the *SWANCC* Court held that “nonnavigable, isolated, intrastate” ponds in northern Illinois – which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway – were not jurisdictional under the CWA. 531 U.S. at 169. The *SWANCC* Court found that assertion of jurisdiction over such features would raise “significant constitutional questions” and “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. Not only did *SWANCC* emphasize the importance of the term “navigable” in the CWA’s text, it explicitly reversed the lower court’s holding that the CWA reaches as many waters as the Commerce Clause allows. *See* 531 U.S. at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)). Responding to the government’s argument that its jurisdictional claims could be upheld based on “Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce,” *SWANCC*, 531 U.S. at 173, the Court noted that allowing the government to “claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. Such an interpretation, pushing the limits of Congressional authority, could only be upheld if there were “a clear statement from Congress that it intended” such a result. *Id.* The Court found no such statement.

As explained in more detail in an industry-wide letter, *see* note 6 *supra*, the holding in *SWANCC* is not limited to the particular isolated, intrastate water features or the Migratory Bird Rule that were before the Court. It applies with equal force to any interpretation of CWA jurisdiction.<sup>14</sup> Under this controlling precedent, in adopting a rule to define the “waters of the

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<sup>14</sup> As the letter, which is incorporated by reference here, emphasizes, the assertion of jurisdiction over the isolated ponds at issue in *SWANCC* or other similar water features – under the 2015 Rule’s theory of what constitutes a significant nexus or any other theory – is incompatible with the statutory text and Supreme Court precedent.

United States,” the Agencies must give full effect to the term “navigable” and respect the limits of federal authority that flow from Congress’s explicit choice to preserve and protect the States’ traditional and primary authority over land and water use. Thus, the assertion of jurisdiction over the very ponds at issue in *SWANCC* under some alternative theory would be incompatible with that holding. The Court’s holding in *SWANCC*, including its rationale for rejecting jurisdiction, was reaffirmed in Justice Kennedy’s *Rapanos* concurrence. *Rapanos*, 547 U.S. at 767.

Finally, in *Rapanos*, the Court considered the Agencies’ attempt to assert jurisdiction over four sites which contained “54 acres of land with sometimes-saturated soil conditions” located twenty miles from “[t]he nearest body of navigable water.” *Rapanos*, 547 U.S. at 720 (plurality). The Agencies asserted jurisdiction based on the theory that CWA jurisdiction extends to any waters with “any connection” to navigable waters. Under this “any connection” theory, ditches, largely excluded from jurisdiction previously, became the Agencies’ preferred method of showing a “connection.” Farm ditches, roadside ditches, flood control ditches – all common and abundant across the landscape – were deemed “tributaries,” providing a “connection” to regulate areas previously considered isolated.

The *Rapanos* plurality (authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito) determined that the Agencies lacked authority to assert jurisdiction over the four sites at issue based on the Agencies’ expansive “any hydrological connection” theory. *Id.* at 742 (plurality). Justice Kennedy concurred, criticizing the Agencies for leaving “wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it,” and for asserting jurisdiction over wetlands “little more related to navigable-in-fact waters” than the isolated ponds at issue in *SWANCC*. *Id.* at 781-82 (Kennedy, J., concurring). Reaffirming the holding in *SWANCC*, Justice Kennedy explained that the plain text of the CWA did not permit the Corps to assert jurisdiction over waters “that were isolated in the sense of being unconnected to other waters covered by the Act” and hence lacked the sort of significant nexus to navigable waters that informed the Court’s reading of the Act in *Riverside Bayview*. 547 U.S. at 766-67; *see also id.* at 779, 781-82, 784-85 (emphasizing that the significant nexus must be to navigable waters “in the traditional sense” or “as traditionally understood”). As the *SWANCC* and *Rapanos* courts explained, regulating these isolated, remote features raises constitutional questions. Indeed, it goes well beyond the limits of the Commerce Clause to assert jurisdiction over such features, which do not have the requisite effect on channels of interstate commerce.

Although the plurality and Justice Kennedy agreed on what was *not* jurisdictional, their formulations of CWA jurisdiction differed. While the plurality held that the CWA confers jurisdiction over only “relatively *permanent* bodies of water,” and “only those wetlands with a continuous surface connection” to traditional navigable waters, *id.* at 734, 742 (plurality) (emphasis in original), Justice Kennedy held that the Agencies’ CWA jurisdiction extends only to wetlands with a “significant nexus” to traditional navigable waters. *Id.* at 767 (Kennedy, J., concurring).

We agree with the Agencies that there are important areas of common ground between the concurring and plurality opinions:

- (i) The term “navigable waters” must be given some importance and effect. *Id.* at 731 (plurality), 779 (Kennedy, J., concurring).
- (ii) Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Id.* at 731 (plurality), 767 (Kennedy, J., concurring).
- (iii) To be jurisdictional, non-navigable waters must have a substantial relationship with traditional navigable waters. *Id.* at 741-42 (plurality), 767 (Kennedy, J., concurring).
- (iv) The Corps’ standard for defining tributaries went too far. *Id.* at 726-28, 734 (plurality), 781-82 (Kennedy, J., concurring).
- (v) “Mere adjacency to a tributary” is insufficient. *Id.* at 741 n.10, 748-49 (plurality), 786 (Kennedy, J., concurring).
- (vi) Regulatory jurisdiction does not reach all wetlands, or even “all ‘non-isolated wetlands.’” *Id.* at 741-42 (plurality), 779-80 (Kennedy, J., concurring).
- (vii) The presence of a hydrologic connection to navigable-in-fact waters is not enough, standing alone. *Id.* at 742 (plurality), 784-85 (Kennedy, J., concurring).

As discussed in more detail below, the 2015 Rule ignores these limitations, asserts sweeping jurisdiction based on connections as tenuous as the Migratory Bird Rule that was rejected in *SWANCC*, and essentially amounts to the “any connection” theory that was rejected in *Rapanos*.

**B. The 2015 Rule Has No Bounds and Is Tantamount to the Broad Theories of Jurisdiction Rejected by the Supreme Court in *SWANCC* and *Rapanos*.**

The 2015 Rule would reach the very intrastate or isolated waters or wetlands that the Supreme Court held in *SWANCC* were beyond the Agencies’ CWA authority.

**1. The 2015 Rule’s Regulation of “Tributaries” Far Exceeds the Agencies’ Statutory Authority.**

With its broadened concept of “tributary,” the 2015 Rule would extend CWA jurisdiction to any channelized feature (*e.g.*, ditches, ephemeral drainages, and stormwater conveyances), lake, or pond that contributes flow to navigable waters, without consideration of the duration or frequency of flow or proximity to navigable waters. *See* 80 Fed. Reg. 37,054, 37,105 (June 29, 2015). The Rule’s definition is inconsistent with the plurality’s and Justice Kennedy’s *Rapanos* opinions, both of which were concerned about far-reaching jurisdiction over features distant from navigable waters and carrying only minor volumes of flow. The plurality chastised 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.” *Rapanos*, 547 U.S. at 734 (plurality) (internal quotation marks omitted). Similarly, Justice Kennedy criticized the Agencies’ use of ordinary high water mark (“OHWM”) to identify tributaries because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water

volumes toward it.” *See id.* at 781 (Kennedy, J., concurring). As the U.S. District Court for the Southern District of Georgia recognized, “The WOTUS Rule allows the Agencies to regulate waters that do not bear any effect on the ‘chemical physical, and biological integrity’ of any navigable-in-fact water.” *Georgia*, 2018 WL 2766877, at \*4. Contrary to the limits of CWA jurisdiction recognized by the *Rapanos* plurality and Justice Kennedy’s concurrence, the 2015 Rule’s definition of tributary would allow for *per se* jurisdiction over features with remote proximity and tenuous connections to navigable waters, such as ephemeral drainages, and goes well beyond the Agencies’ previous assertions of jurisdiction that were criticized by the *Rapanos* Justices as exceeding the scope of their CWA authority.

Also, the definition of “tributary” covers a trace amount of water so long as “the physical indicators of a bed and banks and an ordinary high water mark” can be found by “mapping information” or “remote sensing tools” where actual physical indicators are “absent in the field.” 80 Fed. Reg. at 37,076-77. Thus, the Rule allows use of LIDAR and historical indicators rather than determining jurisdiction based on actual physical characteristics currently visible on the ground. As a result, the 2015 Rule’s tributary definition “is similar to the one invalidated in *Rapanos*, and it carries with it the same concern that Justice Kennedy had there ....” *Georgia*, 2018 WL 2766877, at \*4.

Moreover, bed, banks, and OHWM can be seen in features without ordinary flow. Particularly in the desert and semi-arid regions of the United States, field indicators of an OHWM can develop very easily. Naturally sparse vegetation and erodible soils of the deserts combined with monsoon storms result in a significant number of small channels (often only a few feet in width) yet with a defined bed and bank. Many of these features would likely not develop in humid regions of the U.S. and would be representative of unregulated sheet flow or upland-vegetated swales in humid regions. Therefore, the arid states are unfairly burdened by the OHWM concept, compared to Eastern and humid states. Crossing the threshold from a non-jurisdictional erosion feature to a small channel with an OHWM in the desert occurs easily and is a significant source of jurisdictional uncertainty. Many of these exceedingly small channels are *per se* jurisdictional tributaries under the 2015 Rule, even with discontinuous surface connections to another water and a speculative nexus to traditional navigable waters, interstate waters, territorial seas, and/or impoundments.

## **2. The 2015 Rule’s Regulation of “Adjacent Waters” Likewise Ignores Statutory and Constitutional Limits Recognized by the Supreme Court.**

In addition, the 2015 Rule’s assertion of jurisdiction over “adjacent waters,” which could include any wetland, water, or feature located within the floodplain of and within 1,500 feet of a jurisdictional water, 80 Fed. Reg. at 37,104-05, is inconsistent with *Riverside Bayview*, *SWANCC*, and *Rapanos*. The 2015 Rule’s categorical determination that all waters and wetlands that fall within this distance threshold have a significant nexus is a serious departure from the plain meaning of “adjacent”<sup>15</sup> and is a far cry from the actually abutting wetlands found to be adjacent in *Riverside Bayview*. Similarly, the 2015 Rule’s inclusion of non-wetlands in its

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<sup>15</sup> *See Rapanos*, 547 U.S. at 748 (plurality) (“[A]dherent’ as used in *Riverside Bayview* is not ambiguous between ‘physically abutting’ and merely ‘nearby.’”).

“adjacent waters” category is an impermissible expansion of Agency jurisdiction. The *SWANCC* Court rejected assertion of jurisdiction over water features that did not abut navigable waters, and held that regulation of these isolated waters was beyond the scope of the Agencies’ authority under the Act. *SWANCC* 531 U.S. at 168.

Contrary to Justice Kennedy’s *Rapanos* opinion, the 2015 Rule’s adjacent waters standard would allow for jurisdiction based on “adjacency” to features that are not “major tributaries.” *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). In *Rapanos*, Justice Kennedy explicitly rejected the Corps’ attempts to assert jurisdiction based on “adjacency to tributaries, however remote and insubstantial.” *Id.* Nor does the *Rapanos* plurality allow for such an expansive assertion of jurisdiction over “navigable waters.” The plurality found that “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.” *Id.* at 742 (plurality) (emphasis in original). Thus, the plurality explained, “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters ....” *Id.* Ignoring these limits set forth by the Supreme Court and codifying practices specifically rejected by the *Rapanos* Justices, the 2015 Rule would allow for jurisdiction over waters, including wetlands, based on location within the floodplain of and within 1,500 feet from non-navigable, remote features it would classify as tributaries.

### **3. The 2015 Rule’s Regulation of “Similarly Situated” Isolated Waters Is Inconsistent with Supreme Court Precedent.**

Further, if a feature would not qualify as jurisdictional under the 2015 Rule’s broad “tributary” or “adjacent waters” categories, the Rule contains a catch-all category for all waters within the 100-year floodplain of a navigable water or located within 4,000 feet of a jurisdictional water that, when aggregated with all other “similarly situated” wetlands and waters in the entire watershed, have a “more than speculative or insubstantial” effect on navigable waters. 80 Fed. Reg. at 37,105-06.<sup>16</sup> The 2015 Rule’s assertion of jurisdiction over these remote features is contrary to the *SWANCC* Court’s holding that “nonnavigable, isolated, intrastate waters” – which, unlike the wetlands at issue in *Riverside Bayview*, did not actually abut a navigable waterway – are not jurisdictional under the CWA. *SWANCC*, 531 U.S. at 169-71. As noted above, the *SWANCC* Court found that assertion of jurisdiction over such features would raise “significant constitutional questions” and “would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174. With its essentially limitless jurisdictional reach, the 2015 Rule would most certainly reach features like the remote waterbodies that troubled Justice Kennedy that are “little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*.” *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring).<sup>17</sup> The 2015 Rule would apply the WOTUS definition

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<sup>16</sup> Under the 2015 Rule, ditches, groundwater, and erosional features (*i.e.*, gullies, rills, and swales) could serve as hydrological connections that would demonstrate that a feature has a “significant nexus” and is therefore jurisdictional. *See* 80 Fed. Reg. at 37,093.

<sup>17</sup> We agree with the Agencies that the 2015 Rule misconstrues Justice Kennedy’s *Rapanos* decision resulting in assertions of jurisdiction beyond CWA statutory limits. For example, under the 2015 Rule to determine

to a whole host of features that are remote from navigable waters and carry minor water volumes, all of which the *Rapanos* Court made clear are beyond the scope of federal jurisdiction. *Id.* at 734 (plurality); *id.* at 781 (Kennedy, J., concurring).

#### **4. The 2015 Rule’s Application of the “Significant Nexus” Concept Misconstrues Justice Kennedy’s *Rapanos* Opinion and the Limits Recognized by *SWANCC*.**

The 2015 Rule allows a significant nexus determination based on any one of nine functions, such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. 80 Fed. Reg. at 37,106. It is sufficient for determining whether a water has a significant nexus if any single function performed by the water, alone or together with similarly situated waters in the watershed, contributes significantly to the chemical, physical, or biological integrity of the nearest category (a)(1) through (3) water.<sup>18</sup> *Id.*

By requiring only one type of connection, the 2015 Rule effectively reinstates the Migratory Bird Rule invalidated by the Supreme Court in *SWANCC*. 531 U.S. at 167. In particular, it asserts jurisdiction based on singular functional connections, including the “[p]rovision of life cycle dependent aquatic habitat,” 80 Fed. Reg. at 37,108, between one water and some other distant water. That is the exact theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely “because they serve[d] as habitat for migratory birds.” *SWANCC*. 531 U.S. at 171-72. The Georgia district court found in part that the 2015 WOTUS Rule “will likely fail for the same reason that the rule in *SWANCC* failed” because it “asserts that, standing alone, a significant ‘biological effect’ – including an effect on ‘life cycle dependent aquatic habitat[s]’ – would place a water within the CWA’s jurisdiction.” *Georgia*, 2018 WL 2766877, at \*5 (quoting 33 C.F.R. § 328.3(c)(5)).

For all of these reasons, we agree that the 2015 Rule does not comport with or accurately implement the limits on jurisdiction reflected in the statute and the Supreme Court’s decisions. As such, the Rule must be repealed.

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whether one water is jurisdictional, the agencies can aggregate “similarly situated” waters within a watershed to determine whether all of those waters, taken together, significantly affects the chemical, physical, or biological integrity of an (a)(1) through (a)(3) water. 80 Fed. Reg. at 37,106. As we stated in our 2014 comments on the proposed rule, this approach is inconsistent with the significant nexus standard described by Justice Kennedy. *See* 2014 Comments at 20-22. In application of the significant nexus standard to the wetlands at issue in *Rapanos* and *Carabell*, Justice Kennedy did not aggregate wetlands in the same watershed, nor did he take the position that lower courts should determine jurisdiction over the wetlands at issue by aggregating impacts of all the wetlands surrounding the wetlands at issue. Rather, he focused on use of an individual significant nexus test and examination of the distance, quantity, and regularity of flow for each wetland at issue.

<sup>18</sup> The first three categories of jurisdictional waters under the 2015 Rule are: “(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters, including interstate wetlands; (3) The territorial seas.” 80 Fed. Reg. at 37,104.

#### IV. The Science Does Not Justify the 2015 Rule’s Overreach or Answer the Question of the Scope of CWA Statutory Authority.

In promulgating the 2015 Rule, the Agencies attempted to justify the 2015 Rule’s regulatory overreach, which ignored Constitutional and statutory limits, by suggesting that such broad categories of jurisdiction were supported by science. But the Agencies failed to acknowledge that the Connectivity Report<sup>19</sup> shows only the connection, and not the *significance* of the connection, of upstream waters to downstream navigable waters. The Report essentially concluded that all waters are connected and that connectivity exists on a gradient, but, importantly, the report did not draw lines or address the *legal question* of what should be jurisdictional under the statute.

Therefore, the Supplemental Repeal Notice’s characterization that the Agencies “placed *too much emphasis* on information and conclusions of the Connectivity Report when setting jurisdictional lines in the 2015 Rule” is unfitting. *See* 83 Fed. Reg. at 32,241 (emphasis added). The problem is that the Agencies exaggerated and mischaracterized the findings of the Connectivity Report and the extent to which the Report dictated a particular result. For example, the final Connectivity Report did not evaluate the importance of connections between small streams, nontidal wetlands, and open waters on larger navigable waters. The Report noted that “the research community has not reached a consensus regarding the best methods or metrics to quantify or predict hydrologic or chemical connectivity.”<sup>20</sup> Accordingly, the Agencies concluded in the preamble to the 2015 Rule that “the science does not provide bright line boundaries” for distinguishing “the waters of the United States” from the waters of the States. *See* 80 Fed. Reg. at 37,060. Indeed, “[s]ignificant nexus is not purely a scientific determination.”<sup>21</sup> Thus, the Connectivity Report did not answer the many policy and legal questions that arise when defining the outer bounds of the scope of the CWA, nor did it provide bright line boundaries.

As the Agencies note in the Supplemental Repeal Notice, the 2015 Rule’s broad definitions ignore statutory limits recognized in case law, and this error cannot be overcome by suggesting that such broad categories of jurisdiction were supported by science. *See* 83 Fed. Reg. at 32,240-41. And, in fact, the Connectivity Report, the related SAB review, and other technical analyses performed during the rulemaking process raise serious questions regarding the 2015 Rule’s categorical, far-reaching assertions of federal jurisdiction. For example, the science does not demonstrate that treating ephemeral features as WOTUS, such as the ones described above, will have significant benefits for downstream waters. As Dr. Michael Josselyn notes, “[t]hese 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 [connectivity] gradient....”<sup>22</sup>

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<sup>19</sup> EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015).

<sup>20</sup> *See* Connectivity Report at 2-49 to 2-50.

<sup>21</sup> Br. for Resp’ts, *In re EPA*, 803 F.3d 804, No. 15-3751, at 136 (6th Cir. Jan. 13, 2017) (citing 80 Fed. Reg. at 37,060).

<sup>22</sup> 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*



These are not features with significant effects on downstream navigable waters. The State of Missouri, for instance, determined, based on a U.S. Geological Survey (“USGS”) analysis, that data did not exist to support a significant connection between ephemeral streams and aquatic uses.<sup>23</sup> Accordingly, the State of Missouri (with EPA approval) determined that it would not set water quality standards for certain ephemeral streams.<sup>24</sup> Likewise, in Kansas, EPA approved water quality standards that unconditionally excluded ephemeral waters because “connectivity in the western stream networks is tenuous and episodic, at best,” and such features are protected by state law.<sup>25</sup> Nevertheless, Kansas estimates a more than four-fold increase under the 2015 Rule, from approximately 31,000 miles of streams to approximately 174,000 miles of streams, that would be WOTUS and therefore subject to water quality standards.<sup>26</sup>

Nor does the Connectivity Report demonstrate that ephemeral features have significant chemical, physical, and biological effects on traditional navigable waters. Indeed, the Agencies ignored the caution from the SAB Panel that “temporal and spatial predictability of connectivity is especially important to quantify when assessing potential for downgradient effects in systems without permanent or continuous flowpaths.”<sup>27</sup> Further, as Dr. Mark Murphy of the SAB Panel observed, “inclusion by rule of all ephemeral tributaries, ‘regardless of size or flow duration,’ is not scientifically justified.”<sup>28</sup>

In light of all of the flaws described above, it is simply not enough to say, as the Agencies do in a proposed alternative conclusion in the Supplemental Repeal Notice, that the interpretation adopted in the 2015 Rule was *not compelled*, and a different policy balance can be appropriate. 83 Fed. Reg. at 32,238. The interpretation in the 2015 Rule was unlawful and cannot stand. Thus, the Agencies’ decision to repeal the 2015 Rule is not just a matter of policy differences. It is compelled by the law.

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‘Waters of the United States’ Under the Clean Water Act,’ at 42 (Sept. 2, 2014) (comments of Dr. Michael Josselyn) (“SAB Panel Member Comments”).

<sup>23</sup> 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.).

<sup>24</sup> See Mo. Code Regs. Ann. tit. 10, § 20-7.031.

<sup>25</sup> State of Kansas, Comments on Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, at 2-4 (Oct. 23, 2014), Doc. No. EPA-HQ-OW-2011-0880-16636.

<sup>26</sup> *Id.* at App. A.

<sup>27</sup> SAB, Panel for the Review of the EPA Water Body Connectivity Report, SAB Review of the Draft EPA Report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA-SAB-15-001, at 15 (Oct. 17, 2014).

<sup>28</sup> SAB Panel Member Comments at 99 (comments of Dr. Mark Murphy).

## V. The Agencies Relied on Faulty Data and Underestimated the Potential Scope of CWA Jurisdiction Under the 2015 Rule.

The Agencies determined that the 2015 Rule would result “in an estimated increase between 2.84 and 4.65 percent in positive jurisdictional determinations annually.” 80 Fed. Reg. at 37,101. In developing the 2015 Rule, the Agencies examined records in the Corps’ Operation and Maintenance Business Information Link, Regulatory Module (“ORM2”) database. The Agencies’ reliance on data from the Corps’ ORM2 database is problematic and led to an underestimation and mischaracterization of the 2015 Rule’s increases in jurisdiction. The ORM2 database documents jurisdictional determinations associated with various aquatic resource types, including an isolated waters category. According to the Agencies’ final Economic Analysis, “[t]he isolated waters category is used in the Corps’ ORM2 database to represent intrastate, non-navigable waters; including wetlands, lakes, ponds, streams, and ditches, that lack a direct surface connection to other waterways. These waters are hereafter referred to as ‘ORM2 other waters.’”<sup>29</sup> The Agencies relied on an analysis of these “other waters” to determine the potential scope of jurisdiction under the 2015 Rule. We agree that this approach was problematic and contributed to an underestimation in the increase in jurisdiction that would result from the 2015 Rule. As a result of that flawed methodology, the public did not have ample notice of the doubling of projected positive jurisdiction over the other waters category from the proposed to final rule.<sup>30</sup>

In addition, there are several other problems with the Agencies’ use of the ORM2 database to quantify increases in jurisdiction. As explained more fully in a report prepared by David Sunding,<sup>31</sup> the categories of ORM2 records did not correspond with the Rule’s categories of jurisdictional waters. In addition, the ORM2 data failed to capture the entire universe of areas that were jurisdictional under the existing CWA framework because it only accounted for situations in which regulated entities engage in the section 404 jurisdictional determination or permitting process. Even for those instances where regulated entities engage in that process, the ORM2 database does not capture all aquatic resources on the subject parcel because the Corps focuses only on impacted areas and mitigation sites. Finally, because Corps staff is not required to fill in the “aquatic resource type” field in the ORM2 database, EPA failed to account for a large portion of records in its calculations of the increase in jurisdiction.

The Agencies could not accurately quantify the 2015 Rule’s increase in jurisdiction by using the ORM2 database because the database only accounts for the section 404 program, and its data do not fit this exercise. Indeed, the final Economic Analysis looks at Corps jurisdictional determinations that concluded under previous regulations that there is no jurisdiction, but that would change under the 2015 Rule. This analysis fails to recognize that landowners and project proponents would not have sought JDs for many of the features that would now be considered

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<sup>29</sup> Economic Analysis of the EPA-Corps Clean Water Rule, at 7 (May 20, 2015), Doc. No. EPA-HQ-OW-2011-0880-20866 (“2015 Rule Economic Analysis”).

<sup>30</sup> Compare EPA and Corps, Economic Analysis for the Proposed Revised Definition of Waters of the United States, at 12 (Mar. 2014), Doc. No. EPA-HQ-OW-2011-0880-0003 (estimating 17 percent of the negative jurisdictional determinations for other waters would become positive) with 2015 Rule Economic Analysis at 12 (estimating that 34.5 percent of the ORM2 other waters will be found to now be jurisdictional under the final rule).

<sup>31</sup> See WAC Comments on 2015 Rule, Exhibit 19 at 4-9.

WOTUS under the 2015 Rule, such as ditches and ephemeral washes. In addition, the Agencies' calculation of increased jurisdiction fails to account for the universe of waters and features for which landowners have not previously sought CWA permits. All of these errors contributed to the Agencies systematically and drastically underestimating the impact of the 2015 Rule.

We agree with the Supplemental Notice that the Agencies' estimates significantly misled the public regarding the true regulatory and economic implications of the Final Rule. For example, the Agencies estimated in the 2015 Rule Economic Analysis that 34.5 percent of the other waters category could become jurisdictional under the Rule.<sup>32</sup> Kansas estimated a 460 percent increase in federal jurisdiction in that State alone under the Proposed Rule, with an additional 143,000 miles of ephemeral streams subject to *per se* jurisdiction under the new tributary definition.<sup>33</sup> Alaska is concerned that the 2015 Rule would regulate "nearly all waters and wetlands" within that State.<sup>34</sup> Also, the Florida Department of Agriculture and Consumer Services ("FDACS") noted in its comments on the 2014 Proposed Rule that the Rule's "changes in definition, combined with Florida's flat topography and broad expanse of floodplains, wetlands and sloughs, could subject virtually all of Florida's water bodies to federal jurisdiction under the CWA, even concrete lined flood control conveyances and other man made systems intended to capture and treat stormwater flows."<sup>35</sup>

With regard to streams in particular, to assess how assertion of jurisdiction may change under the 2015 Rule, the Agencies reviewed the ORM2 records from FY13 and FY14 and assumed that "100 percent of the records classified as streams will meet the definition of tributary in the final rule,"<sup>36</sup> resulting in a relatively minor projected increase in positive jurisdictional determinations under the final rule for streams: 99.3 percent to 100 percent, or a 0.7 percent increase. This analysis failed to account for the significant expansions of jurisdiction in western states. Lands in the West contain features that the agencies claim are excluded from jurisdiction (*e.g.*, desert washes, arroyos, gullies, rills, and channels), but which would in fact often be covered by the Rule any time they arguably exhibit a bed and banks and an OHWM. For example, in New Mexico the 2015 Rule "would in effect engulf all streams, drainage systems, and watersheds within the State."<sup>37</sup> Also, 96 percent of Arizona's streams "flow only part of the time or only in direct response to precipitation events," but may have the physical indicators.<sup>38</sup>

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<sup>32</sup> 2015 Rule Economic Analysis at 12.

<sup>33</sup> State of Kansas, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, App. A (Oct. 23, 2014), Doc. No. EPA-HQ-OW-2011-0880-16636.

<sup>34</sup> State of Alaska, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 1 (Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-19609.

<sup>35</sup> *See* FDACS, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 1 (Oct. 31, 2014), Doc. No. EPA-HQ-OW-2011-0880-10260.

<sup>36</sup> 2015 Rule Economic Analysis at 8.

<sup>37</sup> New Mexico Environment Department, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 10 (Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-16552.

<sup>38</sup> Arizona Department of Environmental Quality, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 2 (Nov. 14, 2014), Doc. No. EPA-HQ-OW-2011-0880-16437.

In support of the Agencies' Economic Analysis, the Agencies analyzed nearly 200 approved jurisdictional determinations to assess how jurisdictional status might change based on the distance limitations in the final 2015 Rule.<sup>39</sup> A handful of these determinations are described in detail in the Agencies' Supplemental Repeal Notice. *See* 83 Fed. Reg. at 32,244-45. We agree that these examples reflect the expansive scope of jurisdiction under the 2015 Rule and that such examples likely exceed the significant nexus standard. We also agree that these examples reflect the concerns expressed by the Sixth Circuit and the North Dakota and Georgia district courts that the 2015 Rule exceeds the Agencies' statutory authority under the CWA, as interpreted by the Supreme Court in *SWANCC* and *Rapanos*.

## **VI. The 2015 Rule Is Inconsistent with the Policy Goals of CWA § 101(b) and Fails to Preserve the States' Authority to Regulate Non-Navigable Water Resources.**

With CWA § 101(b), Congress recognized and sought to preserve the States' traditional and primary authority over land and water use. 33 U.S.C. § 1251(b). The CWA contemplates that the goals of the Act would be addressed through a complementary array of protections and tools – *e.g.*, permits for point source discharges and planning by local agencies for nonpoint source runoff, among others. States and local governments regulate waters that are not federally regulated through robust water quality programs and other mechanisms based on state law. Consistent with Congress's objectives, any WOTUS definition should preserve the States' traditional and primary authority over land and water use and provide clarity sufficient to allow states to identify which waters are and are not subject to federal CWA regulation. The 2015 Rule does not preserve the States' authority.

Therefore, we strongly support the Agencies' proposal to repeal the 2015 Rule so that they can, among other things, reevaluate the best means of balancing the Act's statutory goals to "restore and maintain" the integrity of the nation's waters, as well as to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 82 Fed. Reg. at 34,902. The regulation of land and water use within a State's borders is a "quintessential" State and local function. *Rapanos*, 547 U.S. at 738 (plurality).

The Supreme Court has explained that when an agency takes action that infringes on traditional State powers, agencies must be able to point to a clear grant of such authority from Congress in the relevant statute. *See SWANCC*, 531 U.S. at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."). Similarly, absent clear direction from Congress, courts will view with skepticism statutory interpretations that extraordinarily expand federal regulatory jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). The CWA contains no such clear statement. Nonetheless, the 2015 Rule infringes on traditional State powers and significantly expands jurisdiction without pointing to any clear grant of authority from Congress.

Therefore, the 2015 Rule would result in authorization for the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially

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<sup>39</sup> *See* Supporting Documentation: Analysis of Jurisdictional Determinations for Economic Analysis and Rule, Doc. No. EPA-HQ-OW-2011-0880-20877.

wet areas. Indeed, under the 2015 Rule, many types of waters and features that were previously regulated as “waters of the State” or that states purposely chose not to regulate (*e.g.*, roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would be subject to federal regulation as WOTUS. As a result, increased CWA section 404 permitting requirements will subject project proponents to additional federal and State environmental compliance burdens, including CWA section 401 water quality certification requirements. States may struggle to process certification requests as they work to manage the influx of new permit applications, thus increasing the burdens on states’ already strained resources. The increased burden on states would also be felt through CWA section 402 NPDES permitting requirements and the increase in CWA sections 303, 304, and 305 state water quality standards assessments. *See* WAC Comments on 2015 Rule at 67-71.

## **VII. The Agencies Should Repeal the 2015 Rule Because it Fails to Provide Needed Clarity and Certainty.**

The Act’s reach is notoriously unclear, and the consequences to landowners even for inadvertent violations can be crushing.<sup>40</sup> In addition to the reasons provided above, the 2015 Rule should be repealed because it does not achieve its stated goal to provide clarity and certainty on the scope of the “waters of the United States.” *See* 80 Fed. Reg. at 37,055. Thousands of public commenters have suggested that the 2015 Rule lacks clarity on key terms and definitions, hinders administrability of the “waters of the United States” definition, creates significant confusion, and fails to put parties on notice regarding when their conduct might violate the law.

The following are some key examples of terms and concepts from the 2015 Rule that are vague, inconsistent with case law, and/or would likely lead to more regulatory inconsistency and uncertainty:

- **Impoundments.** The 2015 Rule would assert jurisdiction over “impoundments” and allows for features to be jurisdictional based on their relationship to “impoundments” without defining the term. 80 Fed. Reg. at 37,104-05. The Agencies likewise failed to respond to comments seeking to understand the meaning of “impoundment” and, for example, which features on the landscape holding water (*e.g.*, farm ponds? stock ponds? industrial ponds?) can be considered impoundments. *See* WAC Comments on 2015 Rule at 32-33.
- **Ordinary high water mark.** OHWM is the lynchpin concept of the 2015 Rule’s “tributary” definition, but the 2015 Rule fails to change or clarify the OHWM definition, which Corps experts have said is one of the most inconsistent and ambiguous terms in the CWA regulatory program.<sup>41</sup> The Agencies failed to respond to commenters’ concerns

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<sup>40</sup> *See Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). The CWA imposes civil penalties of up to \$53,484 per day for unauthorized discharges to waters of the United States. 33 U.S.C. §§ 1319(c)(2), (d); 40 C.F.R. § 19.4, last updated by 83 Fed. Reg. 1190, 1192-93 (Jan. 10, 2018).

<sup>41</sup> Matthew K. Mersel, U.S. Army Corps of Engineers, Cold Regions Research and Engineering Laboratory, Development of National OHWM Delineation Technical Guidance, slide 3 (Mar. 4, 2014), [http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014\\_0760.pdf](http://insideepa.com/sites/insideepa.com/files/documents/apr2014/epa2014_0760.pdf) (subscription required) (noting

that use of the existing, imprecise regulatory definition of OHWM is problematic because many of the OHWM physical indicators can occur wherever land may have water flowing across it, regardless of frequency or duration. *See* WAC Comments on 2015 Rule at 37-38.

- Floodplain. The 2015 Rule would provide for jurisdiction over waters within the floodplain of and within 1,500 feet of a jurisdictional water, as well as waters within the 100-year floodplain of a water identified in categories (1) through (3) of the Rule that has a significant nexus, but the Rule fails to provide adequate clarity for the term “floodplain.” 80 Fed. Reg. at 37,104-05. The preamble provides that the Agencies would use the 100-year floodplain where a Federal Emergency Management Agency (“FEMA”) Flood Zone Map is available, but acknowledges “much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground.” *Id.* at 37,081. Thus, for many instances, the 2015 Rule leaves it to the unpredictable discretion of the agency field staff to assess the applicable floodplain. Again, the Agencies failed to respond to commenters’ questions, such as whether areas behind levees are still within the “floodplain” for purposes of adjacency determinations. *See* WAC Comments on 2015 Rule at 52.
- Significant nexus. The 2015 Rule would categorically determine that all features that meet the “tributary” and “adjacent waters” definitions have a “significant nexus.” 80 Fed. Reg. at 37,068-70. It would also allow for jurisdiction over other features (*e.g.*, prairie potholes, Western vernal pools, waters within 4,000 feet of a jurisdictional water) if the Agencies find a “significant nexus.” *Id.* at 37,104-05. The Rule would allow for a significant nexus determination where a feature “alone, or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity” of a (1)-(3) water, and instructs the Agencies to find a significant nexus where one of nine ecological functions could be demonstrated to occur. *Id.* at 37,106. As the Corps noted, the 2015 Rule “does not provide clarity for how ‘similarly situated’ is defined” and fails to explain how the definition’s “more than speculative or insubstantial” standard would be quantified.<sup>42</sup>
- Dry land. Many of the 2015 Rule’s exclusions apply only to features that were “created in dry land.” 80 Fed. Reg. at 37,105 (excluding, among others, artificial lakes and ponds, reflecting and swimming pools, water-filled depressions, stormwater control features, and wastewater recycling structures that were created in dry land). Yet, the Agencies refused to define the term “dry land” in the regulatory text despite commenters’ requests for a regulatory definition. Instead, the preamble gives a very confusing explanation of the

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that inconsistent interpretations of the OHWM concept have led to inconsistent field indicators and delineation practices).

<sup>42</sup> Memorandum from Jennifer A. Moyer, Chief, Regulatory Program, Dep’t of the Army, Corps, to John W. Peabody, Deputy Commanding Gen. for Civil & Emergency Ops., Corps, Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of “Waters of the United States,” at 6 (May 15, 2015) (“Moyer Memorandum”).

term, and explains that the Agencies did not define “dry land” because they “determined that there was no agreed upon definition.” *Id.* at 37,099.

### **VIII. Repealing the 2015 Rule Is the Best and Most Efficient Option to Ensure Regulatory Certainty.**

Repealing the 2015 Rule and recodifying the pre-existing regulations is the only approach that will provide needed regulatory certainty now. While the 2015 Rule will not be applicable until February 6, 2020, the flawed regulatory text remains in the Code of Federal Regulations. As explained above, a decision from any one of the courts where the Applicability Rule has been challenged that finds the Applicability Rule to be unlawful, in whole or part, could result in the untenable situation where the 2015 Rule is stayed in 24 states by court order, and would otherwise go into effect in other states (not subject to a court stay and where parties have prevailed on their challenges to the Applicability Rule). Such a patchwork regulatory scheme across the country would be unmanageable and extremely disruptive to the economy, including the critical activities undertaken by the Coalition’s members.

Repealing the 2015 Rule and the corresponding recodification of the pre-existing regulations will true up the Code of Federal Regulations to reflect the current legal regime under which the Agencies are operating. Further, recodifying the regulations that were in place prior to the 2015 Rule, which has been stayed or otherwise not in effect for almost two years, will maintain the status quo. Indeed, the 2015 Rule took effect in 37 states for only about six weeks between the Rule’s August 28, 2015, effective date and the Sixth Circuit’s October 9, 2015, nationally applicable stay order. During that 43-day period, there were no enforcement actions under the Rule, and, since the Sixth Circuit nationwide stay or the new applicability date has been in place, well over 34,000 approved jurisdictional determinations (“AJDs”) have been issued pursuant to the “familiar” pre-Rule regime.<sup>43</sup> Therefore, the Agencies should repeal the 2015 Rule to maintain the status quo, provide a greater degree of certainty to the regulated community, and ensure that the Agencies’ regulatory actions (*e.g.*, jurisdictional determinations, permitting, and enforcement) are consistent with the applicable provisions in the Code of Federal Regulations.

In addition, repealing the 2015 Rule is a better course of action than alternative approaches, such as revising specific provisions of the 2015 Rule, or issuing revised implementation guidance and manuals. As we have explained throughout these comments, there are numerous provisions of the 2015 Rule that are unlawful and must be revised. We agree that the Agencies should evaluate and revise those provisions as necessary in the Step 2 rulemaking, but that must be a separate rulemaking process. Leaving some or the entire 2015 Rule in place while the Agencies complete the Step 2 rulemaking would result in confusion and inconsistency.

Likewise, issuing revised implementation guidance or manuals would not provide the needed clarity. First, implementation guidance could not cure the deficiencies in the overbroad 2015 Rule. Second, there has been widespread agreement among the States, NGOs, and industry that a rulemaking is needed to ensure clarity and consistency on this issue. Agency guidance

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<sup>43</sup> EPA, Clean Water Act Approved Jurisdictional Determinations, <https://watersgeo.epa.gov/cwa/CWA-JDs/> (last visited July 24, 2018).

documents would not satisfy the notice and comment requirements of the Administrative Procedure Act for amending a rulemaking, nor would they provide the requisite clarity. Finally, extending the date of the Applicability Rule, which is currently the subject of litigation, would not provide certainty and would not remove the faulty regulatory language from the Code of Federal Regulations.

#### **IX. Promulgating a New Definition of “Waters of the United States” in a Separate, Step-2 Rulemaking Process Is Critical.**

According to the supplemental notice, following repeal of the 2015 Rule, the Agencies are planning to take the additional, second step of conducting a separate notice and comment rulemaking to propose a new definition of WOTUS. 83 Fed. Reg. at 32,231. The Coalition agrees with this approach. Although repealing the 2015 Rule (and the corresponding recodification of the pre-existing regulations) is necessary in the near term for clarity and regulatory certainty, there are many issues with the current regulations and guidance documents that should be addressed through a new rulemaking. Furthermore, the Supreme Court has also called for a rulemaking. The Chief Justice stated in a concurring opinion that the Agencies could have potentially “avoided another defeat” if they had completed the rulemaking they began following *SWANCC*. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), 812 (Breyer, J., dissenting) (“today’s opinions, taken together, call for the [Agencies] to write new regulations, and speedily so.”); *see also Sackett*, 566 U.S. at 133 (Alito, J., concurring) (“only clarification of the reach of the Clean Water Act can rectify the underlying problem.”). Thus, the Coalition continues to support a rulemaking to reasonably and clearly articulate federal and State CWA authorities.

#### **X. Conclusion**

WAC supports repealing the 2015 Rule because it seeks to assert federal control over land and waters well beyond the Agencies’ statutory authority, ignores important statutory and constitutional limits recognized by the Supreme Court precedent, fails to preserve the States’ authority to regulate non-navigable waters, and fails to provide needed clarity and certainty regarding the scope of “waters of the United States” for both regulators and the regulated community. The Agencies should work expeditiously to finalize the repeal and recodification of the pre-existing rules as soon as possible.